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29 May 2009

Mr Paris Mashile
Chairperson
ICASA
Block B, Pinmill Farm
164 Katherine Street
Sandton

Via Email : PMashile1@icasa.org.za

Attention : Mandla Mchunu
Manager: Spectrum Management

Via Email : MMchunu@icasa.org.za

Dear Sirs,

RE: GOVERNMENT GAZETTE NOTICE No. 32029 IN TERMS OF SECTION 34 OF THE ELECTRONIC COMMUNICATIONS ACT (ECA) 36 OF 2005 INVITING COMMENTS RELATING TO THE DRAFT RADIO FREQUENCY SPECTRUM FEE REGULATIONS

MTN thanks the Authority for an opportunity to comment on the draft Radio Frequency Spectrum fee draft regulations (herein after referred to as spectrum pricing draft regulations) as published.

MTN would like to participate in any further consultation on these draft regulation be it a workshop or oral hearing if the Authority decides to conduct such workshop or hearing.

We trust that you will find this to be in order.

Yours faithfully,

LAHLANG SOMO
SENIOR LEGAL & REGULATORY ADVISOR
MTN (PTY) LTD

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Vat Reg. No. 4630140434



MTN'S RESPONSE IN RELATION TO THE
NOTICE OF ICASA'S INTENTION TO
REVISE RADIO FREQUENCY SPECTRUM
FEE REGULATIONS AS PUBLISHED IN
GOVERNMENT GAZETTE No. 32029 DATED
16 MARCH 2009

29 May 2009

This written submission is structured as follows:

- a) General comments;
- b) Specific comments on the draft regulations; and
- c) Conclusion.

A. GENERAL COMMENTS

The discussion document in the introduction states that these draft regulations are as a result of certain shortcomings and amongst these are that some fee structures encourage spectrum hoarding but this concept is not addressed in the draft regulation..

This process, in our view, presents the Authority with an opportunity to finally regulate spectrum hoarding. To that end, MTN proposes the following position taken from the Nepal Telecommunications Authority's analysis and recommendation relating to cellular spectrum refarming and spectrum pricing:

Spectrum hoarding tendencies:

- No costs at all to reserve and hoard spectrum
- Need to pay only upon usage
- No guarantee to obtain spectrum when needed.

Instruments to address these tendencies:

- Simplify pricing formula
- Establish proper spectrum assignment policy or criteria
- Increase spectrum usage charges
- Set extra fees for spectrum hoarding

Set standards for spectrum allocation:

- Set minimum number of subscribers per MHz
- Set minimum revenue to be generated per MHz
- Determine minimum spectrum necessary to provide the services
- Regard excess spectrum as hoarded spectrum.

Set spectrum prices according to its real value to licensees and apply premium prices for hoarding. Set a time frame at the allocation of spectrum i.e. revoke hoarded spectrum if kept unused for over 2 years.

It is very critical that all spectrum users are subject to the same fees, terms and conditions. The statement in the discussion document that "while most of the radio frequency spectrum will be priced according to spectrum, a large proportion of smaller individual licensees will be charged the minimum fee" should not find way into the regulations as it would result in undue

discrimination. We submit that Spectrum pricing should be based on the importance of the spectrum only and not the size of the licensee.

Another shortcoming that is mentioned in the introduction, is that currently the fees do not give any incentive for efficient use of spectrum at a time when there is increasing pressure on limited spectrum resources. However, what comes through in the newly proposed formula are penalties for inefficient use more so than incentives for efficient use. Furthermore, there are no incentives given for employing higher modulation orders, the use of statistical multiplexing, the use of high performance antennas over standard performance antennas, the use of Automatic Transmit Power Control (ATPC), etc., all of which are real costs incurred by some spectrum users in an attempt to increase the bits per MHz and to enable earlier re-use of spectrum. MTN would like to propose that the current formula be modified to clearly reflect an incentive based objective and to be expanded in order to incentivise commonly known methods (as mentioned above) to increase the efficient use of spectrum.

It is unclear on reading the discussion document how the different formulas were modelled and what the impact thereof will be on the industry. MTN suspects that a bulk spectrum user such as Telkom will be affected quite significantly due to increased spectrum cost. Since a significant part of the Cellular Operators' transmission network is still provided by Telkom, it is to be expected that Telkom will pass their expected increased operational cost on to the Cellular Operators. MTN respectfully requests that the Authority reveal the full details of its impact study on the Cellular industry.

The Authority states that its intention in revising the structure of the annual Radio Frequency Spectrum Licence Fees is amongst others to at least cover the costs to ICASA for monitoring, interference investigations, international coordination, ITU membership and policy development. There is no indication in the discussion document of any industry study that could have informed the proposed new fees structure.

The draft regulations are also silent on how the Authority will treat the residue as there is bound to be an increase in the number of licensees under the Electronic Communications Act. Such residue may attract the provision of Section 77 of the Constitution which 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

Currently the monies paid by licensees to the Authority get transferred to the treasury meaning that there is no direct benefit for the Authority and therefore no justification for charging administration fees. From a public policy perspective it is also prudent to take reasonable steps necessary in the process not to increase spectrum pricing. An increase on spectrum fees will detrimentally impact on licensees using spectrum with the result that such increase end up having to be absorbed by customers.

MTN is of the view that an increase in spectrum fees should have a reasonable relationship with the underlying regulatory cost of doing such regulatory work.

¹ Section 73(2)(a).

In fact there is nothing wrong with not increasing spectrum fees. 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. Increasing spectrum fees may jeopardise the licensees' ability to achieve these objectives. It should also be noted that lower spectrum fees will also enable regulators to ensure that capital remains within the communications sector.

It is critical for all users of spectrum to be subject to the same fees, conditions, etc. There must be no exceptions for instance where certain users have 20 year bulk spectrum allocations, etc. MTN is of the opinion that the Draft Regulations have failed to revoke traditional excessive bulk allocations of almost entire bands that Telkom for example currently enjoys. This situation makes it very difficult for Cellular Operators to self provide transmission services as they depend on the Authority to assign spectrum on a case-by-case basis (especially in the lower bands), whereas Telkom, as a result of their traditional bulk assignments, do not have to apply to the Authority as often as the Cellular Operators have to do.

Currently broadcasters are exempt from paying for spectrum; we submit that broadcasters like any other licensee who use any part of the spectrum they should pay i.e. they should pay for their use of the broadcasting spectrum. In the converged environment, broadcasters will have the opportunity to provide converged services that will compete with ECS licensees. In any event, it is our opinion that the administrative work relating to a broadcasting application is more involved than that required for a telecommunication application.

MTN submit that there should be a provision added in these regulations relating to the counter performance by the Authority for the processing period of spectrum applications (e.g. an SLA added), etc. Similar to the Numbering Regulations, MTN propose 30 days turn-around time for a spectrum application with a penalty attached for defaulting.

B. SPECIFIC COMMENTS

Ad paragraph 4 Fee Determination

The Authority should provide a mapping of how the current spectrum fees will be migrated to the new model in order to allow licensees to quantify the financial impact on their businesses. (The table on Regulation 11 maps the current spectrum fee with the proposed spectrum fee based on the radio frequency licence type. The drawback is that there could be some confusion for some radio frequency licence types).

Ad paragraph 5(3) Exceptions

One of the objectives for these regulations is stated as “To ensure that the costs of managing and monitoring the radio frequency are at least covered by fee income”. If amongst other things, the purpose of these regulations is to cover the administration costs to ICASA to process spectrum applications then these regulations must also be made applicable to broadcasting services otherwise we end up with an undesirable situation of cross subsidisation.

Ad paragraph 6 Formula

MTN understand that the proposed formula is based on the OFCOM one, but again it is not clear what impact study was conducted to see how the proposed formula would fit into the South African market. We propose that the calculations be modelled in order to make them adaptable to the South African market. MTN also seek clarity on the figures used for the variables in the proposed formula.

Ad paragraph 6(8)(d) Congestion

MTN seek clarity on how the Authority will handle congestion with regards to the number of licensees requesting bandwidth. MTN also need clarity on how incumbent holders of the spectrum will be impacted in bands where there is increased demand.

Ad paragraph 6(7) Unit price

The unit price of R2000 as point of departure for most calculations, was proposed without any transparency of how it was derived. The Authority is kindly requested to provide details of how exactly this amount was derived, what the model or basis will be for future adaptation of it, how its possible future adaptation will relate to inflation tracking (or not), etc.

Ad subparagraph 8(d)

Any valuable spectrum will have a waiting list especially given the increased numbers of the market players. We seek clarity on how the Authority will handle congestion with regards to the number of licensees requesting bandwidth. It is also not clear whether the congestion will impact on licences that would have been issued in a particular band prior to the authority declaring congestion.

ASTER Factor

The discussion document states that for convenience and implementation simplicity, the area ranges are intended to allow easy application at the local, provincial and even national level. It further goes on to state that the prospective licensee shall submit their system description including the location of their radio base stations as well as transmit power figures. The authority shall estimate the area covered by the transmitters and feed this value into the price algorithm.

There is no clarity in the Draft Spectrum Fees Regulations on how the ASTER factor is applied. This lack of clarity is further compounded by the above statements that are contained in the discussion document. The above statements seem to suggest that a licensee may apply an appropriate ASTER factor for local, provincial or national frequency assignments. On the contrary, the second statement suggests that the ASTER factor will be applied per base station irrespective of whether the assignment is a national or provincial assignment.

Ad paragraph 10 Multiyear licenses

We appreciate the option for licence fees to be paid for several years in advance with a discount scheme and further propose that the multi licence fee be extended to 20 years instead. This will align to the 20 year Electronic Communications Network licence term.

C. Conclusion

We propose that the Authority publish on its website a spectrum register indicating the various spectrum allocations, the duration or tenure on the spectrum and what has been freed up and available for application.

MTN would like clarity on the process of auction where demand exceeds supply as mentioned in the draft regulations. This should be done prior to any significant investment into equipment utilizing said spectrum. Further, we would like to caution the Authority against resorting to the auctioning of spectrum as that has a negative impact on CAPEX.

END