



ISPA Submission
on the
Notice of Intention
of the
Independent Communications Authority of South Africa
to make
Regulations in respect of General Licence Fees
in terms of section 4(4)(a) read with sections 4(1)(c)(iv-v) and 5(7)(a)(iii)
of the Electronic Communications Act 36 of 2005

Published
as General Notice 1305 of 2008
in Government Gazette No 31542
of 24 October 2008.

ISPA Management Committee:

Johann Botha, Ant Brooks*, Marc Furman, Rob Hunter, Jenny King, Lynne Orrock,
William Stucke, Edwin Thompson, Elaine Zinn* (*ex officio)

Section 1

Introductory Remarks

1. Introduction

The publication by the Authority of the Draft General Licence Fee Regulations represents the last base element of the licensing framework imposed by the ECA., and comes in the midst of unprecedented regulatory volatility and uncertainty, particularly surrounding the licence conversion of VANS licences. The efficient finalisation of these Draft Regulations is accordingly important in that it will return a degree of stability to licensing matters.

ISPA confirms that it wishes to participate in any oral hearings or workshops which the Authority may conduct in respect of the intended review and requests a one hour time slot for its oral representations.

1.1. About ISPA

The Internet Service Providers' Association is a South African Internet industry body, duly constituted not for gain. ISPA currently has more than 150 members, comprised of large, medium and small Internet service and access providers in South Africa. Formed in 1996, ISPA has historically served as an active industry body, facilitating exchange between the different independent Internet service providers, the Department of Communications, the Authority, operators and other service providers in South Africa.

1.2. Structure of this submission

ISPA's comments on the decisions are divided into:

- this Section 1;
- Section 2, which contains some general comments
- Section 3, which contains ISPA's specific comments on the Draft Regulations;
- Section 4, which contains our contact details; and
- Section 5, which contains certain annexures.

1.3. Definitions

In this submission the following expressions and words have the meanings assigned to them and derivative expressions and words will have a corresponding meaning: -

1.3.1. "the Agency" means the Universal Service and Access Agency of South Africa;

1.3.2. "Authority" means the Independent Communications Authority of South Africa, as defined in the ICASA Act;

1.3.3. "CECS" means a class electronic communications service, as defined in the ECA;

1.3.4. "ECA" means the Electronic Communications Act, Act 36 of 2005;

- 1.3.5. "ECNS" means an electronic communications network service, as defined in the ECA;
- 1.3.6. "ECS" means an electronic communications service, as defined in the ECA;
- 1.3.7. "the ICASA Act" means the Independent Communications Authority of South Africa Act, Act 13 of 2000, as amended.
- 1.3.8. "IECNS" means an individual electronic communications network service, as defined in the ECA;
- 1.3.9. "IECS" means an individual electronic communications service, as defined in the ECA;
- 1.3.10. "ISPA" means the Internet Service Providers' Association;
- 1.3.11. "Process and Procedure Regulations" means the Regulations published as General Notices 397 & 398 in Government Gazettes 30914 & 30916 respectively;
- 1.3.12. "Telecommunications Act" means the Telecommunications Act 103 of 1996, repealed on 19 July 2006; and
- 1.3.13. "Universal Service and Access Fund Regulations, 2008" or "USAF Regulations", means the Regulations published on 10 October 2008 as General Notice 1270 in GG 31499.

Section 2

General Comments

2. Process to be followed

While ISPA is aware of the exigencies surrounding the finalisation of the Draft Regulations the Authority is proposing significant increases in annual licence fees as well as fundamental changes to the manner in which fees are calculated and paid and the basis on which they have been set. These proposals moreover come at a time when licences are being converted and the principle of conversion “on no less favourable terms” as set out in Chapter 13 of the ECA is still the subject of considerable market uncertainty.

In the circumstances ISPA wishes to caution the Authority against undue haste in finalising what is a delicate task. As is set out below ISPA believes there to be a number of contentious issues which will require proper debate if a robust and legally-defensible set of regulations is to result.

It is also necessary to point out that the Draft Regulations have taken an inordinately long time to publish for comment (over a year since the initial workshop was conducted). ISPA appreciates that this delay is not necessarily of the Authority’s making but neither should it mask the interest of all parties in a comprehensively considered process and outcome.

3. Ministerial Policy

Section 7(a)(iii) of the ECA requires that the Authority prescribe regulations setting out:

“(iii) the licence fees applicable to the licences specified in subsections (2) and (4), taking into account any policy or policy directions issued by the Minister in terms of section 3;”

ISPA is aware that the Authority has interacted with the Minister regarding the formulation of the Draft Regulations. The following slide was presented by ICASA at the VANS Industry Briefing held on 30 May 2008:

“Licence Fees

Process:

1. Industry workshop conducted 2007
2. Undertook further research
3. Formulated recommendations for Minister
4.Awaiting policy or policy directive from Minister”

ISPA assumes that the Minister has issued Policy for ICASA’s consideration under section 3(1) of the ECA and that this in all likelihood sets out the principles which ICASA has based the calculation of fees on. ISPA submits that it would be in the interests of greater transparency and understanding for the content of this policy to be released to the public.

ISPA further believes that any Policy issued for the Authority's consideration should be reviewed against the implications of the Altech decision.

4. Basis on which ICASA's budget is allocated

ISPA is aware of the problems which have bedevilled ICASA's funding since its inception and does not wish to raise this issue at this time other than in one respect.

Based on ISPA's experience of the relevant Parliamentary proceedings ISPA believes that the Authority should be more assertive in requesting the budget which it needs to deliver on its mandate. The Authority, if it operates in a transparent manner, would have the support of industry in this regard.

Will ICASA be obtaining a 24% percent increase in its allocated budget over the next five years?

5. Basis on which fees are calculated

The Authority has indicated that it used the following principles in creating a framework for the formulation of the licence fees regulations:

5.1. Licencees 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 licences

ISPA does not support this principle insofar as it holds that

- an IECS licence can be equated with an IECNS licence, or
- an IECS licence is necessarily wider in scope of operation than a CECNS licence; or
- an IECS licence is significantly wider in scope than a CECS licence.

and refers further to paragraph 10 below in this regard.

5.2. The duration of the licence should be recognised as a significant factor when determining the value of the licence.

ISPA supports this principle.

5.3. Licencees with revenue below a certain threshold, for example R1 000 000.00 per annum, should pay marginal annual licence fees as a measure to support start-ups and SMMEs.

ISPA supports this principle but is concerned that such a threshold will be arbitrarily set without reference to either the different licence categories or the realities of the market place.

ISPA believes that different thresholds should be considered for different licence types. While it is unlikely that an IECNS licensee would be affected by this clause it is conceivable that IECS, CECS and CECNS licenses would potentially benefit from an appropriate threshold. Given that the Authority proposes to employ Gross Revenue as the base for annual licence fee applications it is probable that an investigation of revenue derived from different licensed activities would indicate that the threshold should be set higher for CECNS licensees in order to constitute a

meaningful intervention benefiting such licensees. Likewise an IECS licensee has greater potential to earn revenue and a higher threshold than that for CECS licencees may be required.

ISPA also submits that the threshold or thresholds to be applied should be based on an investigation of the state of the SMME sector of the electronic communications industry in order to ensure that the mechanism achieves its objectives.

5.4. At minimum the licence fees need to cover the cost of regulating the market.

ISPA supports this principle subject to its application in a transparent manner.

ISPA submits that adopting such a basis for the setting of annual licence and administrative fees requires that the Authority provides greater transparency with regard to the manner in which these fees are calculated. The Draft Regulations proposes **massive** increases in annual licence fees and administrative fees without setting out any proper basis therefore, leaving ISPA with the impression that this is more of a hit-and-miss approach than a properly-considered exercise.

These increases will be applied from the next financial year without any attempt on the part of the Authority to introduce, at the very least, a form of glide path which will ameliorate the impact of the increase on licencees.

The Authority further notes that its expenses are projected to increase at a rate of 24% p.a. for the first five years decreasing to 8% p.a. for the remaining five years (supported by historical figures and implementation of the Electronic Communications Act, in particular Chapter 10).

ISPA is concerned at the paucity of supporting information regarding such increases and has little option but to reserve its members' rights in this respect should the Authority insist on adopting this approach.

ISPA submits that the process of setting licence fees constitutes administrative action as defined in section 1(i) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") read with sections 3 and 4. As such the setting of licence fees must be undertaken in a manner that is rationally connected to the information before the Authority and the reasons which it provides for its decision.

ISPA submits further that the Draft Regulations singularly fail to provide cogent reasons or to properly disclose the information on which the decision was made, and are therefore vulnerable to review proceedings.

Having sight of the ICASA budget for the forthcoming year and even taking into consideration the projected increases in the budget over the forthcoming years, it is clear, without further interrogation, that the proposed tariffs will far exceed the budget and thus the "cost to regulate" principle holds no water.

It is accordingly not clear to ISPA why these indications were provided in the first place. Nor does there appear to be any value in espousing a principle which seems irrelevant to the manner in which ICASA has proceeded.

ISPA is also concerned that, given that the unambiguous effect of the proposed licence fees is to constitute a national tax on licence fees, the use of section 5(7)(iii)(a) of the ECA as a authorising provision may be problematic. It is certainly arguable that the proposals of the

Authority may constitute a Money Bill and this in turn casts doubt on to whether section 5(7)(iii)(a) of the ECA was properly enacted with reference to the different enactment procedures applicable to money bills (see sections 77(1)(b) read with section 75 and 74(2)(a) of the South African Constitution.

Finally in this regard ISPA notes that the Authority has not explicitly taken into account income to be derived from the awarding of spectrum frequency licences. Income accruing to the Authority from envisaged competitive processes in bands where demand exceeds supply can be reasonably anticipated to be significant and well in excess of funds specifically required for the management of spectrum in South Africa.

5.5. The licence fees should be structured in such a manner that promotes a competitive ICT sector, and should not constitute a barrier to market entry.

ISPA strongly supports this principle and notes that it accords with the central role of the Authority in promoting competition within the industry..

ISPA has reservations, however, as to the extent to which the Draft Regulations achieve this, particularly in the light of the massive increases in annual licence and administrative fees proposed. A high industry-specific tax will certainly constitute a disincentive to entry.

5.6. The licence fees should facilitate the establishment of an environment conducive to network investments.

ISPA supports this principle.

ISPA has reservations, however, as to the extent to which the Draft Regulations achieve this other than through the proposed Draft Regulation 3(2).

5.7. The administrative fee structure should be as simple as possible;

ISPA supports this principle.

5.8. The licence fees should be calculated in a transparent manner; and

ISPA has severe reservations as to the extent to which the Draft Regulations achieve this, which reservations are detailed above and below.

5.9. The licence fees should be offset against commitments to construct ECN and provide ECS in rural and under-serviced areas.

ISPA supports this principle and eagerly awaits further progress from USAASA in this regard..

6. The requirement for audited financial statements

The Authority proposes that annual licence fees are, *inter alia*, to be adjusted immediately on receipt of the audited annual financial statements of the licensee which must be submitted within three months from the financial year end of such licensee.

6.1. Exemption with regard to submission of audited financial statements

ISPA submits that the approach adopted in the recently promulgated Universal Service and Access Fund Regulations, 2008 should also be adopted in the General Licence Fee Regulations.

Regulation 4(5) of the USAF Regulations allows an exemption to the requirement to file audited financial statements where a licensee is not otherwise required by law to provide such statements. Under these circumstances such licensee can file financial statements signed by their accounting officer.

ISPA believes this approach to be preferable to that proposed in the Draft Regulations and that it would act as a further break to SMME players in the industry. This is also consistent with the relevant companies act and taxation laws

6.2. Time period for production of audited financial statements

ISPA members have indicated that it is often impossible to obtain audited financial statements within three months of the end of their financial year end, particularly where the year end falls on a date commonly used for this purpose.

ISPA accordingly submits that the Authority should give consideration to extending this period or to providing a mechanism for formalising extensions to this period. Such consideration is made more important in the light of the serious penalties which the Authority is proposing for non-compliance.

Companies Act requirements specify that audited annual financial statements (AFS) be finalised within 6 months of year end for a private company¹. Private enterprises in general don't have infrastructure which is sophisticated enough to finalise AFS within 3 months. ISPA accordingly submits that it is unreasonable for ICASA to impose an earlier deadline which is inconsistent with general corporate law requirements.

Doing so will have both huge cash flow and cost implications for the affected parties. ISPA submits that a 6 month rule should apply for private companies which are the holders of licence under the ECA.

In the case of listed companies the requirements are that AFS be finalised within 3 months of year end and ISPA accordingly supports the retention of the 3 month rule applied by ICASA for listed companies.

As the ISP industry generally bills in advance, the draft regulations need to be clear on the periods concerned for calculation of fees and that these are consistent with revenue recognition in an enterprises' AFS.

7. Towards a common understanding of the licensing framework

ISPA believes that many of the regulatory processes which the Authority is undertaking are being compromised by a lack of clarity around the licensing framework under the ECA and, in particular, the relationships between different categories of licensees and licence exempt

¹ Section 304

persons. There does not appear to be a shared understanding amongst industry players or between industry and the regulator of these relationships. This is evidenced by the submissions made elsewhere regarding the relationship between IECS and IECNS licences, and, in another context, about the manner in which the different licence categories may interconnect with each other.

The relationships between the different types of licences and licence exemptions are furthermore critical insofar as defining what constitutes “licensed activities” as opposed to licence exempt activities such as ECS resale. ISPA is of the view that the different percentages proposed in respect of different licence categories and the fact that no licence fee is payable in respect of most licence-exempt services provides a great deal of latitude as to how licencees will arrange their internal structures. Further submissions in this regard are set out in section 10.4.2 below.

ISPA believes that it is an urgent imperative for the Authority to reach a clear understanding of these relationships and to communicate this to industry.

8. The implications of the Altech decision

This confusion has been exacerbated by the decision of the High Court of South Africa in the matter of Altech vs The Chairperson of ICASA and Others (2008).

ISPA submits that this decision has a profound impact on the very basis on which the ECA licensing framework is structured. The decision heralds liberalisation of the electronic communications network industry and, with the imminent introduction of a large number of licensed ECNS providers, it is no longer correct to in any sense regard individual licences as being scarce resources.

It flows from this, ISPA submits, that the Telecommunications Act model, premised on the now defunct policy of managed liberalisation, of charging high usage fees in relation to a scarce resource – the service licence – can no longer apply.

Does the basis on which the Draft Regulations were written still hold? No. ICASA gave its recommendations to the Minister prior to 30 May 2008 and the Minister would certainly not have been entertaining notions of big bang liberalisation at the time when she provided policy guidance to the Authority.

ISPA submits that the imposition of licence fees must be rooted in the emerging realities of a post licence conversion industry, with hundreds of licencees authorised to self-provide networks and access the National Numbering Plan.

In such a context the continued relevance of high usage fees is questionable, with international best practice pointing rather to removing usage fees where there is a liberalised market and covering the cost of regulation through administrative fees alone.

When principles for the formulation of fees regulations are espoused which relate to the lowering of barriers to entry and promotion of competition ISPA submits that this would be a more desirable approach to take.

Section 3

Specific Comments

9. Definitions

There is a small drafting error in the definition of “Fees” and ISPA suggests the following amendment:

“**Fees**” means the applicable fees as set in schedules ~~2 and 3~~ 1 and 2;

10. Calculation of Annual Licence Fees

Leaving aside BS licencees, the Authority proposes the following formula for the calculation of Annual Licence Fees by licencees:

$$P_a = P_p \times (GR_a)$$

Where $GR_a = GR - AD$

Key:

P_a = Payable Annual Licence Fee

P_p = applicable percentage per licence category

GR = Gross Revenue

AD = Allowable Deductions

GR_a = Adjusted Gross Revenue

ISPA now turns to an examination of this formula and its constituent elements.

10.1. Gross Revenue and Adjusted Gross Revenue

The Authority notes the following in the preface to the Draft Regulations:

“Previously licence fees were based on either Gross Revenue or Net Operational Income. Whilst Gross Profit is internationally the more common definition, and encourages cost savings and effectively rewards efficiency, the Authority proposed using adjusted Gross Revenue to allow for the necessary deductions in the different licence categories.”

ISPA notes that the preference accorded to Gross Revenue implies that the position previously applicable to VANS in this regard will be preserved.

ISPA is, however, not comfortable that the Authority has outlined sufficiently its motivation for rejecting an approach based on Gross Profit as opposed to Gross Revenue and notes that the latter basis has proved problematic in the past in South Africa. The Authority itself notes that an approach based on Gross Profit encourages efficiencies and cost savings but does not advance

a reason as to why such benefits should be discarded. ISPA further contends that using adjusted Gross Revenue on this basis that it allows for the necessary deductions in the different licence categories is faulty logic in that the Gross Profit approach also clearly makes allowance for deductions.

10.2. Calculation of a licensee's Gross Revenue

ICASA has put forward the following definition of Gross Revenue:

"Gross Revenue" means revenues from licensed activities, including but not limited to the following, where applicable:

- (a) Services provided
- (b) Leasing of infrastructure
- (c) Installation charges
- (d) Call charges
- (e) Late fees
- (f) Hand sets
- (g) Bandwidth
- (h) Income from value added services
- (i) Supplementary services
- (j) Interconnection fees
- (k) Facilities leasing
- (l) Sale of set top boxes
- (m) Application fees

What is a "licensed activity"? Aside from the specific categories set out in the definition of "Gross Revenue" the Draft Regulations define "licensed activities" as activities which are necessary for rendering a service for which the licence was granted. This is distinct from the current notion of "licensed services" which has been the basis for calculating revenue in the hands of the holders of VANS licences.

ISPA acknowledges the need for a degree of flexibility in defining this term so as to allow for new bases for deriving revenue which may arise in the future, but wishes to remind the Authority that it took some four years before clarity was reached as to what a service licensed by a VANS licence actually was.

ISPA submits that the phrase "revenues from licensed activities" needs to be strictly interpreted to avoid anomalous situations. ISPA refers to its submission above regarding the lack of clarity surrounding the ECA licensing framework and submits that it would be a more pragmatic and workable approach for the Authority to supply a definition of licensed activity for each licence type.

10.2.1. Leasing of infrastructure

The term "infrastructure" is not used in the ECA and may cause unnecessary confusion in this context. ISPA is not clear on whether the use of the term "electronic communications facilities" is intended by the Authority or whether the intention here is to include in GR income from passive infrastructure such as rooftops, towers and dark fibre (to the extent that these may not be electronic communications facilities).

Consider the following:

Company A is a licensee which leases space on its roof to other licensees for the installation of wireless equipment. If income derived from such leasing is included in the definition of GR this has the effect of prejudicing and discriminating against the licensee in that companies which are acting in the same manner (i.e. as landlords renting space to licensees) are not required to pay any licence fee in respect of the same activity.

In other words, the activity cannot be said to be licensed merely because it is provided in proximity to a licence. The more relevant question is whether the requirement of a licence is a *sine qua non* (i.e. "without which the activity/service cannot occur"). Clearly in the factual scenario presented above it is not.

10.2.2. Hand sets

ISPA submits that it would only be correct to include handsets where these are offered by a licensee as part of a bundled service offering based on their licence. Revenue from stand alone sale of hand sets (which are not bundled with electronic communications services) should not be included in Gross Revenue as it cannot be said to be an activity for which a service licence is required (as opposed to the bundling scenario where the handset is made part of a licensed activity).

ISPA notes that if the above argument is accepted the cost of the handset should be specified as an allowable deduction.

10.3. Calculation of Adjusted Gross Revenue

Once a licensee has calculated its Gross Revenue it is then proposed that it be allowed to make certain Allowable Deductions in order to arrive at its Adjusted Gross Revenue.

10.3.1. Allowable Deductions

The Authority proposes the following Allowable Deductions (AD) for ECS and ECNS licensees respectively:

ECS

- VAT
- Discounts granted in relation to revenue generated from licensed activities;
- Interconnection charges.

ECNS

- VAT
- Discounts granted in relation to revenue generated from licensed activities;
- Facilities leasing charges
- Leased line costs

10.3.1.1. Deductibility of facilities leasing from ECS licence

It is not clear to ISPA why an ECNS licensee – which by definition is licensed to provide network services consisting of leased facilities to ECS licensees – should have an Allowable Deduction for facilities leasing costs while an ECS licensee – which by definition is licensed to obtain network services through leasing facilities from ECNS licensees – does not².

The very industry structure contemplated by the ECA dictates that facilities leasing is an essential cost component of providing ECS and that, the leasing of facilities to an ECS licensee being authorised by an ECNS licence, revenue derived therefrom should be regarded as GR in the hands of ECNS licensee. From the perspective of the ECS licensee these are third party charges that are in most cases passed on at cost.

ISPA urges the Authority to closely examine whether or not the approach suggested in the Draft Regulations would constitute double taxation.

10.3.1.2. Deductibility of leased lines costs

It flows from the foregoing that ISPA submits that leased line costs should also be an Allowable Deduction in the hands of ECS licensees.

ISPA moreover believes that the Authority is being unduly technology specific in restricting the Allowable Deduction to only “leased lines” and submits that it would be a sounder approach to use a more neutral term. This flows from the reality that there are a number of different types of access network which have the same effect as a leased line. One example of this is 3G / GPRS networks which are increasingly being utilised to access corporate networks.

10.3.1.3. Interconnect charges

ISPA supports the view that interconnect and other pass through charges should be an Allowable Deduction as these are generally revenue collected from a customer by one licensee for using the services of another licensee, i.e. these charges are eventually passed on to another licensee. A failure to allow a deduction in this regard will result in double taxation of the two licensees involved.

In applying revenue recognition rules in accordance with International Financial Reporting Standards (IFRS) any income received as an agent or where you have a “pass through” scenario is not revenue as defined but merely an offset of the charges incurred. Thus these should be either excluded from GR definition or included as an allowable deduction

10.3.1.4. Spectrum licence fees

ISPA requests that the Authority give due consideration to specifying spectrum licence fees as an Allowable Deduction so as to avoid double taxation as between service and spectrum licences.

10.3.1.5. Grants or subsidies received from the Agency

ISPA submits that grants, subsidies and other funds received by a licensee from USAASA should be a further Allowed Deduction for both ECS and ECNS licensees.

² ISPA accepts that an ECNS licensee may have an allowable deduction for facilities leasing costs where it itself leases facilities from another provider.

10.3.1.6. Revenue arising out of reversal of provisions made for bad debts and taxes

ISPA submits that such revenue should be specified as an allowable deduction. In accordance with revenue recognition rules per IFRS, revenue is recognised when it is likely that economic benefits will flow to the enterprise. In applying hindsight to a situation where you have a defaulting customer, revenue would not have been recognised in the first place following revenue recognition rules. As the enterprise never received the benefit and in hindsight should not have recognised the revenue why should the enterprise have to pay a fee to ICASA?

10.4. **Applicable percentage per licence category**

The Authority proposes a licence fee formula based on a flat rate as a percentage of revenue.

With regard to the equation of IECS and IECNS licences for this purpose ISPA refers to its detailed comments regarding the relationship between these two licence categories in section 10.1 below.

10.4.1. The impact of the proposed increases

ISPA submits that the proposed applicable percentages constitute massive increases in the annual licence fees payable by licensees and that the Authority has not laid out sufficient motivation to industry for what is in, effective, an unanticipated significant augmentation of the cost of doing business as a licensee. The effect of the proposed increases is compounded by the wider collection base (“licensed activities” as opposed to “licensed services”) set out in the Draft Regulation.

Within the ISP industry it is reasonably accurate to say that the general Gross Profit percentage is in the region of 30%. Considering it probably costs an additional 20% to support these revenue streams, this leaves a bottom line of 10% to an enterprise of which 30% is payable to SARS and now a further 30% would be payable to ICASA leaving 40% in profits to the enterprise in the case of an IECS scenario. This scenario certainly underlines the penal nature of these fees and the potential impact on the ISP industry.

From the perspective of a current holder of a VANS licence the increase in the applicable percentage from 0.1% of licensed services constitutes (conservatively estimated) an increase of:

- 30 times in respect of a VANS licence converted to an CECS licence; or
- 15 times in respect of a VANS licence converted to an IECS licence.

In highly simplified terms where the revenue on which licence fees are to be levied (i.e. after deductions) is assumed to be R10 million rand per annum:

	VANS (0.1%)	CECS (1.5%)	IECS (3%)
Licence Fee payable on revenue from licensed activities with allowable deductions / on Adjusted Gross Revenue	R10 000	R150 000	R300 000

In other words

- a VANS licensee that pays R10 000 in Annual Licence Fees for the 2008/2009 financial year and which is converted to a CECS licence will, all other things being equal, pay R150 000 in licence fees for the 2009/2010 financial year; and
- a VANS licensee that pays R10 000 in Annual Licence Fees for the 2008/2009 financial year and which is converted to a IECS licence will, all other things being equal, pay R300 000 in licence fees for the 2009/2010 financial year.

ISPA does not believe that this is a fair and equitable proposal – particularly given that a CECS is most definitely a lesser licence than a VANS (in the sense that it has less rights with the right to numbers stripped away). Moreover an IECS is also potentially a far lesser licence than a VANS depending on the eventual outcome of proceedings to determine the actual rights attaching to VANS (i.e. whether they have infrastructure rights or not).

ISPA has little alternative but to reserve the rights of its members in this regard.

10.4.2. Arbitrage between licences categories

ISPA is of the view that the proposed applicable percentages per licence category will create considerable opportunities for “licence fee arbitrage” as between individual and class licences under the control of the same party.

By way of example in the ECS environment:

Any entity with a class ECS licence is authorised to operate an outbound call service whereas an IECS licence is required to obtain the numbers necessary for providing an inbound service. Simply running two companies allows the IECS to provide a cost-price wholesale inbound service to the class ECS company which would then bundle with its own outbound.

It remains to be seen, furthermore, whether it will be feasible for the Authority to accurately assess the annual licence fee payable where a single entity holds both an IECS and a CECS (i.e. where differing percentages apply).

11. Application & Exemptions

Draft Regulation 3(2) proposes that ECNS Licensees “who are granted and issued a licence in terms of Chapter 3 of the Act” will enjoy an initial three-year exemption in exchange for undertakings to roll-out electronic communications networks in areas identified by the Authority at the time of the issuing of the licence in terms of the Act.

ISPA supports the principle behind this provision.

ISPA seeks confirmation from the Authority of its understanding that this provision will not be of application to entities obtaining IECNS licences pursuant to the licence conversion process but will apply to:

- IECNS licences issued pursuant to an ITA once authorised by the Minister of Communications;
- CECNS licences registered *ab initio*.

ISPA further submits that a public participation process should be undertaken in finalising the licence conditions which would give effect to this Draft Regulation and notes that the effective operation of such an intervention remains dependent on the activities of the Agency.

12. Payment

ISPA notes that the Authority proposes that payments in respect of annual licence fees are

- due quarterly based on the licensee's financial year;
- due and payable within 45 calendar days from the end of the relevant quarter/period;
- are to be adjusted immediately on receipt of the audited annual financial statements of the licensee which must be submitted within three months from the financial year end

ISPA is extremely concerned about the impact of quarterly payments on SMME licencees for which this requirement will constitute both an additional administrative overhead and a cash flow management challenge and urges the Authority to consider alleviating the difficulties which this poses for such licencees. It is likely that a portion of the fees payable to ICASA on a quarterly basis will be paid before the revenue is collected as collection days in the ISP industry are generally in the region of 45 days.

It is also generally recognized across all industries that most small and medium size enterprises face regular cash flow challenges in order to survive, a reality which indicates the suitability of an annual payment rather than a quarterly one.

ISPA accordingly urges the Authority to reconsider its approach in this regard. ISPA submits that it would be worth investigating the feasibility of distinguishing between licensees based on revenue bands or their listed nature as regards the frequency of ALF payments.

ISPA further seeks confirmation from the authority that adjustments favourable to licencees will likewise be "adjusted immediately".

13. Administrative Fees

ISPA notes that the Authority considered activity-based costing in the formulation of the administrative fees, inflation, the new competitive framework provided by the ECA and other relevant factors and supports this approach.

ISPA is, however, of the opinion that the administrative fees proposed are generally to be regarded as excessive if not extreme and, insofar as it is not possible for ISPA to determine the relationship between the proposed fees and activity-based costing, reiterates its request for greater transparency to industry in this regard.

13.1. The relationship between IECS and IECNS licences

ISPA submits that the Authority is incorrect to equate IECS and IECNS licences for the purposes of administrative fees and advances the following arguments in support of its position.

In simple terms the defining characteristic of each licence type is that

- an IECS allows the holder to apply to access number ranges from the National Numbering Plan;
- an IECNS allows the holder to self-provide, operate and sub-let an electronic communications network on either a national or provincial basis.

The disparity in rights is further underpinned when considering that

- an IECS under the current Numbering Regulations does not in fact cost any more than a CECS given that there is no application or other fee attaching to applications for numbers;
- the administrative costs attaching to an IECNS licence would be anticipated to be substantial.

There is no basis to differentiate IECS licences on the basis of their socio-economic importance. Neither is the argument that numbers are a scarce resource and that entitlement thereto of substantial economic value convincing in the face of the lack of any associated application fee.

In practice the only similarity between the licences is a literal one: they both have the word “individual” in their titles.

ISPA therefore submits that

- the proposed fees for relating to IECS licences should be based on the fees proposed for applications relating to CECS licences; and
- given the cost-recovery basis employed by the Authority the IECS fees would be increased so as to cover at a minimum the administrative cost associated with the mandated management of the national numbering plan.

ISPA requests that the Authority also take these points into consideration when issuing an ITA for IECS licences in the future.

13.2. Comparison of administrative costs relating to VANS, CECS and IECS

The proposed fees should also be seen from the perspective of the current administrative fee structure applying to VANS licencees which have been allocated numbers and therefore stand to have their licences converted into IECS licences:

	VANS	CECS	IECS
Initial Application Fee	R5 000 ³	R10 000	ITA
Application for amendment of licence	No cost.	R10 000	R250 000
Application for transfer of licence	No cost.	R10 000	R250 000

³ R6 190.52 at 2008 prices.

Application for renewal of licence	No cost.	60% of registration fee paid	60% of ITA
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ISPA notes that the Authority states that it has moved to a cost-recovery basis for the setting of administrative and annual licence fees but the need for transparency in this regard is underlined by the increases represented in the above table.

For example:

The transfer of an IECS would involve the completion of the appropriate form in the Process and Procedures Regulations by the applicant and transferee and the submission thereof by the parties. The Authority is then required to do an audit of the licence to be determined which, in this case can be differentiated from other licence types in that it would of necessity require examination of the usage of the numbers allocated to the applicant.

- It is not clear to ISPA how this process can be equated with the transfer of an IECNS licence – for which the same administrative fee is levied – where the licence audit processes is orders of magnitude more complex.
- It is not clear to ISPA how the Authority would justify the discrepancy between the fees required for the transfer of an IECS licence as opposed to a CECS licence where the only additional audit item is the usage of allocated numbers. Notwithstanding this there is a difference of R240 000 in the applicable fee!

There are numerous further inconsistencies inhering in the Authority's proposed administrative fees and ISPA urges ICASA to address these in the final regulations.

14. Interest

ISPA submits that the provisions regarding interest are unduly onerous, both in respect of the rate applied and in respect of the administrative burden which will result on the Authority.

ISPA submits that the draconian penalties imposed will in any event be sufficient to focus licensee's attention on timeous payment of licence fees and supporting documentation.

15. Contraventions & Penalties

The Authority proposes the following penalties for specified contraventions:

- Where payment is more than 21 days overdue, the licensee will be liable for a late payment penalty of 25% of the capital amount due in addition to the overdue amount; and
- The Authority may impose a fine
 - not exceeding R1 000 000 where a licensee is found to have contravened regulations 3(2), 4(1)(c), 5 and 6(2); or
 - Not exceeding R100 000 for any other offence; and
 - An addition R1 000 000 for repeated contraventions of the regulations.

ISPA submits that these proposed sanctions are unduly harsh and not justified by the nature of offence contemplated.

ISPA further submits that the Authority is required to provide far greater particularity in respect of the offences which it intends sanctioning in this manner. It is not simply sufficient to refer to a general obligation and to state a contravention thereof may result in the following fines: rather it is necessary as a drafting requirement that the Authority specifically state the nature of the conduct or non-compliance which is to be regarded as a contravention that will attract a specified sanction.

[There appears to be a typographical error in the Draft Regulation in that there is no regulation 6(2).]

Section 4

Contact Details

Should ICASA require any further input from ISPA, please contact us using any of the details listed below:

Elaine Zinn
ISPA Secretariat
info@ispa.org.za
+27 11 314 7751

Ant Brooks
ISPA General Manager
ant@ispa.org.za

