

# **SUBMISSIONS BY e.tv ON THE DRAFT GENERAL LICENCE FEES REGULATIONS**

## **INTRODUCTION**

1. In Notice 887 of 2012 published in Government Gazette no. 35819 on 24 October 2012, the Independent Communications Authority of South Africa (“the Authority”) gave notice of its intention in terms of Section 4(1)(c)(iv – v) and 5(7)(a)(iii) of the Electronic Communications Act 2005 to make regulations in respect of general licence fees and administrative fees (**“the draft regulations”**).
2. e.tv thanks the Authority for the opportunity to comment on the draft regulations and gives notice of its intention to make oral representations, should the Authority decide to hold hearings.
3. e.tv confines its comments to the proposed amendments to the general licence fees.

## **DEFINITION OF TURNOVER**

4. e.tv notes that the Authority is, once again, proposing a material change to the manner in which general licence fees are calculated. Various changes have been made to the general licence fees since 1998 when e.tv was first licensed. As the general licence fee is a significant annual payment, the formula used to calculate it has a direct and material impact on e.tv’s financial situation. Ideally e.tv would want long-term stability in this regard so that it can plan

accordingly. Frequent changes to the general licence fee formula serve to undermine the regulatory stability required by licensees.

5. Nonetheless, e.tv is mindful of the reasons given by the Authority in seeking to change the manner in which the general licence fee is calculated. Leaving aside the percentages payable, e.tv has no particular difficulty with the proposed method used to calculate payment. It is not opposed in principle to the payment being calculated on turnover rather than on profit.
  
6. e.tv notes that the Authority is again reverting to using turnover as a basis for calculating the general licence fee as it previously did in terms of the Private Broadcasting Service Licence Fee regulations of 5 September 1997. In terms of the 1997 regulations, the Authority allowed for certain deductions (such as agency fees and commission). e.tv is content that the proposed licence fee contained in the draft regulations be based on turnover without any deductions but only if the proposed percentage of 0.75% of turnover does not increase. Should any increase be contemplated, this will impact broadcasters prejudicially and in these circumstances an allowance for deductions should be made.

## **EXEMPTION OF THE PUBLIC BROADCASTER**

7. e.tv is very concerned that the draft regulations continue to exempt the commercial services of the SABC from the payment of general licence fees.
  
8. e.tv submits that this is manifestly inequitable, anti-competitive, discriminatory and at odds with the purposes of the Broadcasting and EC Acts.

9. In light of this, e.tv therefore submits that services within the commercial service division of the SABC must be subject to the licence fees in the draft regulations.

**MINISTERIAL GUIDANCE – Dan and I agree that this section should not be included given our favourable view of the draft regs. Including it would only be dilatory. Please advise.**

10. e.tv notes that the draft regulations have been made before the Minister has issued any guidelines on this issue in terms of section 3(1)(e) of the ECA.

11. That provision provides that the Minister “**may**” make policies on matters of national policy in relation to-

**“guidelines for the determination by the Authority of licence fees associated with the award of the licences contemplated in Chapter 3, including incentives that may apply to individual licences where the applicant makes binding commitments to construct electronic communications networks and provide electronic communications services in rural and under-serviced areas of the Republic;”**

12. Section 5(7)(a)(iii) in turn provides that ICASA must take into account any policy or policy directions issued by the Minister in terms of section 3.

13. The word “**may**” as used in section 3(1)(e) is often used to indicate a permissive power. However, depending on context, the word “**may**” can indicate the existence of a power coupled with a duty to exercise that power. In those circumstances, colloquially speaking, “**may**” means “**must**”.

***South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) at paras 15 – 16**

***Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) at paras 180 – 182**

14. Given the importance and sensitivity of this issue, e.tv submits that the drafters of the ECA would not have contemplated ICASA making licence fee regulations until the Minister had provided guidance in this regard. That is why section 5(7)(a)(iii) contains a specific obligation on ICASA to consider the Minister's guidelines in this context – beyond the general obligation in section 3(5) of ICASA to consider the Minister's policies and policy directions.
15. In the circumstances, e.tv is concerned that ICASA may not have the power to issue these licence regulations until it has first had the benefit of the Minister's views in this regard.

#### **CONSIDERATIONS TO BE TAKEN INTO ACCOUNT WHEN SETTING THE GENERAL LICENCE FEES**

16. e.tv submits that in setting the percentage of turnover payable by individual licensees, the Authority should be mindful of the existing fees and levies payable by broadcasters. Leaving aside the general licence fee, e.tv is already subject to at least the following compulsory fees and levies based on annual turnover:
  - 16.1 a levy payable to the South African Advertising Research Foundation ("SAARF") based on annual turnover less programming sponsorships and agency commission;

- 16.2 a levy payable to the Southern African Music Rights Organisation (“SAMRO”) based on annual turnover less agency commission and a portion of the SAARF levy; and
  - 16.3 the prescribed annual contribution to the Universal Service and Access Fund (less any contributions to the Media Development Diversity Agency) which licensees are now required to pay. This consists of an additional levy which e.tv was not previously required to pay and which taken with the suggested increased licence fee will adversely affect e.tv.
17. e.tv is also required to make the following compulsory contributions in respect of skills development and training:
- 17.1 1.5% of its salary bill to the Skills Development Levy; and **CHECK**
  - 17.2 5.5% of its salary bill to employee training, as required by its licence conditions.
18. In addition, e.tv is committed, in terms of its licence conditions, to the following programming requirements which exceed the minimum requirements set out in the relevant regulations:
- 18.1 45% local content during the performance period;
  - 18.2 4 hours of prime time South African drama each week;
  - 18.3 19 hours of information programming (including 2 hours of prime time information programming) each week;
  - 18.4 2 hours of news programming per day; and

18.5 16 hours of children's programming per week.

These programmes cost substantially more to produce than acquired programmes and some of them, for example, children's programming, run at a loss.

19. The manner in which the abovementioned compulsory payments impact on e.tv's business and its profitability is substantially prejudicial. e.tv is satisfied with the proposed percentage of the general licence fee contained in the draft regulations. However, e.tv submits that any increase in the proposed percentage contained in the draft regulations will have a severely prejudicial effect on its business. In the circumstances, and in view of the impact DTT will have on e.tv's business, e.tv submits that the Authority should build in a provision in the draft regulations to the effect that the proposed general licence fee will not change for a period of five years. This will enable e.tv and other broadcasters to plan effectively for DTT.

## **DIGITAL TERRESTRIAL TELEVISION**

20. In addition to the above, e.tv submits that the Authority should consider the impending move to DTT, when setting the general licence fee for television broadcasters. All terrestrial broadcasters are involved in the roll out of digital terrestrial television. As the Authority is well aware, the roll out of digital terrestrial television and the dual illumination period involves additional expenditure and investment by broadcasters which will impact severely on their business. This significant and unprecedented financial burden does not affect licensees other than broadcasters, although all

licensees will benefit from the spectrum released when digital migration is complete.

21. e.tv submits that, in view of the impact of DTT, broadcasters should receive some assistance during the initial period of DTT terminating on 1 June 2015. This should take the form of the Authority allowing those broadcasters who broadcast on both analogue and digital spectrum to deduct the costs of transmission on the digital spectrum from the general licence fee they are obliged to pay.

## **CONCLUSION**

22. e.tv respectfully requests ICASA to take the above points into consideration in enacting the licence fee regulations. e.tv looks forward to participating in any hearings to be held by the Authority.

*5 December 2012*