



REPORT OF THE PUBLIC INQUIRY ON THE LICENSING 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 Licensing Regulations (the Regulations). Based on the Commission's policy of participatory rule-making, the Regulations was published on its website for Comment from the general public, especially telecommunications operators and other stakeholders.

Further to this, the Commission received Four (4) submissions from the following stakeholders:

1. Airtel Networks Limited
2. Emerging Markets Telecommunication Services Limited (trading as Etisalat)
3. MTN Nigeria Communications Limited, and
4. Punuka Attorneys & Solicitors.

As required by the Act, a Public Inquiry on the Regulations was scheduled for July 7, 2015 and a Notice of the Public Inquiry was published in Guardian Newspapers on Wednesday June 24, 2015, in This Day Newspapers on Thursday June 25, 2015 as well as in Vanguard Newspapers on Tuesday June 30, 2015.

2.0. THE PUBLIC INQUIRY

The Inquiry held as scheduled at the Conference Hall of the Commission. The forum commenced at 2:10pm and was chaired by the Executive Vice Chairman, represented by the Executive Commissioner, Stakeholders Management, Dr. Okechukwu Itanyi. Staff of the Commission and over Nineteen (19) persons made up of representatives of telecommunications companies, interested stakeholders and the media attended the forum.

The EC(SM) welcomed participants to the forum. He explained that the Inquiry was part of the rule-making process adopted by the Commission to ensure wide consultations in the making of regulations by the Commission. He highlighted the primary objectives of the Regulations which include:

- Providing a regulatory framework for the effective and efficient licensing processes and procedures in the communications industry.
- Providing a regulatory framework for the operation of communications systems, facilities and services.

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

The Head, Legal & Regulatory Services, Mrs. Yetunde Akinloye gave a short overview of the Regulations. This was followed by a presentation by Mr. Gwa Tobbie Mohammed (Assistant Director, Legal & Regulatory Services) on issues raised on the Regulations prior to the Public Inquiry.

A. General Overview of the Licensing Regulations

The Regulations is made up Sixty-Three (63) Regulations and structured into Ten (10) Chapters. Also included in the Regulations are Three (3) Schedules. The Regulations deal with several issues including the Scope and Objective of the Regulations, Licence Process and Exemptions, different types of Licences, Procedure for Transfer of Licence and Shares, Registers, Sanctions as well as Interpretation. The Schedules deal with General Undertakings, Individual Licences and Class Licences.

B. Review of Submissions Received

The Commission had prior to the Public Inquiry reviewed the submissions received from stakeholders and its response to the issues raised are set out below.

1. Scope and Application

Comment

The considerations in Section 33 of the Act such as effective and efficient licensing processes and procedures in the communications industry; the operation of communications systems and facilities; and the operation of communications services should be incorporated in the Regulations.

Response

Accepted.

2. Objectives

Comment 1

Regulation 1 (2) and (3) which states the Objective of the Regulations as including operation of communications systems, facilities and services should be deleted as it appears inconsistent with the scope and purpose of the Regulations and do not fall within licensing processes and procedures.

Response

Not accepted. Under Section 70 of the Act, the Commission retains the statutory authority to also make regulations on those matters.

Comment 2

The Regulations should provide a roadmap to guide license evolution beyond the nature of licences recognized in the Act and liberalize certain areas of the communications market.

Response

Not accepted. This is beyond the ambit of the Regulations. Moreover, license evolution is a policy issue.

3. Communications Licences

Comment

This regulation would unnecessarily complicate the procedure sought to be established by the Regulations as Section 32 of the Act prescribes the categories of licences that the Commission may determine as Class and Individual licenses.

Response

The marginalia will be amended to read “Application” instead of “Communications Licences”. The intent of this provision is to state the categories of licences to which the Regulations apply.

4. Reclassification of Licences

Comment

In addition to notification of Licensees, a consultative process should be held with the Licensees. The provisions of Sections 32 – 37 of the Act should be reflected in this regulation.

Response

Accepted.

5. Pre-condition for communications services

Comment

There should be a modification of this section to provide for exemptions under Section 31 of the Act.

Response

Not accepted. Regulation 6 has already provided for the exemption in line with the provisions of Section 31 of the Act.

6. Non-Discriminatory provisions

Comment

This regulation does not include principles enshrined in Section 33(3) of the Act. These principles include fairness, transparency, efficient use and management of frequencies, the need to promote fair competition and investment in the communications industry; etc.

Response

Not accepted. Regulation 5 is not concerned with listing all the factors to be considered in granting licenses, rather it sets out objective indicators of what should be regarded as non-discriminatory terms.

The provisions of Regulation 5 do not in any way purport to set aside or make obsolete the provisions of Section 33(3) of the Act which still remains the principal Act.

7. Exemptions from Licensing

Comment 1

The term ‘Notwithstanding’ used in the provision should be substituted with “Subject to” to avoid ambiguity in the respective provisions.

Response

Not Accepted. This will change the intent of the regulation.

Comment 2

Section 31(12) of the Act only permits the Commission to exempt determined “communications services” from licensing. The provision “specified activities or classes of persons” is inconsistent with and contravenes the Act.

Response

Accepted to the extent that “specified activities” will be replaced with communications services”. “Class of Persons” will however be retained as it is consistent with Section 31(1) of the Act.

8. Exemptions from Non-Radio Telecommunications Equipment

Comment

Clarification needed on the Commission’s objectives as it appears to be applicable to radio communications equipment.

Response

This provision applies to non-radio communications. This will be amended for clarity and proviso will be deleted.

9. Scope of Licence

Comment

A suggestion was made for the modification of this regulation for greater clarity.

Response

This is clear enough. The exemptions have been adequately provided for under Sections 31 and 32 of the Act and Regulations 4 and 6 above.

10. Licence Application Conditions

Comment 1

Paragraph 1(c) of this regulation is vague and subjective as it does not specify how the Commission will determine and be satisfied with the financial capacity of the applicant. Financial capacity should be pre-determinable.

Response

Not accepted. This captures the Commission’s existing discretionary power.

Comment 2

The statement “licensing and administrative fees” was said to be a misnomer as licensing fees should ideally cover administrative costs.

Response

Not accepted. The Commission has powers under Section 4 (1) (g) and 17(2)(b) of the Act to fix and collect distinct fees for licensing and regulatory services. The phrase “licensing and administrative fees” is therefore appropriate.

Comment 3

The provisions of Regulation 9(1)(d) is vague and leaves room for discriminatory treatment of applicants and is thus inconsistent with the provisions of Regulation 5.

Response

Not accepted. Section 33(3) of the Act provides adequate safeguards against discrimination and arbitrary acts by the Commission.

11. Licensing Process for Pre-existing Licences

Comment 1

A provision for voluntary surrender of a Licence prior to its expiration or revocation should be incorporated, and a minimum notice requirement for such surrender should also be stated.

Response

Not accepted. There is already a specific provision on surrender under Section 44 of the Act and Regulation 22 of these Regulations.

Comment 2

This regulation does not take into consideration the provisions of Condition 20 (2) of the Digital Mobile Licence on automatic renewal of the licence.

Response

Not accepted. Contrary to the assertion, this regulation takes into consideration the provisions of all licences including the DML which in paragraph 4 makes automatic renewal subject to certain conditions including compliance with regulations made by the Commission.

12. Consultation on Issue of Licence

Comment 1

In addition to the consultative process for limiting the number of Licences to be granted for a particular service, the Commission should make public the licensing method applied to the limitations as well as the rationale for the eventual choices.

Response

Accepted. This will be made public in the licensing Consultation Document.

Comment 2

Limitation on number of licences to be issued in any licensing process should be only on grounds of scarcity of requisite resources in accordance with best practices by ITU.

Response

Not Accepted. The Commission reserves the right to determine what factors are to be considered in limiting the number of licences, in order to attain prevailing policy objectives through licensing. Such limitation will however be subjected to public consultation.

Comment 3

Granting of licences for the operation of a particular type of network should be amended to adequately reflect the Commission's unified licensing framework.

Response

Not Accepted. It is not in every circumstance that a licence to be granted will be a Unified Licence. Even under a unified licensing regime, licences can still be issued for the operation of specific networks.

13. Quality of Service**Comment**

This regulation is duplicative and already covered by grade-of-service obligations imposed in assigned licences.

Response

Accepted.

14. Grant of Individual Licences**Comment**

The licensing methods for individual licences should be exhaustively listed, without room for ‘any other method’ as such provision gives rise to uncertainty. A proviso should be included highlighting that the method will be transparent and non-discriminatory.

Response

Not accepted. Any resort to Regulation 13(1)(e) would require the Commission to predetermine a method to be applied to a particular licensing process. Moreover, use of the phrase ‘any other method’ is merely to reinforce the discretion granted to the Commission under Section 33(2) of the Act. Adequate safeguards relating to transparency and non-discrimination are already provided under Section 33(3) of the Act.

15. Requirement for Information and Documents

Comment 1

The letter ‘s’ should be deleted from ‘requests’ to read ‘request’ (in the singular) and not plural.

Response

Accepted. Will be amended.

Comment 2

The inference from Regulation 14(5) is that a revocation automatically occurs upon a discovery of inaccurate or incomplete information. Such an approach does not give room for fairness.

Response

This provision will be deleted. Regulation 14(3) already provides for supply of accurate and complete information. A breach of this may attract revocation of licence in accordance with Section 45(1)(b) of the Act.

16. Restriction on Individual Licence

Comment

There is need to define the phrase “controlling interest.”

Response

Not accepted. This is self-explanatory.

17. Duration and Expiration of Individual Licence

Comment

The provision that licence renewal application should be made 3 months before its expiration is inconsistent with Section 43 of the Act which stipulates a period not later than 6 months before its expiry. Clarification required.

Response

Noted. This will be amended to align with the timeline stated in Section 43.

18. Absence of Expiry Date

Comment

There is need to ensure that every licence issued by the Commission contains a provision on tenure.

Response

Not Accepted. This is unnecessary as Regulation 18 already addresses individual licences which have tenures. Class Licences have no tenure.

19. Surrender of Individual Licence

Comment

Regulation 22 is inconsistent with Section 44 of the Act which stipulates the procedure to be followed for the surrender of a licence. This states that the surrender of a licence may be at any time or in accordance with the requirements set out in the individual licence.

Response

Not accepted. However, Regulation 22(1) will be redrafted deleting any reference to a Form; and requiring all licences to give the Commission a notice of intention to surrender in accordance with Section 44.

20. Extension of time for Surrender of Licence

Comment

This provision is inconsistent with Section 44(2) of the Act.

Response

Not accepted.

21. Application for Class Licence

Comment 1

Under regulation 24(4), it is suggested that the letter 's' be deleted from the highlighted word to read 'expire'.

Response

This is no longer necessary as Sub-regulation (4) is to be deleted.

Comment 2

There are inconsistent timelines in regulation 24 (2) and (4).

Response

Not necessary as Sub-regulation (4) is to be deleted.

Comment 3

In view of the law maxim "*qui tacet consentire*" – 'silence gives consent' the stakeholder is concerned that silence by the Commission means a refusal.

Response

Not accepted. Sub-regulation 4 which gave rise to this comment is to be deleted. The regulation will be amended to state that the Commission reserves the right to extend the time within which it processes an application but not longer than an additional 30 days.

Comment 4

Provision should be made for review of the decision refusing to grant a Licence.

Response

Not accepted. Decisions of the Commission are already subject to review in accordance with Part X of the Act.

22. Grounds for De-registration

Comment

The determination of fraud without a judicial conviction violates the rules of natural justice and should be only upon conviction by a competent Court.

Response

Not Accepted. The determination that a licensee has been involved in a fraudulent activity is subject to it having been so declared. This provision will however be redrafted to clear any ambiguity.

23. Issuance of Frequency Licence

Comment

The licensing methods for Frequency Licences should be exhaustively listed and indicate the general nature of activities that fall within each category of licensing method, without room for ‘any other method’ as such provision gives rise to uncertainty.

Response

Not accepted. Any resort to regulation 29(1)(f) would require the Commission to predetermine a method to be applied to a particular licensing process. Moreover, use of the phrase ‘any other method’ is merely to reinforce the discretion granted to the Commission under section 123(2) of the Act.

24. Issuance of Frequency Licence

Comment

This regulation should include a provision requiring adherence to principles of transparency and best practices.

Response

Adequate safeguards relating to transparency and non-discrimination are already provided under Section 33(3) of the Act.

25. Conditions for Grant of a Frequency Licence

Comment 1

The duration and renewal of individual licences and frequency licences should be linked especially where one is required for the operation of the other.

Response

Accepted. As a general rule, frequency licences can range from 4 (four) months to 15 (fifteen) years in accordance with the provisions of the Frequency Spectrum (Fees and Pricing, etc) Regulations. The Commission will however redraft the regulations to incorporate this suggestion, as best as possible.

Comment 2

The term ‘operational licence’ should be defined.

Response

Accepted. Will be amended to read ‘communications licence’ throughout the Regulations.

Comment 3

There should be a grammatical modification of this provision. The word “or” should be replaced with “and”; as it would be incongruous to presume that the Commission would assign the scarce resource of spectrum to a party that is not actually a licensee of the Commission.

Response

Not accepted. An applicant cannot assume the status of (a) and (b). The provision will however be amended to elicit clarity.

Comment 4

There is a typographical error in paragraph (b) of this regulation. This should read ‘an’ instead of ‘N’.

Response

The typographical error will be corrected.

26. Application and Processing of Frequency Licence

Comment

The Regulations should contain provisions requiring the Commission to revert to the applicant regarding the success or otherwise of its application.

Response

This provision will be amended to give the Commission the right to extend the application timeframe within which to process and to require the Commission to communicate the success or otherwise of an application.

27. Duration and Termination of Frequency Licence

Comment

This provision prescribing an annual renewal process will encourage spectrum warehousing practices that denigrate from the efficient use of scarce spectrum resources. A provision prescribing the ‘use or lose’ principle and automatic reversion of frequencies to the Commission should be inserted.

Response

Accepted. A provision prescribing efficient use of spectrum will be incorporated as follows:

- (1) *The Licensee shall ensure that spectrum assigned to it by the Commission is efficiently utilized.*
- (2) *The Commission reserves the right to review usage of the spectrum assigned to a licensee.*
- (3) *Where there is under-utilization or non-utilization of assigned spectrum, the Commission may:*
 - (a) *refuse to renew the Licence at the expiration of term of the Frequency Licence;*
 - (b) *impose time-bound obligations on the Licensee and/ or sanctions.*

28. Renewal of Frequency Licence

Comment

This provision should be in line with best practice principle that an operator should ‘use or lose’ any frequency allocations in order to ensure efficient and effective use of frequency.

Response

Accepted.

29. Surrender of Frequency Licence

Comment

Regulation 38 is inconsistent with Section 44 of the Act which stipulates the procedure to be followed for the surrender of a licence. This states that the surrender of a licence may be at any time or in accordance with the requirements set out in the individual licence.

Response

Not accepted. Section 44 of the Act refers to surrender of an individual licence. This regulation relates to surrender of a frequency licence.

30. Transfer of Shares

Comment

Provision should be amended for clarity. “The proposed date of transfer” should be amended to read “the proposed date of completion of the transfer” as the date of completion is often different from the date agreement in principle is reached by parties.

Response

Not Accepted. In practice, the Commission has made provision for parties to apply for and obtain ‘approval-in-principle’ from the Commission prior to commencement of negotiations leading to agreement in principle. This practice will be provided for in the Regulations.

31. Anticompetitive Measures – Power of the Commission to refuse transfer on grounds of anti-competition

Comment

An appeals process should be included.

Response

Not Accepted. Decisions of the Commission are already subject to review in accordance with Part X of the Act.

32. Anticompetitive Measures – Power of the Commission to refuse transfer on grounds of anti-competition**Comment**

The Commission should clarify which of the licenses referred to in the phrase “the license of the Licensee”.

Response

This will be amended to reflect revocation of all the licences which the Licensee has been granted. Once there has been a transfer of shares contrary to a decision of the Commission, there is a breach under section 45(1)(d) of the Act.

33. Sanctions**Comment**

The Enforcement Regulations and other licenses/instruments make detailed provisions for sanctions for non-compliance. No duplication necessary and only infractions pertaining to the licensing process should be sanctionable under this instrument.

Response

These Regulations are specific and will be enforced alongside the Enforcement Regulations.

34. Notice to Vary, Suspend or Revoke**Comment**

The Commission’s powers to suspend, revoke or vary a license should not be unilateral as this violates best practice and runs contrary to the Act.

Response

This will be amended to incorporate a reference to Sections 34 - 37 and 45 of the Act. The power to vary will also be separated from suspension and revocation.

35. Notice to Vary, Suspend or Revoke

Comment

In order to avoid any ambiguity, the procedure for variation should be excluded from this provision as variation of a license does not amount to revocation/suspension.

Response

Accepted. Variation of licence has been deleted from this provision. However, provisions for amendment, modification and variation have been inserted in the Regulations.

36. Suspension and Revocation

Comment

The Act is clear that licence revocation is a grave consequence which cannot be summarily invoked for breaches and other contraventions that may (often inadvertently) occur in the course of business.

Response

Accepted. This provision will be made subject to Section 45 of the Act.

37. Suspension and Revocation

Comment

Reference was erroneously made to Regulation 46 which does not relate to the issue. This relates to Regulation 48.

Response

Noted. Will be amended

38. Grounds for Suspension and Revocation

Comment

This instrument, being a subsidiary legislation, cannot be utilized to amend or augment the provisions of the Act. We therefore request that the provision be deleted.

Response

This will be amended to align with the Act.

39. Grounds for Suspension and Revocation**Comment**

Regulation 50(3)(b) which provides that subsequently discovered information which would have warranted the refusal to grant a licence, can be ground for revocation of a licence, seeks to enforce the law retroactively.

Response

Not accepted. It is imperative for licensees, throughout the duration of their licences, to hold themselves accountable for information furnished to support their application for grant of a licence.

40. Enforcement**Comment**

This provision duplicates the Enforcement Regulations and reliance should be placed on the Enforcement Regulations alone for determining appropriate penalties.

Response

Accepted. The regulations will be amended to state that in imposing a financial penalty, the Commission will be guided by the Enforcement Regulations.

41. Enforcement**Comment**

It is recommended that there should be an inclusion of the basis upon which the Commission will determine gravity of contraventions. Fair hearing should also be granted.

Response

Not accepted. The determination of gravity will be done on a case-by-case basis. On fair hearing, the investigation process which is an integral part of enforcement, incorporates the principle of fair hearing. See Sections 61 – 63 of the Act.

42. Enforcement**Comment**

There are doubts whether the Commission is constitutionally empowered to make interim orders restraining conduct, which is the function of the court of law.

Response

The Commission as a regulatory body discharges quasi-judicial functions including the power under Section 53 of the Act to issue directions for licensees not to contravene or continue with a contravention.

43. Payment of fees

Comment

The requirement to pay administrative fees should include a publication of actual administrative costs incurred by the Commission. Alternatively, the Commission should charge only application fees with Licence fees.

Response

Not accepted. The Commission has powers under Section 4 (1) (g) and 17(2)(b) of the Act to fix and collect distinct fees for licensing and regulatory services. The phrase “licensing and administrative fees” is therefore appropriate.

44. Other fees

Comment

Regulations 53 – 55 are meant to be correctly numbered as Regulation 52(2),(3), and (4) from the wordings of the provisions themselves.

Response

Accepted.

45. Other fees

Comment

The procedure guiding other fees not dealt with by preceding provisions in Regulation 55 are uncertain. These procedures should be properly defined so that an applicant can easily ascertain where to get information on any other fees required to be paid.

Response

Regulation 55 will be amended to state that *“The Commission shall inform the licensee of any other fees, if any, which is applicable to the licensee and which is not covered under sub-regulation (2) or (3) above”*.

46. Resolution of Conflicts between Regulations and Licence

Comment 1

This regulation is silent on what happens when the regulations conflict with the Act and insists that the Act ought to prevail in such cases.

Response

This point is trite. This provision will however be deleted.

Comment 2

This regulation has the effect of retroactively altering the terms of licences and such a policy would erode certainty and transparency in the licensing process.

Response

Not accepted. This provision is an inherent effect of legislation.

47. Schedule 1 – General Undertakings: Documents

Comment

Company Incorporation and Business Name cannot apply to the same corporate entity.

Response

Accepted. This will be amended. The terms will be used disjunctively by replacing “AND” with “OR”.

48. Schedule 2 – List of Individual Licences

Comment 1

The Digital Mobile Licence has been abolished but is listed along UASL in the list of existing individual Licences.

Response

Not Accepted. The Digital Mobile Licence is an existing licence. At the time it was issued, the spectrum of the Licensees was tied to the Licence. Operators with the DML will hold such licences until they expire.

Comment 2

Clarification is needed on whether the inclusion of MNP Licence would mean that Licensees need a separate licence to offer MNP or whether a licensing requirement is being created for an ancillary service without which MNP would be impossible.

Response

The MNP Licence listed in Schedule 2 will be deleted. Other licences such as the Commercial Basic Radio Communications Network, FWA and Non-Commercial Basic Radio will also be deleted as these licences are no longer available.

49. Miscellaneous – Use of Open-Ended Provisions

Comment

The functions of the various provisions noted as open-ended have been explained.

Response

Regulatory certainty is key; however, some extent of flexibility is necessary to accommodate discretionary powers of the Commission and the dynamics of the market, without necessarily changing the licensing regime in these Regulations. The Commission is at all times guided by the principles enumerated in Section 33(3) of the Act.

50. Miscellaneous – The NCC should have a Pre-Qualification Phase

Comment

To ensure that only parties that have demonstrable financial and technical qualifications can be licence applicants, a licensing process that has a pre-qualification phase should be included.

Response

Not accepted. An applicant is mandated to include evidence of its financial and technical capability when applying for a licence. The evaluation exercise which applications are subjected to, serves the purpose of the pre-qualification phase.

51. Miscellaneous – Objectives of the Regulations

Comment

The objectives of the licensing process should be clear and the selection criteria should align with its objectives. The selection method should also consider the

relative advantages and disadvantages of each of the above listed criteria in the particular license circumstances.

Response

The objectives of these Regulations are clear, however, the Commission will include regulatory certainty. Suffice to state that the Commission will always consider the advantages for selecting one method over and above the others, but no purpose will be served by listing the advantages in the Regulations.

3.0. GENERAL COMMENTS

The Head, Legal and Regulatory Services thanked everyone for coming and assured them that all Comment submitted by stakeholders within 7 days from the date of the Public Inquiry will be considered by the Commission before the Regulations are finalized.

The Public Inquiry ended at 2:55pm.

Dated this 7th day of July 2015

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