

MOBILE TELEPHONE NETWORKS (PTY) LTD
Head Office: 216 14th Ave Fairland 2195
Private Bag 9955 Cresta 2118 South Africa
Tel +2711 912 3000 Fax +2711 912 3001 <http://www.mtn.co.za>



4 December 2012

Godfree Maulana

Manager: ECS/ECNS Compliance

Independent Communications Authority of South Africa

Block B, Pinmill Farm

164 Katherine Street

Sandton

Via Email: GMaulana@icasa.org.za and EcsEcns.Compliance@icasa.org.za

Dear Sir,

RE: DRAFT GENERAL LICENCE FEE REGULATIONS (GAZETTE NO: 35819) (“THE DRAFT REGULATION”)

MTN would like to thank the Independent Communications Authority of South Africa (“the Authority”) for the opportunity to make comments on the above draft regulation and herewith submit our comments for your consideration.

Furthermore, MTN records that it wishes to make oral presentations to the Authority should oral hearings be scheduled.

Thanking you in anticipation.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Graham de Vries', written over a light blue horizontal line.

GRAHAM DE VRIES

GENERAL MANAGER: REGULATORY AFFAIRS

MTN (PTY) LTD

Directors PL Heinemann (Chairman) KW Pienaar (Managing Director)*, Z Bulbulia*, ZNA Cindi, RS Dabengwa, R Gasant, IN Mkhize, NWC Molope, PD Norman, NI Patel, AJ Taylor, IS Sehoole

Company Secretary: MML Mokoka *Executive

Reg No. 1993/001436/07

Vat Reg. No. 4630140434



**MTN'S RESPONSE TO THE AUTHORITY'S PROPOSED DRAFT
GENERAL LICENCE FEE REGULATIONS AS PUBLISHED IN
GOVERNMENT GAZETTE NO 35819 DATED 24 OCTOBER 2012**

4 December 2012

TABLE OF CONTENTS

- 1. EXECUTIVE SUMMARY 4
- 2. INTRODUCTION 6
- 3. GENERAL COMMENTS TO THE DRAFT REGULATION 7
 - 3.1. The objective of the proposed draft regulations 7**
 - 3.2. The Necessity of Regulatory Impact Assessment (“RIA”)..... 9**
- 4. SPECIFIC COMMENTS TO THE DRAFT REGULATION 12
 - 4.1 Exemptions..... 12**
 - 4.2. Interest..... 12**
 - 4.3. Schedule 2, Annual Licence Fees..... 13**
- 5. ADMINISTRATIVE LAW ISSUES..... 13
 - 5.1. Requirements for the decisions of public bodies 14**
 - 5.2. The 2009 regulations 15**
 - 5.3. The 2012 regulations 15**
 - 5.4. Changes to the method of calculating the annual licence fee payable ... 16**
 - 5.5. Conclusion on administrative law issues 18**
- 6. CONCLUSION..... 18

1. EXECUTIVE SUMMARY

MTN is not unsympathetic to the Authority's argument of changing the licence fee methodology to reduce the administrative regulatory burden of verifying such licence fee payments but it requests that this be done in a reasonable manner and in line with what Operators are currently contributing in respect of licence fees. Therefore, MTN believes the current Draft regulation can be strengthened and improved upon, in particular:

- MTN does not support the percentage of the revised licence fee calculation evident in the Draft Regulation, which is 0.75% of annual turnover. MTN believes this percentage is grossly overstated and should be corrected to reflect an equitable quantum of the licence fees currently collected by the Authority.
- MTN has calculated that 1.5% of its gross profit translates into 0.29% of its annual turnover in respect of licence fees. Consequently, MTN believes the Authority should correct the percentage of annual turnover to reflect 0.29% to ensure an equitable effect of the proposed changes for licence fee regulations.
- Failing to correct this percentage, would effectively mean that the Authority has proposed to increase Operator licence fees on an unsubstantiated basis as no reasonable justification has been provided by the Authority for the resultant licence fee increase.
- MTN believes that the Authority should conduct a proper Regulatory Impact Assessment ("**RIA**") before publishing this regulation. A RIA would assess the regulatory impact that a new licence fee regulation would have on socio-economic and macro-economic objectives for ICT industry. Moreover, it should verify what percentage of gross revenue would equate to 1.5% gross profit. MTN's view is that the turnover based formula may not be based on anything more than 0.29% of turnover.

- MTN found it surprising that the Authority's proposed new methodology has ignored the Authority's own position papers on the current General Licence Fee Regulations (Gazette no. 32084), which argues against the levying of a licence fee based on gross revenue or turnover as it creates a heavy administrative burden for the Authority.
- MTN notes that it has over the years consistently engaged with the Authority to identify and agree on the costs that should be subtracted in respect of MTN's current licence fee calculation methodology. This consultation with the Authority has always resulted in MTN submitting a rigorous and detailed write-up to the Authority detailing the licence fee calculation for their records. MTN records that at no time did the Authority raise any objections or dispute MTN's calculation methodology that was submitted to ICASA in writing.
- MTN proposes that the Authority can ensure that similar agreements are in place with other licensees in order to ease the Authority's administrative burden in verifying annual licence fee calculations going forward.
- Should ICASA wish to continue on the basis of the turnover based calculation methodology, from an administrative law point of view, it is clear that there is no rational basis for the change from the gross-profit based formula to the turnover-based formula. The gross-profit formula should be retained in the calculation of the annual licence fee, alternatively the percentage of the fee should be reduced to 0.29% of turnover.
- To the extent that ICASA has experienced difficulties in managing the current gross profit based system, it should seek to implement improved monitoring and regulation rather than impose a significantly more onerous licence fee regime on licensees.

2. INTRODUCTION

MTN (Pty) Limited (“**MTN**”) would like to thank the Independent Communications Authority of South Africa (“**the Authority**”) for the opportunity to respond to its proposed draft General Licence Fee Regulations as published in government gazette no. 35819, dated 24 October 2012 (“**the Draft Regulation**”).

MTN is not unsympathetic to the Authority’s argument of proposing an administratively simpler method of calculating licence fees. However, MTN believes that this simplification of the existing regulations should not come at the financial expense of significantly increasing licence fees. MTN understands that the justification provided for the simplification of this licence fee methodology is to alleviate the administrative burden faced by the Authority, however, no concomitant justification is provided for the financial regulatory increase.

On the face of it, MTN’s views the Draft Regulations as unreasonably increasing licence fees under the guise of alleviating the Authority’s administrative burden. MTN’s view to support this submission is based on two arguments, namely, our own financial calculation is that our year on year licence fee will increase by 163% which is a substantial financial burden and a serious business shock in any business environment. This proposed increase is at odds with the general global slowdown in economic activity and the continued pressure by the Authority itself stating that Operators should reduce the costs to communicate.

Secondly, the Authority’s lack of justification for the changes in the licence fee methodology makes the increase in licence fees unreasonable as Operator’s are not provided an opportunity to engage with the reasons behind the increase in licence fees.

Notwithstanding the second argument MTN believes that the Authority should be entitled to change regulations to alleviate administrative burdens but it should be done in a manner that reflects an equitable outcome of licence fees levied.

MTN’s submission is structured as follows:

Section 1 provides an executive summary;
Section 2 this introduction;
Section 3 sets out MTN's general comments to the Draft Regulation;
Section 4 provides specific comments to the Draft Regulation; and
Section 5 concludes.

3. GENERAL COMMENTS TO THE DRAFT REGULATION

3.1. The objective of the proposed draft regulations

The Authority claims that the purpose of the draft regulation is to propose an administratively simpler method of calculating licence fees which will lessen the administrative burden of verifying direct costs incurred in providing licensed activities. MTN seeks clarity from the Authority on how calculating gross revenue of licensed activities will prove to be a different scenario for the Authority which is not clarified in the Draft Regulation.

Notwithstanding the clarity sought, MTN is surprised that the Authority has ignored its own findings evident in the Authority's original position paper on the existing General Licence Fees in Gazette no. 31993 ("the Position Paper"). In this Position Paper the Authority outlined the comparable strengths and weaknesses of levying licence fees on gross revenue versus gross profit. In the new proposed Draft Regulation, the Authority now seeks to levy licence fees based on gross revenue or annual turnover¹. Table 1 below is an extract from this Position Paper in relation to the strengths and weaknesses of levying licence fees based on the gross revenue versus gross profit.

¹ The Draft Regulation defines turnover as "means *income generated from the provision of licensed services*". Gross revenue from an accounting perspective has the same meaning.

Table1: Levying licence fees on gross revenue versus gross profit

The impact of general licence fees being levied on Gross Revenue	
Strengths	Weaknesses
<i>Easy to administer for both licensee and the Regulator</i>	<i>Is susceptible to double taxation</i>
	<i>Negatively affects new entrants compared to incumbents as these firms may not yet be breaking even but are still required to pay annual licence fees.</i>
	<i>Accentuates the trend in the business cycle, i.e. a licensee faces a significant downturn in sales revenue, is required to pay CIT but also has to pay annual licence fees. This is of particular concern for firms with high fixed costs relative to their variable costs, typically being the smaller firms.</i>
	<i>Annual revenues received by the regulator is dependent on the business cycles</i>
	<i>Heavy administrative burden on both the Authority and the licensee if certain items have been declared deductible to counter the double-taxation effect.</i>
The impact of general licence fees being levied on Gross Profit	
Strengths	Weaknesses
<i>Easy to administer for both licensee and the regulator</i>	<i>Annual revenue received by the regulator is dependent on the business cycle.</i>
<i>Avoids double taxation</i>	
<i>Is neutral in relation to new entrants versus incumbents as fee is only based on profits i.e. competition neutral</i>	
<i>Is business cycle neutral as fee is only based on profits</i>	
<i>No requirement for justification of specific items that may be declared deductible , thereby removing administrative burden.</i>	

Source: ICASA position paper on the existing General Licence Fees, page 7 in Gazette No. 31993.

The Position Paper clearly suggested that levying licence fees based on gross profit was the correct approach to follow in that its strengths outweighed its weaknesses. Moreover, the Authority's analysis clearly stated that levying licence fee payments on **gross revenue** will introduce "**heavy administrative burden on both the Authority and the licensee if certain items have been declared deductible to counter the double-taxation effect.**" In addition, the same Position Paper stated that levying licence fees on gross profit had "**no requirement for justification of specific items that may be declared deductible, thereby removing administrative burden**".

Notwithstanding the above, MTN maintains that a change in the current licence fee calculation to alleviate the Authority's administrative burden must be done on an equitable basis, compliant with administrative law principles and should not come at the financial expense of significantly increasing licence fees. MTN has financially calculated that our year on year licence fee will increase by 163% which is a substantial financial burden and a serious business shock which we view as unreasonable as the Authority has not provided any justification for this increase in licence fees nor have operators been afforded an opportunity to engage with the reasons behind the increase in licence fees.

Therefore, MTN believes the Authority should correct the percentage of MTN's gross revenue to reflect 0.29% as this translates into an equivalent licence fee in gross revenue terms. MTN is aware of administrative justice implications of the Authority's regulatory processes in this regard, and in being prejudiced in terms of our existing business rights MTN would by necessity be forced to reserve its rights in law.

3.2. The Necessity of Regulatory Impact Assessment ("RIA")

MTN notes that the Authority has not considered the impact of the Draft Regulations in relation to the objectives contained in section 2 of the Electronic Communications Act, 2005("the ECA"). It is our view, that given the concomitant socio-economic impact of the Draft Regulation, the latter should be the cornerstone of the Authorities analysis.

MTN believes that as currently drafted the Draft Regulations will have a negative impact on a key ECA objective, namely:

“2(d) encourage investment; include strategic investment and innovation in the communications sector”

The Minister of Communication’s recent address to the Women’s Summit on Growing Local Economic Development at the Nkangala District Municipality², stated:

*“The Department of Communications has committed to achieving **100 percent broadband access by 2020**. We realise that improved broadband access serves as a catalyst for economic growth”*.

In order to achieve this objective of 100% Broadband access, huge infrastructure investment is required. These Draft Regulations governing licence fees are published at a time where government has called upon operators such as MTN to facilitate and co-operate with government in achieving these ICT objectives. MTN has heeded government’s call for co-operation in this investment endeavour and has embarked on a roadmap of network infrastructure investment initiatives such as network infrastructure development (e.g. upgrading our network to LTE) and increasing our network infrastructure rollout, which supports government’s 2020 vision of 100% broadband penetration. In addition to Broadband penetration, MTN’s consistently has to accommodate increased traffic volumes which require constant network upgrading and investment in order to provide customers with good quality of service.

Increasing MTN’s licence fees by a significant 163% under the guise of alleviating the Authority’s administrative burden will have noteworthy implications for both the Authority and the socio-economic objectives of the ICT industry as a whole. Increasing regulatory costs at a time when socio-economic objectives are dependent on substantial capital investments and infrastructure roll-outs does not create an environment which encourages investment and innovation in the communications sector, which is one of the objectives in section 2 of the ECA.

² http://www.doc.gov.za/index.php?option=com_docman&task=cat_view&gid=46&Itemid=104

In addition, the GSM Association Report (May 2012)³ states: *“By raising the cost of using mobile services, mobile-specific charges and taxes can constrain the growth of the wide range of industries that rely on mobile communications and hence reduce the ability of governments to earn higher revenues across the economy”*.

These aspects should be considered by the Authority and policy makers alike, as MTN believes that unsubstantiated increasing of licence fees will by necessity be passed onto the consumer in some shape or form at a time where there is a call to reduce the cost to communicate. Therefore, MTN believes the Authority should conduct a RIA to analyse unintended consequences of their proposed regulations which proposed regulations significantly increases operator’s licence fees under the guise of alleviating administrative burden for the Authority.

Moreover, an increase of this magnitude in licence fees which has not been modelled into immediate investment decisions will by necessity need to be considered by operators and would likely impact the quantum of future capital investment at a time when LTE network expansion requires considerable investment to upgrade the existing network infrastructure and provide valuable wireless mobile services to consumers.

MTN has calculated that a licence fee of 1.5% of gross profit is equivalent to a licence fee of 0.29% in terms of its annual turnover. The percentage of annual turnover must be corrected to reflect an equivalent licence fee in revenue terms which addresses the alleviation of the Authority’s administrative burden and is an equitable change in terms of changing the formula and methodology of the licence fee.

³ GSM Association Report, *“Licensing to support the mobile broadband revolution”*(May 2012).

4. SPECIFIC COMMENTS TO THE DRAFT REGULATION

4.1 Exemptions

Regulation 4(d) of the Draft Regulation states:” *Licensees will be exempted from paying Annual Licence fees in the first three (3) years of generation of revenue from licensed services.*”

MTN notes that the Draft regulation does not define “new entrant” in its definitions section. In this regard, MTN proposes that the Authority include a definition of new entrant as follows:

“New entrant licensees” means a person that is *licensed in terms of the Electronic Communications Act after the promulgation of these regulations*”

Consequently MTN recommends that regulation 4(d) should be amended as follows:
New Entrant [Licensees] will be exempted from paying Annual Licence fees in the first three (3) years calculated from the date of licensing.”

4.2. Interest

MTN supports the Authorities amendments in respect of interest charged on late payments, which needs to be payable in accordance with the Public Finance Management Act.

MTN has noted that there is no definition for the acronym PFMA. MTN would advise that the following definition is inserted into the definitions section of the Draft Regulation. “PFMA” means Public Finance Management Act, 1999(Act 1 of 1999). Another reason for inserting this definition in the Draft Regulation is that it is not defined in the ECA.

4.3. Schedule 2, Annual Licence Fees

It is MTN's view that the percentage of annual turnover which is 0.75% should be corrected to reflect an equivalent fee in revenue terms of 0.29%.

MTN further seeks clarity from the authority at how it arrived at 0.75 percent, which forms part of the licence fee calculation.

5. ADMINISTRATIVE LAW ISSUES

The Independent Communications Authority of South Africa ("ICASA") has drafted regulations ("the 2012 draft regulations") in terms of section 4(1)(c)(iv-v) and 5(7)(a)(iii) of the Electronic Communications Act 36 of 2005 and published these regulations for comment.¹

² When promulgated, the 2012 draft regulations will repeal the General Licence Fees Regulations, 2009 ("the 2009 regulations").

In this regard, MTN (Pty) Ltd ("MTN") makes the following administrative law submissions:

- The formula used in the determination of the annual licence fee payable should be based on the profits of licensees and not on their turnover, alternatively the turnover based percentage should be amended to reflect 0.29% to result in an equivalent licence fee payment to what MTN is currently paying; and
- To the extent that ICASA has experienced difficulties in managing the system under the 2009 regulations, it should seek to implement improved monitoring and regulation rather than impose a significantly more onerous licence fee regime on licensees.

5.1. Requirements for the decisions of public bodies

ICASA is a public regulatory body established by section 3 of the Independent Communications Authority of South Africa Act 13 of 2000.

The principles of administrative law and the provisions of the Promotion of Administrative Justice Act 3 of 2000 (“the PAJA”) therefore apply to the making of regulations by ICASA.

As a public body, ICASA must ensure that any decisions it makes are reasonable and made in accordance with procedural fairness. ICASA must ensure that in exercising its decision making power, including the power to make regulations, it does so in a reasonable and procedurally fair manner that is consistent with the principles of administrative law.

The standard of reasonableness required in administrative law is whether a decision taken is reasonably related to the facts before the decision-maker, the purposes of the power that the decision-maker has and all relevant circumstances. The principle of rationality is fundamental to the requirement of reasonableness and requires that a decision must be supported by the evidence before the administrator as well as the reasons given for it. [*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 43]

There must be a rational objective basis justifying the conclusion made by the administrative decision-maker between the evidence and information available to him and the decision ultimately taken. [*Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) para 21]

A further aspect of rationality is that a decision must be objectively capable of furthering the purpose for which the decision was purportedly taken. [C Hoexter *Administrative Law in South Africa* 2007, 307]

5.2. The 2009 regulations

In the 2009 regulations, the formula used for the determination of the annual licence fees payable by licensees is **“Pa = Pp x (GP) where GP = GR – TC”** (“the gross profit-based formula”).

In the gross profit-based formula, “Pa” is the payable annual licence fee; “Pp” is the applicable percentage, which is 1.5%; “GP” is gross profit; “GR” is gross revenue; and “TC” is total costs.

The 2009 regulations define “gross profit” as “total revenue generated from Licensed Services less total costs directly incurred in the provision of such services”.

5.3. The 2012 regulations

In Schedule 2 to the 2012 draft regulations, ICASA provides the formula that it will use to calculate the annual licence fees payable by licensees. This formula is **“Pa = Pp x (T)”** (“the turnover-based formula”).

In the above formula, “Pa” is the payable annual licence fee; “Pp” is the applicable percentage, which is 0.75%; and “T” is turnover due to licensed activities.

The definitions section of the 2012 draft regulations define “turnover” as “income generated from the provision of licensed services”.

The 2012 draft regulations were published together with an explanatory memorandum. The explanatory memorandum describes ICASA’s reasons for having chosen to levy licence fees on gross profit in 2009. The reasons are given as:

- only profitable entities will pay fees, thus giving a regulatory holiday to unprofitable entities;
- levying fees based on a percentage of gross profit is competition-neutral in the sense that it treats different entities differently;

- the methodology takes into account the impact of economic cycles on profitability; and
- the methodology is easier to administer.

The explanatory memorandum goes on to explain that the definition of “gross profit” in the 2009 regulations has proven to be problematic over the preceding three years and has led to “regulatory arbitrage” due to the practice by certain operators of subtracting all manner of costs from their revenue in order to declare a minimal or no profit.

ICASA points to its inability to verify the accuracy of costs and claims that it “has been at the mercy of operators in terms of interpreting what direct costs entail”.

ICASA therefore proposes to determine annual licence fees based on annual turnover derived from licensed activities, rather than based on gross profit.

5.4. Changes to the method of calculating the annual licence fee payable

Given the reasons that ICASA provides for the need to change from a gross-profit based formula to a turnover-based formula, the change to the formula will not alleviate the problem that ICASA is experiencing in calculating the annual licence fees. ICASA’s failure to properly administer the system that it established under the 2009 regulations on the basis of the reasons provided is not a sufficient reason to implement a system which has no rational basis.

ICASA has provided some reasons for its proposal to change the basis on which annual licence fees are calculated. The “regulatory arbitrage” which ICASA alleges, has resulted from its inability to verify the accuracy of costs when operators declare their profits is sought to be addressed through what ICASA describes as an “administratively simpler method of calculating annual licence fees”.

In order to address the problems that have arisen, ICASA must properly monitor and regulate the annual licence fees paid by licensees and examine the financial statements submitted.

It is alleged that the resulting system will be simpler for ICASA. However, there is no indication that it will be simpler for licensees. The new system may even prejudice certain licensees.

Furthermore, ICASA must establish a rational link between the formula used to calculate the annual licence fee and the costs it seeks to cover. It is not apparent that the turnover-based formula will be any more effective in generating the correct income for the covering of ICASA's costs than the gross profit-based formula.

The newly inserted provisions of Schedule 3 introduce a more onerous process on licensees in respect of their financial reporting. Additionally, the turnover-based formula has the potential to prejudice larger licensees whose turnovers are not necessarily in proportion to their gross profit.

Furthermore, in its explanatory memorandum, ICASA states that "levying fees based on a percentage of gross profit is competition-neutral in the sense that it treats different entities differently". ICASA does not address the issue of competition-neutrality in relation to the turnover-based formula.

It is not appropriate for ICASA to seek to address the reported problem by changing the formula in such a way that it imposes greater burdens on the licensees. Furthermore, as an administrator, ICASA should look to the least restrictive means of achieving its aims. The consequence of imposing the turnover-based formula in the place of the gross profit-based formula is the imposition of a significantly more onerous licence fee regime on licensees, unless the percentage on turnover calculation is based on 0.29%.¹

It is of course, the prerogative of ICASA to impose licence fees. However, as a public body, it must do so within the bounds of administrative law and it is therefore bound by the requirement of rationality.

ICASA sees the purpose of the change in formula as removing the uncertainty that results from the gross profit-based formula. However, given the onerous consequences that will result for licensees from the imposition of the turnover-based formula at the percentage proposed namely 0.29%, This cannot be the most appropriate means to address the challenges it faces. There are other less restrictive and therefore more appropriate means that ICASA could use to address the issue, such as improved monitoring and regulation.

5.5. Conclusion on administrative law issues

In light of the above, it is clear that there is no rational basis for the change from the gross-profit based formula to the turnover-based formula. The gross-profit formula should be retained in the calculation of the annual licence fee, alternatively the percentage of the fee should be reduced to 0.29% of turnover.

To the extent that ICASA has experienced difficulties in managing the current gross profit based system, it should seek to implement improved monitoring and regulation rather than impose a significantly more onerous licence fee regime on licensees.

6. CONCLUSION

Regarding the Authority's requirements of alleviating its administrative burden, MTN has consistently worked with the Authority in justifying its current licence fee calculation and has on an annual basis provided the Authority with a rigorous breakdown of its methodology in calculating its licence fees. In the future MTN would anticipate the same level of interaction with the Authority.

In respect of the Authority's Draft Regulation, MTN has no objections to the Authority changing the licence fee methodology in so far as it reasonably justified and it should

be done in an equitable manner so as not to negatively prejudice operator's existing licence fee payments.

Consequently, MTN believes the Draft Regulation should be corrected to reflect a percentage of annual turnover which equates to what operators are currently being levied in terms of licence fees.

-END-