



5 December 2012

Independent Communications Authority of South Africa

Attention: Mr Godfree Maulana, Project Leader

Per email: gmaulana@icasa.org.za

Dear Sir

SUBMISSIONS ON DRAFT GENERAL LICENCE FEES REGULATIONS

1. ISPA sets out below its submissions in respect of the Draft General Licence Fees Regulations published in a schedule to Notice 887 of 2012 in GG 35819 on 24 October 2012 ("the Draft Regulations").

General submission

2. ISPA appreciates that the context for the proposed reformation of the annual licence fee regime is formed by the qualified audits given to the Authority by the Auditor-General and the need for the Authority to take steps to ensure this is not repeated in future.
3. It seems, however, that the difficulties experienced by the Authority, as set out in the Explanatory Memorandum accompanying the Draft Regulations, are, with respect, of its own making. The Authority now proposes to abandon the existing framework along with the benefits which the Authority explicitly recognises accompany it, viz:
 - 3.1. That fees based on gross profit are competition-neutral;
 - 3.2. That fees based on gross profit take into account the impact of economic cycles; and

ISPA Management Committee:

Graham Beneke, Ant Brooks*, Marc Furman, David Gentleman,
Jenny King, Duncan Martin, Jaap Scholten, Mike Silber, Elaine Zinn* (*ex officio)

- 3.3. That basing fees on gross profit means that only entities which are profitable will be required to pay such fees.
4. Where the Authority refers to administrative challenges, regulatory arbitrage and information asymmetry as reasons for abandoning the current fee calculation methodology, ISPA sees only a failure to implement with the required foresight and process.
5. ISPA's general view is accordingly that it is highly unfortunate that the benefits of the existing methodology, as recognised by the Authority, are being abandoned due to a failure of implementation, and that the net result would appear to be that licensees are to shoulder a greater regulatory cost burden.

Procedural objection

6. On 16 November 2012, ISPA sent correspondence to the Authority requesting clarification of the basis on which the Authority proposed to set the applicable percentage for the calculation of annual licence fees at 0.75%. ISPA affirmed that this clarification was necessary in order for ISPA to be put in a position to assess and respond to the rationale informing the Authority's position. ISPA believes it is unfortunate that this was not forthcoming and reiterates that the lack of transparency in this regard materially prejudices interested parties. While the Authority may provide its reasons at a later stage there will not be an opportunity for the public to respond to these.
7. The value to be accorded to the applicable percentage is the single most critical aspect of the proposed amendments to the current regime. ISPA submits that the failure to substantiate the proposed value of 0.75% goes to the integrity of the public participation process.
8. The Authority will be aware that those of ISPA's members who previously held Value Added Network Service (VANS) licences were, prior to licence conversion and the coming into effect of the General Licence Fees Regulations 2009, obliged to pay an annual licence fee of 0.1% of revenue derived from licensed services. The Authority will then appreciate that it is incumbent upon it to offer up some justification for what is a 650% increase in the annual licence fee payable.
9. ISPA's position is that the annual licence fees should cover the Authority's costs as set out in its budget. The Authority should not seek to generate further revenue over and above this given that licensees are already required to pay:
 - 9.1. An annual contribution to the Universal Service and Access Fund (USAF) which is intended to create a pool of available funds for deepening access to communications in South Africa; and

9.2. General taxes which are intended to contribute to the South African Government's wider mandate.

10. Following this approach would dictate that the basis for the setting of the applicable percentage would be such that the total annual licence fee income received by the Authority would be in the region of R300m – R350m per annum.
11. ISPA is furthermore constrained to highlight that the payment by licensees of an annual licence fees is not a one-way transaction. Rather licensees are entitled to a *quid pro quo* in respect of such payments, being the performance by the Authority of its mandated role under the Electronic Communications Act 2005 as amended ("the ECA") and the ICASA Act as amended. The performance of the Authority over the past decade is not such that licensees are receiving the required value for the payment of their annual licence fees which they can legitimately expect. Of particular relevance in this regard is the failure of the Authority to deal with the vast number of unlicensed operators and its failure to take steps under Chapter 10 of the ECA to introduce pro-competitive remedies designed to eliminate anti-competitive pricing and conduct.
12. ISPA's members have indicated that the uncertainty with regard to the licence fees payable from 1 April 2013 is problematic in that it becomes impossible for licensees to manage shareholder expectations regarding the taxes applicable to their businesses or to budget accurately. Members providing voice services are especially hampered in their ability to set and publish new rates applicable from 1 March 2013 – the date on which the next reduction in wholesale termination rates takes effect.

The applicable percentage

13. ISPA submits, in the absence of any stated rationale for the setting of the applicable percentage at 0.75%, that such applicable percentage is too high and that the net effect will be to increase the cost of communication in South Africa at a time when the country can ill-afford it.
14. For example: providers of voice services in South Africa typically employ a model which involves high volumes of calls with low margins. Where such a provider charges R0.05 ex VAT per minute over and above the applicable call termination rate of R0.40 ex VAT per minute (applicable to the termination of mobile calls from 1 March 2013) it would have a margin of 11.1%. An annual licence fee based on an applicable percentage of 0.75% of revenue derived from licensed services would constitute 7% of the provider's true income (i.e. the retail price less call termination input costs). This is obviously a substantial percentage of revenue before costs and providers will have little alternative but to seek to recover this – in full or in part – from subscribers.

15. ISPA calls on the Authority to either reduce the applicable percentage or to allow the deduction of direct, verifiable costs which are payable by one licensee to another in respect of the provision of an upstream licensed service which is an input for the provision of downstream services.
16. Finally in this regard, ISPA notes that the requirement under sub-regulation 7(f) of Schedule 3 for licensees to submit the prescribed form showing the calculation of their fees and that such form must be subject to audit also constitutes a further additional regulatory cost to be borne by licensees.

Failure to clarify the meaning of licensed services

17. Amending the basis for the calculation of annual licence fees to a simpler model based on annual revenue derived from licensed services as opposed to the current model under the General Licence Fees Regulation 2009 represents only half of the solution to the challenges which the Authority faces in avoiding further qualified audits.
18. ISPA submits that the difficulties which the Authority is experiencing in calculating, verifying and collecting annual licence fees will continue until such time as it moves to clarify, authoritatively, exactly which activities constitute licensed services. ISPA has engaged extensively with the Authority regarding this issue since 2005 but the required clarity has not been forthcoming.
19. As communicated to the Authority, the principal difficulty experienced by licensees is in distinguishing between the licensed provision of electronic communications services and the licence-exempt provision of resale of electronic communication services.
20. The definition of “Licensed Services” found in the Draft Regulations does not provide any assistance in this regard.

Specific submissions

21. ISPA has marked up a copy of the Draft Regulations to highlight typographical errors it has identified and attached this as an Annexure to this submission.
22. Implementation of the Draft Regulations:
 - 22.1. ISPA notes that it is the intention of the Authority to put the Draft Regulations, in their final form, into force on 1 April 2013.

22.2. ISPA requests that the Authority include a note on the implementation of the finalised regulations with specific regard to the fact that licensees have a variety of financial years, very few of which are aligned with the Authority's financial year. It would be helpful for licensees to have clear guidance on how to handle the different regulatory frameworks for the calculation of annual licence fees applicable to their financial years.

22.3. This is particularly relevant given that licensees will be required, under draft regulation 7(f) of Schedule 3, to submit the manner of calculation of its annual licence fees in the prescribed format and that this itself must be subject to audit. ISPA submits that this requirement needs to be introduced in a phased manner for licensees whose financial year does not align with that of the Authority.

23. Adjustment of administrative fees:

23.1. ISPA refers to draft sub-regulation 3(1)(b): while the principle of adjusting administrative fees according to a maximum of either CPI or a percentage determined by the Authority, it is not clear when or how such an increase would be effected, nor is it clear on what basis the Authority would make a determination that a lesser increase would be warranted.

24. Exemptions:

24.1. ISPA welcomes the introduction of an annual licence fee holiday for licensees in their first three years of generation of revenue from licenses services. This is the precisely the type of nuanced approach which will promote competition and the move away, in this instance, from the one-size fits all approach is appreciated.

24.2. ISPA requests that the Authority clarify the application of this proposed exemption. Will the payment holiday extend to existing licensees that, as at 1 April 2013, are still within the three year period?

24.3. ISPA further welcomes the retention of the exemption for licensees which fall below the turnover threshold as per the requirements for classification as a small enterprise in the Transport, Storage and Communication Sector as defined in the National Small Enterprise Act 102 of 1996, as amended ("the National Small Enterprise Act").

24.4. In this regard ISPA notes that the threshold of R13m per annum specified in a schedule to the National Small Enterprise Act was set in November 2003 (in which year it was increased from R10m) but that it has not been updated since that date notwithstanding the passing of nine

years. While there is a mechanism in subsection 20(2) of the National Small Enterprise Act for the Minister of Trade and Industry to amend this figure “to account for inflation, macro-economic shifts in the economy, any legislation affecting small enterprise, and any other matter which could have an effect on the functionality of the Schedule”, this has not been utilised.

24.5. ISPA calls on the Authority to take steps to ensure that the exemption threshold which it has selected to apply to annual licence fees remains relevant. This could be achieved either through lobbying the Minister of Trade and Industry or, preferably, adopting the R13m figure as a baseline amount which will be subject, in terms of the finalised regulations, to an annual CPI increase effective on 1 April of each year.

25. Administrative fees

25.1. ISPA submits that it is irrational to set the administrative fee for the amendment or transfer of a class licence at the same level as the administrative fee for an initial registration for a class licence. The logical consequence is that a licensee will not seek to use the amendment or transfer process as it is simpler to obtain a new licence at the same cost.

25.2. ISPA therefore calls on the Authority to consider lowering the administrative fees for applications for the amendment and/or transfer of class licences.

26. Contraventions and penalties

26.1. ISPA submits that the meaning of draft sub-regulation 7(1)(a) is not clear insofar as it refers to the fine being imposed “from date of non-compliance”.

Conclusion

27. ISPA notes that the Authority does not intend to hold public hearings prior to the finalisation of the process to implement new licence fee regulations. ISPA submits that this is an error on the part of the Authority given the fundamental importance of the matter at hand: industry should not be penalised in this manner due to errors on the part of the Authority in drafting and implementing the current Regulations.

Regards

Dominic Cull

ISPA Regulatory Advisor

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