



CONSULTATION PAPER

Proposed Universal Access and Service Levy for 2017

Issued on 24 August 2017

Introduction

NICTA has had considerable and extended discussions with operator licensees about the introduction of a Universal Access and Service (UAS) levy in recent years. The current paper concerns the UAS levy for 2017 only.

Legislative Requirements

Section 107 of the *National Information and Communications Technology Act, 2009* ("the Act") sets out the procedure that NICTA must follow in levying charges on operator licensees for the Universal Access and Service (UAS) Fund.

NICTA is required under subsection (2) of the Act to set the levy as a percentage of the net revenues of each operator licensee at a level, to be determined annually, to apply from the beginning of each fiscal year –

- (a) to achieve the desired level of funding for the Fund for that year as advised to NICTA by the UAS Board, less any amounts paid by NICTA in the previous year; and
- (b) not exceeding a maximum percentage as prescribed by the regulations.

There is no requirement in the Act for NICTA to consult with operator licensees or other parties in setting the percentage levy for any particular year under Subsection 107(2) of the Act. However in discussions earlier in 2017 with representatives of a number of operator licensees potentially subject to a levy under Section 107, NICTA undertook to have further consultations before implementation of a levy for 2017. The current consultation is in furtherance of that specific undertaking.

The process to date

The process that sets the basis for the determination of a levy is set out in Section 108 of the Act.

To date the UAS Board has engaged with NICTA to undertake the following tasks as set out in Subsection 108(1) of the Act:

- (a) identify, develop and estimate the indicative cost of UAS Projects for 2017
- (b) seek and receive stakeholder submissions on proposals for UAS Projects for 2017–
- (c) undertake public consultation
- (d) estimate the proposed aggregate budget for all UAS Projects to be undertaken for the relevant period identified by the UAS Board
- (e) rank the UAS Projects in order of priority having regard to the criteria in paragraph 108(1)(e)
- (f) prepare for consideration by the UAS Board, a report summarising the UAS Projects under consideration, their respective indicative costing, their proposed ranking and the proposed aggregate budget.

The UAS Board has met on 11 May 2017 and considered the report from NICTA on the matters referred to in paragraph 108(1)(f) of the Act. The UAS Board has subsequently on 18 May prepared a report on its recommendations to the Minister. This paper includes those recommendations as background to the establishment of the levy.

The NICTA Board met on 26 May 2017 and determined that the draft UAS 2017 Levy Determination should be subject to public consultation before being formally approved. This determination was made in furtherance of the undertaking given to operator licensees earlier in 2017 that the matter should be subject to a further round of industry consultation prior to approval. The views of the operator licensees will be carefully considered prior to the implementation of any decision by NICTA.

Recommendations determined by UAS Board for UAS Projects in 2017

The UAS Board determined as follows:

- It approved a report under Section 108(2) of the Act which proposed the following UAS Projects for 2017:

(a) Voice connectivity

This project involves the provision of voice service to unserved communities. The UAS Board selected 12 proposed sites for implementation and ranked these sites as shown in the table below. The UAS Board's selection and ranking gave emphasis to sites in remote and less developed areas that are likely to be more deserving and obtain greater benefits from Voice Connectivity.

A minimum of 10 of these sites should be implemented for 2017, having regard to their ranking by the Board, and that additional sites should also be implemented if time and funding permit during 2017.

No.	Province	District/Area	LLG	Census Units	Population Served
1	Central	Goilala	Guari Rural	18	2035
2	Northern	Sohe	Higaturu Rural	16	2066
3	Morobe	Nawae	Nabak Rural	23	5190
4	West Sepik	Aitape/Lumi	West Wapei Rural	10	2224
5	West New Britain	Kandrian/Gloucester	Kandrian Inland Rural	15	2428
6	East Sepik	Ambunti/Drekikir	Tunao Hustein Rural	19	2749
7	Western Highlands	Dei	Dei Rural	15	2750
8	Chimbu	Karimui/Nomane	Karimui Rural	11	3016
9	East New Britain	Pomio	West Pomio/Mamusi Rural	20	3530

10	Madang	Middle Ramu	Josephstaal Rural	16	3638
11	Southern Highlands	Kagua Erave	Erave Rural	25	4627
12	East New Britain	Pomio	Central Inland Pomio	24	4257

The average capital cost per site is estimated to be K600,000 for the 10 sites to be implemented in 2017. Accordingly, the 2017 budget for this proposed project is K6.0 million.

(b) Accelerated Mobile Phone Expansion and Upgrades

This Project is aimed at upgrading base stations from 2G (effectively voice and limited data) to 3G or 4G in areas where, but for UAS funding, would not happen on a commercial basis.

The budget of PGK 2 million is based on upgrading 40 sites at an average capital cost of PGK 50,000. A single contract is proposed to be offered, with specific sites negotiated at the time.

The benefits of these upgrades will be to enable customers in the service areas to better engage in the economy and with government services through access of Internet services.

(c) Connect the Schools

This Project aims to provide internet connectivity and broadband services to all primary, secondary and tertiary institutions in the country that currently do not have such access and are not planned to have such access during the period of the project. This project will, of necessity, extend well beyond 2017.

The Project will be undertaken with the active partnership of the Department of Education whose main role will be to ensure that the educational outcomes of the project are maximized.

The project involves providing internet access, and the provision at each school of a computer laboratory equipped with PCs and printers.

In consultation with the Department of Education, a total of five (5) schools around the country have been initially selected to benefit from this project.

NICTA expects an average cost of K200,000 per site over a period of two (2) years, covering both the establishment and support for each site.

(d) Summary of Budget Requirements

In summary, the cost of the Projects recommended for the remainder of 2017 is K10.00 million made up of:

Project	PGK (million)
Voice Connectivity	6.0
Accelerated Mobile Phone	2

Expansion and Upgrade	
Connect the Schools	2
Grand Total	10.0

2. Ranking: The UAS Board has taken account of the matters referred to in Subsections 108(1)(e) and 108(4) of the Act and has ranked the 'Voice Connectivity' Project first; the 'Accelerated Mobile Phone Expansion and Upgrade Project second; and the 'Connect the Schools' Project third.

UAS Levy

The NICTA Board has considered the UAS Levy Determination attached hereto as Annex "A" and is inviting comments and inputs from interested parties and operators. This levy should yield the budget recommended by the UAS Board for 2017. It is less than the maximum percentage of 2% and takes into account that there is no surplus in the UAS Fund from previous years.

Consultation

NICTA invites operator licensees and other stakeholders to consider and comment on the Draft UAS Levy Determination . Written submissions should be submitted via email to consultation.submission@nicta.gov.pg and must be received by **noon on Friday 8 September 2017**.

Copies of all submissions received will be published on NICTA's Public Register, notwithstanding that consultation is not required by the Act in this case. Additional procedural information is set out in the *Guidelines on the submission of written comments to public consultations and public inquiries*, which are available on NICTA's Public Register.

Contact

If you have any enquiries relating to this consultation please address them to the above email address in the first instance.

Annex "A":

DRAFT DETERMINATION: 2017 UNIVERSAL ACCESS AND SERVICE LEVY

I. EXECUTIVE SUMMARY

1. Part 5 of the National Information and Communications Technology Act, 2009 ("the Act") provides for the implementation of a "Universal Access and Service Regime."
2. The UAS Regime includes a "Universal Access and Service Fund" with the purpose of promoting "the long-term economic and social development of Papua New Guinea by funding approved UAS Projects".
3. UAS Projects generally provide telecommunications or other ICT services to communities or areas that are unserved or under-served.
4. The Universal Access and Service Fund ("UASF") may be funded from various sources, including an annual "Universal Access and Service Levy" ("UAS Levy") paid by operator licensees.
5. In early 2017, NICTA advised operator licensees that NICTA had not made a final decision as to a 2017 UAS Levy, and would consult with them about this, by issuing a draft 2017 UAS Levy Determination for comment by them.
6. This prior advice by NICTA is now being implemented by NICTA providing this Draft 2017 UAS Levy Determination to operators and other interested parties, for comment.
7. In this Draft Determination, NICTA proposes that the 2017 UAS Levy be set at 1% of the net revenues of operator licensees, and seeks written submissions, comments and relevant documents or information from operators on this Draft Determination. These responses of operator licensees are to be provided to NICTA by noon on September 8, 2017.
8. This Draft Determination does not involve any binding or other decision by NICTA on any matter, or any other action by NICTA that is subject to appeal or judicial review. NICTA will make its decision relating to a 2017 UAS Levy only after the close of the comment period referred to above, and consideration of submissions received.
9. NICTA also advises that submissions or comments should be made with adequate substantiation or evidentiary support. Contentions made without such support may not be given significant weight, or be accepted by, NICTA. For example, if an operator claims that a 2017 Universal Access Service Levy in the amount proposed, or a lesser amount, would be unduly harsh financially, the operator should provide audited financial statements from the past several years and other financial documentation relating to more recent periods, to support such a claim.
10. NICTA also sent notices requiring operator licensees to, provide "net revenue" and financial statement information for the purpose of a 2017 UAS Levy calculation. Operators are obliged to provide such information under Section 107(b)(3) of the Act. All operators should provide this information on or before the deadline for responses to this Draft Determination if the information is yet to be provided.

II. Key Background Information

A. Summary Of Legal Framework

11. In preparing this Draft Determination for comment by interested parties, NICTA has considered the relevant provisions of the Act, which include, but are not limited to, the following:

Section 90(1), which states: “The objective of Universal Access and Service Fund is to promote long-term economic development by funding approved Universal Access Service Projects.”

Sections 102 – 104, which provide for the establishment of a Universal Access and Service Fund Trust (“Fund”) and trust account, for NICTA to be the Fund Manager, and that the responsibilities of NICTA, as Fund Manager, include:

- (a) receiving funds collected from operator licensees as Universal Access and Service Levies imposed pursuant to Section 107; and
- (b) directing the disbursement of funds from the Universal Access and Service Fund in accordance with Section 107; and
- (c) collaborating with the UAS Board to determine-
 - (i) the amount of annual revenue required to ensure that the Universal Access and Service Fund remains fiscally sound; and
 - (ii) the calculation of the rate of assessment for the Universal Access and Service Levy imposed pursuant to Section 107.”

Section 101(2), which provides that payment or contributions to the Fund are tax deductible.

Section 105(1), which provides that NICTA, as Fund Manager, “may establish reserves from surpluses resulting from the Universal Access and Service Levy or other sources of funding for the purpose of funding UAS projects in future years.”

Section 107, which relates to NICTA’s setting of a UAS Levy. It provides:

- (1) “Subject to Subsection (2), NICTA may levy charges on operator licensees for the Universal Access and Service Fund, to be known as the Universal Access and Service Levy;
- (2) NICTA shall set the Universal Access and Service Levy as a percentage of the net revenues of each operator licensee at a level, to be determined annually, to apply from the beginning of each fiscal year –

- a. to achieve the desired level of funding for the UASF for that year as advised to NICTA by the UAS Board, less any amount paid by NICTA in the previous year under Section 32(2)(a); and
 - b. not exceeding the maximum percentage as prescribed in the regulations;
- (3) Each operator licensee shall fully co-operate with NICTA, including through the provision of relevant information requested by NICTA, in order to enable NICTA to make the calculation identified in Subsection(2);
- (4) Upon receiving notification of the amount owed as its Universal Access Service Levy, an operator licensee shall submit payment of the Universal Access Service Levy to the Universal Access Service Trust Fund Account;
- (5) The Universal Access Service Levy is a debt owed to the State and may, in addition to other avenues, be recovered in a court of competent jurisdiction;
- (6) Without limiting any other action or remedy available to it if an operator licensee fails to pay an amount owing in accordance with Subsection (4) NICTA may recover the outstanding amount of the Universal Access and Service Levy from funds otherwise payable under Section 115;
- (7) Subject to Subsection (8), any regulations made under s32(4) may determine the timing for payment of the Universal Access and Service Levy and the manner of calculation of any late payment charges; and
- (8) No Universal Access and Service Levy may be charged prior to 1 January 2011."

Section 108, which provides, among other things, for NICTA to report to the Universal Access and Service Board ("the UAS Board") as to the proposed UAS Projects, for the UAS Board to provide the Minister with a report recommending and ranking proposed UAS Projects, and for the Minister (under Section 108(5)(b)), to determine which of the proposed projects will be carried out within the proposed aggregate budget.

Section 109, which provides, among other things, that NICTA "shall develop and carry out a competitive selection process, in order to select a successful bidder for each UAS Project determined by the Minister under Section 108(5)(b)"; and

Section 115, which provides for NICTA to enter into 'Project Agreements' with successful bidders for the implementation of UAS Projects.

12. NICTA also has had regard to the National Information and Communications Technology (Operator Licensing) Regulation, 2010, including Section 22 which states:

"For the purposes of Section 107(2)(b) of the Act, the Universal Access and Service Levy shall be set by NICTA at a level that does not exceed 2 percent of net revenues."

B. Summary Of Factual Background

13. From 1 January 2011, when NICTA was first required to impose a UAS Levy pursuant to Section 107 of the Act, to the present, NICTA has not received any material amount of UAS Levy payments from operators. The main reasons for this are summarized below.
 - a. During the period from 1 January 2011 until November 2016, NICTA had not assessed and imposed any UAS Levy.
 - b. In October 2014, NICTA advised operators that having regard to the substantial "access gap" in PNG identified by NICTA for telecommunications services, and the fact NICTA had not imposed any UAS Levy in prior years, it expected to impose the maximum levy of 2% for the 2015 year.
 - c. However, as the 2015 UAS Projects proposed to the Minister were not approved, and no UAS Levy was imposed for 2015.
 - d. UAS Projects were again developed and budgeted for 2016, and on 6 October 2016 the proposed UAS Projects for 2016 were submitted to the Minister.
 - e. On 10 October 2016, pursuant to Section 105(b) of the Act, the Minister approved two UAS Projects proposed by the UAS Board for 2016, namely "Connect Schools" and "Voice and Mobile Services", with a proposed aggregate budget of K22 million, and directed NICTA to initiate these projects.
 - f. On 5 December 2016, in accordance with the Minister's decision, NICTA assessed and gave operators notice requiring payment of a 2016 Universal Access and Service Levy of 2% of operator net revenues, in the total amount of ~ K 22 million;
 - g. However, Digicel and all other major operators did not pay, or agree to pay, the 2016 Levy. This was said to be based on claims the 2016 Levy was invalid or unlawful. The grounds of complaint by these operators included that they had not been consulted about proposed 2016 projects, or as to the need for, or amount of, a 2016 UAS Levy. The 2016 Levy only was paid by two small operators, in a nominal and immaterial amount.
14. NICTA disagrees with and disputes the operators' claims against the 2016 UAS Levy. In addition, NICTA has taken steps to avoid such disputes in relation to a 2017 UAS Levy, as referred to below.
15. On 23 December 2016, NICTA issued a Consultation Paper on Universal Access and Service Projects for 2017. The Consultation Paper described some proposed 2017 UAS projects that were substantially similar to those approved by the Minister for 2016, and sought input from operators and other interested parties on these or other possible UAS Projects for 2017. This Consultation Paper is attached to this Draft Determination as Annexure 1.

16. Only one operator, Digicel PNG Limited, provided comments on the Report. No commenter proposed additional or different UAS Projects for 2017 from those proposed. After receiving and considering comments from interested parties, NICTA issued a Response Paper, which is attached to this Draft Determination as Annexure 2.
17. Following the above consultation process, on May 11, 2017 NICTA provided a Report to the UAS Board concerning possible 2017 UAS Projects, pursuant to Section 108(1) of the Act. A copy of that NICTA Report is attached to this Draft Determination as Annexure 3. This Report proposed 3 UAS Projects for 2017 namely "Voice Connectivity," Accelerated Mobile Phone Expansion and Upgrade and "Connect the Schools", with an aggregate budget of K 11.2 million.
18. In preparing this Report, NICTA had regard to a range of relevant considerations. These included, but were not limited to, the fact that, since NICTA's initial analysis in 2014 of the likely telecommunications "access gap" in PNG that could be addressed through UAS Projects, there have been substantial increases in telecommunications coverage and access. This expansion in access and coverage was due in part to commercial activities of operators, and in part to projects implemented by NICTA, with World Bank funding.
19. The first of these World Bank projects was the "Voice Telephony Project", which resulted in construction of an additional 59 mobile towers, primarily in unserved areas, at a cost of about \$US 7 million. The contract to build these towers was awarded to Digicel on 14 May 2014.
20. The second and third World Bank projects were for Upgrade of existing 2G Internet access services. It commenced in 2016 using a World Bank grant of \$US5.0 million.
21. Notwithstanding these important projects funded by the World Bank, and the ongoing commercial activities of operators to expand services or coverage, NICTA considered that there still are a substantial number of areas and communities within PNG that are unserved or underserved for key telecommunications services and that, absent UAS Projects, are unlikely to be served, or adequately served, now or in the near or even longer-term future.
22. The World Bank funded projects referred to above also provided significant benefits to several operators, who were the successful bidders to implement these projects, and accordingly received the project funds and used to them to build facilities from which they can derive commercially benefit in the future. These operators also have consistently opposed, and never paid, a UAS Levy to fund such projects.
23. After considering this NICTA Report, the UAS Board approved its Report to the Minister concerning 2017 UAS Projects, pursuant to Section 108(2) of the Act.
24. The UAS Board's Report is attached to this Draft Determination as Annexure 4. It makes some changes to the proposed 2017 budget and project details proposed by NICTA, and requests that the Minister approve three 2017 UAS Projects, namely, "Voice Connectivity", "Accelerated Mobile Phone Expansion and Upgrades," and "Connect the Schools", as modified by the UAS Board, with an aggregate budget of K10 million. The K10 million budget is comprised of K6 million for the "Voice Connectivity" project and K 2 million for each of the "Accelerated Mobile Phone Expansion and Upgrades," and "Connect the Schools" projects.

25. The UAS Board's Report to the Minister on proposed 2017 UAS Projects was submitted to the Minister, pursuant to Section 108(3) of the Act, on or about August 23, 2017.

III. Proposed UAS Levy For 2017

26. NICTA collaborated with and received advice from the UAS Board as to 2017 UAS Projects and the amount of any 2017 UAS Levy. In this respect, the UAS Board has advised NICTA that:
 - a. the desired level of funding in the Universal Access and Service Fund for 2017 is an amount at or approximately at the estimated 2017 project for the proposed projects. The UAS Board's Report to the Minister (K 10 million), plus a modest and prudent contingency for cost variations or overruns; and
 - b. the percentage amount or rate of assessment for a UAS Levy for 2017 should be sufficient to provide the desired level of funding referred to in Paragraph 3, after reductions for any other funding sources obtained for the 2017 Year.
27. Having considered this advice, the above Reports, and other relevant circumstances, NICTA considers that the 2017 UAS Levy should be set at 1% of operator net revenues.
28. The supporting considerations for this include that:
 - a. This amount should allow implementation of the 2017 Projects proposed by the UAS Board, which have been the subject of industry consultation, and extensive deliberations and reporting by NICTA and the UAS Board;
 - b. NICTA considers that it is feasible to tender, award and implement these projects and budget during the remainder of 2017;
 - c. To the extent such projects and budget were not fully implemented in 2017, this UAS Levy amount would provide a prudent but modest level of reserve, contingency or surplus for continuation of these projects in 2018 (or to go toward other projects as may be approved by the Minister), thereby reducing the amount of any 2018 UAS Levy;
 - d. The amount of the proposed 2017 UAS Levy (1%) is significantly less than the maximum percentage of 2% provided in NICTA's regulations, and
 - e. Operator-licensees have known since the enactment of the Act in 2009 that, from January 2011, they will be subject to an annual UAS Levy, from at least late 2014, NICTA advised operators that it believed there was a large access gap and expected for one or more years to impose the maximum 2% annual levy to seek to close that gap, no levies were imposed prior to 2016, and the major operators have opposed, and never paid, any UAS Levy.
29. NICTA also has had regard to legal claims previously made by one or more operators against a 2% UAS Levy as proposed by NICTA in 2015 or 2016, and does not believe these claims require or warrant NICTA not implementing any UAS Levy for 2017, or not implementing the proposed 2017 UAS Levy of 1%.

30. For example, Digicel has contended that NICTA is required to, or should, implement a so-called “Pay or Play” approach, in which:
 - a. a UAS Levy is imposed only “as a last resort”;
 - b. each operator is allowed to negotiate and agree with NICTA to implement one or more UAS Projects instead of paying any Levy or the same levy as operators who do not agree to implement such project; and
 - c. a different levy percentage may apply to different operators.
31. NICTA does not believe that Part 5 of the Act requires such a “Pay or Play” approach.
32. NICTA also is concerned that such a “Pay or Play” approach is contrary to Part 5, or would be vulnerable to legal challenge on that basis. For example a “Pay or Play” approach:
 - a. apparently does not require competitive project tendering between operators to implement each (or any) UAS Projects, which appears to be required under Section 109 of the Act; and
 - b. may involve NICTA imposing different percentage levies on operators, rather than “a percentage” levy amount on all operators, as referred to in Section 107(2).
33. More generally, NICTA would prefer (or need) to have compelling reasons that would warrant departing from the specific provisions of Part 5 of the Act and applying a materially different approach, such as “Pay or Play.” No such justification currently appears to exist. NICTA also prefers to apply the specific scheme and processes identified in the Act, before embarking on experimentation that may not be authorized or consistent with the Act.
34. NICTA also does not believe that Section 107(b)(2) of the Act makes any UAS Levy invalid unless it is imposed prior to the beginning of the year (i.e. prior to 1 January). No provision of the Act so states, and NICTA considers it unlikely that such a rigid requirement would be read-into Part 5 of the Act, as it could impede or frustrate the remedial purpose of Part 5 to benefit needy and deserving communities or areas in PNG. NICTA’s proposed UAS Levy for 2017 also complies with Section 107(b)(2) as it has been formulated with regard to, and “applies” for the period from, the beginning of the 2017 Year.
35. NICTA also notes that, to the extent an operator has legal or other arguments against the proposed 2017 Levy, it should put those forward in its written materials in response to this Draft Determination the proposed 1% UAS Levy for 2017.

Annexures

- Annexure 1: Consultation Paper on Universal Access and Service Projects 2017
- Annexure 2: NICTA’s Response Report
- Annexure 3: NICTA Report on 2017 UAS Projects
- Annexure 4: UAS Report on 2017 UAS Projects