GOVERNMENT NOTICE

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

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Independent Communications Authority of South Africa
Pinmill Farm, 164 Katherine Street, Sandton
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"ICASA GENERAL LICENCE FEES REGULATIONS, 2012"
"ICASA GENERAL LICENCE FEES AMENDMENT REGULATIONS, 2014"

REASONS DOCUMENT

I, Dr Stephen Sipho Mncube, Chairperson of the Independent Communications Authority of South Africa, hereby publish the reasons for the adoption of the ICASA General Licence Fees Regulations, 2012 and the ICASA General Licence Fees Amendment Regulations, 2014.

Dr Stephen Sipho Mncube
Chairperson

REASONS DOCUMENT

ICASA GENERAL LICENCE FEES REGULATIONS, 2012 AND ICASA GENERAL LICENCE FEES AMENDMENT REGULATIONS, 2014

1. Introduction

1.1 The Independent Communications Authority of South Africa (the **Authority**) published the ICASA General Licence Fees Regulations, 2012 (the **2012 Regulations**) under GN 299 in *Government Gazette* 36323 of 28 March 2013, in terms of sections 4(1)(c)(iv)-(v) and 5(7)(a)(iii) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) (the **ECA**).

1.2 The 2012 Regulations repealed the ICASA General Licence Fees Regulations, 2009 (the **2009 Regulations**), published under GN 345 in *Government Gazette* 32084 of 1 April 2009. Amongst other things, the 2012 Regulations changed the manner in which the annual licence fees payable by licensees under the ECA are determined.

1.3 The Authority subsequently published the ICASA General Licence Fees Amendment Regulations, 2014 (the **Amendment Regulations**) under GN 263 in *Government Gazette* 37521 of 2 April 2014 in terms of sections 4(1)(c)(iv)-(v) and 5(7)(a)(ii) read with section 4(7)(b) of the ECA. The Amendment Regulations amended the 2012 Regulations with effect from 1 April 2014.

1.4 In this reasons document, the Authority sets out its reasons for the adoption of the 2012 Regulations and the Amendment Regulations.

2. Background

2.1 The 2009 Regulations obliged certain licensees to pay annual licence fees. Schedule 2 to the 2009 Regulations stipulated that the annual licence fee payable by a licensee was equal to 1.5% of that licensee's gross profit. "Gross Profit" was defined to mean "total revenue generated from Licensed Services less total costs directly incurred in the provision of such services". "Total costs" was not defined and the various costs which could be deducted from annual revenues generated from licensed services were not enumerated. As such, licensees had some discretion as to the types of costs which, in their interpretation, were regarded as being incurred in the provision of licensed services. Different licensees adopted materially different approaches in this regard. This created a number of problems, including that the Authority and licensees sometimes disagreed on the licence fees that were payable. This lack of certainty also led to the under-collection of licence fees.

2.2 In an attempt to limit licensees' broad interpretation of the 2009 Regulations, the Authority published a practice note on the 2009 Regulations in March 2012 (the

Practice Note) (published under GN 280 in *Government Gazette* 35211 of 30 March 2012).

2.3 While the Practice Note was not legally binding, it was issued by the Authority for the "use and benefit of its licensees" (para 5). As such, the Practice Note observed that the requirement imposed on licensees to pay annual licence fees based on their gross profit "has proved cumbersome for licensees, on the premise that licensed services differ from licensee to licensee", and that the 2009 Regulations "place the onus on the licensee to determine the annual licence fees payable to the Authority which has resulted in some licensees using their own discretion in determining which revenue and costs to include or exclude in their determination" (p 4, paras 1.2.1 and 1.2.2.). In this regard, the Practice Note further identified that licensees have conflicting views of what constitutes "total revenue generated from licensed services" and "total costs directly incurred... in the provision of licensed services", which is exacerbated by the fact that the Authority did not include a "list of regulated services in the [2009] Regulations, as a guideline to assist licensees in computing annual licence fees" (p 4, paras 1.2.1 and 1.2.2.).

2.4 The Practice Note provided the following examples of licensed services (p 8, paras 3.5.1.1 and 3.5.1.2):

2.4.1 electronic communications services or "ECS", as defined in terms of the ECA, include: voice, data (including internet services via wireless internet access or fixed line access and connections and rentals whether wireless or wire-line ADSL distribution), roaming, number porting, transmission, virtual private networks, and interconnection;

2.4.2 electronic communications network services or "ECNS", as defined in terms of the ECA, include: leasing of infrastructure (leasing of network infrastructure for the purpose of generating revenue), facilities leasing, network (services and maintenance), and core and access network elements; and

2.4.3 broadcasting services, as defined in terms of the ECA, include pay sound and television services (subscriptions for access to paid services and revenue from airing of advertisements and programming), free-to-air television services (revenue generated from airing of advertisements and programming excluding television licence fees), and free-to-air sound services (only revenue generated from airing of advertisements and programming).

2.5 The Practice Note stated that gross revenue was "the gross revenue only generated from licensed services", while total costs were "the costs directly incurred in the provisioning of licensed services" (p 8, paras 3.5.1.1 and 3.5.1.2). The Practice Note

emphasised that only costs which relate and correspond to a licensed service should be declared under cost incurred. In a footnote, the Practice Note further delineated the concept of "total costs" as follows (p 8, footnote 11):

2.5.1 directly attributed costs include those costs that can be directly and unambiguously related to licensed services such as technical/engineering staff cost, transmission, electricity only for network equipment, IT hardware and software only for network services;

2.5.2 indirectly attributed costs "could be apportioned to licensed services" but this must be limited to human resources, finance and accounting, insurance for network equipment, and procurement and information systems and it should be clearly shown, and reasons should be given, as to how and where these costs arise; and

2.5.3 bank and finance charges, bad debts, advertising and promotions, courier services for customer premises equipment, etc will not be considered as deductibles.

2.6 A workshop regarding calculations and the payment of licence fees was subsequently held with licensees and interested parties on 18 April 2012.

2.7 Despite the Authority's attempts to ensure consistency in the approach adopted by licensees and to clarify the revenue items that should be included and cost items that should be deducted in the calculation of gross profits through the publication of the Practice Note, the fact that the Practice Note was not binding on licensees meant that certain licensees were of the view that they retained some discretion as to the revenues and costs which were to be included in and excluded from the gross profit amounts which form the basis for their fee calculations. Given the number of licensees presently operating in South Africa, verifying and interrogating licensees' licence fee submissions absorbed a significant amount of time on the Authority's part. As such, the Authority found it necessary and appropriate to reconsider the basis on which licence fees were calculated in order to, amongst other things, make the calculation of licence fees simpler and less administratively burdensome for both the Authority and licensees.

2.8 The 2009 Regulations were prepared on the basis of the policy positions outlined in the Position Paper on General Licence Fees (the 2009 Position Paper) (published under GN 239 in *Government Gazette* 31993 of 6 March 2009. Accordingly, before adopting or proposing to adopt a different approach to the calculation of licence fees, it was necessary for the Authority to consider whether it was appropriate to depart from the policy positions outlined in that Position Paper. These policy positions included the following conclusions –

2.8.1 Licence fees levied on gross revenue are contrary to the objectives of the ECA as fees levied on gross revenue "will reduce the incentive for firms to enter the ICT sector, harm smaller players in a disproportionate manner and increase rather than decrease the administrative burden of regulation".

2.8.2 The "optimal financial measure on which to base licence fees appears to be gross profit (of licensed activities)", based on the objectives of the ECA which include promoting competition as well as supporting small businesses.

2.9 In the Authority's assessment, the practical problems experienced by it in invoicing and collecting licence fees and verifying the licence fee calculations and revenue and cost figures presented by licensees justified a reconsideration of the approach adopted in the 2009 Position Paper and the 2009 Regulations. As discussed in further detail below, the Authority has to work within the resource constraints that are imposed on it and must in each case seek to adopt the most efficient approach to regulation that it can in the circumstances. On this basis, the Authority considered that it might be appropriate to adopt an alternative method to the calculation of licence fees, namely calculating licence fees on the basis of gross revenues as opposed to profits. The advantages that the Authority identified in this approach included reducing the Authority's administrative burden in verifying licence fee calculations. This is on the basis that, although the Authority will still need to verify the revenues that have been included and excluded in a particular licensee's reported revenues, it would not have to verify the various cost items identified by licensees for exclusion, or to verify the extent to which particular licensees exclude common costs. The resources that are required to perform the exercise of verifying the revenues and cost items reported by licensees to arrive at gross profit generated from licensed services are significant and this led to delays on the Authority's part in processing submissions on licence fees. In the Authority's assessment there was significant benefit in adopting a less cumbersome process.

2.10 Following the publication of the 2012 Regulations, the Authority identified certain drafting issues which were causing confusion in the market in relation to the revenues from licensed services on which licence fees are to be levied. Accordingly, the Authority decided to publish the Amendment Regulations to remedy the most significant drafting issue in the 2012 Regulations. The Authority intends to publish further amendment regulations for public comment and to conduct a public consultation process in due course to clarify exactly which revenues generated by licensees are considered to be revenues from licensed services and must be included in the amount on which annual licence fees are calculated

3. **Process followed by the Authority**

3.1 The Authority published the draft General Licence Fees Regulations, 2012 (the **draft Regulations**) for public comment on 24 October 2012 under GN 887 in *Government Gazette* 35819 of 24 October 2012. Interested persons were invited to submit written representations within 30 days of the publication of the draft Regulations.

3.2 The Authority received written submissions from 20 interested parties in respect of the draft Regulations, including the following:

3.2.1 Allied Technologies Limited (**Altech**);

3.2.2 Broadband Infraco SOC Limited (**Broadband Infraco**);

3.2.3 Cell C (Pty) Ltd (**Cell C**);

3.2.4 Eskom Holdings SOC Limited (**Eskom**);

3.2.5 Midi Television (Pty) Ltd (**e.tv**);

3.2.6 Internet Service Providers Association (**ISPA**);

3.2.7 Internet Solutions (a division of Dimension Data (Pty) Ltd) (**Internet Solutions**);

3.2.8 Liquid Telecommunications Operators South Africa (Pty) Ltd (**Liquid Telecom**);

3.2.9 Electronic Media Networks (Pty) Ltd and Orbicom (Pty) Ltd (**M-Net and Orbicom**);

3.2.10 Mobile Telephone Networks (Pty) Ltd (**MTN**);

3.2.11 MWEB Connect (Pty) Ltd (**MWEB**);

3.2.12 National Association of Broadcasters (**NAB**);

3.2.13 Neotel (Pty) Ltd (**Neotel**);

3.2.14 South African Broadcasting Corporation SOC Limited (**SABC**);

3.2.15 South African Communications Forum (**SACF**).

3.2.16 Sentech Limited (**Sentech**);

3.2.17 Smile Communications (Pty) Ltd (**Smile Communications**);

3.2.18 Telkom SA SOC Limited (**Telkom**);

3.2.19 Vodacom (Pty) Ltd (**Vodacom**); and

3.2.20 Wireless Access Providers Association of South Africa (**WAPA**).

3.3 Public hearings in relation to the draft Regulations were convened on 17 January 2013.

3.4 As indicated above, the 2012 Regulations were ultimately published on 28 March 2013. These Regulations came into effect on 1 April 2013.

3.5 The Authority then published the draft ICASA General Licence Fees Amendment Regulations, 2014 (the **draft Amendment Regulations**) under GN 135 in *Government Gazette* 37381 on 27 February 2014. The draft Amendment Regulations were published in terms of sections 4(1)(c)(iv) to (v) and 5(7)(a)(ii) read with section 4(7)(b) of the ECA which provisions confer on the Authority the power to make regulations without following the processes described in section 4(4) of the ECA where the public interest requires that a regulation be made without delay. For the reasons give below, in the Authority's assessment it was necessary for the Amendment Regulations to be made without delay.

3.6 Interested parties were requested to submit their written comments within 10 calendar days of publication of the draft Amendment Regulations.

3.7 Written comments were submitted by:

3.7.1 Internet Solutions;

3.7.2 ISPA;

3.7.3 M-Net;

3.7.4 MTN;

3.7.5 MultiChoice (Pty) Ltd;

3.7.6 NAB;

3.7.7 Neotel;

3.7.8 Telkom;

3.7.9 Vodacom; and

3.7.10 WAPA.

3.8 The Amendment Regulations were published under GN 263 in 2014 in *Government Gazette* 37521 on 2 April 2014. The Amendment Regulations came into effect on 1 April 2014.

4. **Submissions received from interested parties on the draft Regulations**

4.1 The submissions of the various interested parties identified above were taken into account by the Authority in finalising the 2012 Regulations. There were several broad themes which emerged from the various submissions, which are summarised below. The summaries in this reasons document do not comprehensively address each and every submission made or point raised by the various parties but instead summarise and address the primary submissions that were made.

4.2 Clarifications to the 2009 Regulations

4.2.1 A number of written submissions that were received by the Authority suggested that the Authority should not finalise the draft Regulations, but should instead attempt to address the challenges in the existing 2009 Regulations:

4.2.1.1 in their written submissions, Neotel, Sentech and Vodacom submitted that, instead of a wholesale replacement of the 2009 Regulations, the Authority should clearly define direct and indirect costs to accurately determine allowable deductions in the calculation of gross profit;

4.2.1.2 in their written submissions, Sentech, MTN and SACF argued that the administrative challenges facing the Authority would not be resolved by merely changing the 2009 Regulations, and that the Authority should increase its capacity to monitor and evaluate compliance as well as provide guidance to licensees (i.e. the same challenges may arise even if the basis of calculating the fee is changed).

4.3 Information on the policy framework underlying the draft Regulations

4.3.1 MTN submitted that it was unreasonable for the Authority to maintain the

proposed 0.75% of gross revenue as the annual licence fee without providing any justification for this increase in licence fees.

4.3.2 MWEB, Altech, Liquid Telecom, Neotel, SACF, MTN, WAPA, and Telkom all submitted that the Authority does not have an unfettered discretion effectively to increase licence fees based merely on reasons of convenience and to provide for easier administration. As such, in order for licensees to comment adequately on the fees proposed, these parties submitted that the policy framework from which the fee structure was derived should be clearly set out.

4.4 Calculation of licence fees on the basis of turnover as opposed to profits

4.4.1 MWEB, Liquid Telecom, and ISPA submitted that the calculation of licence fees based on revenue instead of gross profit results in a double tax situation in instances where the Authority disallows 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. Telecommunications operators pay licence fees on revenue derived from IPC income. If internet service providers are not allowed to deduct the costs of IPC, then they will also pay licence fees to the Authority on the same IPC, resulting in the Authority being paid twice for income derived from the same source.

4.4.2 The SACF submitted that the formula set out in schedule 2 to the draft Regulations referred to turnover due to licensed activities. This may create confusion in the calculation of fees because licensed activities may not always necessarily mean licensed services. The word "activities" should be replaced with the word "services". This will bring the formula in line with the definition of turnover in the draft regulations and leave no doubt in the calculation of licence fees.

4.4.3 Neotel and Vodacom submitted that the proposal to base the licence fee calculation on a percentage of turnover for licensed services was justified. From an accounting perspective, this will require fewer resources across the industry and for the Authority to calculate. It will also result in a fair contribution towards regulatory costs, provided the percentage amount set is not punitive or deleterious to licensees.

4.4.4 Cell C proposed that the following formula should be used to calculate general licence fees:

Pa = Pp x (T-Tc)

Where:
Pa = Payable annual licence fee
T = Turnover due to licensed activities
Pp = applicable percentage (e.g. 0.75% for ECNS)
Tc = Total costs of licensed activities

4.5 The definition of "turnover" in the draft Regulations

4.5.1 Vodacom submitted that the word "turnover" as used in the draft Regulations should be substituted by the term "revenue" as defined in International Accounting Standard 18 of the International Finance Reporting Standards (IFRS). This simplified definition of revenue based on IFRS will minimise regulatory arbitrage and close interpretation loopholes that could create inconsistencies in the application of the regulations.

4.5.2 The NAB, and M-Net and Orbicom submitted that the definition of "turnover" in the draft Regulations was unreasonable as it overlooked the necessary deductions that are standard practice in the broadcasting industry. It was submitted that the Authority should amend the definition of turnover to the following:

"total revenue generated from licensed services per annum less service provider discounts, agency fees, interconnection and facilities leasing charges, government grants and subsidies".

4.5.3 It was submitted that the proposed definition is generally accepted and is in line with the definition in the Regulations for Private Television Broadcasting Service Licence Fees. A similar approach had also been adopted by the Authority in the Universal Service and Access Fund Regulations, 2011. These deductions are broadcasting-related and standard practice.

4.6 The applicable percentage used for the calculation of licence fees

4.6.1 MWEB, Liquid Telecom, MTN, Vodacom, ISPA, and Internet Solutions submitted that, in the absence of any stated rationale, the stated percentage of 0.75% for the levying of licence fee was excessive. Imposing licence fees of 0.75% of revenue would have an unjust financial impact on ISPs, which will inadvertently have adverse effects which outweigh the objective sought by the proposed amendments. The net effect will be to increase the cost of communication. The Authority should reduce this percentage.

4.6.2 Liquid Telecom, Vodacom, Neotel, Cell C, and Internet Solutions submitted that the overarching principle should be that licence fees collected must only cover the Authority's regulatory costs as set out in its budget. Following this approach dictates that the basis for setting the applicable percentage should be such that the total annual licence fee income received by the Authority should be in the region of R300 000 000 to R350 000 000 per annum. The Authority's budget expenditure for the 2011/2012 financial year was approximately R314 000 000 and the Authority should not seek to generate further revenue over and above this amount, given that licensees are also obliged to pay an annual contribution to the Universal Service and Access Fund as well as general taxes. Based on market research, approximately 0.25% of industry turnover would cover the Authority's costs. Charging 0.75% of turnover would over-recover funds from the industry to cover the Authority's regulatory costs.

4.6.3 If turnover is to be used as the basis for calculating licence fees instead of the proposed 0.75%, the Authority could use –

4.6.3.1 M-Net and Orbicom - 0.2%;
4.6.3.2 Neotel – 0.25% to 0.50%;
4.6.3.3 MTN – 0.29%;
4.6.3.4 Vodacom - 0.375%;

of industry turnover as the measure.

4.7 Neotel and Vodacom submitted that a percentage measure of net profit (of no more than 0.25% - 0.50%) should be used for small and newer operators with due regard to asymmetry for new and smaller players and companies not yet yielding a profit either through payment holidays or a phased-in period of a number of years on a graded scale, culminating in 0.25%.

4.8 MTN and Telkom submitted that the Authority should adjust the proposed percentage of gross revenue that will be levied as a licence fee such that the final licence fee translates into an equivalent of the amount that licensees were paying in terms of the 2009 Regulations (1.5% of gross profit). A change in the licence fee calculation to alleviate the Authority's administrative burden must be done on an equitable basis, compliant with administrative law principles and should not come at the financial expense of significantly increasing licence fees.

4.9 Input from the Minister of Communications

4.9.1 In its written submission, e.tv argued that, in terms of section 3(1)(e) read with

section 5(7)(a)(iii) of the ECA, the Authority does not have the power to issue draft regulations until it has first had the benefit of the view of the Minister of Communications in this regard (i.e. the Authority does not have the power to issue draft regulations until it has taken into account any policy or policy directions issued by the Minister in terms of section 3 of the ECA). e.tv submitted further that, given the importance and sensitivity of the licence fee issue, the drafters of the ECA would not have contemplated allowing the Authority to make licence fee regulations until the Minister had provided guidance in this regard.

4.9.2 The Minister has, to date, not provided any specific guidance in respect of licence fees.

4.10 Effective date of the new regulations

Cell C, Neotel, Liquid Telecom and ISPA submitted that:

4.10.1 The Authority should give a clear indication from which financial year of the licensee the new licence fee requirement will be applicable.

4.10.2 The Authority should include a note on the date of implementation of the finalised regulations to provide guidance to licensees on how to handle the different regulatory frameworks applicable to their financial years.

4.10.3 Any implementation of the new regulations should only apply to the 2013/2014 financial year and the regulations should not apply retrospectively.

4.11 Exemptions for new entrants from the payment of licence fees

4.11.1 Broadband Infraco submitted that:

4.11.1.1 The Authority should extend the regulatory holiday that defers Broadband Infraco's annual general licence fee payment (i.e. an extension of five years from the date of licensing must be considered) or, alternatively, the Authority should consider phasing in the revised annual general licence fee to minimise its negative effect on Broadband Infraco's cash flow.

4.11.1.2 The combination of the lapsing of the regulatory holiday and the proposed change in the annual licence fee calculation method from gross profit to gross turnover would severely hamper Broadband Infraco's efforts to meet its statutory mandate and its ability to operate

as a profitable entity. As a state owned company with significant fixed costs and possessed with a mandate to extend the availability and accessibility of electronic communications network services in under-serviced areas, Broadband Infraco is unlikely to be cash flow positive for some time.

4.11.2 Neotel submitted that:

4.11.2.1 the proposed 3 year exemption was insufficient and should be extended to 6 years; and

4.11.2.2 asymmetry should be factored into the exemption, so that 0% is levied in the first 6 years and a small percentage of turnover is (0.25 – 0.50%) is levied from the seventh year of operation onwards.

4.11.3 Smile Communications submitted that:

4.11.3.1 the 3-year "regulatory holiday" offers very little protection for small industry players;

4.11.3.2 new operators require more than three years to be in a position to afford paying licence fees without this having a significant impact on their working capital and cash flows;

4.11.3.3 based on growth patterns, it takes six to eight years of operation for new entrants to become profitable and sustainable. Additionally, at the end of the 3-year holiday, new entrants will then have to pay significant costs irrespective of their size or profitability; and

4.11.3.4 the regulatory holiday should be extended to 5 years from the commencement of commercial operations.

4.11.4 Broadband Infraco submitted that: a 3-year exemption period for a new entrant such as Broadband Infraco is not sufficient for that entity to attain profitability, although it may be generating income.

4.11.5 M-Net and Orbicom, Sentech and SACF submitted that:

4.11.5.1 the proposed 3-year payment holiday seems to be arbitrary and it is too little because in most cases new businesses take well over 3 years before they reach break-even point;

4.11.5.2 the exemption should continue to be based on profitability as it was in the 2009 Regulations; and

4.11.5.3 although the introduction of a payment holiday may lower or even remove barriers to entry, the sustainability and viability of licensees should be kept in mind.

4.11.6 The SACF and WAPA submitted that:

4.11.6.1 the new regulations should clarify if the proposed payment holiday will have retrospective effect and should clarify whether the "regulatory holiday" is applicable as an exemption;

4.11.6.2 the Authority should clarify whether the exemption will be extended to licensees who are within the 3-year period as at 1 April 2013; and

4.11.6.3 the new regulations should specify whether the payment holiday will only apply to licences that are granted after the regulations are finalised or if it will also apply to those that have already been granted or issued before the regulations are finalised.

4.11.7 MTN submitted that:

4.11.7.1 in order to limit the scope of the exemption and provide clarity as to retrospectivity, the exemption in regulation 4(d) should be amended by the substitution of the word "licensees" by the phrase "New entrants" to read as follows:

"*New entrants* [Licensees] *will be exempted from paying Annual Licence Fees in first three years calculated from the date of licensing*"; and

4.11.7.2 the term "new entrant" should be defined in the definitions section to mean –

"a person that is licensed in terms of the [ECA] after the promulgation of these regulations".

4.12 Exemption of the SABC from the payment of licence fees

4.12.1 Altech submitted that the Authority should provide a more detailed explanation as to why the SABC was being granted an exemption from the payment of an

annual licence fee. In Altech's view this exemption is contrary to the Authority's stated objective to establish a more competitive environment in the ICT sector as it creates an unfair advantage for the SABC.

4.12.2 e.tv and M-Net and Orbicom submitted that:

4.12.2.1 services within the commercial service division of the SABC must be subject to the licence fees in the draft regulations;

4.12.2.2 the continued exemption of the commercial services of the SABC from the payment of general licence fees is manifestly inequitable, anti-competitive, discriminatory and at odds with the ECA and the Broadcasting Act 4 of 1999;

4.12.2.3 SABC 3 and the commercial sound broadcasting licensees of the SABC compete directly with other commercial broadcasters for viewers, listeners and advertising revenue, and their continued exemption places them at an unfair advantage to their competitors; and

4.12.2.4 the licence fee is no more than a tax, and state-owned entities are not exempt from paying other taxes. There is no reason why the licence fee should be any different.

4.13 Other exempted licensees

4.13.1 ISPA submitted that in order to ensure that the exemption threshold which the Authority had selected to apply remains relevant, the Authority should either lobby the Minister of Trade and Industry or preferably adopt the R13 million figure as a baseline figure which will be subject, in terms of the final regulations, to an annual CPI increase effective 1 April of each year.

4.13.2 Eskom submitted that the proposed regulations should note and acknowledge that the exemption that applies to Eskom will remain in force, and that Eskom operates a private electronic communications network and is thus exempted from paying annual licence fees.

4.14 Penalties and compliance

4.14.1 Neotel submitted, in general, that:

4.14.1.1 the draft Regulations proposed to increase the penalty amounts

substantially without indicating a basis or rationale for the proposed increase; and

4.14.1.2 the contravention and penalty clause in the current regulations should remain unchanged at between R100 000 to R1 000 000 instead of the proposed amendment to 5% of first quarter turnover for contraventions of regulations 5 and 6.

4.14.2 Telkom submitted that:

4.14.2.1 the formulation of regulation 7 should be reconsidered in accordance with the underlying purport of the Independent Communications Authority of South Africa Act 13 of 2000 (**ICASA Act**);

4.14.2.2 the "contraventions and penalties" in draft regulation 7 were punitive and not in line with the ICASA Act; and

4.14.2.3 the Complaints and Compliance Committee (**CCC**) has the discretion and latitude to recommend to ICASA a suitable penalty. This draft regulation therefore constrained the CCC's powers as set out in section 17D(2) of the ICASA Act.

4.14.3 Vodacom submitted that:

4.14.3.1 The penalties under draft regulation 7 ought to be simplified. Regulation 7 could be amended to read as follows:

"(1) Upon a determination of non-compliance by the Complaints and Compliance Committee in terms of the ICASA Act, the Authority may impose a fine not exceeding:

(a) one million Rands (R1 000 000.00) for contravention of regulation 5 and 6;

(b) one million Rands (R1 000 000.00) for contravention of all the regulations not specified in regulation 7(1)(a); and

(c) *an additional one million Rands (R1 000 000.00) for repeated contraventions of the regulations.*"

4.14.4 Liquid Telecom, ISPA and WASPA submitted that the meaning of draft regulation 7(1)(a) was not clear in so far as it refers to the fine being imposed "from date of non-compliance".

4.14.5 Vodacom submitted that it was not clear how the penalty under draft regulation

7(1)(a) was to be implemented, and that there were questions as to why only revenue from quarter one of the preceding year was subject to the 5% penalty and how the penalty would be calculated in practical terms.

4.14.6 Vodacom also submitted that the rationale and basis for the penalty under draft regulation 7(1)(b) was questionable as the penalty only applied in relation to regulation 4, which lists the licensees who are exempt from paying licence fees.

4.15 Changes to the policy framework surrounding licence fees

Altech, e.tv, Cell C, and Telkom submitted that:

4.15.1 it is prudent that input variables (such as general licence fees) must be stable for long periods of time so as to enable long term financial planning and budget measures by licensees in order for them to be more competitive in the sector;

4.15.2 frequent changes to the formula used to calculate general licence fees serve to undermine the regulatory stability needed by licensees;

4.15.3 the Authority should limit the persistent regulatory changes and promote regulatory certainty; and

4.15.4 the Authority should build a provision into the new regulations to the effect that the proposed general licence fee will not change for a fixed period, e.g. three or five years.

4.16 Administrative fees

4.16.1 WAPA and ISPA submitted that:

4.16.1.1 the fact that the fee for transferring licences is the same as the fee for registering a new class licence means that the transfer procedure for class licenses is rarely used because there is no economic incentive to do so;

4.16.1.2 it is irrational to set the administrative fee for amendments or transfers of class licences at the same level as the administrative fee for registrations for class licences, and the administrative fee payable for the transfer of a class licence should therefore be lower than the fee payable for the registration of a class licence.

4.16.2 The SABC submitted that:

4.16.2.1 the draft Regulations are silent on the exemption of the SABC from administrative fees as well as licence fees, which makes the regulations uncertain;

4.16.2.2 the SABC was in terms of the 2009 Regulations exempt from paying both licence fees and administrative fees in line with ICASA's position on the matter since 2009, and the SABC should continue to be exempted from administrative fees because of the impact that these fees will have on its capacity to deliver on its public service mandate and also to protect the integrity and viability as provided for in section 2(t) of the ECA; and

4.16.2.3 the new regulations should be clear and unambiguous on the SABC's exemption from administrative fees so as to avoid confusion.

5. **The Authority's reasons for the 2012 Regulations**

5.1 The principal change introduced by the 2012 Regulations was the move from calculating licence fees on the basis of gross profits generated from licensed activities in any particular financial year to calculating licence fees on the basis of revenue generated from licensed services in any particular financial year. The Authority's decision to move to the new approach was based on the following considerations –

5.1.1 Calculating licence fees on the basis of revenue is a simpler calculation than calculating fees on the basis of gross profits. This is on the basis that there is no deduction of costs associated with the provision of licensed services, which, as discussed above, allowed licensees some discretion as to the costs to be deducted depending on their particular interpretation of the words "total costs directly incurred in the provision of such services" as used in the definition of "Gross Profits" in the 2009 Regulations. Although there is still at present some room for different interpretations to be adopted by different licensees as to what revenues should be considered as being generated from licensed services and, accordingly, included in the revenue amount on which licence fees are calculated, as explained above, the Authority intends to address this issue in due course through the publication of further amendment regulations detailing the particular service components which constitute licensed services, the revenues from which should be included in the amount used to calculate licence fees. (The Authority will follow a public consultation process in this regard.) There is also much less room for differing interpretations to be adopted by different licensees given that it is not open to licensees to interpret both

what revenues should be included and what costs should be deducted.

5.1.2 Moving to a revenue-based approach for the calculation of licence fees means that licensees are no longer obliged to account for the various costs that they incur in the provision of licensed services, which reduces the administrative burden on them. In particular, licensees do not have to perform the exercise of allocating a proportion of common costs incurred in the performance of the licensees' various activities to licensed services. The alternative approach that the Authority considered was developing a specific format for the apportionment ***of*** common costs and requiring licensees to obtain a direction from the Authority before deducting any other costs, developing a detailed format for the submission of supporting information in respect of licence fee calculations to justify the proportion of common costs attributed to licensed services and for the Authority to interrogate the submissions made by licensees in more detail. While the Authority considered this as an alternative, the Authority ultimately decided instead to adopt a revenue-based approach. The primary reason for this is that, for the Authority properly to verify the submissions made by licensees in relation to *both* revenues generated from licensed services and directly attributable costs to be excluded from those revenues, a significant investment in resources and manpower would be required for the Authority to implement appropriate controls to ensure that it invoices and collects the correct amounts from licensees. It is not open to the Authority simply to rely on the revenue and cost information that the licensees themselves report and the calculations that the licensees perform. Instead, it is necessary for the Authority to interrogate the information presented by licensees and to verify that licensees are (1) reporting the correct information and (2) calculating licence fees correctly. Inadequate invoicing and collection of licence fees and failure to verify the completeness of information presented by licensees has been raised by the Auditor-General in the past as a cause for concern in the auditing of the Authority's finances. As such, it is appropriate for the Authority to adopt a method of calculating licence fees that best allows for appropriate controls to be implemented in the context of the Authority's organisational structure and budget constraints. In the Authority's assessment, because a revenue-based approach eliminates one leg of the enquiry that must be undertaken when a profit-based approach is used (on the basis that costs are not taken into account), the revenue-based approach is the most suitable approach.

5.1.3 The calculations that licensees are required to perform pursuant to a revenue-based approach are much simpler than under a gross profit-based approach. The reduction in the number of variables given that the various costs items identified by different licensees as being directly related to the provision of

licensed services are no longer taken into account makes it significantly easier for the Authority to verify the calculations performed by licensees and to interrogate licensees' submissions on licence fees. This is on the basis that the Authority will not need to interrogate both the revenue items that have been included (and those that have been excluded) and cost items that have been deducted (on the basis that they are regarded by a particular licensee as being attributable to the provision of licensed services, but instead only the revenue items that have been included and excluded from the revenue amount reported by the licensee.

5.2 The Authority decided to levy licence fees on a sliding scale linked to the revenues generated by licensees from licensed services. The Authority took into account the comments made by various interested parties that the 0.75% rate to be applied generally to all licensees was not justified. In the Authority's assessment, rates of between 0.15% (for revenues up to R50 million) to 0.35% (for revenues above R1 billion) were considered to be appropriate on the basis that the licence fees that will be collected if this sliding scale is used are broadly the same as the licence fees that were calculated previously when licence fees were calculated as a fixed percentage (1.5%) of gross profits generated from licensed services. The amount that the Authority seeks to collect from licence fees in any financial year (which is paid to the National Revenue Fund in terms of section 15(3) of the ICASA Act) is the amount that the Authority proposes to the Department of Communications and Parliament should be allocated to the Authority to fund its regulatory activities given that this is what the Authority considers its regulatory costs actually to be and considers that this is the amount required to fund the activities that it is required to undertake. The adoption of the sliding scale whereby smaller licensees which generate less revenues will pay less than large licensees which generate more revenues, in the Authority's assessment and on the Authority's calculations, allows the Authority to collect this amount.

5.3 The Authority took into account the various submissions made by interested parties on the need to clarify the meaning of the word "turnover". Accordingly, the Authority elected to substitute the word "turnover" and instead to use the word "revenue" which has been given a particular technical meaning based on the relevant accounting standards.

5.4 Given that licensees which generate revenues up to R50 million are required to pay a significantly reduced percentage of revenues as licence fees, in the Authority's assessment it was unnecessary to include an exemption for small businesses as was previously provided for in the 2009 Regulations and proposed in the draft Regulations and for new entrants as was proposed in the draft Regulations.

5.5 The Authority decided to retain the exemption for community broadcasting service

licensees on the basis that these are non-profit entities.

5.6 It was not regarded as necessary to specifically provide in the 2012 Regulations that persons who are exempted from the licensing requirements imposed by the ECA, such as operators of private electronic communications networks and resellers, as provided for in the ICASA Licence Exemption Regulations, 2008 (published under General Notice 912 in *Government Gazette* 31289 of 29 July 2008) are not required to pay licence fees given that although the services provided by licence-exempt persons are ECS, ECNS and/or broadcasting services, as the case may be, they are not licensed services. Regulation 3(1) of the 2012 Regulations makes it clear that the annual licence fees prescribed in the Regulations are payable by "holders of individual and class ECS Licences, individual and class ECNS Licences and individual commercial BS Licences". These fees are, accordingly, not payable by persons who do not hold licences such as licence-exempt persons.

5.7 In relation to the implementation of the 2012 Regulations, the fact that the Regulations commenced on 1 April 2013 means that licensees must calculate licence fees on the basis of the 2009 Regulations for any part of any financial year up until 31 March 2013 and must calculate licence fees for any part of any financial year after 1 April 2013 on the basis of the 2012 Regulations. This allows for consistency and a common approach to be applied to all licensees. If the Authority allowed licensees to apply the new approach under the 2012 Regulations for a particular financial year e.g. the 2012/2013 financial year, this would result in some licensees employing the new approach for a longer or shorter period than other licensees depending on the end of their respective financial years. Instead, all licensees must calculate licence fees on the same basis from the same point in time.

5.8 The Authority took into account the submissions received in relation to the proposed penalties for contravention of the draft Regulations and considered that it was more appropriate to create a mechanism for the Authority to suspend a particular licence pending payment of outstanding licence fees.

5.9 The Authority's position is that, if the Minister has not made any policy or issued any policy direction to the Authority in relation to licence fees, the Authority is not required to wait for the Minister to do so before making regulations dealing with fees. Of course, the Authority is required to take any relevant policy or policy direction issued by the Minister into account when making regulations, as and when such a policy or policy direction is issued. The Authority must also inform the Minister of any proposed regulations and, if the Minister provides his views in relation to such regulations, take those views into account. However, there is no specific provision that regulations in relation to licence fees are a special category of regulations that may only be made in response to a policy or policy direction from the Minister. By contrast, the ECA does

provide that, in certain instances, the Authority may only act in response to a direction from the Minister to do so. For example, section 5(6) of the ECA provides that the Authority may only accept and consider applications for individual ECNS licences in terms of a policy direction issued by the Minister.

5.10 In relation to administrative fees, the Authority agreed with the comments made by certain interested parties that requiring registrants for class licences and class licensees to pay the same fee for an initial registration for a class licence and to transfer a class licence meant that few class licences were ever transferred. Accordingly, the Authority decided to reduce the administrative fees that are payable for the transfer of a class licence to better reflect the regulatory costs associated with processing such an application.

6. **The submissions received from interested parties on the draft Amendment Regulations**

6.1 The submissions of the various interested parties identified above were taken into account by the Authority in finalising the Amendment Regulations. There were several broad themes which emerged from the various submissions, which are summarised below. The summaries in this reasons document do not comprehensively address each and every submission made or point raised by the various parties but instead summarise and address the primary submissions that were made.

6.2 Retrospective application of the Amendment Regulations

Internet Solutions, ISPA, M-Net, MTN, NAB, Telkom, Vodacom and WAPA submitted that the Amendment Regulations should not apply retrospectively. This was on the basis that the retrospective application of the Regulations would present licensees with a number of difficulties particularly in relation to the calculation and payment of licence fees. By virtue of the fact that licensees have different financial year ends, the intended period in which the Amendment Regulations will apply retrospectively (i.e. 1 April 2013 – 31 March 2014) may fall within or outside licensees' financial years. As such, licensees may have already calculated the licence fees payable to the Authority in terms of the 2012 Regulations (prior to their amendment) and have budgeted on the basis of those calculations. Furthermore, the licence fees may have already been declared as expenditure and reported to licensees' shareholders, and licensees may have declared dividends on the basis that the expenditure declared in relation to the licence fees for the 2013 financial year was certain and would not change. As such, licensees may be placed in a position where they would not be able to comply with the requirement.

6.3 Period allowed for public consultation

ISPA, M-Net, MTN and Vodacom objected to the fact that the Authority had allowed a reduced period of time for the submission of comments on the draft Amendment Regulations (10 days rather than 30). It was submitted that the Authority must allow sufficient time to apply its mind to the written submissions, allow for a meaningful period for public hearings (if required) and also allow for a meaningful period for consideration of the arguments and submissions made and, if necessary, to publish revised draft regulations. It was submitted that the Authority did not provide adequate reasons as to why reducing the ordinary 30-day period for public consultation is in the public interest, particularly given the consequences of the proposed amendment to the 2012 Regulations.

6.4 Deduction of certain revenue and cost items from relevant revenue amount

6.4.1 M-Net submitted that the exclusion of discounts and agency fees by broadcasters is standard practice in the broadcasting industry and these amounts have always been excluded from broadcasters' licence fee calculations. M-Net submitted that, given that the Authority specifically provided for the exclusion of such amounts following representations made by the broadcasting industry prior to the adoption of the 2012 Regulations, these deductions should continue to be permitted.

6.4.2 Vodacom agreed that the definition of "licensed service" in the 2012 Regulations gives rise to confusion (on the basis outlined in paragraph 2.3 of the Explanatory Memorandum published with the draft Amendment Regulations) but indicated that the clarification proposed by the Authority does not clarify whether it is expenses that must be deducted from revenue or certain revenue items that must be excluded from total revenue, in the computation of licence fees. It was submitted that, while the 2012 Regulations allow for deductions or exclusions, the Amendment Regulations will not permit any such exclusions and, accordingly, will result in an increase in licence fee liability due to the change in the formula. Vodacom submitted that, given that the Authority has not demonstrated that its administrative costs for regulating the sector have increased, there is no justification for collecting higher fees from licensees.

6.4.3 Telkom submitted that it was not clear why certain "third party" costs (such as amounts paid to other operators to terminate calls on those operators' networks) cannot be deducted when calculating licence fees, when corresponding revenue items (such as revenue received by a licensee from other licensees for calls terminated on the first licensee's network) are included in the revenue amount used to calculate licence fees. Telkom submitted that the adoption of this approach will result in an increase in the licence fees that

Telkom will be required to pay.

6.4.4 Internet Solutions submitted that service provider discounts, agency fees, interconnection and facilities leasing charges, government grants and subsidies, even from an accounting perspective, all fall outside the category of "licensed services" as defined in the ECA. Accordingly, to the extent that licence fees are payable in respect of such amounts this is incorrect and unfounded.

6.4.5 ISPA and WAPA supported the proposed amendment to the definition of "licensed service" to remedy the incorrect inclusion of items to be deducted from revenues, which "have no place in a definition of 'licensed services'". However, ISPA and WAPA submitted that the Authority should then amend the term "turnover" so that the "currently allowable" deductions are provided for.

6.4.6 Internet Solutions and ISPA suggested that the "definition" in paragraph 2.3.1 of the Explanatory Memorandum published with the draft Amendment Regulations was wrong and, if it were to be allowed, would have a negative impact on licensees. These and other parties appeared to regard the discussion in paragraph 2.3.1 of the Explanatory Memorandum as the Authority's proposal as to what revenues should be included in the revenue amount to be used in the calculation of licence fees. Certain licensees, such as MTN, indicated that they already followed the approach outlined in paragraph 2.3.1 of the Explanatory Memorandum in calculating their licence fees.

6.4.7 Telkom and Vodacom submitted that a consistent approach between the 2012 Regulations and the USAF Regulations should be adopted: the same revenues that form the basis for the calculation and payment of contributions to the USAF (including the deductions from those revenue amounts) in terms of the definition of "annual turnover" in the USAF Regulations should be the revenue amount on which annual licence fees are calculated.

6.5 <u>The inclusion of revenues from resale services</u>

Various parties (including Internet Solutions, ISPA and WAPA) made submissions that licence fees cannot be payable on revenues generated from the provision of services on a resale basis. The basis for the concerns expressed in this regard appeared to be the proposed deletion of the words "does not include the resale of electronic communications service ..." from the definition of "licensed service" in the 2012 Regulations. Some interested parties appeared to interpret the proposed deletion to mean that revenues from ECS provided on a resale basis would be included in the

revenue amount on which licensees are required to pay licence fees. It was submitted that this would allow for double-taxation in that the wholesale providers of the ECS sold by resellers are required to pay a licence fee on the revenues generated from the sale of ECS on a wholesale basis, and resellers would then need to pay a further licence fee on the revenues generated from their reselling activities.

6.6 The proposed amendment does not provide sufficient clarity

6.6.1 Most of the interested parties (including ISPA, Telkom, Vodacom and WAPA) submitted that the proposed amendment to the definition of "licensed services" in the 2012 Regulations does not provide sufficient clarity to licensees as to what services (or activities) exactly constitute licensed services i.e. ECS, ECNS and broadcasting services. It was submitted that there is confusion in the industry as to what the definitions of ECS, ECNS and broadcasting services, which does not assist licensees when they have to determine what revenues should be included in the revenue amount on which their licence fees are calculated.

6.6.2 ISPA indicated that the principal difficulty experienced by licensees is in distinguishing between the licensed provision of ECS and the licence exempt provision of resale of ECS.

6.6.3 Vodacom submitted that clarity can be provided by clearly stipulating which revenue items should be excluded or expense items deducted in the computation of licence fees.

7. The reasons for the Amendment Regulations

7.1 Revenues to be included in revenue amount on which licence fees are levied

7.1.1 Under the 2012 Regulations as initially published, the annual licence fee payable by a licensee was equal to that licensee's revenue from licensed services multiplied by a specified percentage. "Licensed service" was defined as "in the [ECA] under 'broadcasting service', 'electronic communications service' and 'electronic communications network service'; and as contained in the relevant licence *and does not include the resale of electronic communications services, service provider discounts, agency fees, interconnection and facilities leasing charges, and government grants and subsidies*" (emphasis added).

7.1.2 The Authority's intention when it published the 2012 Regulations was that licence fees should be levied on all revenues generated by licensees from licensed services, without any deduction or exclusion of particular revenues,

and without deducting any costs incurred by licensees in providing licensed services.

7.1.3 It became clear to the Authority that the definition of a "Licensed Service" in the 2012 Regulations, prior to their amendment, did not properly reflect the Authority's intention because it was open to interpretation in one of two ways:

7.1.3.1 From an accounting perspective, it could be argued to include all revenues generated by licensees from licensed services including "the resale of electronic communications service, service provider discounts, agency fees, interconnection and facilities leasing charges, and government grants and subsidies" (i.e. no amounts, including no cost amounts, should be deducted from the revenues generated by a licensee to determine the base amount on which licence fees are levied). This is on the basis that, in terms of accounting terminology, the specified charges and fees should have been included within a licensee's potential turnover amount and the words "charges" specifically refers to deductions.

7.1.3.2 The definition of a "Licensed Service" could be interpreted as providing that revenues generated from certain listed items are expressly excluded from the definition of a "Licensed Service". These revenues include interconnection and facilities leasing charges, agency fees, the resale of electronic communications services, service provider discounts, and government grants and subsidies. Although the wording of the definition is unclear, and although the excluded items are monetary amounts and not services, it suggests that the licence fees should be calculated on the basis of income from licensed services (i.e. electronic communications services, electronic communications network services and broadcasting services) but that certain income sources (interconnection revenues, facilities leasing revenues etc) are to be excluded when revenue is calculated.

7.1.4 It also became clear to the Authority that the italicised words in quoted in paragraph 7.1.1 above were in the wrong place: "*service provider discounts, agency fees, interconnection and facilities leasing charges, and government grants and subsidies"* are amounts of money rather than services and could, accordingly, not be included or excluded from the category of "services" to which the definition refers. The Authority accordingly wanted to clarify the drafting to ensure that the definition of "licensed services" refers only to the services and not also to cost items or revenues which are not services, the inclusion of which did not make sense in the context of the definition of

"licensed services" and which did not reflect the Authority's intention.

7.1.5 Through the publication of the Amendment Regulations, the Authority wished to resolve the confusion and make it clear that no deductions or exclusions are permissible from revenues generated from licensed services on which licence fees are levied.

7.1.6 The Amendment Regulations sought to remedy the problems identified above by deleting the italicised passage in the definition of "Licensed Service" quoted in paragraph 7.1.1 above. Because the exclusion in the definition has been deleted, "Licensed Service" (and therefore revenue from licensed services) should now be interpreted not to exclude what was previously explicitly excluded: "*the resale of electronic communications services, service provider discounts, agency fees, interconnection and facilities leasing charges, and government grants and subsidies*".

7.1.7 As indicated in the reasons for the 2012 Regulations set out above, the Authority accepts that there is a obvious need for further clarity in relation to exactly what services and components of the services provided by licensed entities are considered to be "licensed services" i.e. ECS, ECNS and broadcasting services, and that there is no consensus between licensees in this regard. As such, the Authority intends to institute a further public consultation process aimed at drafting further amendment regulations to include details in the 2012 Regulations of what revenues from particular revenue sources must be included in the revenue amount on which licence fees are levied. This public consultation process will be aimed at, amongst other things, delineating those services that are considered to be ECS, those services that are regarded as ECNS, and what types of services are ECS provided on a resale basis.

7.1.8 As set out above, the Authority does not regard revenues from the sale of services by resellers as revenues from licensed services. Providers of ECS on a resale basis have specifically been exempted in terms of the Exemption Regulations from the requirement to hold an ECS licence. Unless and until this exemption changes, revenues generated from resale of ECS are not revenues generated from licensed services because they are not provided in terms of or under a licence. This applies whether the reseller holds an ECS licence or not in respect of other licensed services that it provides. A reseller who holds an ECS licence should provide other ECS under that licence in accordance with the requirements of the Standard Terms and Conditions for Individual Electronic Communications Services, 2010 and Standard Terms and Conditions for Class Electronic Communications Services, 2010.

7.1.9 Certain of the other items that are not specifically included or excluded are similarly also not clearly revenues from licensed services, such as government grants and subsidies. As appears from the Practice Note published in relation to the 2009 Regulations, the Authority's view is that interconnection and facilities leasing are licensed services and, accordingly, that revenues from these activities should be included in the revenue amount on which licence fees are levied. This issue will be fully ventilated in the context of the public consultation process to be undertaken.

7.2 The public interest served by abbreviating the consultation periods

7.2.1 Section 4(1) of the ECA permits the Authority to make regulations "with regard to any matter which in terms of [the ECA] or the related legislation must or may be prescribed, governed or determined by regulation". Section 4(4) of the ECA requires that, as a general rule, the Authority must give notice of its intention to make any regulation and invite written representations at least 30 days before the regulation is made. Section 4(7)(b) of the ECA contains an exception to this rule: if the public interest requires that a regulation be made without delay, the requirements imposed by section 4(4) of the ECA need not be complied with. This means that the Authority is able to rely on section 4(7)(b) of the ECA, where the public interest requires that a regulation be made without delay, to not give any prior public notice of the proposed regulation or to adopt shortened time periods in the making of the proposed regulations.

7.2.2 Given that sections 4(1)(c)(iv)-(v) and 5(7)(a)(iii) of the ECA allow the Authority to make the 2012 Regulations, and given that the making of the Amendment Regulations are related to the Authority's powers under the ECA, section 4(1) also allows the Authority to make the Amendment Regulations.

7.2.3 In the Authority's assessment, the public interest required that the Amendment Regulations be made as soon as possible. Any confusion surrounding the definition of a "Licensed Service" needed to be resolved without any further delay. In particular, the Amendment Regulations clarify the Authority's position in respect of whether interconnection and facilities leasing charges, for example, are amounts that should be deducted from the revenues generated by a licensee to determine the base amount on which licence fees are levied. This is an issue which has repeatedly caused confusion for licensees, and as discussed above the Authority does intend, in due course and following an appropriate public consultation process, publishing further draft amendment regulations to provide further clarity in respect of this issue. However, a failure to take steps urgently to resolve this confusion, particularly in respect of the

exclusion of various charges and fees from the definition of a "Licensed Service", would have ongoing adverse effects for licensees in respect of the calculations of their licence fees, and for the Authority in respect of its collection of licence fees.

7.3 Retrospective effect of the Amendment Regulations

Given that, as indicated by the various interested parties who commented on the draft Amendment Regulations, many licensees had already budgeted for licence fee payments on the basis of their interpretation of the definition of "licensed service" given the problems with that definition, the Authority accepted that making the Amendment Regulations apply with retrospective effect could adversely affect these licensees. Accordingly, the Authority decided that the Amendment Regulations would only apply as from 1 April 2014. As such, annual licence fees that are payable by licensees for any part of their respective financial years as from 1 April 2014, must be calculated in terms of the 2012 Regulations, as amended.