



**REPORT OF THE PUBLIC INQUIRY
ON THE
NIGERIAN COMMUNICATIONS (ENFORCEMENT PROCESSES,
ETC.) REGULATIONS**

1.0. INTRODUCTION

The Nigerian Communications Commission (the Commission) pursuant to its powers under Section 72 of the Nigerian Communications Act 2003 (the Act) reviewed the Nigerian Communications (Enforcement Processes, etc.) Regulations 2005 (the Regulations). Based on the Commission's policy of participatory rule-making procedure, the Regulations was published on its website for comments from the general public, especially telecommunications operators and other stakeholders.

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

1. Airtel Networks Limited
2. Emerging Markets Telecommunication Services Limited (Etisalat)
3. MTN Nigeria Communication Limited
4. Breeze Micro Limited
5. Wireless Applications Service Providers' Association of Nigeria (WASPAN),
and
6. Punuka Attorneys & Solicitors.

As required by law, a Public Inquiry on the Regulations was scheduled for July 14, 2015 and a Notice of the Public Inquiry was published in Guardian Newspapers on Wednesday June 24, 2015, in Thisday Newspaper on Thursday June 25, 2015 and in Vanguard Newspaper 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 11:25am and was chaired by the Executive Vice Chairman, Dr Eugene Juwah. The Forum was attended by One Hundred and Twenty (120) persons made up of representatives of telecommunications companies, interested stakeholders, the media and staff of the Commission.

The EVC welcomed participants to the Forum. He stated 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 also highlighted the primary objectives of the Regulations which include:

- Providing more robust regulatory framework for effective and efficient processes.
- Providing the procedures for carrying out enforcement in the industry.

In addition, the EVC noted that the draft Enforcement Regulations which is an amendment of the Regulations made by the Commission in 2005, reflects modern industry practice and in many instances has provided increased fines for contraventions.

Thereafter, he encouraged 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. Thereafter, Mr. Gwa Tobbie Mohammed (Assistant Director, Legal & Regulatory Services) made a presentation on issues raised by stakeholders on the Regulations prior to the Public Inquiry.

A. General Overview of the Enforcement Processes Regulations

The Regulations is made up of Twenty-Two (22) Regulations and structured into Six (6) Parts. Also included in the Regulations are Two (2) Schedules. The Regulations deal with several issues including the Preliminary Provisions, General Processes and Procedures for Exercising Monitoring and Enforcement Powers, Consumer Affairs and Technical Regulations, Administrative Fines, Grounds for Revocation of Licence and Miscellaneous Provisions. The Schedules consist of general forms and specific administrative fines.

B. Review of Submissions Received

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

1. Scope of the Regulations

Comment

The Regulations should not create new obligations outside its scope, rather it should focus on how the Commission monitors and enforces compliance

with existing stipulations under the Act, existing Guidelines, Directives and Regulations.

Response

Not accepted. Section 72 of the Act empowers the Commission to review any Rules, Guidelines and Regulations it makes in a process that may include varying, modifying or repealing its provisions as the Commission has done in the present circumstances. Moreover, no new obligations have been created that can be said to be outside the scope of the Regulations.

2. Process for Initiating Monitoring and Enforcement

Comment 1

The phrase “enforcement report” used in Regulation 2(1) (b) should be defined.

Response

Not accepted. However, instead of using the narrow phrase “enforcement report”, the word “report” will be used in the Regulations for clarity.

Comment 2

Form A1 which was omitted from Regulation 2(1) (b) as reviewed should not have been deleted.

Response

Form A1 will be re-introduced. However, a report to initiate monitoring and enforcement will not be considered invalid on grounds that it was not in the prescribed form as long as it contains the necessary information.

Comment 3

The decision to delete Form A2 along with the entire Regulation 2(2) should be reversed to ensure transparency of the process and accountability to all stakeholders. Furthermore, the timeline for completion of the enforcement exercise should be indicated.

Response

Accepted. The Commission will acknowledge receipt of all reports and complaints, although it may not be feasible to indicate a timeline for completion of the enforcement exercise.

3. Response to an Enforcement Report

Comment

Regulation 2(3) excludes the erstwhile provision which required the Commission to respond promptly to enforcement reports made by persons

under the Regulations. The provision should be retained and amended thus: “*The Commission shall promptly respond to enforcement reports pursuant to subsection (1)(b) of this Section*”

Response

Not accepted. The Regulations did not require any prompt response by the Commission as claimed. It suffices to say however, that the Act has specified timelines which the Commission is mandated to comply with.

4. Publication of Enforcement Activities

Comment

Regulation 2(4) should be deleted as it contradicts the spirit of the confidentiality provision of Sections 59(1), 60(1), and 68(2) of the Act and it does not sufficiently take into consideration the commercial interests of licensees to which it relates.

Response

Not accepted. This provision seeks to ensure that besides monetary sanctions, publication of enforcement activities may serve as an effective deterrent to defaulters.

5. General Principles of Monitoring and Enforcement Powers

Comment

The observance of fair hearing should also be included in the general principles of monitoring and enforcement.

Response

Not accepted. Regulation 3 already state that the principles of fairness (which entails fair hearing among others) will be observed.

6. Civil Enforcement Proceedings

Comment 1

The phrase “*Without Prejudice to*” in Regulation 4(1) should be amended to “*Subject to...*”

Response

Accepted.

Comment 2

In view of the confidentiality provisions embedded in Sections 59(1), 60(1), and 68(2) of the Act, Regulation 4(2) should be amended to “*The Commission may issue directions in writing to any person or licensee pursuant to Chapter V of the Act.*”

Response

Not accepted. It is not the whole of Chapter V of the Act (section 53 – 89) which deals with Directions. Only sections 53-56 of the Act deals with Directions. Section 59 and 60 deal with Private Inquiries and Publication of Reports on Public Inquiries.

Comment 3

In order to forestall abuse of Regulation 4(3), the specific law enforcement agencies from which the Commission can seek assistance should be defined.

Response

Not accepted. It may be counterproductive for the Commission to restrict itself to only particular agencies from which to seek assistance. Apart from the fact that every law enforcement agency has its powers and functions defined by law, in the 15 years that this provision has been in place, no incidence of abuse has been cited against the Commission.

7. Procedure for Exercising Power to Seal-off Premises or Seize Equipment

Comment 1

Regulation 5(1) (a) should be amended to reflect the fact that access to such facilities and the power to authorize the Commission’s officers/inspectors may only be issued by competent and authorized employees of the owners of such facilities.

Furthermore, the phrase “*use howsoever*” should be deleted so as to ensure accountability

Response

Not accepted. This is not a matter to be provided for in the Regulations as it is the duty of operators to assign the appropriate staff to issue such authorization. On the phrase “*use howsoever*”, it is the opinion of the Commission that its usage in the context does not relate to accountability but functionality.

Comment 2

The phrase “*court of competent jurisdiction*” in Regulation 5(3) (a) should be defined.

Response

There is no need to define this phrase as Section 141 of the Act has already defines this as any magistrate or judge.

Comment 3

The provisions of Regulation 5(3) (b) be amended to read thus: the Commission shall “*on demand produce to the person against whom the powers under this regulation are being exercised, such warrant and letter of authority issued under paragraph (4) of this regulation*”

Response

The suggestion that the warrant be produced on demand is accepted. There is however no need to replicate the requirement to produce the letter of authority as this is already provided in section 141(3) (a) of the Act.

Comment 4

Under Regulation 5(4), in addition to producing a letter of authority from the Commission, an authorized officer or inspector should also be required to produce a *warrant* issued by a court to the person or licensee to which the execution is to be levied.

Response

Not accepted. A warrant will be obtained and produced in the exercise of powers under section 141 of the Act if such execution is to be carried out against a person who is not a licensee of the Commission. However, where the person is a licensee, the proviso to section 141(3) implies that no warrant is required.

8. Imposition of Terms of Imprisonment for Obstructing of Monitoring and Enforcement Duties.

Comment

It would require an Act of the National Assembly to create offences/crimes and impose the terms of imprisonment, therefore, the Commission should seek the advice of the Attorney General pursuant to the exercise of this provision

Response

Not accepted. The National Assembly has vide the Act granted the Commission rule-making powers. However, the Regulations will be amended such that it only creates the offence while punishment will be as stipulated under section 140 of the Act.

9. Preservation of Subscribers’ Basic Information for Six (6) Months

Comment 1

The definition of “basic information” which is first mention in Regulation 7(1) is too broad. It was suggested that the definition should be aligned with the Registration of Telephone Subscriber’ Regulations which includes biometric data in the definition of “subscriber information” required for law enforcement purposes and also precludes operators from retaining subscriber information pertaining to biometrics & other personal information of a subscriber

Response

Not accepted. This provision has been redrafted to read preservation of “Call Data Records” instead of “Subscribers’ Basic Information”. Furthermore, the data-retention period will be tied to the Consumer Code of Practice Regulations which is being reviewed to ensure conformity with the Cybercrime (Prohibition, Prevention etc) Act 2015.

Comment 2

Subscribers’ basic information (including mobile call numbers) are usually collected and maintained by Value Added Service Providers (VASPs) for only their business purpose. It was suggested that Regulation 7(1) should seek to preserve a fair balance between the privacy expectations of citizens and the legitimate needs of law enforcement.

Response

This Regulation has been redrafted and now provides for the retention of Call Data Records.

Comment 3

Form C1 which was omitted from Regulation 7(2) as reviewed should not have been deleted

Response

Noted. The Regulation will eb redrafted to include Form C1 requesting for release of information

Comment 4

In line with the definition of “non-basic information” in the Regulations, Form C1 should be amended to include the request for information on the operations of the licensee.

Response

Not Accepted. The “non-basic information” referred to is about a customer and not the licensee.

Comment 5

The Commission should clarify who would qualify as a “relevant authority” in the context of Regulation 7(2).

Response

The Regulations already define “Relevant Authority.”

Comment 6

Regulation 7(3) should be deleted as the Commission cannot by regulation seek to alienate a subscriber’s fundamental right to the privacy of their CDRs by exempting itself from the need to observe due/statutory process where such fundamental right to privacy is to be breached for any purpose.

Response

Section 146 of the Act has already made provision for the Commission to exercise this power without the express requirement to observe the procedure in Regulations 7(1) and (2).

10. Guidelines for Promotion and Advertisement of Services.**Comment 1**

Regulation 8(2) conflicts with the functions of Advertising Practitioners Council of Nigeria (APCON). The Commission and APCON should reach an understanding/collaboration to resolve this issue.

Response

Not Accepted. There is no conflict here with the functions of APCON as a licensee is also be required to obtain the requisite approval from APCON as applicable.

Comment 2

Having regard to the status of the APCON legislation as an Act of the National Assembly, in the event of any inconsistency between that Act and these regulations, that Act would prevail, therefore this provision should be amended to read thus: *“Subject to the provisions of the Advertising Practitioners Act of 1992,..... Provided that in the case of any conflict between the provisions of this regulations and the Advertising Practitioners Act, the provisions of the Advertising Practitioners Act shall prevail”*

Response

Not Accepted. APCON’s considerations are different from those of the Commission. The Commission is concerned about issues of Quality of Service, anti-competition; etc.

Comment 3

Regulation 8(3) should state that where the Commission does not communicate its decision to an operator within the specified timeline, this should be deemed to be an approval of the promotional products or services and the operator upon expiry of the said timeline should be at liberty to launch the promotional products or services.

Response

Not accepted. The ‘deeming’ of an application as having been approved will negate the express requirement that the approval of the Commission must first be obtained. However the time-line for communication of promotional products/services has been redrafted to read fourteen (14) days.

11. Miscellaneous Provisions Relating to Spectrum Frequency Interference

Comment

Regulation 10 is too rigid as it did not take into consideration stakeholders operational realities in the area of radio interference.

Response

This provision will be redrafted and a sub-regulation included to state that *“licensee shall not be considered as having contravened sub-regulation (1) where it establishes to the satisfaction of the Commission, that any harmful interference was unintended and that the licensee immediately took steps to rectify the interference.”*

12. Acts Constituting Contravention

Comment

Regulation 11 does not take cognizance of the contraventions which may arise as a result of inadvertence, force majeure or other unavoidable circumstances.

Response

Accepted. This regulation has been redrafted to exclude force majeure events.

13. Provisions on Quality of Service

Comment

The QoS Regulations already specify the minimum standards for quality of service and the penalties for contraventions of the expected performance thresholds. Thus, the imposition of administrative penalties under two separate enactments in respect of the same infraction would directly contradict the duty to observe proportionality of sanctions with which the Commission is charged.

Response

Accepted. Regulation 12 will reflect that the fines in the Quality of Service Regulations will apply for this purpose.

14. Administrative Fines for Contravention of Technical Regulations

Comment

The term “*without prejudice to...*” used in Regulation 13 should be replaced with “*Subject to...*”

Response

Not accepted. However, the term has been changed to read “*Notwithstanding*”

15. Guiding Principles for Imposing General Administrative Fines

Comment 1

Regulation 14(2) (g) establishes a subjective benchmark for imposition of fines as there is no standard measure of “*attitude and conduct*”

Response

Accepted. This provision will be deleted

Comment 2

Regulation 14(2) (i) should be replaced with a provision that the previous record of the licensee with regards to regulatory compliance and frequency of breach/contravention will be considered in the imposition of the administrative fines.

Response

Accepted.

Comment 3

Regulation 14(2) (l) refers to the size of the annual turnover of the person who committed the contravention. However, there is no definite statement as to whether the “*person*” is used in a legal or natural sense. Accordingly, a clear statement as to the interpretation of person as a legal person should be included.

Response

Not accepted. “*Person*” is defined in the Act.

Comment 4

The provisions of Regulation 14(2) (l) runs contrary to the spirit of impartiality. All Operators must be treated fairly and equally irrespective of their size and should be expunged.

Response

Not accepted. The Competition Practices Regulations also recognizes dominance in the industry which entails imposing obligations on an operator over and above other operators, on account of the size of its market share.

Comment 5

This provision extends the purview of enforcement sanctions beyond serving to fill a gap to being capable of inflicting duplicated punitive obligations upon a licensee. It therefore recommends that this provision be amended to read thus; “*Subject to...provided that such administrative fines relate only to instances where specific...*”

Response

Administrative fines will only be imposed where specific fines have not been provided by the Act or any Regulations made thereunder.

Comment 6

Granting of fair hearing should be considered as a critical factor before imposing fines on operators to afford an alleged wrongdoer the opportunity to make representation.

Response

Regulation 3(a) has already made provision for fair hearing.

Comment 7

The Commission should consider the establishment of an independent mechanism (made up of adjudicators who are independent of both the licensee and the Commission) for hearing of appeals against fines/sanctions imposed further to Regulation 14.

Response

Sections 86-88 of the Act has already provided a procedure for review of decisions of the Commission including issues of fines/sanctions.

Comment 8

There is a need to further review administrative fines pertaining to anti-competitive pricing, pricing in violation of existing directives/determination/orders of the Commission and other elements of economic regulation so as to reflect the intention of Regulation 14(2) and ensure that the penalty is commensurate to the contravention and thus serve as a deterrent.

Response

Accepted. The fines have been reviewed upwards.

16. Imposition of Specific Administrative Fines

Comment 1

The Commission should replace the phrase “*Without prejudice to...*” in Regulation 15(1) with “*Subject to...*” to eliminate the doubts pertaining to its purport and further avoid the potential exposure of licensees to double jeopardy.

Response

Not Accepted. The intention is properly conveyed as drafted.

Comment 2

The time-limit of 14 days in Regulation 15(2) to pay a fine is too short. The administrative fines are also high and it could take longer time to source the funds. Furthermore, a licensee may intend to challenge the alleged liability and 14 days might be too short to file a defense. Finally, the Commission ought to notify a licensee of its intention to sanction.

Response

Not accepted. The 14 days is sufficient time to pay a fine or file a challenge. Moreover, by Section 88(2) of the Act, the decision of the Commission to impose a fine remains binding until expressly set aside by a final judgment of a court hence, challenging it does not affect the requirement to pay. However, the Commission accepts the suggestion to notify licensees of its intention to sanction. This is in line with the current practice where the Commission issues “Pre-Enforcement Notice” to licensees before fines are imposed.

Comment 3

Section 142(3) of the Act makes provision for a 1 month pre-action notice and it could be interpreted to mean an attempt to impede access to court where the 14 days’ notice to pay elapses before the statutory pre-action notice matures.

Response

Not accepted. This is not an attempt to impede a licensee's constitutional right to seek redress in court. The Courts recognize pre-action notices which must be served where mandated by law.

Comment 4

Regulation 15(4) would amount to multiple punishments for the same offense and is unfair/inequitable. Consequently, withholding of regulatory

assistance should only apply where a licensee fails or delays in paying the fine imposed by the Commission.

Response

Accepted. The Regulations will be amended to indicate that withholding of regulatory assistance will be invoked where a licensee fails to comply with any sanction, pay any fine imposed by the Commission, or if there is a case of a repeated infraction.

Comment 5

The Regulations should define the range-of-actions which may be deemed as “regulatory assistance”

Response

Accepted. Regulatory Assistance will be defined as *“any action which the Commission is empowered to carry out under the Act and the Regulations made thereunder.”*

Comment 6

Regulation 15(4) grants the Commission broad powers which may be subject to misapplication. Accordingly, this power should be exercisable in relation to certain offences/contraventions which are clearly classified as serious offences and should be applicable where the contravention has been duly determined/ proved.

Response

Not accepted. The classification of contraventions in the manner sought will not serve the purpose of discouraging all forms of contraventions. The provision has however been amended such that withholding regulatory assistance will be done where there is a failure to comply with sanctions, delay to pay fine or for repeated infractions.

Comment 7

Where a licensee continues to contravene the provisions of the Guidelines on Advertisements and Promotions, the Commission should withhold all regulatory services for such a period to be determined by the Commission.

Response

The Regulations already provide for withholding of regulatory assistance. However, the Regulations shall be amended to specify withholding of regulatory assistance if there is a case of repeated infractions.

17. Procedure for Revocation of Licence

Comment 1

Regulation 16 does not provide the procedure for revocation of a license; rather it outlines situations that might warrant revocation of a license and the provisions contradict the clear provisions of the Act on license revocation.

Response

This Regulation has been redrafted to read “Grounds for Revocation of Licence”. The grounds however do not contradict the provisions of the Act, rather they are additional grounds.

Comment 2

The phrase “*failure to comply with type approval*” in Regulation 16(1) (c) is ambiguous. Since type approval tests are conducted towards the issuance of a certificate which confirms that a proposed communication equipment meets set standards.

Response

This has been redrafted to read “*if the licensee fails to obtain type approval certificate for its equipment or facilities or comply with the conditions attached to any type approval certificate issued by the Commission pursuant to section 132 of the Act*”

Comment 3

The provision that a licensee would be notified and given an opportunity to make representations or redress the situation before licence revocation comes as a proviso after Regulation 16(1)(d). It is unclear whether it will also apply to Regulation 19(1)(e) which deals with revocation for giving false or misleading material statement in its application for a licence.

Response

Noted. The Regulations will be rearranged such that the proviso after Regulation 16(1)(d) will come after Regulation 16(1)(e).

Comment 4

The phrase “*in addition*” used in Regulation 16(1) should be amended to read “*as an alternative.*”

Response

Not Accepted. The intention of the Regulations is properly conveyed as drafted.

Comment 5

It was recommended that principles such as fairness, impartiality, gravity and frequency of contravention should be stated as guiding principles in the exercise of the discretion of the Commission in Regulation 16 (2) to either impose a fine or recommend changes in management of the contravening licensee.

Response

Not accepted. Regulation 3 has already placed a responsibility on the Commission in exercising its enforcement powers to be guided by principles which include transparency, fairness, non-discrimination proportionality etc.

Comment 6

The proviso to Regulation 16(2) which gives power to the Commission impose a fine on a licensee “in addition” to a licence revocation appears to be absurd in context. It was recommended that the phrase “in addition to” be amended to “as an alternative”.

Response

This proviso has been deleted.

18. Interpretation**Comment**

Basic Information - The phrase “*such other information as the Commission may, from time to time, determine...*” should be deleted.

Response

Not accepted.

19. Failure to Provide Information Required by the Commission or Providing False/Misleading Information**Comment**

While a stakeholder suggested that the fine of ₦5,000,000.00 should be decreased to ₦1,500,000.00, another suggested that the Commission should retain the fine under the extant Regulations.

Response

Not Accepted. These fines are to serve as a deterrent.

20. Obstructing or Preventing Howsoever the Exercise of the Powers of the Commission in Regard to Monitoring and Enforcement Pursuant to Section 141 of the Act**Comment**

While a stakeholder suggested that the fine of ₦5,000,000.00 should be decreased to ₦1,500,000.00, another suggested that the Commission should retain the fine under the extant Regulations.

Response

Not Accepted. These fines are to serve as a deterrent.

21. Occasioning Harmful Interference in the Context of Regulation 11

Comment

While a stakeholder suggested that the fine of ₦5,000,000.00 should be decreased to ₦3,000,000.00, another suggested that the Commission should retain the fine under the extant Regulations.

Response

Not Accepted. These fines are to serve as a deterrent.

22. Contravention of Section 133(1) of the Act

Comment

While a stakeholder suggested that the fine of ₦5,000,000.00 and a further sum of ₦500,000.00 for each model of equipment should be decreased to ₦750,000.00, another suggested that the Commission should retain the fine under the extant Regulations.

Response

Not Accepted. These fines are to serve as a deterrent.

23. Contravention of Section 133(2) of the Act

Comment

While a stakeholder suggested that the fine of ₦5,000,000.00 and a further sum of ₦500,000.00 for each model of equipment should be decreased to ₦750,000.00, another suggested that the Commission should retain the fine under the extant Regulations. A third stakeholder stated that the fine of ₦500,000.00 for each model of equipment seems excessive because telecommunication equipment may include smaller items that are mass produced. e.g. mobile handsets.

Response

Not Accepted. These fines are to serve as a deterrent.

24. Violation of Guidelines on Advertisements of Products and Services

Comment

While a stakeholder recommended that the fine of ₦10,000,000.00 should be decreased to ₦1,500,000.00, there was also a recommendation for an increase to ₦250,000,000.00

Response

Not Accepted. However, the penalty shall be redrafted to read: “~~₦10,000,000.00~~ and forfeiture to the Commission of all proceeds obtained from the unapproved promotion/ advertisement for as long as the contravention persists”

25. Failure to Obtain the Prior Approval of the Commission in Respect of any Promotion or Services

Comment

While a stakeholder suggested that the fine of ₦5,000,000.00 should be decreased to ₦3,000,000.00, another suggested that the Commission should retain the fine under the extant Regulations.

Response

Not Accepted. These fines are to serve as a deterrent.

26. Failure to Maintain Required Records, Data, Forms or Information

Comment

A stakeholder suggested that the fine of ₦5,000,000.00 and a further sum of ₦500,000.00 per day should be decreased to ₦750,000.00 and a further sum of ₦500,000.00 per day after expiration of the notice as long as the contravention persists. Another Stakeholder suggested that the Commission should retain the fine under the extant Regulations.

Response

Not Accepted. These fines are to serve as a deterrent.

27. Operation of Services Outside the Scope of a Licence other than Contravention of Section 31 of the Act

Comment

While a stakeholder suggested that the fine of ₦10,000,000.00 should be decreased to ₦6,000,000.00, another suggested that the Commission should retain the fine under the extant Regulations.

Response

Not Accepted. These fines are to serve as a deterrent.

28. Contravention of Section 100 of the Act

Comment

While a stakeholder suggested that the fine of ₦10,000,000.00 should be decreased to ₦1,500,000.00, another suggested that the Commission should retain the fine under the extant Regulations.

Response

Not Accepted. These fines are to serve as a deterrent.

29. Failure to Comply with any Direction, Decision, Determination or Orders of the Commission

Comment

A stakeholder suggested that the fine of ₦10,000,000.00 and a further sum of ₦1,000,000.00 per day should be decreased to ₦6,000,000.00 and a further sum of ₦500,000.00 per day after expiration of the notice as long as the contravention persists. Another Stakeholder suggested that the Commission should retain the fine under the extant Regulations.

Response

Not Accepted. These fines are to serve as a deterrent.

30. Transmission by a Licensee of Indecent, Subversive or Obscene Material
Comment

While a stakeholder suggested that the fine of ₦10,000,000.00 should be decreased to ₦3,000,000.00, another suggested that the Commission should retain the fine under the extant Regulations.

Response

Not Accepted. These fines are to serve as a deterrent.

31. Violation of any Regulations Issued or Published

Comment

A stakeholder suggested that the fine of ₦10,000,000.00 should be decreased to ₦2,000,000.00. Another stakeholder submitted that this provision should be deleted as it has a blanket effect to sanction licensees for infractions which may already have been penalized under the act or other regulations.

Response

Not Accepted. These fines are to serve as a deterrent. However, where there are specific fines for infractions under other regulations, this provision will not apply. The provision is meant to address instances where there is no penalty for the infraction in other regulations.

32. Second Schedule Part A, Paragraphs 1-15.

Comment 1

A stakeholder submitted that the fines in the extant Regulations are adequate and should be retained. Also, that the Commission should apply a high degree of empathy and moderation in prescribing fines as operators are already overburdened with multiplicity of taxes and levies.

Response

Considering the several cases of repeated infractions – even after the imposition of sanctions under the extant Regulations, the current fines cannot be deemed as being adequate for purpose of deterring repeated contraventions.

Comment 2

It was suggested that the Regulations should include an escalation clause which will expressly provide for the intervals at which penalties may be reviewed and also the factors (such as inflation) which will be taken into consideration in determining the amounts of the new penalties.

Response

Not Accepted. It is inherent in every subsidiary legislation that there will be a review of same hence there is no need to expressly provide for review in the Regulations. Specifically, such review will cater for any desired review of penalties.

Comment 3

Some of the fines and sanctions relate to contraventions which have been dealt with under the primary regulations for such matters. The provisions should therefore be amended to apply subject to the terms of those instruments, and the Regulations should focus on enforcing such existing regulations rather than creating parallel/conflicting penalties

Response

Not Accepted.

33. Administrative Fine Generally

Comment

The fines are excessive and could lead to crushing liability, therefore lesser amounts should be imposed for each day of default.

Response

Not Accepted. The fines are to serve as a deterrent.

34. Failure to Commence Full Licensed Operations

Comment

The Commission should retain the fine under the extant Regulations.

Response

Not Accepted. The fines are to serve as a deterrent.

35. Contravention of Section 111 of the Act

Comment

A stakeholder suggested that the fine of ₦10,000,000.00 should be deleted and the Commission maintain the previous fine of ₦1,000,000.00.

Response

Not Accepted. The fines are to serve as a deterrent.

36. Transfer or Assignment by a Licensee to a Third Party Without the Prior Written Consent of the Commission of any Rights Interests or Obligations under a License

Comment

It was suggested that the fine of ₦10,000,000.00 and a further ₦500,000.00 per day calculated from the effective date of the transfer or assignment should be decreased to ₦750,000.00 per day calculated from the effective date of the transfer or assignment. Another stakeholder suggested that the Commission should retain the fine of ₦500,000.00 per day in the extant Regulations.

Response

Not Accepted. The fines are to serve as a deterrent.

37. Failure to Obtain the Prior Written Consent of the Commission in Respect of any Joint Venture Arrangement by or with a Licensee or such Percentage Level of Changes in the Shareholding Structure of a Licensee

Comment

It was suggested that the fine of ₦5,000,000.00 and a further ₦500,000.00 per day calculated from the effective date of the joint venture or change should be deleted and the fine under the extant Regulations of ₦100,000.00 per day should be retained.

Response

Not Accepted. The fines are to serve as a deterrent.

38. Using Frequency Modulation other than that which is Authorized under the License

Comment

It was suggested that the fine of ₦1,000,000.00 for every day that the contravention persists should be deleted and the fine under the extant Regulations of ₦50,000.00 per day should be retained..

Response

Not Accepted. The fines are to serve as a deterrent.

39. Using Carrier Frequencies other than that which is Authorized under the License

Comment

It was suggested that the fine of ₦1,000,000.00 for every day that the contravention persists should be deleted and the fine under the extant Regulations of ₦50,000.00 per day should be retained..

Response

Not Accepted. The fines are to serve as a deterrent.

40. Unauthorized SIM Replacement

Comment 1

This penalty does not take into account the factors limiting licensees' responsibility for fraudulent SIM swaps and should be deleted.

Response

Not Accepted. Licensees are expected to enhance their SIM Replacement procedure hence sanctions will be imposed for non-compliance with the procedure.

Comment 2

The Commission should state what constitutes a "*Fraudulent/unauthorized SIM Swap*".

Response

This phrase has been redrafted to read "*unauthorized SIM Replacement*".

Comment 3

All penalties pertaining to SIM Swaps should be removed from the Regulations until industry consultations on the draft SIM Replacement Guidelines are concluded.

Response

Not accepted. In line with regulatory best practice that Guidelines should not contain penalties/sanctions, completion of consultation on the SIM Replacement Guidelines will not affect/change any penalty prescribed in the Regulations.

41. Sale of Pre-registered SIM Card

Comment 1

An operator should not be held responsible for the sale of pre-registered SIM cards which is carried out by dealers that are licensees of the Commission. Accordingly, the Commission should not sanction operators for an activity outside their control.

Response

Not Accepted. Operators are liable for actions of their agents, since the operators are responsible for selecting the agent to perform a function which is ordinarily to be performed by the operator.

Comment 2

It remains outside the control of the licensees to determine the use to which a subscriber may choose to put a SIM card which they have registered in their name. Therefore, this provision should be deleted.

Response

Not Accepted. Operators may not be liable for the use to which subscribers put their SIMs, but are liable for SIM cards pre-registered before sale.

42. Knowingly Providing False Subscriber Information for Registration

Comment 1

The Commission should reconsider the imposition of a fine on operators in this regard since no operator is directly responsible for fraudulent registration of SIM cards.

Response

Accepted. Liability will be placed on the subscriber.

Comment 2

This provision is unclear as it tends to duplicate the provisions of Regulation 10 of these regulations and should be deleted.

Response

Not Accepted. These are two distinct violations.

43. Failure to Capture Subscriber Information/Data in Accordance with the Registration Specifications Pursuant to the Registration of Telephone Subscribers Regulations made by the Commission.

Comment 1

The term “wrongful subscriber information” is vague and gives room for ambiguity, in view of this, the fine should be dropped.

Response

For clarity purposes, the phrase will be redrafted to read “*incorrect subscriber information*”.

Comment 2

The Registration of Telephone Subscribers Regulations already have very clear provisions which adequately cover matters related to central database, as such there is no need for duplication. This provision should be deleted.

Response

This is not a duplication. This provision refers to capturing and transmitting wrong information intentionally.

44. New Provisions

Comment 1

Provision should be made for the Commission to decrease fines imposed on an operator and to consider the following factors in reaching a decision:

- i. The extent to which the licensee has taken steps in advance to identify and mitigate external factors that might result in a contravention;
- ii. The extent and timeliness of any steps taken to end the contravention in question, any steps taken for remedying the consequences of the contravention.

Response

Not Accepted. Provision has already been made for these factors to be taken into consideration before fines are imposed.

Comment 2

Provision should be made that upon consideration of the representation made by an operator in relation to the above factors, the Commission should determine an appropriate and proportionate penalty. However, the amount imposed must not exceed the maximum penalty prescribed in schedule 2 for the consideration.

Response

Not Accepted in view of the preceding response of the Commission.

Comment 3

The Commission should consider the inclusion of compliance credits or rewards in the Regulations to motivate compliance and discourage breach.

Response

Not Accepted. Operators are statutorily obliged to operate within the law hence there is no need for any compliance incentive.

C. Additional Issues Raised at the Public Inquiry

At the Public Inquiry, stakeholders made comments and raised additional issues which the Commission addressed. Highlights of the issues that were raised and response given by the Commission are as follows:

1. Communication of Approval of the Content of Promotional Products

Comment 1

A stakeholder sought clarification on the obligation, if any, imposed on the Commission to communicate the approval of the content of an advertisement and promotion to an operator within 14 (fourteen) days. Further clarification was sought on what actions are open to an operator in instances where approval is not conveyed within the stipulated timeline.

Response

For emphasis, failure by the Commission to respond within the allotted 14 (fourteen) days cannot be deemed to be an implied approval. Where the Commission is unable to meet the requirement to convey approval within the period, it shall in line with its processes, write to intimate the operator that its application is still being processed.

Comment 2

The Commission should also impose an obligation on itself to convey the approval of an advertisement/promotion so as to establish a balance. This is necessary because the “*deeming*” of approvals is recognized under the Digital Mobile Licence (DML) and should therefore apply to applications on advertisement/promotions.

Response

The Commission took into consideration the provisions of Condition 4 of the DML while reviewing the Regulations. The said licence condition applies to “*discounts*” and is not connected to “*advertisements and promotions*”. Furthermore, since the Regulations specifically require prior written approval, to allow “*deeming*” will create chaos in the regulation of promotions and advertisements.

2. Fines Relating to SIM Replacement

Comment

A stakeholder requested for the rationale for duplicating fines relating to SIM Replacement in both the Regulations and the Registration of Telecoms Subscribers Regulations.

Response

In reviewing the Regulations, the Commission took into consideration provisions of the Registration of Telecoms Subscribers Regulations to ensure that the fines provided therein are not duplicated in the Regulations. This notwithstanding, the Commission shall again cross-check the Regulations to avoid duplicity and conflict.

3. Sale of Pre-Registered SIM Cards**Comment 1**

Stakeholders stated that the requirement for operators to deactivate a new SIM Card if there is no revenue yielding activity within 48 hours of activation is not reasonable.

Response

The period of 48 hours is reasonable time for a subscriber who buys, registers and activates a SIM Card for another person to send it that person anywhere within Nigeria. Therefore, the stand of the Commission remains that all newly activated SIM Cards should be deactivated if no revenue yielding activity takes place within 48 hours of activation.

Comment 2

It was canvassed that since the sale of pre-registered SIM cards by agents is not within the control of operators, the operator should not be held liable.

Response

The Commission reiterates that such agents are at all times acting on behalf of the operators. Accordingly, operators will be held responsible for the sale of any pre-registered SIM card by such agents. Moreover, it also behooves operators to detect if there has not been any activity on a registered SIM card within 48 hours.

3.0. GENERAL COMMENTS

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

The Public Inquiry ended at 1:37pm.

Dated this 14th day of July 2015

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