



REPORT OF THE PUBLIC INQUIRY ON THE ANNUAL OPERATING LEVY REGULATIONS

1.0 INTRODUCTION

The Nigerian Communications Commission (the Commission) pursuant to its powers under Section 70 of the Nigerian Communications Act 2003 (the Act) developed the draft Annual Operating Levy Regulations. Based on the Commission's participatory rule making procedure, the draft Annual Operating Levy Regulations was published on its website for comments from the general public especially, telecommunications operators and other stakeholders.

A Public Inquiry was scheduled for February 21, 2013 and all stakeholders were duly notified. A Notice of the Public Inquiry on the Regulations was published on Tuesday February 5, 2013 in the Daily Sun, This Day Newspapers as well as on Wednesday 6, 2013 in the Guardian Newspapers.

Further to this, the Commission received Six (6) submissions from the following stakeholders:

1. MTN Communications Nigeria Limited
2. Airtel Networks Limited
3. Emerging Markets Telecommunications Service (Trading as Etisalat)
4. Multi-Links Ltd
5. ipNX
6. Direct on PC (DoPC).

2.0 THE PUBLIC INQUIRY

The Inquiry held as scheduled at the Conference Hall of the Commission. The forum commenced at 12:05 pm and was chaired by the Executive Vice Chairman, Dr. Eugene Juwah. Staff of the Commission and over twenty-eight

persons representing telecommunications operators, interested stakeholders and the media attended the forum.

The EVC welcomed everyone to the Forum. He explained that the Inquiry was part of the Commission's rule-making process aimed at ensuring wide consultations in the enactment of regulations by the Commission. He highlighted the primary objectives of the Regulations which include:

- Creating and providing an effective and efficient administration of an annual operating levy regime which will specify the mode and methods of assessment of AOL.
- Complementing the Act and the respective Licences issued by the Commission.
- Clarifying any ambiguity existing in respect of the AOL and other fees and charges to be paid by Operators.

The EVC enjoined all participants to freely make their contributions and to raise issues that would assist the Commission in coming up with regulations that would enhance development of the industry and the entire economy.

The Director of Legal & Regulatory Services, Ms Josephine Amuwa gave a short overview of the Regulations. This was followed by a presentation by the Assistant Director, Legal & Regulatory Services, Mrs. Yetunde Akinloye on issues raised in the various submissions received prior to the Public Inquiry. Further comments received are also covered by this Report.

A. General Overview of the AOL Regulations

The draft Regulations is short and concise and made up of 5 Chapters of 15 pages. The Chapters deal with the Scope and Objective of the Act, the Assessment and Payment of AOL, Accounting Returns and Standards, Sanctions and Penalties, as well as a Chapter which defines certain terms used in the Regulations. The draft Regulations also has three schedules dealing with Annual Operating Levies for Non-Network Operators, Annual Operating Levy Self Assessment Form, Quarterly and Annual Payment of AOL.

B. Review of Submissions Received

The Commission had prior to the Public Inquiry reviewed the submissions and the responses thereto are set out below.

1. Scope, Application and Licence Conditions

Comment

The Regulations should be amended to acknowledge the significance of licence instruments.

Response

Not accepted. The essence of the Regulations is to streamline and clarify the provisions of the various Licences issued by the Commission to Operators which is expressly stated in Regulation 1(3). From that perspective and in terms of hierarchy, the Regulations are superior to the terms of the various Licences. The proposal is therefore not accepted.

2. Resolution of Conflicts between Licence Conditions and the Regulations

Comment

The Regulations as presented tends to alter, amend, modify or vary the terms of existing operational licences.

Response

The essence of the Regulations is to remove any ambiguity in AOL payments. The Regulations will clarify provisions in existing Licences and where there is any conflict the Regulations will prevail.

The provisions of Sections 34 -36 of the Act refer to declarations by NCC on Licence conditions; such declarations are not on the same hierarchical pedestal as Regulations which are subsidiary legislation under the Act. Indeed, the Act stipulates that the conditions of all classes of licences shall be subject to the Regulations published by the NCC from time to time. These Regulations are hierarchically superior to the declarations referred to under Sections 34-36 of the Act.

3. Penalties for Non-Compliance with Regulations

Comment

The penalties stipulated in the Enforcement Regulations 2005 are sufficient and provide certainty in the Industry.

Response

The penalties in the Enforcement Regulations are general for nonpayment of AOL and are not specific to the offence. Section 70 (c) and (g) of the Act empower the Commission to make and publish regulations for any fees, charges, rates or fines to be imposed pursuant to or under this Act or its subsidiary legislation; and such other matters as are necessary for giving full effect to the provisions of this Act and for their due administration.

4. Assessment of AOL payable by Network Operators

Comment

The Regulations should reflect current environmental challenges and operational evolution, such as deductions of other credible costs from Gross Revenue. Interconnection cost should also include Bandwidth cost for Internet Service Providers.

Response

Regulations will be amended to allow the following deductions for purpose of computing AOL; Roaming Costs, Interconnect Costs for network operators and Bandwidth Cost for Internet Service Providers.

5. Assessment of AOL payable by Non-Network Operators

Comment

Payment of AOL by VAS Providers who are regarded as Non-Network Operators would amount to double taxation.

Response

Operators will not be permitted to charge Value Added Service (VAS) providers directly for AOL. VAS providers will be required to pay AOL directly to the Commission in accordance with the schedule for non-network operators.

6. AOL Levies and Assessment Rates for Non-operational Licensees

Comment

Licensees that are non-operational should not pay Annual Operating Levy.

Response

Not accepted. If granted more operators will declare non-operational status. There is also a need to discourage non-utilization of licences by licensees. The levy to be paid by licensees that are non-operational is only a percentage of the operating licence fee.

7. Power of the Commission to review, change or modify AOL assessment rates

Comment

The power of the Commission to review, change or modify AOL assessment rates should not be frequently exercised and the principle of wide consultations as specified by the Act should be applied by the Commission.

Response

Any amendment to the Regulations will be carried out in accordance with the Act.

8. Computation of timelines for payment of AOL

Comment

A certification process by independent third parties should be introduced for the computation of timelines for payment of AOL as an alternative to annual audited accounts.

Response

Not accepted. Audited accounts are the best means of ascertaining the base figures for computation and assessment of AOL. However, where Audited Accounts are not ready, the Commission will rely on the Licensee's Management accounts which will be valid for a period of six (6) months only.

9. AOL Payment Timelines

Comment

Quarterly payment of AOL by Network Operators after the first year of the Licence tenure based on the Licensee's quarterly management accounts for the relevant quarter (Regulation 4(2) (a) (ii)) would be difficult to accommodate in practice and the introduction of certification process should also applied.

Response

Not Accepted. Reason provided in comment No. 8 above.

10. Publication of Additional Information

Comment

The provision for publication of additional information on which basis the AOL maybe assessed by licensees tends to alter, amend, modify or verify the terms of existing operational licences as regards AOL and should be deleted.

Response

Not Accepted. NCC reserves the right to make such publications in the exercise of its regulatory functions. This provision does not alter, amend, modify or vary operational licences.

11. Self- assessment of AOL by Licensees

Comment

The provisions of this Regulation should be consistent with the provisions of the Interpretation Act and the Act, therefore the provision of self-assessment of AOL to be submitted to the Commission should be amended to reflect "seven (7) business days".

Response

Not Accepted.

12. Editing of Regulations

Comment

The AOL Regulations should be re-numbered as Regulation 6 was omitted.

Response

The Regulations will be amended accordingly.

13. Accounting Returns

Comment

The provisions on Accounting Returns are not in alignment with the scope and title of the draft Regulations. The title should therefore be amended to “*Draft Accounting Procedures and Processes Regulations*”

Response

The draft Regulations is drafted in line with global practices and based on what is obtainable in several jurisdictions in the world.

14. Maintenance of Accounting Records by Licensees

Comment

On the maintenance of accounting records by Licensee, there should be an equitable reporting standard which should provide for both revenues and expenditures (costs). Furthermore, the Commission should be guided by the primary instruments regulating financial reporting in Nigeria.

Response

Regulation 9 will be redrafted to provide that audited Financial Statements of the Licensees shall conform to IFRS/SAS or such other accounting standards as may from time from time be prescribed and published by the relevant accounting bodies (local and international) authorized to do so.

15. Comment: Maintenance of Accounting Records by Licensees

Section 7(a) appears to be a repetition of Section 7(b) and should be deleted.

Response

Repetition will be deleted.

16. Comment: Submission of Financial Statements to the Commission

The provision for submission of Financial Statements to the Commission should be amended to allow for flexibility at the Commission's discretion.

Response

Operators should comply with the 180 days period as stipulated by the Regulations.

17. Comment: Accounting Standards for the Communications Industry

Adoption of IFRS rather than SAS.25 as the Accounting Standard for the Communication industry, which is in view of the requirement for telecoms operators with a multinational footprint to adopt the IFRS Accounting Standard.

Response

See Commission's comment in No. 14 above.

18. Comment: Verification of Financial Statements

The provision for verification of Financial Statements conflicts with the provisions of Part XI of Companies and Allied Matters Act (CAMA) and complete adherence to its provision may remedy the mischief addressed in Paragraph 1(b) of this provision.

Response

The provisions of the Regulations do not conflict in any way with the provisions of CAMA.

19. Comment: Verification of Financial Statements

The cost of the additional audit as highlighted may lead to an increase in the cost of regulation.

Response

The Commission as a regulator must satisfy itself that the information received from the Operator is substantially accurate for the purpose of computing AOL charges due to that operator.

20. Comment: Review by the Commission of Licensees' AOL Self-assessments

The provision for review by the Commission of Licensees AOL Self-assessment tends to deny a licensee the right to question the Commission's calculations of AOL, and does not provide the avenue for reconciliations or any engagements on assessment of AOL. It also departs from the principle of industry best practice which allows both parties to reconcile their computations. A timeline of one (1) month from the receipt of the audited financial statements for the review of same to ascertain net outstanding AOL obligations was recommended.

Response

Operators should pay the NCC reassessed AOL within the stipulated timeline. However, the Regulations will be amended to provide a process and timeline of 1 (one) month for review and recalculation of the reassessed AOL.

21. Comment: Payment of Re-Assessed AOL

There should be a channel through which an objection to the re-assessment may be raised.

Response

The Commission accepts this recommendation and will amend the Regulations accordingly.

22. Comment: Sanction and Penalties of defaulting Licensees

The sanctions in the Enforcement Regulations should be retained. The penalty is high and the Commission should review why an operator has not paid its AOL before applying the penalty or in the alternative, the provision should be deleted. The denial of regulatory services should be adopted under sanctions and penalties for defaulting licensees.

Response

Not Accepted. The provision in this regulations are specific to the offence and do not contradict the existing provisions of the Enforcement Regulations. The Commission can also deny regulatory services to the licensees in addition to the sanction already provided.

23. Comment: Cost of administrative fines arising from the failure to pay AOL

Reduction of administrative fines and account reconciliation opportunity for operators in cases of under-assessed AOL

Response

Accepted. However payment should be made while process of account reconciliation is being initiated. Any over assessment on the part of the Commission will be applied towards the next payment. This would be included in the Regulations.

24. Comment: Definition of Gross Revenue

The definition of Gross Revenue should be in line with the IFRS Accounting Standards.

Response:

Definition is in line with IFRS Standards. A proviso would be added stating that the definition of “Gross Revenue” in the Regulations supersedes the definition stated in the respective licence documents.

25. Comment:

AOL should not be paid on funds which an operator may never receive, such as bad interconnect debt and contracts debts. Cost of producing recharge cards vouchers, dealer commission, roaming, interconnects and bad debt should be included as deductible expenses.

Response

Interconnect cost are recognized as deductible item for computation of AOL Charges. The list of items to be deducted is stated in Comment No. 4 above.

26. Comment: Definition of Gross Revenue

Spectrum fee should be included as a cost.

Response

Spectrum fee is the cost of scarce resources; and as such cannot be considered as a cost of sale in AOL computation.

27. Comment: Interconnect cost

Interconnect Costs which the Regulations have defined, should be extended to include interconnect debts and the definition should be expanded to include Bandwidth cost.

Response

The operator must put in place its own debt recovery measures to ensure debts are paid. The deductibles already include interconnect cost and will include Bandwidth cost for Internet Service Providers.

28. Comment Definition of Net Revenue

A uniform definition of Net Revenue should be developed, adopted and applied in line with the present standard industry practice.

Response

The definition will be amended to specify deductible costs such as interconnection, roaming and Bandwidth costs.

29. Comment: Sale of hardware/equipment

The draft Regulations does not mention payment of AOL on hardware/equipment sales.

Response

Schedule (1) one of the Regulations provides for AOL for Sales and Installations equipments.

C. Additional Issues Raised at the Public Inquiry

At the end of the Commission's presentation other issues and questions were raised and the Commission responded accordingly. Highlights of the issues and responses are as follows:

1. Comment: Deductible Costs for AOL

Other direct costs should be included in the deductible expenses. The share of revenue paid to the VAS providers should not be a deductible in arriving at net payment. This is because the VAS content is owned by a third party.

Furthermore, AOL should not be paid on bad interconnect debt and dealers commission and other things that help an operators sales profile and keep the network running.

Response

As earlier stated the Regulations will be amended to allow only the following deductions for purpose of computing AOL, Roaming Costs, Interconnect Costs, and Bandwidth Cost.

The Commission will find it difficult to recover AOL on a debt when it is paid. Licensees will also continue to pay AOL on dealers commission as these are marketing cost which are business decisions of the operator not the Commission.

2. Comment: Overpayment of AOL

The Regulations do not have any provision requiring a credit note to be given by the Commission when a licensee makes an over payment.

Response

The Commission will issue a credit note when there is an over payment and this would be applied to the next payment. But when there is an underpayment the operator would be required to pay up the balance. Comment B 23 has addressed this issue.

3. Comment: Reduction on AOL

Recommendation that there should be a reduction on the 2.5% of AOL in line with what obtains in other jurisdictions. This is also premised on the fact that over the years the industry has matured, the degree of regulatory intervention has declined and the industry has advanced.

Response

For now, AOL will remain at 2.5%. Licensees should note that 40% of the AOL payments go to the Universal Service Provision Fund (USPF) projects for the benefit of Nigerians.

4. Comment: Definition of Gross Revenue

The Regulations should define Gross Revenue.

Response

Comment B 24 above adequately addresses this issue.

5. Comment: Payment of AOL on VAS

Further to the Regulations, VAS providers are required to pay AOL directly to the Commission in accordance with the schedule for non-network operators, However, Accounting Standards require that Operators report the revenue from VAS operators as part of the gross revenue since they are principal in the relationship with the VAS provider.

Response

Non-Network Operators providing VAS should pay AOL directly to the Commission.

6. Comment: Payment of AOL by Non-Network Operators

Clarification required if the Non-Network Operator would be permitted to deduct their costs from Gross Revenue. Attention was also drawn to the fact that there was no standard percentage for AOL for non-network operators and based on the schedule of payment for non-network operators, the charges do not seem equitable.

Response

The Commission will amend the draft Regulations to provide for AOL rate of 1% on gross turnover on all non-network operators in order to ensure equity in the computation of AOL. Non-network operator will also be permitted to make the approved deductions in arriving at gross revenue as applicable.

7. Comment: Deduction of Interconnect Debt

There were several comments requesting that AOL should not be paid on interconnect debts.

Response

These comments were not accepted. It was highlighted that the Commission had issued new Disconnection Guidelines for the industry, and that operators should use the available options to recover debts from their interconnect partners.

8. Comment: Timeline for Payment of AOL

The provision in Regulation 4(1)(c) mandating the payment of assessed AOL to be made within 30 days from the date of the invoice from the Commission did not take into consideration the period of reconciliation between the Commission and the Licensee.

Response

Thirty (30) days shall be taken as defined in the Interpretation Act. A provision for reconciliation will also be included in the Regulations; however, a Licensee will be required to make payment first before reconciliation. Where there is an overpayment, a credit note will be given by the Commission and applied towards the next payment.

3.0 General Comments

The Director, Legal and Regulatory Services Department thanked everyone for coming and assured them that all comments will be considered by the Commission before the Regulations are finalized.

The Public Inquiry session ended at 1:06 pm.

Dated this 21st day of February 2013

Dr. Eugene I. Juwah
Executive Vice-Chairman/CEO
NIGERIAN COMMUNICATIONS COMMISSION