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5 December 2008

Mr Paris Mashile
Chairperson
ICASA
Block B, Pinmill Farm
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Via Email : PMashile1@icasa.org.za

Attention : Thato Mahapa
Via Email : TMahapa@icasa.org.za
: SMahlawe@icasa.org.za

Dear Sir,

RE: NOTICE OF ICASA OF ITS INTENTION TO MAKE REGULATIONS IN RESPECT OF THE GENERAL LICENCE FEES AS PUBLISHED IN GAZETTE No. 31542

MTN would like to thank the Authority for the opportunity to comment on the above notice and herewith submit our preliminary comments.

Furthermore, MTN records that it wishes to make an oral presentation to the Authority.

Yours faithfully,

GRAHAM DE VRIES
GENERAL MANAGER: REGULATORY AFFAIRS
MTN (PTY) LTD

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Vat Reg. No. 4630140434



**MTN'S RESPONSE IN RELATION TO THE NOTICE OF
ICASA'S INTENTION TO MAKE REGULATIONS IN
RESPECT OF THE GENERAL LICENCE FEES IN TERMS OF
SECTION 4(1)(c)(iv-v) AND 5(7)(a)(iii) OF THE ECA
ACT AS PUBLISHED IN GOVERNMENT GAZETTE No.
31542 DATED 24 OCTOBER 2008**

5 December 2008

1. INTRODUCTION

MTN (Pty) Ltd (“MTN”) wishes to thank ICASA for the opportunity to comment on General Notice 1207 in terms of which the Authority invites comments on the proposed regulations in respect of General Licence Fees in terms of section 4(1)(c)(iv-v) and section 5(7)(a)(iii) of the Act as published in Government Gazette 31542 on 24 October 2008.

MTN wish to participate in the public hearing process and look forward to hearing from ICASA in this regard.

MTN welcomes the publication of the proposed licence fees regulations. A comprehensive licence fee framework is indeed an essential element for the successful implementation of the service licensing framework in terms of the Electronic Communications Act (ECA) and the realisation of ECA’s laudable objectives set out in section 2. MTN therefore agrees with ICASA that the expeditious finalization of the licence fee regulations should be regarded a priority.

Although MTN in principle agrees with the principles underpinning the proposed licence fees as well as the proposed licence fees, MTN is of the respectful view that there are few critical aspects which needs to be addressed to ensure the smooth implementation of the regulations and the realization of the laudable objectives set out in section 2 of the ECA. MTN’s comments below focus on these and are divided into two components, namely:

- General Comments relating to process and lawfulness
- Specific comments on specific provisions of the proposed regulations

2. GENERAL COMMENTS RELATING TO PROCESS AND LAWFULNESS

2.1 Meaningful public participation requires full disclosure of all relevant information

MTN commends ICASA for soliciting industry views and opinions and conducting a workshop on 11 October 2007 on the relevant principles to be considered in the formulation of licence fees. MTN further appreciates the extensive research and analysis it has done before formulating the proposed regulations.

MTN however respectfully submits that the *additional research (comprising of an international benchmarking exercise and an analysis of the current licensing environment in South Africa)* which ICASA conducted and which it refers to in the proposed regulations, should also be made available to the public in order to ensure meaningful public participation and comment on the proposed licence fee regulations.

Considering the already long delay in the implementation of the ECA's converged service licensing framework, it is extremely important that South Africa takes its lead from and bases its regulatory approaches only on those jurisdictions that have proven successes in converged licensing environments. In this regard it is submitted that it would be insightful to ascertain how other jurisdictions, such as Malaysia, who also implemented a converged licensing framework, are regulating licence fees. It will specifically be of interest to know whether and/or how they differentiate between the licence fees of "converted" licences and "new" licences.

MTN therefore respectfully proposes that ICASA makes the *additional research (comprising of an international benchmarking exercise and an analysis of the current licensing environment in South Africa)* available to the public prior to the public hearings on the proposed licence fees.

MTN respectfully submits that ICASA need not gazette the research, but that publication on its website would suffice.

Furthermore, MTN submits that the views expressed by those that attended the workshop on 11 October 2007 should similarly be published by ICASA. At the workshop views were expressed by the participants as to the relevant principles to be considered in the formulation of licence fees. It would similarly assist if ICASA could indicate which principles as expressed were accepted by ICASA and which principles were not accepted including the reasons for the non acceptance.

2.2 Socio-Economic Benefits of Lower Licence Fees

MTN notes that on a very simplistic calculation the proposed licence fees greatly exceed ICASA's regulatory budget. MTN is of the view that licence fees should have a reasonable relationship with the underlying regulatory cost of doing such regulatory work.

In fact there is nothing wrong with imposing lower licence fees to licensees. The ITU shares this view:

“The social and economic benefits of lower licence fees are indisputable. Lower licence fees allow operators to invest resources in infrastructure and innovations in services and applications. Moreover, they lead to lower prices for consumers.

The trade-off between licence fees and other considerations must be analyzed. All operators' revenues are capped by demand factors in the countries where they operate. These factors include demographics such as the size of the potential customer base, per capita GDP and the price elasticity of demand. To the extent that regulators charge high licence fees, this affects the viability of an operator's business case by increasing the costs of supply. If the costs of supply exceed revenues, the viability of an operator's business will be doubtful. So regulators must understand the factors affecting both demand and supply

before undertaking a licensing initiative. If they decide that social and economic objectives such as universal access, lower consumer prices and technological innovation are key policy objectives, they have to realize that imposing high licence fees may jeopardize the operators' ability to achieve these objectives. And conversely, larding licences down with heavy socio-economic mandates may undercut the operators' ability to pay high licence fees.

Lower licence fees also allow regulators to ensure that capital remains within the telecommunication sector. In many countries, licence fees are paid directly into the government's general treasury and are not available to the regulator or telecommunication ministry. But by structuring a tender as a beauty contest -- with a low licence fee and sector specific licence obligations (such as network build-out mandates) -- a regulator can ensure that capital is reinvested in the telecommunication sector.

In addition to reducing the amount that operators are willing to pay for a licence, the imposition of licence obligations has one other notable disadvantage: it may reduce the operators' ability to adapt to changes in technology or market conditions. This may be particularly problematic when licence obligations are not identical among all competitors within the same industry. Unforeseen changes in technology or market conditions may place certain operators at a competitive disadvantage to other market participants. Regulators are rightly hesitant to amend licence terms agreed to through an open and transparent licensing process. But they should be open to periodic consultations.

Chapter 4, "Licence Fee Practices: Historical Perspectives and New Trends," *ITU Trends in Telecommunications Reform – 2004/05: Licensing in an Era of Convergence* (Geneva: ITU, 2004). The authors of Chapter 4 are Lynne Dorward and Clayton Rogers.

There are a few key statements that are especially applicable to South Africa. The ECA is very specific about its key policy objectives, amongst others, social and economic objectives such as universal access, lower consumer prices and technological innovation are key policy objectives. Imposing high licence fees may

jeopardize the operators' ability to achieve these objectives. It is also important to note that lower licence fees also allow regulators to ensure that capital remains within the telecommunication sector.

It is with this in mind that MTN submits that it would be prudent for ICASA to give serious consideration to a licence fee structure that would result in reasonable licence fees that only cover the cost of regulation thereby freeing up capital that may be used for infrastructure investment by the various operators. It is trite that Infrastructure competition and not service based competition leads to innovation and sustained lower prices in the market.

2.2. Concerns regarding lawfulness

As stated above MTN agrees with ICASA that the licence fee regulations should be finalized in the most expeditious manner and further also agrees in principle (except for a few aspects dealt with below) with the proposed licensing principles and licence fees. MTN however respectfully submit that in order to prevent unnecessary legal challenges and resultant delays, ICASA should ensure that the regulations in all respects comply with all the requirements of lawfulness.

2.2.1 Regulations may be considered to be a "Money Bill"

The Draft Regulations purport to be issued in terms of, inter alia, section 5(7)(a)(iii) of the Electronic Communications Act 36 of 2005 ("the Act"). Section 5(7)(a)(iii) empowers ICASA to prescribe regulations setting out the licence fees applicable to individual and class licences for electronic communications network services, broadcasting services and electronic communications services, taking into account any policy or policy directions issued by the Minister in terms of section 3.

Section 77 of the Constitution deals with money bills and provides as follows:

"(1) A Bill is a money Bill if it-

- (a) *appropriates money;*
- (b) *imposes national taxes, levies, duties or surcharges;*
- (c) *abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or*
- (d) *authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.*

(2) *A money Bill may not deal with any other matter except-*

- (a) *a subordinate matter incidental to the appropriation of money;*
- (b) *the imposition, abolition or reduction of national taxes, levies, duties or surcharges;*
- (c) *the granting of exemption from national taxes, levies, duties or surcharges; or*
- (d) *the authorisation of direct charges against the National Revenue Fund.*

(3) *All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament.”*

Classification as a money bill is significant because section 73 of the Constitution deals with promulgation procedure and provides that only the minister of finance may introduce a money bill in the assembly.¹

¹ Section 73(2)(a).

It follows that if the Draft Regulations amount to a money bill, then it was improper for ICASA to prepare them.

While mindful of the fact that international regulators operate under different statutory and constitutional mandates, a fairly common denominator in regulatory fees is that the licence fees must cover the cost of regulating the market. The Draft Regulations admit as much. It is significant to note that the Authority very specifically states that it has adopted a framework for the formulation of the licence fees regulations. Point IV of that framework states that “at a minimum the licence fees need to cover the cost of regulating the market”. It is difficult to conceive of another rationale for licence fees.

Our courts have made reference in a variety of matters to what is a tax. Tax is *"usually pecuniary charge imposed by legislature or other public authority upon persons or property for public purposes; a forced contribution of wealth to meet the public needs of a government"*.

City Treasurer and Rates Collector, Newcastle Town Council v Shaikjee and Others 1983 (1) SA 506 (N) at 507F – H

To the extent that the proposed licence fees greatly exceed the Authorities regulatory budget (with the result that the excess portion is used for a purpose unrelated to the regulatory scheme operated by the Authority), that excess portion could very well constitute a tax. This is especially so since the proposed licence fees would definitely exceed those costs.

The draft regulations are also vulnerable when it comes to the existence of a sense of proportionality between the charges levied and the actual costs of regulation. The draft regulations do not explain how the charges envisaged have been arrived at in a detailed and transparent way, as is the case in other countries. The bottom line is that there does not seem to be a correlation between the regulatory fees and

regulatory costs involved. It is therefore possible that the draft regulations start to look more like a tax.

It is with this background that MTN submits that it would be prudent for ICASA to ensure that the proposed licence fees are reasonable and proportionate to the underlying regulatory regime and the costs associated with regulating that regime.

It is MTN's considered view that apart from the above, the lawfulness of the licence fee regulations could possibly be legally challengeable with regard to:

- the application of the licence fee regulations to both converted and new licences; and
- the inclusion of unlicensed activities in the licence fee calculation.

2.2.2 The application of the licence fee regulations to both converted and new licences

The scope of the proposed regulations seems to extend to both "converted" licenses² and licences granted after the promulgation of the ECA (herein after referred to as "new" licenses).

ICASA is mandated in terms of section 5(7)(a)(iii) to make licence fee regulations pertaining to new licences referred to in section 5(2)³ and 5(4). The use of the words "application" and "registration" in sections 5(2) and 5(4) respectively seems to indicate that the licenses are new licenses, i.e. licenses applied for and registered after the effective date of the ECA. MTN therefore supports the applicability of the licence fees regulations to "new" licences.

² Section 1 of the ECA's definition of *"existing licences: means the licenses granted to persons prior to the coming into force of this Act in accordance with the provisions of the Telecommunications Act, the IBA Act or the Broadcasting Act.*

³ Section 5(2): *The Authority may upon application and due consideration in the prescribed manner grant individual licenses*

Considering that section 93(1) guarantees a converted licence on no less favourable terms, that licence fees of existing licenses are contained in licence terms, that the section 93 conversion process do not provide for licence applications or registrations (as provided for in section 5(2)) and that section 5(7)(a)(iii) is limited to section 5(2) and 5(4) licences, MTN respectfully requests ICASA to provide the industry with its interpretation regarding its statutory authority to extend the scope of the licence fee regulations to existing/converted licenses.

2.2.3 Licence fees may only be levied in respect of licensed activities

ICASA's jurisdiction to levy licence fees excludes activities that are not licensed activities. The inclusion of the revenues of unlicensed activities (such as revenues from handsets and revenues from supplementary services) in the calculation of licence fees could therefore result in the licence fee regulations being legally challengeable.

3. SPECIFIC COMMENTS ON SPECIFIC PROVISIONS OF THE PROPOSED REGULATIONS

3.1 Ad Background

It appears that ICASA was guided in formulating a licensing policy framework by research comprising of an international benchmarking exercise as well as an analysis of the current licensing environment in South Africa.

- It is respectfully submitted that ICASA should have included such research as background information to the draft regulations, so as to provide insight for interested parties into the considerations the informed ICASA in drafting the regulations.
- Such insight would have enabled interested parties to make informed and constructive comments on the draft regulations, which, ultimately, would have enabled ICASA to finalise the regulations in a much shortened period of time.

Although MTN generally supports the principles adopted by ICASA in formulating the licence fee regulations, it does believe that it should form part of a broader licence fee policy, which includes frequency licence fees.

- Frequency licence fees is an important tool available to ICASA to encourage investment in network infrastructure and to ensure the effective and efficient use of a scarce resource.
- It is for this reason important that ICASA implements a coordinated and integrated licence fee policy in respect of licences fees for ECS, ENCS and frequency spectrum.

3.2 Ad Licence Fee Framework

Although MTN agrees that the licence period (duration of the licence) is a factor in determining the value of a licence as per Principle II, the relationship between the value of a licence and the licence fees payable is not clear, i.e. if ICASA is of the view that there is a correlation between the value of a licence and the licence applicable fees:

- ICASA is following a “market value” approach in determining licence fees and not a “cost based” approach as claimed (refer to principle IV and the consideration of activity based costing).
- It is not clear whether the value of a licence influences all or only some of the categories of licence fees (administrative or annual).

MTN supports the principle that licensees with a revenue below a certain threshold should pay marginal annual licence fees as a measure to support start ups and SMME’s as contained in principle III.

- It is however noted that this principle has not been applied in the draft regulations.

MTN supports the principle that the licence fees need to cover the cost of regulating the market as contained in principle IV.

- In South Africa, however, the licence fees are paid into the State fiscus (i.e. Treasury) and therefore constitutes another form of taxation.
- MTN therefore respectfully submits that there is currently no relationship between licence fees levied and ICASA's budgetary requirements, and as such the principle cannot be applied in the current environment.
- MTN further submits that the projected increases in ICASA's operating expenses, should not be used as a basis for increases in the licence fees, because-
 - As stated, there is no relationship between ICASA's budgetary requirements and the licence fees, i.e licence fees are paid into the state fiscus;
 - ICASA's budgetary requirements include substantially more than just the cost of issuing service licences, i.e. the cost of frequency management, the cost of enforcement, the cost of converting existing licences etc., have no relation to the issuing of service licences.
- ICASA also makes the statement they considered activity based costing, but fail to provide the information to enable interested parties to assess or comment thereon.

MTN reiterates that frequency spectrum licence fees is a key consideration in establishing an environment conducive to network investment as set out in principle VI and can constitute a barrier to market entry as per principle V.

- o It is therefore desirable that ICASA formulate an integrated and coordinated licence fee policy which includes all types of service licence fees as well as spectrum licence fees.

Although MTN supports transparency, there are two dimensions thereto.

- o The first is the method of calculation. MTN agrees that the regulations comply with regards hereto.
- o The second is however the basis for determining the licence fees. MTN respectfully submit that the draft regulations fail the transparency requirement in respect hereto. MTN refers to the earlier comments on the need to include the research done by ICASA as background to the draft regulations.

MTN supports the “pay or play” principle as an effective mechanism to facilitate the achievement of universal access and universal service policy objectives.

- o Similarly, MTN supports the principle that licence fees must be offset against roll-out commitments.
- o Such offset provisions must however be clearly defined and specified in the regulations in order to be effective.
- o It is respectfully submitted that the draft regulations fail to do so and in its current form will be unworkable i.e. it is impossible to implement, to monitor or to measure in a consistent manner.
- o An offset provision can also not be implemented in isolation, but must form part of a broader universal access and universal service policy i.e. how does such offset relate to subsidies by the Universal Service and Access Fund (“USAF”) to finance the construction or extension of EC networks in under-serviced areas?

3.3 Ad 1. Definitions

“Licenced activity”, in its simplest form, is the activity for which the licence is issued i.e. provision of ECS, ECNS or broadcasting service.

- The proposed definition is however convoluted and unclear and should rather be amended to read as follows:

“Licensed Activity” means an activity constituting an electronic communication service, electronic communication network service or broadcasting service as defined in the Electronic Communications Act, 36 of 2005.

The definition of “Gross revenue” attempts to include revenues from activities which are not licenced activities such as-

- revenues from handsets which, except for the required type approval, is an unregulated market e.g. retailers who do not require ECA licenses import and sell handsets, The inclusion of handset revenues in only the licence fee calculation of licensees and not of importers cannot be justified and ought to be deleted.
- supplementary services although not defined, implies services other than licensed activities, e.g. call centre and billing services may be provided without a ECA service licence.
- The definition furthermore contains unnecessary duplications i.e. it includes both “leasing of infrastructure” and “facilities leasing”.
- The definition contains reference to items that require further clarity and or the inclusion of a definition that by necessity will need to be published for comment i.e. “late fees” and “income from Value Added Services”.
- The definition in its current form will be *ultra vires* the ECA.

- MTN therefore respectfully submits that the definition must be amended to read as follows:

“Gross Revenue” means revenues generated from Licensed Activities.

“Applicable Interest Rate” is defined as the “prime interest rate adopted by the main commercial banks”.

- Since each bank determines their own prime interest rate, this definition could be considered vague and ambiguous and poses the following questions:
 - will the rate of any one of the main banks be used?, or
 - will the average rate among a certain number of banks be used?, and
 - who determines whether a bank is “main” or not?
- It is therefore suggested, for the sake of clarity, that ICASA specifies the particular bank whose prime interest rate will be used in the regulations.

“Leased Lines” is used in regulation 5(2)(d), but it is, in fact, a subset of “facilities leasing”. Its use is therefore unnecessary repetitive and it should be deleted.

3.4 Ad Reg 2. Purpose of the regulations

- The regulations seem to apply to all licensees, i.e. both converted and new licensees.
 - Please see MTN’s comments under par 2.2.1 above.

3.5 Ad Reg 3. Application and exemptions

3.5.1 Ad Regulation 3(1)

In terms of regulation 3(1), the licence fee regulations apply to holders of individual and class ECS and ECNS and individual commercial BS licences. TN respectfully submits that this is not correct as the regulations should also apply to class community BS and class commercial BS licences.

MTN respectfully requests an explanation from ICASA regarding why only commercial BS licences are included as well as why class BS licences are excluded.

3.5.2 Ad Regulation 3(2)

TN generally supports the “pay or play” principle as provided for in the proposed licence fees regulations, but it is concerned that the regulation in its current form will not facilitate a smooth implementation of the principle for the following reasons:

- The regulation fails to specify which areas will qualify for the licence exemption i.e. will it be under-serviced areas determined by ICASA in terms of section 88(2) or is it other areas to be identified by ICASA? If is the latter, MTN requests an explanation regarding in terms of which authority ICASA will determine the areas.
- The regulation also fails to identify the target (and associated timeframe) to be undertaken by the licence holder in order to qualify for such licence fee exemption and furthermore fails to set out how such performance will be measured, e.g.:
 - Will a single EC facility rolled-out in year 1 in an under-serviced area qualify for a total three year licence fee exemption?

- Will it do so even if the EC facility has not been operational since year 2?
- What if the EC facility was rolled-out using financing through a USAF subsidy?

These questions clearly show that the implementation of the proposed “pay or play” licence fee regulation, although laudable, has not clearly been thought through and could lead to absurd results or unequal treatment of licensees. It also begs the question whether the “play” obligation exemption should not rather be structured as a set off against the USAF contribution rather than as a licence fee exemption?

MTN submits that the licence fee exemption must form part of an integrated universal access and universal service policy and must, at a minimum, be capped at the actual capital expenditure in any financial year.

A final consideration is to what extent and how will this licence fee exemption be applied to existing licensees i.e. those issued before the commencement date of the ECA and those issued after the commencement date of the ECA but before the effective date of the licence fee regulations? It must also be noted that this licence fee exemption is only available for ECNS licence holders and not ECS and BS licensees.

3.5.3 Ad Regulation 3(3)

MTN notes that ICASA may determine a percentage increase other than the CPI and wishes to record that such determination can only be done by way of regulation and after following the procedure prescribed in terms of section 4.

3.5.4 Ad Regulation 3(4)

Without access to the research that ICASA has considered in drafting the regulations, it is not clear on what basis ICASA determined the two categories (Class licenses for Community Broadcasting and Individual Licenses for Public Broadcasting (sound and television)) that are exempt from paying annual licence fees.

It is also noted that ICASA has not applied principle III of the Licence Framework, i.e. exempted or lowered the licence fee for start ups or SMMEs.

3.6 Ad Regulation 4. Payment of fees

It is noted that the annual licence fees are to be adjusted immediately on receipt of the audited annual financial statement of the licensee which must be submitted within three months from the financial year end. The regulations however fail to provide for those entities that are not required by law to have audited financial statements.

In this regard, MTN refers ICASA to the newly promulgated Universal Service and Access Fund Regulations 2008, which specifically provides in regulation 4(5) that “a licensee that is not required by law to provide audited financial statements must submit financial statements signed by the accounting officer to the Authority.” It is suggested that a similar provision be included in the licence fee regulations.

3.7 Ad Regulation 5. Allowable deductions

3.7.1 Ad Regulation 5(1)

ECS licensees provide services to the retail market. An ECS licence holder is not authorized to provide ECNSs and, as such, is totally reliant on the provider of a wholesale ECN service.

A large portion of the ECS licence holder's costs are therefore made up of

wholesale EC services obtained from other licensees, who are required to pay licence fees in respect of the revenue received in respect of the wholesale services sold to such an ECS.

If the wholesale provider pays its licence fee based on the revenue received for such wholesale EC services and the ECS licensee pays licence fees on the total revenue for such “resold” retail services, it will constitute double taxation which is generally accepted as unfair and to be avoided.

It is therefore important that all wholesale EC service costs must be allowed to be deducted in determining the Adjusted Gross Revenue.

It is further not clear why deductions allowed for BS licences are not allowed for ECS licences, i.e. specifically agency fees and commissions actually paid out must also be allowed to be deducted by ECNS and ECS licensees.

Section 93(1) of the ECA requires that the Authority convert the existing MTN licence by granting “*one or more new licences that comply with this Act on no less favourable terms*”. MTN submits that scope of the proposed “allowable deductions” contained within the draft Regulation 5(1), do not satisfy this obligation. In this regard, MTN requires clarity as to why the proposed deductions do not include the following elements specifically provided for in the definition of “Net Operational Income” in MTN’s existing licence :

- a) Other indirect taxes.
- b) Bad debts actually incurred.

MTN submits that it is fair and reasonable to exclude revenue billed but not received i.e. bad debts, from the Adjusted Gross Revenue and a failure to do so will result in prejudice.

Thus, MTN respectfully requests that bad debts, agency fees and commissions

actually paid out, facilities leasing, national roaming and all other wholesale EC charges be included in the list of allowable deductions in regulation 5(1)(a) to (c).

3.7.2 Ad Regulation 5(2)

An ECNS licence is, in essence, a wholesale provider of ECNS. An ECNS licence holder can choose to build their own network or to lease facilities or other ECN services from another licensee. As such an ECNS licensee can have wholesale ECN service charges that will be subjected to licence fees in terms of the wholesale provider's licence who provides such ECN services to it.

All wholesale services obtained from ECNS licence holders must therefore be allowed to be deducted from the Adjusted Gross Revenue.

It is noted that interconnection is allowed as a deduction at ECS level in terms of regulation 5(1), but not at ECNS level. It is unclear why this was done and it is submitted that this is an error. Interconnection, per definition, can occur at both network and services level. Interconnection must therefore be deductible at ECNS level and must be included as a deduction under regulation 5(2).

It is not clear why deductions allowed for BS licences are not allowed for ECNS licences. It is submitted that specifically agency fees and commissions actually paid out must also be deducted in respect of all licensees.

MTN further notes that bad debt has not been allowed as a deductible expense even though it is currently the practice and has specifically been provided for in the definition of "Net Operational Income" in MTN's existing licence. MTN submits that it is fair and reasonable to exclude revenue billed but not received i.e. bad debts, from the Adjusted Gross Revenue and a failure to do so will result in prejudice.

"Leased lines" as it appears in regulation 5(2)(d) are a sub-set of facilities leasing

that is deductible under regulation 5(2)(c), and should therefore be deleted.

MTN respectfully requests that bad debts, agency fees and commissions actually paid out, interconnection and all other wholesale EC charges should be included in the allowable deductions listed in regulation 5(2)(a) to (d).

3.8 Ad Regulation 6 - Interest

See comments regarding the definition of “applicable interest rate” in para 3.3 above

3.9 Ad Regulation 7 - Contraventions and Penalties

No comment.

3.10 Ad Regulation 8 - Short title and commencement

MTN respectfully refers ICASA to its comments in para 2.2.1 above regarding the applicability of the proposed licence fees to converted licenses.

3.11 Ad Schedule 1

3.11.1 Ad Individual Licences

3.11.1.1 Ad Applications for amendment of licences:

Although it is recognized that all amendments of licences must follow the process set out in sections 9(2) to (6), it is submitted that certain amendments e.g. name change, is purely administrative in nature and will not require a huge amount of time or effort on the side of ICASA. On the other hand, amendments such as a change in a roll-out target, will require careful consideration of a number of factors and will attract public participation and substantially more effort on the side of

ICASA.

Since ICASA adopted an activity based approach with regard to the setting of licence fees, it is submitted that a differentiation must be drawn between substantive amendments and administrative amendments. However, without insight into ICASA's activity based costing and international benchmarking exercise, it is impossible to comment on the reasonableness or not of the proposed charge.

The fee should also only be levied if the amendment was requested by the licence holder in terms of section 10(1)(c) of the ECA and not in the case where ICASA initiates a licence amendment.

3.11.1.2 Ad Applications for renewal of licences

The regulations fail to set out which application fee applicable at the time of the submission of renewal will be applicable i.e. is it 60% of application for amendment fee. It is impossible to determine the cost of an application for renewal from these proposed regulations and MTN is therefore unable to constructively comment on this regulation. Once MTN has been placed in possession as to how the Authority calculated such costs, Then only will MTN be in a position to comment on the proposals.

3.11.1.3 Ad Applications for transfer of licences

Without insight into ICASA's activity based costing and international benchmarking exercise, it is impossible to comment on the reasonableness or not, of the proposed charge. Suffice to point out that similarly to the amendment fee, there may be transfer applications where the transferee is well known to ICASA and the transfer is little more than an administrative function, whilst there may be occasions where the transfer will consist of a total analysis regarding the suitability or not of the transferee. The proposed fee should differentiate such

cases.

3.11.2 Ad Class licence fees

3.11.2.1 Ad Initial registrations

The exemption granted in terms of regulation 4(4)(a) only applies to the annual licence fee set out in Schedule 2. Class BS Licences are therefore still liable for the administrative fees e.g. initial licence fee, application for amendment etc.

Schedule 1, however, only refers to community broadcasting services and fails to stipulate the administrative fees for class BS licences that are not community broadcasters i.e. commercial broadcasters.

3.11.2.2 Ad Applications for renewal of licences

MTN re-iterates its comments above that the regulations fail to set out which application fee applicable at the time of the submission of renewal will be applied i.e. is it 60% of application for amendment fee. It is impossible to determine the cost of an application for renewal from these proposed regulations and MTN is therefore unable to constructively comment on this regulation.

3.11.2.3 Ad Notifications for licence exemptions

Section 6 of the ECA empowers ICASA to prescribe types of ECS that may be provided and EC networks that may be operated as well as radio frequency spectrum that may be used, without a licence. In terms of the ICASA Licence Exemption Regulations, 2008, published on 29 July 2008 in Government Gazette 31289 certain specified ECS, ECN and ECNS are licence exempt.

The regulations require exempted licensees to provide certain information if requested to do so and places certain obligations (publication of tariffs and feed

and metering and billing) on persons selling, leasing or otherwise providing spare capacity on a Private Electronic Communications Network (PECN).

The regulation does not place an obligation on an exemptee to notify ICASA or to apply for a licence exemption. Thus if a person satisfies the criteria set out in the ICASA Licence Exemption Regulations, that person is *de facto* and *de jure* licence exempt.

MTN therefore respectfully submits that the licence fee for notifications for licence exemptions is *ultra vires* the ECA read with the ICASA Licence Exemption Regulations. To the extent that Notice 397 of 2008 specifies otherwise, it too will be *ultra vires* the ECA.

3.12 Ad Schedule 2

The licence exemption in respect of regulation 3(4) only applies to class licences for community broadcasters and individual public broadcasters. In other words, class “commercial” and individual “commercial” BS licences are still liable for the annual licence fees.

Schedule 2, however, only makes provision for individual commercial BS and fails to specify the annual applicable licence fee in respect of class commercial BS.

4. CONCLUSION

It is of utmost importance that the licence fees regulations are sound in law and furthermore provide the necessary framework and clear guidance that will ensure expeditious implementation of the Electronic Communications Act’s service licensing framework. MTN therefore respectfully requests ICASA to consider its comments and recommendations above.