



**SUBMISSION ON
DRAFT GENERAL LICENCE FEES REGULATIONS**

**Liquid Telecommunications Operations
South Africa (Pty) Ltd**

1 INTRODUCTION

Liquid Telecom 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”).

2 GENERAL SUBMISSION

2.1 Liquid Telecom notes that it is a member of the Internet Service Providers’ Association (“ISPA”) and associates itself with the ISPA submission in respect of the Draft Regulations, particularly with regard the procedural submissions made by ISPA.

2.2 Liquid Telecom appreciates that the context for the proposed reformation of the annual licence fee regime is 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.

2.3 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, namely that fees based on gross profit:

2.3.1 are competition-neutral;

2.3.2 take into account the impact of economic cycles; and

2.3.3 mean that only profitable entities will be required to pay such fees.

2.4 Where the Authority refers to administrative challenges, regulatory arbitrage and information asymmetry as reasons for abandoning the current fee calculation methodology, Liquid Telecom sees only a failure to implement with the required foresight and process.

2.5 Liquid Telecom’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.

3 PROCEDURAL OBJECTION

3.1 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%. Liquid Telecom associates itself with this correspondence.

3.2 ISPA affirmed that this clarification was necessary in order for ISPA and its members to be put in a position to assess and respond to the rationale informing the Authority's position. Liquid Telecom 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.

3.3 The value to be accorded to the applicable percentage is the single most critical aspect of the proposed amendments to the current regime. Liquid Telecom submits that the failure to substantiate the proposed value of 0.75% goes to the integrity of the public participation process.

3.4 Liquid Telecom therefor submits that the Authority should hold public hearings in respect of the Draft General Licence Fee Regulations and requests an opportunity to address the Authority on these matters at any hearings to be held.

3.5 The Authority will be aware that licensees such a Liquid Telecom which 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 750% increase in the annual licence fee payable.

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- 3.6 Liquid Telecom'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:
- 3.6.1 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 (the success or lack thereof of the USAF in this regard is similarly of its own making and not the responsibility of licensees); and
- 3.6.2 General taxes which are intended to contribute to the South African Government's wider mandate.
- 3.7 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.
- 3.8 Liquid Telecom 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. Likewise the significant delay in the promulgation of rapid deployment guidelines for electronic communications networks (which is the prerogative of the Minister but in respect of which the Authorities performance has been lacklustre at best) continues to cause harm to operators who are expected to pay higher licence fees without any commensurate undertaking of better service.
- 3.9 Liquid Telecom notes 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.

4 THE APPLICABLE PERCENTAGE

4.1 Liquid Telecom 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.

4.2 Liquid Telecom 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. If the deduction of direct and verifiable costs which are payable by one licensee to another is not allowed, this essentially amounts to a double taxation. Even if these were the only costs which were to be allowed (which Liquid Telecom submits would still be grossly irregular) it would be a significant improvement on the current regulations. Liquid Telecom notes that with regard the collection of Value Added Tax ("VAT"), the South African Revenue Service is able to validate the "value added" portion of taxes collected and paid over by a vast number of VAT vendors and what is suggested here is not significantly different, except that the responsibility of the Authority is several magnitudes smaller.

4.3 Finally in this regard, Liquid Telecom 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.

5 FAILURE TO CLARIFY THE MEANING OF LICENSED SERVICES

5.1 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.

- 5.2 Liquid Telecom 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 amongst others has engaged extensively with the Authority regarding this issue since 2005 but the required clarity has not been forthcoming.
- 5.3 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.
- 5.4 The definition of “Licensed Services” found in the Draft Regulations does not provide any assistance in this regard.

6 IMPLEMENTATION OF THE DRAFT REGULATIONS:

- 6.1 Liquid Telecom notes that it is the intention of the Authority to put the Draft Regulations, in their final form, into force on 1 April 2013.
- 6.2 Liquid Telecom 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 applicable to their financial years.
- 6.3 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. Liquid Telecom 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.

7 CONTRAVENTIONS AND PENALTIES

Liquid Telecom 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”.

8 **CONCLUSION**

Liquid Telecom notes that the Authority does not intend to hold public hearings prior to the finalisation of the process to implement new licence fee regulations. Liquid Telecom 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.