



5 December 2012

The Independent Communications Authority of South Africa

Attention: Mr Godfree Maulana, Project Leader

Per email: gmaulana@icasa.org.za

CC: EcsEcns.Compliance@icasa.org.za

Dear Sir

SUBMISSIONS ON DRAFT GENERAL LICENCE FEES REGULATIONS

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

General submission

2. WAPA welcomes the Authority's revision of the regulations relating to the licence fees payable by licensees.
3. There are certain issues present in the existing framework, and the revision of the regulations affords the Authority with the opportunity to deal with these authoritatively.
4. Despite this, WAPA is of the view that the Authority has squandered this opportunity and has instead chosen a path that is no less clear and also represents an additional regulatory burden to licensees.

Definition of 'Licensed Service'

5. The Draft Regulations indicate that the Annual Licence Fee will be payable on the turnover due to licensed activities, with 'licensed service' being as defined in the Electronic Communications Act No. 36 of 2005 ("the ECA") under 'broadcasting service', 'electronic communications service' and 'electronic communications network service' respectively.
6. The lack of clarity as to what exactly constitutes a 'licensed service' is one that has long plagued industry. The Authority is well aware of this and took steps towards dealing with this lack of clarity by publishing the Practice Note to General Licence Fee Regulations, 2009 ("the Practice Note")¹, wherein the Authority noted the following:

¹ General Notice 280 of 2012 in GG No. 35211 on 30 March 2011.

“The requirement imposed on licensees to pay Annual Licence Fees ("ALF") based on their gross profit has proved to be cumbersome for licensees, on the premise that licensed services differ from licensee to licensee. Further, licensees have conflicting views of what constitutes "total revenue generated from licensed services" and "total costs directly incurred ... in the provision of licensed services". This is further exacerbated by the fact that the Authority did not deem it necessary to include a list of regulated services in the General Licence Fees Regulations, as a guideline to assist licensees in computing ALF.”

7. While the Practice Note was not without its issues (as were raised at the workshop following its publication), it did go some way towards clarifying what would constitute ‘licensed services’ and ‘direct costs’ for the purposes of calculating the licence fees.
8. It is uncertain why the Authority, being fully aware of the issues associated with not properly defining what constitutes a ‘licensed service’, would avoid clarifying exactly what is contemplated by this term. WAPA submits that the Authority has the opportunity to clear to any remaining confusion in this regard while also ensuring that all licensees will use the same criteria to set out ‘licensed services’. WAPA urges the Authority to consider amending the Draft Regulations to address this issue.
9. It is also uncertain whether the Practice Note to the General Licence Fee Regulations, 2009 will continue to apply to the Draft Regulations when finalised, and WAPA requests that the Authority clarify whether this is the case or not.

Calculation of Licence Fees

10. WAPA notes that in terms of the General Licence Fee Regulations, 2009² the Annual Licence Fee is calculated on ‘Gross Profit’, defined as “total revenue generated from Licensed Services less total costs directly incurred in the provision of such services”.
11. In the Draft Regulations, the Annual Licence Fee is calculated on ‘Turnover’, defined as “income generated from the provision of licensed services”.
12. While WAPA appreciates the reasoning behind this change as set out in the Explanatory Memorandum to the Draft Regulations, it is submitted that the Authority should rather take the opportunity to clarify what is contemplated by ‘costs incurred in the provision of licensed services’. Problematic situations that arise subsequent to this can be dealt with on a case-by-case basis, provided they’re dealt with consistently.
13. The Authority has itself set out the benefits of the existing framework in the Explanatory Memorandum to the Draft Regulations, *inter alia*:
 - 13.1. That fees based on gross profit are competition-neutral;
 - 13.2. That fees based on gross profit take into account the impact of economic cycles; and.

² General Notice 345 of 2009 in GG No. 32084 on 1 April 2009.

- 13.3. That fees based on gross profit mean that only profitable entities will be required to pay such fees.
14. While WAPA recognises the administrative challenges, regulatory arbitrage and information asymmetry raised by the Authority as the stated reasons for abandoning the current fee calculation methodology, WAPA sees mainly a failure to implement the existing framework adequately.
15. To ignore the stated benefits for the sake of administrative simplicity when proper implementation of the existing framework would suffice is short-sighted, and has the effect of creating a greater regulatory burden for licensees.
16. WAPA is uncertain as to how the Authority arrived at the applicable percentage of 0.75% for the calculation of Annual Licence Fees, and requests that the Authority provide its reasoning behind obtaining the applicable percentage before finalising the Draft Regulations.
17. In light of the fact that the Draft Regulations do not allow for the deduction of costs incurred in the provision of licensed services, WAPA submits that the applicable percentage is set too high, and requests that the Authority reconsider the applicable percentage in a transparent manner.

Administrative Fees

18. WAPA notes that the administrative fee payable for the transfer or amendment of a Class licence remains the same as for the registration of a new Class licence. WAPA submits that the administrative fee for the amendment or transfer of a Class licence should be lower than that for the registration of a Class licence, and requests that the Authority considers lessening this fee. The fact that the fee for transferring a Class licence is the same as the fee for registering a new Class licence means that the transfer procedure for Class licences is rarely used as there is no economic incentive to do so.
19. With regard to the adjustment of the set administrative fees by a maximum of the Consumer Price Index or such other percentage as determined by the Authority, WAPA requests that the Authority specify the periods after which and the methods by which such increase would be effected, as well as the basis for the determination of any adjustment.

Exemptions

20. WAPA welcomes the exemption as also set out in the General Licence Fee Regulations, 2009 for those licensees who satisfy 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 No. 102 of 1996, as amended.
21. WAPA also welcomes the exemption from paying the Annual Licence Fee in the first 3 years of generation of revenue from licensed services as set out in the General Regulations.
22. WAPA requests some clarity on this regulatory holiday. Specifically, will this exemption be extended to those licensees who are within that 3 year period as at 1 April 2013?

Contravention and Penalties

23. WAPA requests that the Authority clarify what is meant by the imposition of a fine as specified “from date of non-compliance”.

Reporting Format

24. WAPA notes that the Authority has provided a Format for Submission of Financial Statement for the Purpose of Licence Fees Calculation in Schedule 3 of the Draft Regulations.
25. WAPA notes further that the ICASA Compliance Procedure Manual Regulations, 2011³ set out a Basic Financial Reporting format in Form 2. The Authority has recently also sent out yet another reporting format for the submission of financial statements and calculation of Annual Licence Fee calculations, by email to various licensees.
26. While the Draft Regulations do indicate that it will prevail over any conflict with the licence terms and conditions, it does not address conflicts with existing regulations.
27. It is submitted that is an additional administrative burden for licensees to submit multiple reporting formats covering the same information. WAPA requests that the Authority unequivocally clarify exactly which reporting format will be required in this instance, to avoid doubt and superfluous reports by licensees.
28. WAPA also submits that the requirement to have such reporting format reviewed by the licensee’s auditor or accounting officer constitutes an additional regulatory cost to licensees, and should be deleted from the reporting format. The Authority has been repeatedly made aware of the fact that auditors/accounting officers will not sign off on calculations where there is not a clear regulatory basis for the calculations, and the uncertainty as to what exactly comprises turnover from ‘licensed services’ is a hindrance in this regard.

General

29. WAPA notes that there is no indication that the Authority will hold public hearings prior to the finalisation of the Draft Regulations. WAPA submits that such public hearings are necessary for the Authority to comprehend the submissions to the Draft Regulations fully by allowing the Authority to raise questions on the submissions, and that such public hearings are an essential element of a transparent process in finalising regulations.

Regards,

Ellipsis Regulatory Solutions
WAPA Regulatory Advisors

³ General Notice 902 of 2011 in GG No. 34863 of 15 December 2011.