Submission

to

ICASA

by

BT (British Telecom)

in response to the

Draft licence fee regulations

published in

***Government Gazette* 31542 of 24 October 2008**

Submission date: 5 December 2008

INTRODUCTION

INTRODUCING BT

1. BT Ltd (South African branch) holds a value added network service ("**VANS**") licence that was issued under the now repealed Telecommunications Act 103 of 1996 (the "**Telecommunications Act**") on 19 August 2005. Pursuant to an application to ICASA to transfer the licence from the BT branch to BT Communications Services South Africa (Pty) Ltd ("**BT**") ("**BTSA**"), we were told informally by ICASA that the application had been successful. However, BT has not yet received formal confirmation to this effect. For this reason, we will refer to BT Limited and BTSA interchangeably as "**BT**" in this submission.

2. BT wishes to thank the Independent Communications Authority of South Africa ("**ICASA**") for giving it this opportunity to respond to notice published in *Government Gazette* 31542, 24 October 2008 (the "**draft regulations**"), which contain details of the proposed licence fees payable by electronic communications network service ("**ECNS**"), electronic communications service ("**ECS**") and commercial broadcasting service licensees (collectively "**service licensees**").

3. BT would be grateful to participate in any public hearings that ICASA may hold and asks that it be allocated a speaking slot for this purpose.

THE NATURE OF THIS SUBMISSION

4. BT has asked ICASA to convert its VANS licence into both an individual ECNS ("**I-ECNS**") and an individual ECS ("**I-ECS**") licence. In light of this, BT's comments in this submission will largely focus on the issues pertaining to I-ECNS and I-ECS licensees.

5. This submission will be segmented into three parts:

    5.1. in the first part, BT will set out its general comments in relation to the draft regulations, with reference to (i) international best practices and (ii) the South African context; and

    5.2. in the second part, BT will provide detailed comments in response to the draft regulations.

GENERAL COMMENTS
INTERNATIONAL BEST PRACTICE: POLICY AND PRINCIPLES

ADMINISTRATIVE FEES VERSUS USAGE FEES

1. Internationally, it is best practice to distinguish between "administrative fees" and "usage fees" for licence fee purposes. The primary difference between them is as follows:

Usage fees

2. Usage fees are usually linked to the underlying economic value of the resource or service which is being licensed, but are otherwise unrelated to the regulator's administrative costs.

3. High usage fees tend to be imposed in circumstances where demand exceeds supply according to the following principles:

   3.1. ***Service licences***: high usage fees are typically imposed on service licensees in markets that are closed to competition, where for policy reasons, the decision has been taken to issue a limited number of service licences pursuant to a policy of managed liberalisation.

   3.2. ***Spectrum licences***: in many countries, high usage fees are imposed on spectrum licensees who have been authorised to use scarce spectrum. In Europe, many jurisdictions imposed very high fees in respect of 3-G spectrum, and it is likely high fees will also be imposed in respect of WiMAX spectrum.

Administrative fees

4. By contrast, administrative fees are meant to cover the costs of regulating the resource of the resource or service that is being licensed only. It is appropriate for regulators to impose administrative fees in circumstances where there is sufficient demand to satisfy supply.

5. In as far as ***service licences*** are concerned, only administrative fees should be levied if the market is liberalised. This is because there are no or minimal restrictions on the number of ECNS and ECS licensees in a liberalised market, with the result that there is sufficient demand to meet supply. Where this is the case, the licence has no intrinsic value in and of itself, and the licence fees payable by service licensees should serve only to cover the regulator's administrative costs and nothing more.[1]

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[1] In fact, it is arguable that the *Altech* judgment has made the entire individual licensing system under the ECA redundant. In its current formulation, the ECA precludes applicants for individual service licences from applying to ICASA for a licence on an unsolicited basis. Applications may only be made pursuant to the issue of an invitation to apply ("**ITA**") by ICASA. In the case of applications for I-ECNS licences, ICASA may not issue an ITA unless the Minister has issued a policy direction. The individual licence regime creates high barriers to entry which are not appropriate for a liberalised market. The ECA should accordingly be amended so as to remove the notion of an individual licences, and to adopt a system of class licences (general authorisations) for licensees as has been done in the EU.

Bird's eye view of the difference between usage fees and administrative fees

6. At a high level, the difference between usage fees and administrative fees is as follows.[2]

Administrative fees	Usage fees
↓	↓
Related to service licences (ECNS, ECS)	Related to scarce resources (spectrum)
↓	↓
Cost orientated	Set at the "economic value of the resource
↓	↓
Funds collected should be used for the regulator's budget ***	Funds collected can be used for any national purpose unrelated to the communications sector (such as national healthcare

*** In South Africa, ICASA does not retain the licence fees that it collects, as these are required to be remitted to the fiscus. ICASA is in turn funded by an appropriation from parliament.

Linking administrative fees to the regulator's costs

7. Assuming that administrative fees are based on the costs of the regulator, then it becomes necessary to match the administrative fees against the total / average aggregate costs incurred by the regulator each year.

8. In Europe, the Authorisation Directive,[3] the basket of costs that may be taken into account in calculating the regulator's annual costs include the following costs relating to:

   8.1. the administration of the licensing regime;

   8.2. the enforcement of the obligations of licensees who have been designated as having significant market power ("**SMP**");

   8.3. international co-operation, harmonisation and standardisation;

[2] Sweet & Maxwell, *Electronic communications: the new EU framework* (loose leaf publication), page 1.2-12.

[3] *Authorisation Directive*, article 12(1)(a).

8.4. conducting market analyses for the purpose of determining relevant markets, making SMP designations and imposing pro-competitive obligations on licensees who wield SMP;

8.5. monitoring compliance with communications regulatory law;

8.6. regulatory work involving the preparation and enforcement of secondary legislation (regulations); and

8.7. the enforcement of administrative decisions, such as decisions on access and interconnection.

9. The fact that the basket of costs used in the EU is so wide is meant to cater for the fact that modern models of regulation significantly increase regulators' administrative costs. Processes such as conducting ongoing market reviews and monitoring abuses of dominance by SMP designees are extremely expensive to implement.

Methods of calculating administrative fees (flat fee vs revenue-based model)

10. The choice as to how to allocate the regulator's administrative costs between licensees is a complex one, given the vast difference in the size and range between licensees. In the EU, the Authorisation directive mandates regulators to impose administrative charges in an "objective, transparent and proportionate manner",[4] but does not otherwise prescribe how this should be done. The Authorisation Directive also requires regulators to publish "a yearly overview of their administrative costs and of the total sum of charges collected".[5] (A summary of how this is done in the UK by Ofcom is given in **Annexure A**).

11. In general, there are two ways in which regulators typically levy administrative fees, namely a flat fee or a revenue-linked fee. The difference between these two methodologies is as follows:[6]

11.1. ***Flat fee***: a flat fee structure pre-supposes that all licensees should pay an equal amount, regardless of their size or market position. A flat fee structure is only appropriate where administrative charges are very low. However, where the regulator's expenses are high, such that administrative fees are high, it becomes unfair to expect a small internet service provider ("**ISP**") to pay the same amount as large incumbent network operators.

11.2. ***Revenue-linked fee***: in jurisdictions where the regulator's administrative costs are high, it is more appropriate to link administrative charges to operator's revenues. Revenue-linked models require operators to pay over a percentage of their annual revenues by way of an

[4] Authorisation Directive, article 12(1)(b).

[5] Authorisation Directive, article 12(2).

[6] Sweet & Maxwell, *Electronic communications: the new EU framework* (loose leaf publication), page 1.2-14.

administrative fee. In jurisdictions such as the Spain, if the global amount collected exceeds the regulator's expenses in any country, then the excess must be reimbursed to licensees or credited to the following years. By contrast, in the UK, administrative charges are calculated with reference to the previous year.

***Quantum* of the administrative fee**

12. Methodologies for calculating administrative charges differ from jurisdiction to jurisdiction. In the EU (and more specifically in the UK), the following principles apply.

Jurisdiction	Calculated how
EU	The EU Authorisation Directive is not prescriptive as to how administrative fees should be calculated. However, the following general principles apply: ▪ Administrative charges must be objective, transparent and proportionate. ▪ Regulators may impose a flat fee, a revenue-linked fee, or a combination of both. ▪ Administrative charges must be based on the regulator's actual costs. ▪ The basket of costs that may be included in the administrative fee may include the costs of administering general authorisations (class licences), enforcement obligations against SMP operators, international cooperation, market analysis, monitoring, regulatory work and administrative decisions. ▪ Each year, the regulator must publish a summary of its costs measured against charges collected.
UK[7]	Designated ECNS and ECS providers are only required to pay an administrative fee if their "relevant turnover" exceeds £5million in the applicable calendar year. Administrative fees are calculated by applying a percentage tariff to the relevant turnover of the licensee in the previous calendar year but one. Currently, this percentage is 0.0653% of "relevant turnover" in the calendar year ended 31 December 2006. In turn, the *quantum* of the percentage turnover is based on Ofcom's actual administrative expenses in previous years. Where relevant turnover falls within a band Ofcom will use the lower figure of the turnover band to calculate the administrative charge payable. *** *** A summary of Ofcom's charging principles is contained in **Annexure A**.

[7] Ofcom, Statement of Charging Principles, 8 February 2008

GENERAL COMMENTS
SUGGESTED POLICY PRINCIPLES FOR SOUTH AFRICA

13. Before discussing the licence fee regime in South Africa, it is necessary to first give a background to the South African regulatory landscape and the changing market structure. This will help to place the remainder of our comments into context.

THE SOUTH AFRICAN REGULATORY LANDSCAPE

Managed liberalisation framework

14. In South Africa, the regulatory framework for telecommunications has historically been premised on the philosophy of managed liberalisation, that is, the introduction of competition on a phased in basis. The main consequence of this was the placement of tight restrictions on:

    14.1. facilities-based competition, particularly on the self-provisioning of telecommunication facilities, on the leasing of those facilities to third parties and on the resale of spare capacity to third parties; and

    14.2. the carriage of voice traffic,

    pending the liberalisation of the market.

15. With respect to the provisioning of telecommunications facilities, most categories of licensees were required to lease their facilities from the fixed line incumbent operator, Telkom SA Ltd ("**Telkom**"), and were precluded from sub-leasing their facilities to third parties, with very limited exceptions. The reason for this is that after the Telecommunications Act was passed into law with effect from 1 July 1997, the legislation conferred a statutory monopoly on Telkom for five years until 7 May 2002. After 7 May 2002, additional facilities-based providers were licensed, but on a restricted basis. Notably:

    15.1. one additional PSTS licensee was authorised compete with Telkom (Neotel);

    15.2. several regional facilities-based operators were licensed in the form of the under serviced area licensees ("**USALs**"), although their licences confined them to providing services in localised low teledensity areas only; and

    15.3. Sentech was granted multimedia and carrier of carriers licences with effect from 7 May 2002, simultaneously with the expiry of Telkom's monopoly. Sentech's licences represented a partial incursion on Telkom's exclusivity on facilities provisioning in that they authorised Sentech to self provide its own network facilities. However, the licences were restrictive in other senses, particularly as they precluded Sentech from selling voice telephony services to retail customers.

16. With respect to the provision of voice, only a limited number of carriers were historically permitted to carry voice traffic. Traditionally this was the domain of PSTS licensees (Telkom and Neotel) and MCTS licensees (Vodacom, MTN and Cell C). Although Sentech was permitted to carry voice, it could only carry wholesale voice traffic under its carrier of carriers licence. For a long time, VANS licensees were only permitted to carry data traffic. With effect from 1 February 2005, the ministerial determinations also permitted VANS to carry VoIP traffic, impliedly using numbers from the national numbering plan.

The liberalisation of the South African market

17. In addition, on 3 September 2004, the Minister of Communications published a series of determinations (the "**ministerial determinations**"),[8] which had the effect of liberalising the telecommunications market even further. In particular, the ministerial determinations allowed (i) the mobile network operators (Vodacom, MTN and Cell C) to self-provide their own fixed links, (ii) value-added network service ("**VANS**") and private telecommunication network licensees to resell spare capacity on their networks, and (iii) VANS to self-provide their own facilities – all with effect from 1 February 2005.

18. For a long time, there was considerable debate and controversy as to whether or not the ministerial determinations actually allowed VANS to self-provide their own facilities, and thus to build their own networks. These debates were ultimately resolved by the decision of the Pretoria High Court of case of *Altech Autopage (Pty) Ltd v the Chairperson of ICASA & Others* (29 August 2008) (the "***Altech judgment***"), in which it was declared that the ministerial determinations conferred the right to self-provide on VANS licensees (amongst other things).

19. In October 2008, the Johannesburg High Court handed down an order (the "**court order**"), in which ICASA was directed to issue I-ECNS and I-ECS licences to Altech in the place of its existing VANS licence. Although the judgment applies to Altech only on the face of it, the legal reasoning (otherwise known in law as the *ratio* of the judgment) applies to all VANS licensees.

20. Consequently, ICASA must now issue I-ECNS and I-ECS licences to all VANS licensees (there are well over 300 VANS licensees in total). The result is the ECNS and ECS licences are no longer a scarce resource in South Africa, and have no intrinsic economic value in and of themselves.

Effect of the Altech judgment on the ECA licensing framework

21. For reasons that will become apparent below, the *Altech* judgment has effectively made redundant the individual licence application process in the ECA, by effectively dispensing with the need for an

[8] Minister of Communications, Determinations of dates in terms of the Telecommunications Act (Act no. 103 of 1996), *Gazette* 26763, Notice 1924, 3 September 2004

individual licensing regime for service licences, which is more suited to a market that is not yet open to competition.

22. In order to understand why this is the case, we now turn to examine the ways in which other jurisdictions have tended to authorise service providers in the market. In this regard, most regulators use one of three methodologies – individual licences, class licences, or licence exemptions – depending on the state of liberalisation of the market. The difference between these three authorisation methodologies is as follows:

Methodology	Key features	Policy considerations
Individual licences	The defining feature of individual licences is that they require pre-approval to be given on individual application to the regulator.	From a policy point of view, individual licensing systems are appropriate in respect of major licence categories where the government has a significant interest in regulating the behaviour of certain market players, and in respect of licence categories that are limited to competition – whether for policy reasons (managed liberalisation) or scarcity (spectrum). In the EU, most regimes allocate spectrum by means of auctions, although the minority allocate spectrum via beauty parades.
Class licences	A key feature of class licences is that the pre-approval of the regulator is not required. At most, class licensees may be required to register with the regulator or to give the regulator advance notification. Under a class-licensing regime, any service provider may provide the services listed in the licence, for so long as it adheres to the terms and conditions of the class licence, and for so long is it has notified or registered with the regulator.*** *** As will become apparent below, the so-called "class" licensing system in South Africa is not a true class licensing system (because the pre-approval of the regulator is required), but is in fact a simplified individual licensing system.	From a policy point of view, class licences are a useful tool for simplifying the licensing regime in liberalised sections of the market. Class licences are employed where the government retains an interest in regulating liberalised services – for example imposing empowerment requirements in licences.
Licence exemptions	Exemptions refer to activities that are not governed by any licence conditions, and where no refer to activities that are permitted to be provided on an unlicensed basis.	As in the case of class licences, licence exemptions are also a useful tool simplifying the authorisation mechanism in respect of liberalised service categories. From a policy point of view licence exemptions are most appropriate in respect of activities that are technically caught within the definition of activities subject to regulation but where no rationale exists for regulation.

23. In South Africa, both applicants for "individual" and "class" licences require ICASA's pre-approval. However, the application procedures prescribed for both by the ECA are very different. The individual licence application process is particularly onerous and creates high barriers to entry, whereas the procedure for obtaining a class licence is far simpler:

23.1. ***Individual licence application process*** – it is not open for aspiring new market entrants to apply for an individual licence at any time. Certain regulatory processes need to happen first, specifically (i) ICASA may only consider applications for individual ECNS licences in terms of a policy direction issued by the Minister,[9] and (ii) no person may apply for an

[9] Section 5(6) of the ECA.

individual ECNS or ECS licence until ICASA has invited an invitation to apply ("**ITA**") in the *Government Gazette*.[10] ICASA must follow a public process before issuing an individual licence (which typically entails holding a notice and comment process and a public inquiry before taking a decision).[11] In each ITA for an individual licence, ICASA must prescribe the minimum percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%.[12]

23.2. ***Class licence application process*** – unlike individual licensees, any person may apply for a class licence at any time. ICASA must grant the class licence within 60 days after receipt of an application for a class licence, failing which the class licence will be deemed to have been granted if (i) ICASA fails to give notice of a delay to the applicant and fails to grant the class licence within 60 days, (ii) the applicant has complied with all the relevant application processes and procedures, and (iii) ICASA has not rejected the application.[13] The ECA does not require ICASA to follow a public process before issuing a class licence.

24. The ECA requires only those services that carry a high socio-economic importance to be individually licensed (specifically ECNS and ECS of a national or provincial scale).

25. Moreover, the context for retaining such an onerous individual licence application process was that the managed liberalisation process had not yet been completed at the time that the ECA (then still referred to as the Convergence Bill) was first mooted in 2003. The policy makers therefore wished to use the individual licence application process as a mechanism to retain restrictions on the number of facilities and voice-based competitors. The market structure has radically changed since then, such the ECA licensing framework is longer appropriate.

SUGGESTED POLICY PRINCIPLES FOR SOUTH AFRICA

No usage fees should be payable by ECNS and ECS licensees

26. For the reasons indicated above, individual ECNS and ECS licence convertees are set to become numerous. This has lead to a significant decrease the intrinsic economic value of the licence.

27. We accordingly submit that, as the South African telecommunications market has now been opened up to competition, no usage fees should be payable by ECNS and ECS licensees.

[10] Sections 9(1)-(2) of the ECA.

[11] Section 9(2) of the ECA.

[12] Section 9(2)(b) of the ECA.

[13] Section 17(5) of the ECA

In an ideal world, the administrative fees for ECNS and ECS should have been based on ICASA's actual costs associated with regulating ECNS and ECS providers

28. The introduction to the draft regulations states that licence fees should "cover the costs of regulating the environment. The regulations go on to state that ICASA's operating expenses are projected to increase at a rate of 24% per year for the first 5 years, but that the projected annual increase will drop to 8% per year in the following 5 years. In arriving at this conclusion, the draft regulations state that these figures are "supported by historical figures and [the] implementation of the [ECA], in particular Chapter 10", which requires ICASA to conduct market reviews for the purpose of imposing pro-competitive conditions on operators who wield SMP.

29. Unfortunately, ICASA has not given any indication of what its actual operating statements are, whether by reference to its audited annual financial statements or otherwise. Neither has ICASA sought to separately itemise its expenses in relation to the different baskets of regulatory expenses that it will incur (ECNS/ECS, broadcasting, spectrum management, etc), as a precursor to prescribing the fees payable in each of these areas.

30. ICASA's failure to do so is problematic, as the process of conducting imposing licence fees clearly constitutes administrative action for the purpose of the Promotion of Administrative Justice Act No. 3 of 2000 (the "**PAJA**"). Section 1((i) of the PAJA as defines "administrative action" as follows:

> "'**administrative action**' means any decision taken, or any failure to take a decision, by-
>
> (a) an organ of state, when-
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power of performing a public function in terms of any legislation; …
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provisions, which adversely affects the rights of any person and which has a directly, external legal effect …"[14]

31. Certain procedural consequences follow under the PAJA and under our common law if a decision constitutes administrative action. The imposition of licence fees represents a hybrid of administrative action affecting the rights of a person under section 3, and administrative acting affecting the public under section 4. In both cases, administrators are required to take decisions that rationally connected to the information before the administrator and to the reasons given by the administrator for the decision. The administrator must also take relevant considerations into account and exclude

[14] In the case of *Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA t/a Petro SA and Another*, the Court laid down that a decision constitutes administrative action it meets the following test (i) the action must constitute a decision (ii) of an administrative nature made in terms of an empowering provision (iii) that is not specifically excluded by the PAJA (iv) by an organ of state or by a private person exercising public power (v) that adversely affects rights. In addition, the administrative action must have a direct external legal effect. The imposition of licence fees very clearly meet all of these criteria and accordingly qualifies as "administrative action".

irrelevant considerations. Any failure to do so can result in the decision being set aside on review in the High Court.[15]

32. As will become apparent below, ICASA is proposing to hike up administrative fees dramatically, on the basis that it is expecting its operating expenses to increase significantly. However, because ICASA has not given a breakdown of what its administrative expenses are, it is not possible to ascertain whether the administrative fee structure proposed by ICASA is rationally connected to ICASA's underlying administrative costs.

33. This lacuna could expose ICASA to litigation if it proceeds on the basis in the draft regulations, which would not be in the interests of the public. The delays in prescribing the new licence fee structure under the ECA have hampered ICASA's ability to issue both greenfields (new) licences and to convert existing licences. In order to prevent any further delays, It is imperative that ICASA follows a legally bullet proof procedure, so as to circumvent any litigation that may arise as a result.

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[15] See 6(2) of the PAJA, which states:

'A court or tribunal has the power to judicially review an administrative action if –

(a) the administrator who took it –
  (i) was not authorised to do so by the empowering provision;
  (ii) acted under a delegation of power which was not authorised by the empowering provision; or
  (iii) was biased or reasonably suspected of bias;
(b) a mandatory and material procedure or condition prescribed by an empowering provision which was not complied with;
(c) the action was procedurally unfair;
(d) the action was materially influenced by an error of law;
(e) the action was taken –
  (i) for a reason not authorised by the empowering provision;
  (ii) for an ulterior purpose or motive;
  (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
  (iv) because of the unauthorised or unwanted dictates of another person or body;
  (v) in bad faith; or
  (vi) arbitrarily or capriciously;
(f) the action itself –
  (i) contravenes a law or is not authorised by the empowering provision;
  (ii) is not rationally connected to;
    (aa) the purpose for which it was taken;
    (bb) the purpose of the empowering provision;
    (cc) the information before the administrator;
    (dd) the reasons given for it by the administrator;
(g) the action concerned consists of a failure to take a decision;
(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
(i) the action is otherwise unconstitutional or unlawful."

(Our emphasis).

However, in South Africa ICASA may not retain licence fees, but must rely on appropriations from parliament

34. The current legislative framework precludes ICASA from retaining incoming licence fees, as the regulator is dependent on the legislature for its budget allocation. This appears from section 15 of the Independent Communications Authority of South Africa Act 13 of 2000 (the "**ICASA Act**"), which states as follows:

    34.1. ICASA is financed by money appropriated by the South African parliament;

    34.2. ICASA may receive money from any other sources (including licence fees), but this revenue must be paid into the National Revenue Fund within 30 days of receipt by ICASA.

35. The practice of requiring ICASA to rely on budgetary allocations from the legislature is problematic from a policy point of view because it can result in all licence fees (including administrative fees) being used to fund national budget items other than the regulation of the communication sector. Consequently, licensees do not derive as much value for their money as they should.

36. Moreover, this is also contrary to international best practice in jurisdictions such as the EU, in which national regulatory authorities ("**NRAs**") may retain and administrative fees directly to their own budgets.

37. It would have been preferable if ICASA were to be permitted to retain incoming licence fees. This would have allowed ICASA to set its own budget, which ICASA is better placed to do than parliament. This would also have helped to entrench ICASA's independence from the executive arm of government. However, South legislation prohibits this. As a result it is impossible to draw a direct correlation between the administrative fees payable by licensees and ICASA's actual expenses.

38. It is accordingly suggested that the administrative fees payable by service licensees in South Africa should be calculated with reference to the parliamentary appropriations that ICASA receives from parliament. Parliament should be lobbied in turn to ensure that the appropriations that it allocates to ICASA are sufficient to cover ICASA's actual expenses.

SPECIFIC COMMENTS

LICENCE FEE FRAMEWORK (INTRODUCTION)

39. The draft regulations contain an explanatory note which sets out ICASA's reasons for adopting the position that it has in the draft regulations. Whilst ICASA has made some attempt to align the draft regulations with some of the criteria that ICASA has considered when calculating the *quantum* of licence fees are misaligned with the South African context and are dramatically out of synch with international best practice.

Criterion #1: licensees in possession of an individual licence should pay a larger portion of their revenues towards fees as compared to those in possession of class licences, in view of the wider scope of operation permitted by their licence

40. For the reasons given above, it is not strictly appropriate to draw a distinction between the underlying value of individual and class licences in light of the immanent changes to the market judgment following the *Altech* judgment. Moreover, the drawing of a distinction between individual and class licences may be difficult to justify to the extent that ICASA is proposing to base administrative fees on its own expenses.

41. There is also the danger that the imposition of high administrative fees on individual VANS convertees could have the effect of pushing many smaller VANS out of the market, alternatively to accept a class licence, thereby artificially reducing the size and competitiveness of the market. To the extent this is the effect, then this will be contrary to some of the core principles of regulation as set forth in the ECA – including the promotion of universal access and universal service, the encouragement investment and innovation in the sector, and the promotion of competition within the ICT sector.

Criterion #2: the duration of the licence should be recognised as a significant factor when determining the value of the licence.

42. This assumption presupposes that ECNS and ECS licences are intrinsically valuable in and of themselves, and that the value of the licence is linked to the duration of the licence. We respectfully submit that this is not a valid consideration in relation to ECNS and ECS, given the diminution of the value of these licences following the *Altech* judgment.

43. However, we recognise that licence duration may well a valid consideration in relation to those activity areas where the number of licences is restricted, and the licences are therefore inherently valuable – such as in the case of scarce spectrum.

Criterion #3: licensees earning revenue below a certain threshold (eg R1 million) should pay marginal annual licence fees, so as to support startups and SMMEs

44. We agree with this approach.

Criterion #4: at a minimum, the licence fees need to cover the cost of regulating the market

45. Whilst this approach is sound in principle, ICASA is precluded from retaining licence fees in practice by the ICASA Act. Accordingly, the administrative fees payable by service licensees in South Africa should not exceed the appropriations that ICASA receives from parliament.

Criterion #5: the licence fee should be structured in a manner that promotes a competitive ICT sector, and should not constitute a barrier to market entry

46. We agree with this approach.

Criterion #6: the licence fees should facilitate the establishment of an environment conducive to network investments

47. The build out of multiple networks is a laudable objective, as it reduces reliance on the incumbent's network. However, network rollout and licence fees should not be linked together, as this discriminates in favour of market players whose business plans are premised on extensive network rollout.

Criterion #7: the administrative fee structure should be as simple as possible
Criterion #8: the licence fees should be calculated in a transparent manner

48. We agree with this approach.

Criterion #9: the licence fees should be offset against commitments to construct electronic communications networks and to provide ECS in under-serviced areas

49. This assumption presupposes that ECNS and ECS licences have an intrinsic value, which we believe they no longer do. To the extent that this is the case, then this criterion is misguided.

50. In summary, many of the criteria that ICASA has taken into account in formulating the licence fee regime for service licensees, are outdated. One of the primary reasons for this is that the draft regulations were formulated before the Minister of Communications formally decided not to oppose the *Altech* judgment any further, thus paving the way for the market to be opened up to competition. Consequently, ICASA should now revisit some of these assumptions.

ANNUAL VARIABLE LICENCE FEES (INTRODUCTION)

51. The draft regulations propose to impose an annual variable licence fee of 3% of "adjusted gross revenue" (as opposed to net revenue, which is currently applicable to all I-ECNS and I-ECS licensees).

52. The draft regulations also suggest that a 3% licence fee should be payable in relation to each licence held by a multiple licence holder. The implications of this are that all existing telecommunication service licensees who stand to be issued two licences (I-ECNS and I-ECS) in place of their existing (single) licence, will ultimately be required to pay an aggregate service licence fee of 6% upon the conversion of their licences.

53. We understand that the dilemma facing ICASA is that the annual variable licence fees in existing telecommunication service licences facing conversion into I-ECNS and I-ECS licences are vastly different. For example, the percentages in the licences of Telkom, Sentech, the mobiles, WBS and Neotel range from between 0.5% to 5%, and the percentage payable in some licences is based on gross revenue and others on net revenue. However, in no case are the fees as high as 6% of gross income. Currently, the highest fee payable (5%) is based on net income, not gross revenue.

54. A snapshot of those differences is as follows:

Licensee	Licence type	Annual variable licence fee
Vodacom, MTN	Mobile cellular telecommunication services (MCTS)	5% of net operational income
Cell C	MCTS	1% of audited licence fee income
Telkom	Public switched telecommunication services (PSTS)	0.1% of annual revenues generated from PSTS
Neotel	PSTS	0.1% of net invoiced annual sales realised from PSTS revenue
Wireless Business Solutions (WBS)	National mobile data telecommunications service (NMDTS)	2% of annual turnover (revenue sales revenue of WBS's business)
Sentech	Multimedia	0.5% of annual audited licence fee income
Sentech	Carrier of carriers	0.5% of annual audited licence fee income
VANS **subject to the final outcome of current litigation	Value added network services	0.1% of total annual invoiced revenue

55. ICASA's response to this dilemma has been to propose the imposition of the same (very high) annual licence fee on all individual licence convertees. This presents the following problems:

55.1. The businesses of the various individual licence convertees are not comparable to each other. For example, the wireless national data network of WBS and fundamentally differs from the public switched telecommunication network ("**PSTN**") in scale, scope, function and ultimately in profitability.

55.2. Significant dissimilarities also exist within some of the existing licence categories themselves. Within the VANS licence category, for example, the business structures of existing VANS licensees are diverse. The businesses of very small VANS licensees (who employ only a handful of employees) are no match for large network aggregators such as Internet Solutions and large internet service providers ("**ISPs**") such as M-Web.

56. Moreover, we are of the view that the proposed administrative fee of 3% per licence is not only excessive but is also is misaligned with international best practice. In the EU, the European Court of Justice ("**ECJ**") declared an administrative fee of 3% to be too high in the case of *Albacom Spa and Infostrada Spa v. Ministero Del Tesoro and Ministero Delle Comunicazioni.*[16] Since then the Italian regulator has instituted a flat administrative fee structure at a significantly reduced rate. The facts of that case were as follows:

56.1. In 1998, the Italian Ministers of Finance and Communications passed a law in which a new licence fee structure was imposed on providers of public telecommunications networks and public telephony.

56.2. The fee was calculated on a sliding scale as a percentage of turnover of all telecommunications services provided in the previous year. The percentage was 3% for 1999, 2.7% for 2000, 2.5% for 2001, 2% for 2002 and 1.5% for 2003.

56.3. A special dispensation was made for smaller undertakings whose turnover was less than ITL 200 billion (two hundred billion Italian Lire) during the reference year for the calculation of the fee. The fees payable by smaller undertakings were fixed at 2% until 2002 and then were fixed at 1.5% in 2003. No payment was due if an operating loss was sustained. On 15 December of each year, licensees were required to pay a significant portion of the fees in advance, amounting to 70% of the previous year's payment for 1999, 85% for 2000 and 95% for 2001 and subsequent years (the "**contested charge**").

56.4. Two licensees who were required to pay the advance deposit, Albacom and Infrostrada, challenged this practice on the basis that it sought to re-establish usage fee system that had

[16] Joined cases C-292/01 (Albacom SpA) and C-293/01 (Infostrada SpA) ECR [2003], I 9449. 18 September 2003.

previously applied in Italy when telecommunications services were subject to a monopoly, which is prohibited by EU law.

56.5. The ECJ agreed with Albacom and Infostrada. In handing down its judgment, the court reiterated that the EU directives require administrative fees to be based on objective, non-discriminatory and transparent criteria. Moreover, they must not conflict with the objective of liberalising the market completely. The ECJ noted that when the Italians first implemented the EU directives intended to liberalise the national telecommunications market, fees based on turnover were discontinued (the "**former charge**"). In its ruling, the court took the firm view that:

> "(e)ven if that former charge and the contested charge are not identical, the contested charge, like the former charge, is calculated on the basis of the turnover of undertakings which hold individual licences and thereby reintroduces a financial obstacle to the liberalisation process."

56.6. Finally, the court ruled that it was impermissible to impose financial charges other than and in addition to those allowed by the directives, on undertakings which hold individual licences in the telecommunications sector (as opposed to class licences) solely because they hold such licences.

57. It is respectfully submitted that the proposed annual administrative fee of 3% per licence (and 6% for ECNS and ECS licences combined) is disproportionately high, out of synch with international best practice and serves as an artificial barrier to entry in a liberalised market. ICASA accordingly needs to revise down the administrative fee structure dramatically.

CALCULATION OF ICASA'S OPERATING EXPENSES (INTRODUCTION)

58. The draft regulations state that:

58.1. ICASA's operating expenses are projected to increase at a rate of 24% a year for the first five years;

58.2. thereafter, the rate of increase is projected to increase at a rate of 8% year for the next 5 years.

59. In addition, the regulations claim that ICASA's projected operating expenses have been calculated with reference to "historical figures and implementation of the Electronic Communications Act, in particular Chapter 10". However, no detailed breakdown of ICASA's forthcoming annual activity plan and accompanying budget have been given, contrary to international best practice.

60. It is respectfully submitted that ICASA should publish an annual activity plan and budget as is currently done by other regulators abroad. This plan should not only be made available to

parliament (as is currently required by the ICASA Act), but should also be released into the public domain for comment.

61. However, because the ICASA Act does not allow ICASA to keep the licence fees that it collects, the annual plan should give a detailed breakdown of the appropriations that ICASA has received from parliament in the preceding year, which should be used as the basis for calculating the administrative fees payable by licensees in the year under calculation.

CALCULATION OF ADMINISTRATIVE FEES (INTRODUCTION)

62. The draft regulations state that in calculating the *quantum* of the administrative fees, ICASA "considered activity based costing … inflation, the new competitive framework provided by the ECA and other relevant factors."

63. Whilst we agree with the principle of activity based costing (disaggregating regulatory activity areas for the purpose of calculating the administrative fees payable by licensees in each basket), ICASA has not given an itemised breakdown of the costs involved in regulating activity areas such as spectrum management, broadcasting, ECNS/ECS, type approvals, the Consumer Complaints Commission ("**CCC**") and so forth. This is out of synch with the practices of regulators in other jurisdictions such as the EU, who publish activity-based annual plans and budgets every year for comment before finalising the plans.

64. Because the South African context is different from that in the EU (specifically because ICASA cannot retain licence fees), it is respectfully submitted that ICASA should publish an activity based plan and budget each year with reference to the appropriations that it receives from parliament each year. The plan should specify how the monies received from parliament will be allocated to different activity based areas. The budget allocated to each regulatory activity area should in turn be used to calculate the administrative fees payable by licensees in the relevant activity area in the relevant year under calculation.

DEFINITIONS (CLAUSE 1)

65. For ease of reference, we have discussed the definitions at the end of this submission.

PURPOSE OF THE REGULATIONS (CLAUSE 2)

66. In addition to prescribing the annual licence fees payable by service licensees, the regulations prescribe the fees payable in respect of new licence applications, amendments to licences, transfers of licences, renewals of licences (collectively, "**application fees**").

67. Although our comments above concentrate mainly on the annual licence fees, the same principles apply equally to application fees, namely that they should be administrative in nature, and should cover the cost of administering the relevant application process and should not create any artificially high barriers to entry.

EXEMPTIONS FROM THE PAYMENT OF ANNUAL LICENCE FEES (CLAUSE 3(2))

68. The draft regulations propose exempt ECNS from the obligation to pay the annual administrative licence fees for the first 3 years from the date on which their licences are issued, but only if they undertake to roll out a network in areas stipulated by ICASA.

69. We disagree with this approach. The build out of multiple networks is a laudable objective, as it reduces reliance on the networks of the incumbents. However, network rollout and licence fees should not be linked together, as this discriminates in favour of market players whose business plans are premised on extensive network rollout. Moreover, it is not appropriate for ICASA to stipulate the areas for network roll out, as this is an operational issue in which regulatory interference is unwarranted.

ESCALATION OF FEES BY CPI (CLAUSE 3(3)(b))

70. The draft regulations state that the administrative fees for greenfields licence applications, renewals, amendments and transfers (collectively "**application fees**") will escalate annually by the consumer price index ("**CPI**"), or in accordance with "such other percentage" as ICASA may determine. Presumably, the escalations will take effect at the beginning of ICASA's financial year each year, but this is not stated.

71. We agree that CPI is an appropriate escalation mechanism, *provided that* an inflationary increases are set off against any efficiency against ICASA may achieve in the future in relation to its own expenses. However, it is not appropriate to give ICASA the unfettered discretion to deviate from the CPI by imposing a different percentage. Not only does this undermine regulatory certainty and but it has the potential to lead to arbitrary increases being imposed. CPI should accordingly be the only measure used to determine the percentage by which application fees will escalate annually.

PAYMENT OF FEES (CLAUSE 4)

72. The draft regulations state that annual licence fees should be payable quarterly, even though they are calculated annually. The draft regulations go on to state that the annual fees must to be adjusted retrospectively upon the finalisation of the licensee's audited annual financial statements, which must be submitted to ICASA within 3 months of the licensee's financial year end.

73. In our view, ICASA should avoid retrospective adjustment processes as far as possible, as this is more complex to administer and implement. ICASA may wish to consider giving licensees the option to pay the annual licence fee once a year, or within 3 instalments over the following financial year – always with reference to the licensee's annual financial statements in respect of the calculation year in question.

ALLOWABLE DEDUCTIONS (CLAUSE 5)

74. The draft regulations require annual licence fees to be calculated with reference to a licensee's "**adjusted gross revenue**" – which is measured at the difference between the licensee's gross revenue derived from licensable activities ("**gross revenue**") and "**allowable deductions**".

75. Clause 4 of the draft regulations stipulates that the allowable deductions in respect of ECNS and ECS licensees are as follows:

I-ECS:

- VAT
- Discounts granted (presumably to customers) in relation to revenue generated from licensed activities
- Interconnection

I-ECNS:

- VAT
- Discounts granted (presumably to customers) in relation to revenue generated from licensed activities
- Facilities leasing charges
- Leased line costs

76. It is submitted that the basket of exclusions is not comprehensive enough. ICASA should consider including the following additional exclusions within the basket of allowable deductions:

76.1. contributions to the Universal Service and Access Fund (so as to prevent double taxation in the case of ECNS and ECS licensees);

76.2. contributions to the Media Development and Diversity Agency (in the case of BS licensees);

76.3. application fees payable to ICASA for greenfields licences and applications for licence amendments, renewals and transfers; and

77. Some of the existing categories of exclusion are not drafted with sufficient precision to be meaningful. For example the references to "interconnection", "facilities leasing charges" and "leased line costs" are so broad that they could be construed to include both revenues and expenses in relation to each of these items. For obvious reasons, only expenses as opposed to revenues should be considered as an allowable deduction.

78. The blanket references in clause 5 to "licensed activities" are too broad – because they encompass all licensed activities, inclusive of ECNS, ECS and BS). They should accordingly be narrowed down to refer only the licensed activities that is the subject of the administrative fee. This is necessary to prevent double taxation between licensees who hold multiple service licences. For example, in relation to ECNS, the definition should refer to gross revenues derived by the licensee from ECNS only.

79. As a general rule, revenues derived from supplementary services and other licence exempt activities should be excluded from the calculation of gross revenue. This is because ICASA's costs associated with regulating licence exempt activities are either marginal or non-existent.

INTEREST (CLAUSE 6)

80. The draft regulations to impose very high default interest rates on licensees who pay their fees late:

Default of up to 7 days	prime rate
Default of 8 – 14 days:	prime + 3%
Default of more than 14 days	prime + 5%

81. This is not in line with commercial best practice. In the private sector, penalty interest is calculated at prime to prime + 2% at a maximum.

CONTRAVENTIONS AND PENALTIES (CLAUSE 7)

82. Clause 7(1) of the draft regulations states that ICASA should be entitled to claim a "penalty payment" (which is effectively an additional default interest charge) of 25% of the capital amount of all licence fees that have been overdue for 21 days or more.

83. Again, this is inappropriate. ICASA's sole recourse should be to impose and administrative fine on licensees who do neglect to pay their licence fees for an extended period after the due date for payment (as has effectively been proposed in clause 7(2)). Moreover, the default period of 21 days is too short.

ADMINISTRATIVE FEES: INDIVIDUAL LICENCES – GREENFIELDS APPLICATIONS, AMENDMENTS, RENEWALS, TRANSFERS (SCHEDULE 1)

Initial applications for individual licences

84. The draft regulations state that the fees payable when applying for a greenfields I-ECNS and/or I-ECS licence will be stipulated in each invitation to apply ("**ITA**") on an *ad hoc* basis as follows:

I-ECNS	As specified in ITA
I-ECS	As specified in ITA

85. We disagree with this approach. Ideally, application fees should be prescribed in advance by way regulation rather than in ITAs. Moreover, the application fee should be activity- and cost-based, in as far as this is possible.

86. Stipulating the application fee in advance not only promotes certainty and consistency in regulation making, but also creates a stable environment for new investors who are seeking to enter the South African market.

Applications for amendments to and renewals /applications for individual licences

87. The draft regulations state that the administrative fees payable in respect of I-ECNS and I-ECS licences are as follows:

Application for amendment	
I-ECNS	R250 000
I-ECS	R250 000
Application for renewal	
I-ECNS	60% of application fee
I-ECS	60% of application fee
Application for licence transfer	
I-ECNS	R250 000
I-ECS	R250 000

88. For the reasons given above, all administrative fees should be activity- and cost-based, and referenced back to the annual appropriations received by ICASA from parliament. Because ICASA has not given a breakdown of its budgetary expenses and annual plan, it is not possible to comment as to whether the proposed fee structure is reasonable or not. However, application fees in general should be as low as possible, so as not to create artificially high barriers to entry.

ADMINISTRATIVE FEES: CLASS LICENCES – GREENFIELDS APPLICATIONS, AMENDMENTS, RENEWALS, TRANSFERS (SCHEDULE 1)

89. The draft regulations state that the administrative fees payable in respect of C-ECNS and C-ECS licences are as follows:

Application for greenfields licence	
C-ECNS	R10 000
C-ECS	R10 000
Application for amendment	
C-ECNS	R10 000
C-ECS	R10 000
Application for renewal	
C-ECNS	60% of application fee
C-ECS	60% of application fee
Application for licence transfer	
C-ECNS	R10 000
C-ECS	R10 000

90. Because ICASA has not given a breakdown of its budgetary expenses and annual plan, it is not possible to comment as to whether the proposed fee structure is reasonable or not. As a general principle, application fees should be as low as possible, so as not to create artificially high barriers to entry.

ADMINISTRATIVE FEES: NOTIFICATIONS FOR LICENCE EXEMPTIONS (SCHEDULE 1)

91. The draft regulations indicate that an administrative fee of R1000 will be imposed on licence exemptees. This is inappropriate, as it implies that licence exemptees must pay money to ICASA as a prerequisite to providing a licence exempt service. Such a practice is clearly contrary to the nature of a licence exemption, namely that no prior regulatory fee or pre-approval process should be followed as a pre-condition to providing a service in the market. This clause should accordingly be deleted.

ANNUAL LICENCE FEES (SCHEDULE 2)

92. The draft regulations propose that the annual administrative fees should be calculated using the following formula:

$$P_a = P_p \times GR_a$$

Where:

$$GR_a = GR - AD$$

Where:

P_a = payable annual licence fee

GR_a = adjusted gross revenue

AD = allowable deductions

GR = gross revenue

P_p = applicable percentage in accordance with this schedule read with 3(1).

I-ECNS:	3%
I-ECS:	3%
C-ECNS:	1.5%
C-ECS:	1.5%

93. In relation to the "applicable percentage" (that is, the percentage of revenue on which the annual licence fee is based) (P_p), it is not clear what the reference to "3(1)" refers to. In any event, and for the reasons given above, the percentages should be significantly lower, and based on the *quantum* of the appropriations that ICASA receives from parliament.

DEFINITIONS (CLAUSE 1)

94. Our comments in relation to the definitions in clause 1 fall into three categories:

94.1. Firstly, certain terms are defined in clause 1 but are not used in the text of the draft regulations (such as the term ""**Agency Fees**", for example).

94.2. Secondly, certain terms are used in the body of the draft regulations, but are not defined in clause 1 (such as the term "**Consumer Price Index**", for example).

94.3. Thirdly, certain definitions are either vague or incorrect.

95. Our detailed comments are set out below.

"Adjusted Gross Revenue"

96. This term is not defined, even though it is used in the draft regulations. The definition should read as follows:

> "'**Adjusted Gross Revenue**' means the Gross Revenues earned by a Licensee in any relevant year, less Allowable Deductions incurred in the same year".

"Administrative Fees"

97. "**Administrative fees**" are currently defined only to refer to the fees payable in respect of applications for greenfields licences and applications for licence amendments, renewals and transfers (as per schedule 1), to the exclusion of the turnover-based fees in (schedule 2).

98. Application fees and annual licence fees both constitute subsets of "administrative fees". Accordingly, the label used to describe the basket of fees referred to in schedule 1 and should be different ("**Application Fee**") is more appropriate.

99. Accordingly, this definition should read as follows:

> "'**Application Fee**' means the fees payable by Licensees as referred to in Schedule 1".

"Allowable Deductions"

100. This definition is not well drafted and should read as follows:

> "'**Allowable Deductions**' mean the cost items that may be deducted from a Licensee's Gross Revenue for the purpose of determining the Annual Licence Fee payable by that Licensee, on the basis stipulated in clause 5.

Annual Licence Fees"

101. This definition is circular (as it refers back to a clause in the draft regulations, which in turn refers to another schedule). Rather the definition should read as follows:

> "'**Annual Licence Fees**' means the fees payable by Licensees to the Authority each year, as referred to in Schedule 2".

"Applicable Interest Rate"

102. This definition is not well drafted and should read as follows:

> "'**Applicable Interest Rate**' means 2% (two percent) more than the prime overdraft rate normally charged by the Standard Bank of South Africa on all overdue amounts reckoned from the due date until the date of actual payment".

"BS Licensee"

103. This definition is not well drafted and should read as follows:

> "'**BS Licensee**' means any person to whom the Authority has granted a class or individual broadcasting service licence, but excludes those broadcasting service providers whom the Authority has prescribed as being exempt from the requirement to hold a broadcasting service licence in terms of section 6 of the Act".

"Consumer Price Index"

104. An appropriate definition should be inserted for this.

"ECNS Licensee"

105. This definition is not well drafted and should read as follows:

> "'**ECNS Licensee**' means any person to whom the Authority has granted a class or electronic communications network service licence, but excludes those electronic communication network service providers whom the Authority has prescribed as being exempt from the requirement to hold an electronic communications network service licence in terms of section 6 of the Act".

"ECS Licensee"

106. This definition is not well drafted and should read as follows:

> "'**ECS Licensee**' means any person to whom the Authority has granted a class or electronic communications service licence, but excludes those electronic communication service providers whom the Authority has prescribed as being exempt from the requirement to hold ad electronic communications service licence in terms of section 6 of the Act".

"Fees"

107. This definition is not well drafted and should read as follows:

> "'**Fees**' means the Application Fees and/or Annual Licence Fees as the context determines".

"Gross Revenue"

108. "**Gross revenue**" is defined in section 1 to refer to revenue from "licensed activities". The clause then proceeds to give examples the activities that should be included within the basket of licensed activities. This is problematic, as the examples listed more appropriately reside in the definition of licensed activities.

109. Moreover, some of the activities that have been listed in the definition refer to activities are that are not licensable. Examples include: proceeds from the sales of handsets and set top boxes and

income from value added services ("**VAS**") (which although not defined is generally understood to refer to premium rated services).

110. In addition, income derived from "application fees" have been included in the definition. Although this term is not defined, presumably "application fees" refer to the fees payable to ICASA in relation to applications for greenfields licences and applications for licence amendments, renewals and transfers. In any event, it is inappropriate to include this within the definition of "gross revenue". Rather, this should be considered as an "allowable deduction".

"Leased line"

111. This definition is not well drafted and should read as follows:

> "'**Lessed Line'** means any electronic communications facility that has been leased from a Licensee or a licence exemptee."

"Licensed Activity"

112. This definition is not well drafted and should read as follows:

> "'**Licensed Activity'** means electronic communications network services, electronic communications services and broadcasting services, but excludes activities that the Authority has declared to be licence exempt pursuant to section 6 of the Act".

"Licensee"

113. We suggest the insertion of the following new definition:

> "'**Licensee'** means a BS Licensee, an ECNS Licensee and/or an ECS Licensee as the context determines".

CONCLUDING REMARKS

114. We are aware of the fact that the draft regulations have generated considerable controversy within the industry, not least because of the dramatic increases that ICASA has proposed in relation to licence fees.

115. In preparing this written submission, we have attempted to be as non-partisan as possible, in the hope that ICASA will use our suggestions to build a legally defensible licence fee framework.

Annexure A

OFCOM'S CHARGING PRINCIPLES

REGULATORY CATEGORIES

1. Administrative and usage fees differ, depending on the "regulatory category" into which the activity falls. The regulatory categories recognised by Ofcom include the following:

   115.1. **ECNS and ECS** – "relevant activities" for persons for providers of networks and services (ECNS and ECS in South Africa);

   115.2. **television (category A)** – public service broadcasting channels;

   115.3. **television (category B)** – digital television channels;

   115.4. **television (category C)** – long term and short term restricted television services;

   115.5. **television (category D)** – multiplex licences;

   115.6. **television (category E)** – teleshopping channels;

   115.7. **Radio** – national and local sound broadcasting service licences;

   115.8. **Radio** – radio licensable content service licences, additional services licences, restricted service licences (long-term and short-term), digital radio multiplex service licences, digital sound programme service licences and digital additional sound service licences; and

   115.9. **Radio** – community radio licences.

RELEVANT TURNOVER

116. The administrative and usage fees payable are calculated as a percentage of "relevant turnover". The definition of relevant turnover differs, depending on the subject matter of the licence (such as networks (ECNS) / services (ECS), subscription television, etc).

117. In relation to networks and services (which is the focus of this submission):

   117.1. **relevant turnover** is defined as the turnover generated by a "relevant person" (a licensee) during the relevant calendar year from carrying on any "relevant activity" after the deduction of value added tax and any other applicable sales taxes;

   117.2. **relevant activity** is defined in turn to refer to licensable activities only, namely:

      1.1.1. the provision of public ECS to end-users (**retail**);

1.1.2. the provision of ECNS, ECS and network access to communications providers; and/or the making available of associated facilities to communications providers (**wholesale**);

ADMINISTRATIVE FEES FOR THE NETWORKS (ECNS) AND SERVICES (ECS) SECTOR

118. The following general principles apply:

118.1. Designated ECNS and ECS providers are only required to pay an administrative fee if their relevant turnover exceeds a certain threshold. This threshold is currently set at £5million in the applicable calendar year.

118.2. Administrative fees are calculated by applying a percentage tariff to the relevant turnover of the licensee in the previous calendar year but one (the "**charging year**"). The quantum of the percentage tariff is calculated with reference to Ofcom's actual expenses in the relevant charging year. Currently this percentage is 0.0653% of relevant turnover in the calendar year ended 31 December 2006.

118.3. Ofcom also groups relevant turnover into bands. Where relevant turnover falls within a band Ofcom will use the lower figure of the turnover band to calculate the administrative charge payable.

119. In summary, these bands are as follows:[17]

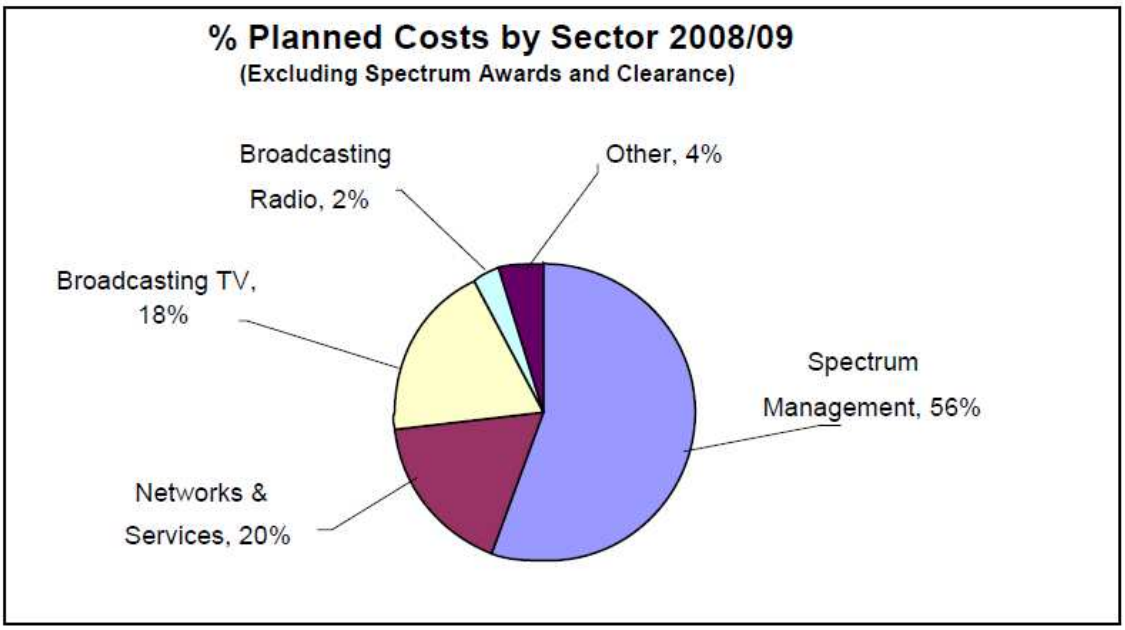
Band		Relevant Turnover	Fee payable (£)
Bottom (£)	Top (£)		
0	5,000,000	0	-
5,000,000	10,000,000	5,000,000	3,265
10,000,000	25,000,000	10,000,000	6,530
25,000,000	50,000,000	25,000,000	16,325
50,000,000	75,000,000	50,000,000	32,650
75,000,000	100,000,000	75,000,000	48,975
100,000,000	150,000,000	100,000,000	65,300
150,000,000	200,000,000	150,000,000	97,950
200,000,000	300,000,000	200,000,000	130,600
300,000,000	400,000,000	300,000,000	195,900
400,000,000	500,000,000	400,000,000	261,200
500,000,000	600,000,000	500,000,000	326,500
600,000,000	750,000,000	600,000,000	391,800
750,000,000	1,000,000,000	750,000,000	489,750
Above 1,000,000,000	-	Actual "relevant turnover"	0.0653%

[17] Ofcom, *Statement of charging principles* 2008/9.

REFERENCE BACK TO OFCOM'S ACTUAL COSTS

120. As indicated above, calculates the administrative fees payable with reference to its actual costs in the relevant charging year. Each year, Ofcom publishes a work programme in its annual plan, which is a public document. The annual plan contains details of Ofcom's operating budget, capital expenditure, loans received and incoming revenue (including licence fees received).

121. In addition to this, Ofcom also separately itemises the costs per sector (networks / services, television, radio, spectrum management), as administrative costs are calculated on a sector-by-sector basis. In the 2008/2009 financial year, Ofcom has projected its sector-by-sector costs to be as follows:[18]



[18] Ofcom, *Statement of charging principles* 2008/9.