



10 March 2014

**Independent Communications Authority of South Africa**

**Attention: Mr Godfree Maulana, Project Leader**

Per email: [gmaulana@icasa.org.za](mailto:gmaulana@icasa.org.za)

Dear Sir

**SUBMISSIONS ON DRAFT GENERAL LICENCE FEES AMENDMENT REGULATIONS 2014**

1. ISPA sets out below its submissions in respect of the Draft Amendment to the General Licence Fees Regulations published in in GG 37381 on 27 February 2014 (“the draft amendment”) and accompanying Explanatory Memorandum.

General Comments

2. The draft amendment introduces substantive changes in the manner in which annual licence fees are to be calculated which will increase the total fees payable. This does not appear to have been recognised by the Authority.
3. ISPA is unable to see that what is being proposed will bring any clarity whatsoever to the challenges facing the Authority with regard to licence fee calculation and collection. ISPA members’ responses to the draft have uniformly stated that the draft amendment serves only to deepen their existing confusion about which services are to be regarded as “licensed services” and the manner in which annual licence fees are to be calculated.
4. A number of ISPA members expressed specific concern about the proposed deletion of the phrase in the definition of “licensed services” relating to resale of electronic communications services and whether this meant that revenue derived from such resale would now have to be included in the annual licence fee calculation.

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**ISPA Management Committee:**

Ant Brooks\*, Graham Beneke, Marc Furman, Jenny King,  
Duncan Martin, Mohammad Patel, Mike Silber, Warrick Ward-Cox, Elaine Zinn\* (\*ex officio)

Errors in definitions and the inconsistency between the General Licence Fee Regulations and the USAF Regulations

5. Both the USAF Regulations 2011<sup>1</sup> (“USAF Regulations”) and the General Licence Fee Regulations 2012<sup>2</sup> (“GLFR”) set out obligations on behalf of holders of service licences issued by ICASA under Chapter 3 of the Electronic Communications Act 36 of 2005 (“the ECA”) to make revenue-based payments to the Authority and detail the steps to be taken to comply with such obligations.
6. It would be reasonable and logical to anticipate that the two sets of regulations would adopt a uniform approach in respect of the fundamental definitions. A consistent and simple approach serves the interest of both the Authority – in the sense of facilitating the calculation and collection of these fees / contributions – and licensees – in the sense of facilitating compliance while not unnecessarily increasing the regulatory burden.
7. A comparison, however, of the critical definitions relating to “licensed services” and “revenue” / “annual turnover” contained in the two sets of regulations reveals some difficulties:

GLFRs	USAF Regulations
" <b>Licensed Service</b> " as defined 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 service, service provider discounts, agency fees, interconnection and facilities leasing charges, and government grants and subsidies".	" <b>Licensed Services</b> " means ECS, ECNS and BS provided pursuant to a licence issued to a Licensee in terms of Chapters 3, 4 and 9 of the Act
" <b>Revenue</b> " means Revenue as defined in terms of the International Accounting Standard 18 and disclosed in the Licensee's audited Annual Financial Statements, i.e. the gross inflow of economic benefits during the period arising in the course of the ordinary activities of the entity when those inflows result in an increase of equity other	" <b>Annual Turnover</b> " means total revenue generated from Licensed Activity per annum less service provider discounts, agency fees, interconnection and facilities leasing charges, government grants and subsidies;

<sup>1</sup> General Notice 93 of 2011, GG 34010, 10 February 2011

<sup>2</sup> General Notice 299 of 2013, GG 36323, 28 March 2013

than increases relating to contributions from equity participants.	
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Table 1: Comparison of definitions between GLFRs and USAF Regulations (current)

8. The following observations can be made:

8.1. As correctly noted in paragraph 2.3.2 of the Explanatory Memorandum<sup>3</sup> the current definition of “Licensed Service” as contained in the GLFR is problematic in that “service provider discounts, agency fees, interconnection and facilities leasing charges, and government grants and subsidies” are monetary amounts not services. These are deductions from revenue and have no place in a definition of “licensed services”.

8.2. This problem is not evident in the definition of “Licensed Services” set out in the USAF Regulations which correctly sets out the applicable deductions in the definition of “Annual Turnover”.

8.3. It appears that, in drafting the GLFRs subsequent to the finalisation of USAF Regulations, the Authority has:

8.3.1. Grafted the second half of the definition of “Annual Turnover” as set out in the USAF Regulations onto the definition of “Licensed Service” to be contained in the GLFR. It is by no means clear as to why this would have been done.

8.3.2. In the preceding draft to the GLFRs<sup>4</sup> the proposed definition of “Licensed Service” is correct - **“Licensed Service”** as defined in the *Electronic Communications Act* under “broadcasting service”, “electronic communications service” and “electronic communications network service”- so the amendment to this definition took place in the Authority’s finalisation of the GLFR. No explanation for this amendment has been advanced by the Authority.

9. ISPA accordingly supports the amendment as proposed in that it would remedy this defect. This support, however, is subject to the Authority realising that the proposed amendment must be accompanied by a further amendment to the term “Turnover” as set out in the GLFR so that the current allowable deductions are provided for.

<sup>3</sup> Note, however, paragraph 15 below

<sup>4</sup> Draft General Licence Fees Regulations, General Notice 887 of 2012, GG 35819, 24 October 2012

GLFRs	USAF Regulations
<p><b>"Licensed Service"</b> as defined in the [ECA] under 'broadcasting service', 'electronic communications service' and 'electronic communications network service'; and as contained in the relevant licence, <u>excluding resale of electronic communications services.</u></p>	<p><b>"Licensed Services"</b> means ECS, ECNS and BS provided pursuant to a licence issued to a Licensee in terms of Chapters 3, 4 and 9 of the Act</p>
<p><b>"Revenue"</b> means Revenue as defined in terms of the International Accounting Standard 18 and disclosed in the Licensee's audited Annual Financial Statements, i.e. the gross inflow of economic benefits during the period arising in the course of the ordinary activities of the entity when those inflows result in an increase of equity other than increases relating to contributions from equity participants, <u>less service provider discounts, agency fees, interconnection and facilities leasing charges, government grants and subsidies.</u></p>	<p><b>"Annual Turnover"</b> means total revenue generated from Licensed Activity per annum less service provider discounts, agency fees, interconnection and facilities leasing charges, government grants and subsidies;</p>

*Table 2: Comparison of definitions between GLFRs and USAF Regulations (taking into account proposed amendment and with ISPA's suggested further amendment underlined)*

- 9.1. ISPA notes that the Explanatory Memorandum, while setting out two possible interpretations of the current definition of "Licensed Services" and indicating that it has opted to select one of these – the so-called "accounting interpretation" for the purposes of the draft amendment, does not in fact provide reasons for the selection decision. Obviously a decision one way or the other will serve to lessen confusion but a decision to select an interpretation which removes the right of licensees to make certain deductions requires a specific justification as to why such deductions will no longer be allowed due to the fact that it makes a substantive difference to the licence fee payable. This justification is conspicuous by its absence.
- 9.2. ISPA's view, in the absence of such justification, is that the decision made to use the "accounting interpretation" is wrong and bad in law.

- 9.3. ISPA submits that the deductions from revenue in respect of service provider discounts, agency fees, interconnection and facilities leasing charges, government grants and subsidies must be included in an amended definition of “Revenue” in that they either serve to
- 9.3.1. Incentivise the broadening of the subscriber base (service provider discounts)
  - 9.3.2. Constitute exceptional income received from Government schemes; or
  - 9.3.3. Prevent double taxation (interconnection and facilities leasing charges).
- 9.4. Further there should be, ISPA submits, justification for a decision which effectively allows the deductions under the USAF Regulations but not under the GLFR. As shown above, the need to amend the definition of “Licensed Services” in the GLFR arises from what appears to be a drafting mistake made by the Authority. Surely the logical approach would be to fix this error so that there is consistency between the two sets of regulations?

Failure to clarify the meaning of licensed services and the continuing lack of clarity regarding resale

10. ISPA submits, with respect, that the Authority continues to ignore the real difficulties presented to licensees in respect of the calculation of annual licence fees and the annual USAF contribution.
11. ISPA submits that the difficulties which the Authority is experiencing in calculating, verifying and collecting annual licence fees will continue until such time as it moves to clarify, authoritatively, exactly which activities constitute licensed services. ISPA has engaged extensively with the Authority regarding this issue since 2005 but the required clarity has not been forthcoming.
12. The definition of “Licensed Services” found in the draft amendment does not provide any assistance in this regard. Defining “Licensed Services” with reference to the definitions in the ECA and the terms and conditions of actual licences is legally correct but practically not helpful given the confusion in industry about what these definitions mean. ISPA has previously suggested that a practise note providing more detailed guidance on what should and what should not be regarded as a licensed service - having specific regard to products and services currently in the marketplace - would be the single most effective step that the Authority could take to alleviate the continuing challenges experienced with annual licence fees.
13. As communicated to the Authority, the principal difficulty experienced by licensees is in distinguishing between the licensed provision of electronic communications services and the licence-exempt provision of resale of electronic communication services.

14. Paragraph 2.3.1 of the Explanatory Memorandum states:

“2.3.1 From an accounting perspective, the definition of a "Licensed Service" 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.”

(our emphasis)

14.1. This statement is legally incorrect insofar as it refers to resale of electronic communications services. As will be set out below, the definition of “Licensed Service” cannot include resale of electronic communications services and no perspective, whether “accounting” or otherwise, can have the effect of dictating that revenue derived from resale of electronic communications services should be included for the purpose of calculating annual licence fees.

15. Paragraph 2.3.2. of the Explanatory Memorandum states:

“Although the wording of the definition is unclear, and although the excluded items are monetary amounts and not services, it suggests that 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 income is calculated.”

(our emphasis)

15.1. The underlined portion of the extracted paragraph is not correct in that it does not take into account the words “does not include the resale of electronic communications service” where they appear in the current definition of “Licensed Services” in the GLFR.

15.2. It follows that the scope of the amendment proposed by the Authority may be broader than the rationale set out in the Explanatory Memorandum.

15.3. ISPA submits that if it is the intention of the Authority in seeking to remove the explicit reference to resale of electronic communications services then such intention has not been motivated as required by the principles of administrative justice and is in any event *ultra vires* the ECA with particular reference to section 6 and the definition of “reseller”:

### **Licence exemption**

6. (1) Subject to subsection (2), the Authority may prescribe the—

- (a) type of electronic communications services that may be provided;
  - (b) type of electronic communications networks that may be operated;
  - (c) type of electronic communications network services that may be provided; and
  - (d) radio frequency spectrum that may be used,
- without a licence.

(2) The electronic communications services, electronic communications networks, electronic communications network services and radio frequency spectrum contemplated in subsection (1) may include, but are not limited to—

....

- (b) electronic communications services that are provided by resellers;

“**reseller**” means a person who—

(a) acquires, through lease or other commercial arrangement, by any electronic communications network service or electronic communications service; and

(b) makes such electronic communications network service or electronic communications service available to subscribers for a fee,

whether or not such electronic communications network services or electronic communications services made available by the reseller—

(i) are identical to the electronic communications network service or electronic communications service acquired;

(ii) are packaged, bundled or otherwise re-grouped to form new or varied service offerings;

(iii) are combined, linked or used in connection with electronic communications networks or electronic communications facilities owned by the reseller; or

(iv) add value to such electronic communications network services or electronic communications services,

and “resale” is construed accordingly;

15.4. In the explanatory memorandum to the draft regulations<sup>5</sup> published prior to the GLFRs being finalised, the Authority explicitly sets out two principles on which the GLFRs are to be based. The first of these is that “annual licence fees may only be imposed on the licensed activities”. Resale of electronic communications services is not a licensed activity.

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<sup>5</sup> Draft General Licence Fees Regulations, General Notice 887 of 2012, GG 35819, 24 October 2012

15.5. It would nevertheless be helpful to have an explicit statement in the definition of licensed services to this effect.

16. That this is a matter of significant importance to ISPA members is obvious from the high level of member input received. The following response is typical of such input:

*“We at [ISPA member] primarily resell other ISP's connectivity services. This includes Telkom's ADSL, but also that of Internet Solutions, M-Web and Altech. If resell now suddenly becomes license bearing, and at a percentage of revenue, then this would in effect be "double-taxation". This is because our providers need to pay a license fee on their services to us and then we need to again pay a license fee on that. Worse though, our margins are already razor thin, so a license fee on our revenue is a much larger chunk of our profit than that of our suppliers. This undermines our business.”*

#### Retrospective effect and financial years

17. There is a fundamental presumption under the principle of legality against retrospective operation of law or regulation. The Authority has sought to justify the proposed retrospective operation of the draft amendment on the grounds of “public interest” but ISPA does not believe that this justification is in any way sufficient.

18. In fact, as shown above, the draft amendment is prejudicial to licensees in that it will result in higher fees being paid for the period from 1 April 2013 onwards. Furthermore licensees will have arranged their operations and reporting based on the existing regulations and will be prejudiced by a substantive amendment to such regulations in that it will require them to change these arrangements.

19. In the words of one ISPA member:

*“How can one have planned one's pricing and business plans to then be retroactively slapped with effectively a penalty? This is like SARS suddenly saying they are raising company tax retrospectively?”*

20. The perceived need for retrospective operation is entirely a function of errors made by the Authority and delays of its own making. ISPA rejects the justification advanced as being nowhere near sufficient to overcome the fundamental assumption against retrospective operation.

21. It appears from paragraph 3.2 of the Explanatory Memorandum that the Authority remains unable to appreciate that licensees have a variety of financial year ends and that it is rare for these to align with ICASA's financial year. ISPA requests that the Authority include a note on the implementation of the



finalised regulations with specific regard to the fact that licensees have a variety of financial years, very few of which are aligned with the Authority's financial year. It would be helpful for licensees to have clear guidance on how to handle the different regulatory frameworks for the calculation of annual licence fees applicable to their financial years.

22. ISPA objects to the short time periods which the Authority has imposed in respect of this process. Any urgency is entirely of the Authority's own making and industry should not be prejudiced by inadequate comment periods. ISPA does not dispute that the Authority has a legislative basis for specifying a short period for comment but does not believe that the Authority has advanced sufficient reason for doing so.

### Conclusion

23. ISPA submits, in essence, that the Authority has not correctly identified the sources of confusion in the practical application of the GLFR.
24. Bluntly put: it is not ICASA's function to maximise revenue from licensees and it cannot simply ignore the provisions of the ECA in an attempt to do so. The difficulties which have bedevilled the calculation of licence fees over the past decade will not be solved by the current haphazard approach: it needs to be done properly and with the requisite attention to providing practical guidance as to the interpretation to be accorded to the term "Licensed Services".
25. ISPA suggests that the Authority urgently consider a proper engagement with industry so that it can begin to understand the practicalities of compliance with its regulations and what action is required from it in order to facilitate such compliance. A workshop designed to address this issue and build consensus would undoubtedly be enthusiastically attended, but ISPA suggests that it would be incumbent upon the Authority to first reach and then set out an understanding of the detail of the licensing framework set out under the ECA.
26. Should the Authority elect to hold public hearings in respect of this process then ISPA confirms its desire to participate.

Regards

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