

**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH
AFRICA**

Government Gazette, General Notice 659 of 26 June 2015

Amendment of the Standard Terms and Conditions Regulations – Individual Licenses of 14 June 2010



**A Submission by
The South African and Communications Forum**



7 August 2015

DRAFT SACF SUBMISSION ON THE AMENDMENT TO LICENCE TERMS AND CONDITIONS REGULATIONS

1. INTRODUCTION

The South African Communications Forum (“SACF”) thanks the Independent Communications Authority of South Africa (“ICASA”) for the opportunity to participate in the review of the Licence Terms and Conditions Regulations by the Authority. The SACF recognises the important role that these regulations will play in furthering the development of the ICT sector which will further the development of the economy as a whole.

This submission is on the amendments as contained in Government Notice No. 38918 of 26 June 2015 amending the regulations as published in Government Notice No. 33294 of 14 June 2010.

2. DRAFT AMENDMENTS

2.1 DRAFT AMENDMENTS TO SCHEDULE 1

2.1.1 Amendment of regulation 2 of the Regulations

Sub-regulation (d) has been amended to read “(d) Physical Address” in place of “(d) Notices and Address”. An additional sub-section (e) has been added to the sub-regulation requiring the written notification of the financial year end.

The SACF is of the view that these amendments are reasonable and would enhance the Authority’s ability to enforce compliance. The changes have been incorporated into the relevant forms except for the changes to (e) for which the Authority needs to ensure that this change is also catered for.

2.1.2 Amendment of regulation 5 of the regulations

*Under this amendment the commencement of broadcasting services by a **free to air sound operator** has now to take place within twelve (12) months from the effective date, a change from six (6) months in the previous regulation. **Free to air television’s** lead time to commence operation from the effective date is being increased to twenty-four (24) months from the current twelve (12) months.*

Subscription broadcasting's lead time to commence operation from the effective date is being increased to twenty-four (24) months from the current twelve (12) months.

The SACF submits that the draft amendments to the Standard Terms and Conditions Regulations for Class licences allows for a commencement period of 24 months, with an extension to be requested 12 months prior to the end of that period. It is our recommendation that the Authority makes the same change here. The 'effective date' should also be changed to 'effective date or transfer date' as is appropriate.

2.1.3 Substitution of regulation 9 of the Regulations

With regard to regulation 9 of the current regulations, the change proposed for (1) (c) is that the phrase "scarce resources" is replaced with "radio frequency spectrum".

The SACF is of the view that the new language brings more clarity as to what is being referred to in this regulation.

2.1.4 Amendment of regulation 13 of the Regulations

Sub regulation (2) of Regulation 13 was amended to indicate that details of prices including adjustments thereto for its services and related terms and conditions of such service at least seven days prior to the provision of the said service.

The SACF submits that this is a significant change as it changes the previous timeline for notifying the authority from 30 days of commencing such service to 7 days prior to commencement of the service.

2.2 DRAFT AMENDMENTS TO SCHEDULE 2

2.2.1 Amendment of regulation 2 of the Regulations

Sub-regulation (d) has been amended to read "(d) Physical Address" in place of "(d) Notices and Address". An additional sub-section (e) has been added to the sub-regulation requiring the written notification of the financial year end.

The SACF submits that the draft amendments to the Standard Terms and Conditions Regulations for Class licences allows for a commencement period of 24 months, with an extension to be requested 12 months prior to the end of that period. It is our recommendation that the Authority makes the same change here. The 'effective date' should also be changed to 'effective date or transfer date' as is appropriate.

2.2.2 Substitution of regulation 5 of the Regulations

The substitution Regulation 5 stipulates that a request for an extension of the commencement period in terms of sub regulation (1) must be brought to the Authority twelve (12) months prior to the expiry of the commencement of operations. Where such extension has been granted, it shall be final and not granted for a period longer than the period within which a licensee was required to commence its operations in terms of sub regulation (1).

A further new requirement is that a licensee who has not commenced operations must provide the Authority with a letter from external auditors confirming nil licensed service revenue.

The SACF is of the view that most licensees who would not have commenced operations might not have external auditors and as such may not be able to provide a letter from external auditors as required.

2.2.3 Substitution of regulation 8 of the Regulations

The substitution regulation has an additional requirement in sub regulation 9 (4) which stipulates that where the licensee refuse or fail to provide the Authority with requested information in terms of sub regulation (1), the Authority may after reasonable attempts, refer the matter to the Complaints and Compliance Committee.

It is the SACF's view that the above-mentioned proposed amendments in respect of individual electronic communications network services ("I-ECNS") licensees and individual electronic communications service ("I-ECS") licensees is inconsistent with the provisions of Section 4(3)(g) of the Independent Communications Authority of South Africa Act, no 13 of 2000 (as amended) ("the ICASA Act") because the proposed amendments do not make reference to a notice being issued by the Authority when requesting such information. Section 4(3) (g) states that the Authority "...may, by notice in writing, direct the holder of a licence in terms of the underlying statutes to produce or furnish to the Authority, at a time and place specified in the notice, any document and information specified in such notice and relating to any matter in respect of which a duty or obligation is imposed on such licensee by this Act or the underlying statutes."

The SACF recommends that the provision be amended as follows: “The Authority may, in the course of carrying out its obligations under the Act, require a Licensee to provide information as may be reasonably requested from time to time by the Authority in the requested format and within reasonable time frames specified by the Authority in terms of the applicable Notice referred to in Section 4(3)(9) of the ICASA Act, provided that the Authority shall not impose any unreasonable burden on the Licensee when requesting information pursuant to this clause and provided that the Authority affords the Licensee every reasonable opportunity to make representations to the Authority in respect of any request so made.”

2.2.4 Substitution of regulation 10 of the Regulations

Sub-regulation 10 (1) is changed to include service providers to be also required to install and operate metering and billing systems that accurately record the extent of the service(s) provided to any end-user, and:

(a) Exact period covered by such invoices;

Sub-section (5) is amended as follows:

(e) duration of the call session; and

(f) unit charge and total charge per call session

It is the SACF’s submission that this regulation does not make provision for a pre-paid subscriber as invoices/ statements and itemized billing are not provided as a matter of course. We propose the following amendment: “(2) ***A Licensee must provide an accurate invoice with a detailed statement of services rendered to any end-user at no charge. In respect of an end-user that subscribes to a pre-paid service, the licensee may provide the prepaid subscriber with their invoice or itemized billing related information upon request by the end user,***”

Regulation 12 Contraventions and Fines has changed as follows:

(1) Any person that contravenes regulations 7, 8, 9 and 10 is liable to a fine not less than R100 000, 00 (One hundred thousand Rand) but not exceeding R5 000 000,00 (Five million Rand) or 10% of the Licensee's annual turnover for every day or part thereof during which the offence is continued.

- (2) Any person that contravenes any other regulation not specified in sub regulation (1) is liable to a fine not less than R10 000, 00 (Ten thousand Rand) but not exceeding R100 000, 00 (One hundred thousand Rand).*
- (3) A person found guilty of sub regulations (1) and (2) is liable for an additional fine of R100 000, 00 for every repeated contravention of a regulation in these Regulations.*
- (4) Failure to commence with operations in terms of regulation 5 will result in the revocation of the licence."*

The proposed amendment to regulations 12 (1) applicable to I-ECNS and I-ECS licensees found in the Draft Regulations states that "Any person that contravenes regulations 7, 8, 9 and 10 is liable to a fine not less than R100 000, 00 (One hundred thousand Rand) but not exceeding R5 000 000,00 (Five million Rand) or 10% of the Licensee's annual turnover for every day or part thereof during which the offence is continued" We submit that the maximum penalty has escalated from R1 million (current regulations) to R5 million. This is an excessive increase which is not justified. It is submitted that the level of voluntary compliance as well as the gravity of the offence must be taken into account when setting fines.

The inclusion of a penalty requirement of 10% of the Licensee's annual turnover for every day or part thereof during which the offense continues is arbitrary. The law should always provide appropriate incentives for compliance and appropriate sanctions for non-compliance. A penalty of 10% of annual turnover is not consistent with section 17(H) of the ICASA Act. This section in the ICASA Act imposes a maximum fine of R5 million and it does not specify that a 10% of annual turnover can be imposed by the Authority, which could be greater than the maximum fine of R5 million. In this instance the ICASA Act does not make provision for the imposition of such an excessive penalty requirements as 10% of licence's annual turnover found in the Draft Regulations. As a result, we submit that this penalty requirement should be deleted as it is not consistent with the penalty provisions in the ICASA Act for the reasons explained previously.

Also, the inclusion of a penalty requirement under regulation 12 (4), which states that failure to commence with operations in terms of regulation 5 will result in the revocation of a licence, is also not consistent with section 17E of the ICASA Act. Section 17E (2) (d) (ii)

provides that a license be revoked or amended only where the licensee has repeatedly been found guilty of material violations. Hence a license may not be revoked or amended as a sanction in the first instance as such sanction is reserved for repeated violations of a material nature. We submit that regulation 12 (4) be deleted in its entirety.

2.3 DRAFT AMENDMENTS TO SCHEDULE 3

Introduction updated as: "In these regulations "the Regulations" means the regulations published by Government Notice No. 523 of 201."

2.3.1 Regulation 2 of the Regulations has been amended as follows:

(1) A Licensee must submit written notice to the Authority within seven (7) days of the occurrence of the following changes:

- (a) the name of the Licensee;*
- (b) contact details including the contact person;*
- (c) shareholding;*
- (d) Physical address; and*
- (e) Financial year end."*

The SACF is of the view that these amendments are reasonable and would enhance the Authority's ability to enforce compliance. The changes have been incorporated into the relevant forms except for the changes to (e) for which the Authority needs to ensure that this change is also catered for.

2.3.3 Regulation 5 of the Regulations has been amended as follows:

5. COMMENCEMENT OF OPERATIONS

- (1) A Licensee must commence operation of the ECS specified in the Licence within twelve (12) months from the effective date, unless the Authority grants, on good cause shown, an extended commencement period on written application.*
- (2) A request for an extension of the commencement period, in terms of sub-regulation (1), must be brought to the Authority twelve (12) months prior to the expiry of the commencement of operations.*
- (3) Where an extension for commencement of operations has been granted, it shall be final and not granted for a period longer than the period within which a licensee was required to commence its operations in terms of sub regulation (1).*

The SACF submits that the draft amendments to the Standard Terms and Conditions Regulations for Class licences allows for a commencement period of 24 months, with an extension to be requested 12 months prior to the end of that period. It is our recommendation that the Authority makes the same change here. The 'effective date' should also be changed to 'effective date or transfer date' as is appropriate.

- a. Where a licensee has not commenced operations, it must provide the Authority with a letter from external auditors confirming nil licensed service revenue.*

The SACF submits that most licensees who would not have commenced operations might not have external auditors and as such may not be able to provide a letter from external auditors as required.

3. CONCLUSION

The SACF is grateful for the opportunity to comment on the draft Amendment to Licence Terms and Conditions Regulations and believes that this public consultation process will ensure that the end result is shaped by all interested parties and that it is supported by a shared vision for a thriving ICT sector which promotes universal access to information.

The SACF therefore thanks ICASA for the opportunity to make a submission on the draft Amendment to Licence Terms and Conditions Regulations and would appreciate the opportunity to make further oral submissions should ICASA hold further hearings or workshops in this regard.