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## GENERAL NOTICE

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### NOTICE 239 OF 2009



### **Independent Communications Authority of South Africa**

Pinmill Farm, 164 Katherine Street, Sandton  
Private Bag X10002, Sandton, 2146

#### **GENERAL NOTICE –POSITION PAPER ON GENERAL LICENCE FEES**

- (1) On 24 October 2008 in Notice No. 1305 in Government Gazette Number 31542, the Authority published draft General licence fees regulations. The Authority also invited interested parties to submit written representations on the draft regulations.
- (2) The closing date for submissions was 5 December 2008 and hearings were held on 13-15 January 2009 whereat parties who have expressed an interest to participate in oral hearings were afforded such an opportunity.
- (3) The Authority hereby publishes the attached position paper to reflect some of its findings and to contextualize the revisions incorporated in the draft regulation as published in the Government Gazette.

**Paris Mashile**  
**Chairperson**  
**ICASA**

(1) This Position Paper is the culmination of a process that included:

- (i) an industry workshop held on 4 October 2007;
- (ii) comments submitted pursuant to the publication of Draft Regulations Notice No. 1305 published in Government Gazette Number 31542 of 24 October 2008; and
- (iii) Public hearings held between 13 and 15 January 2009.

(2) The Draft Regulations are prescribed in terms of section 4(1) (c) and 5(7) (a) (iii) of the Electronic Communications Act 36 of 2005, (The Act). In terms of above notice (Government Gazette No. 31542), the closing date for comments was set at 5 December 2008 and hearings were held on 13 – 15 January 2009. A total of 38 submissions were received from interested parties and 30 participated in the public hearings.

(3) The primary purpose of the Draft General Licence Fees Regulations is to:

- Prescribe a new regulatory framework on administrative and annual licence fees consistent with the Electronic Communications Act, 36 of 2005, as amended; and
- Provide certainty in relation to the conversion of Licences as regards various fees that were due prior the new dispensation as contained in the Act.

(4) The introduction of the Act brought with it a requirement for a reviewed approach to licence fees in general. This required a rethink of the principles that underpin a regulatory approach to licence fees. The principles are also considered against the background of the Act and the objective of ensuring that the impact of licence fees on the ICT sector does not contradict any of the Act's objectives. The relevant objectives of the Act that provide the backdrop are outlined in section 2 of the Act and include to:

- (i) encourage investment and innovation in the communications sector;
- (ii) promote competition within the ICT sector;
- (iii) ensure the provision of a variety of quality electronic communications services at reasonable prices; and
- (iv) develop and promote SMMEs and cooperatives.

(5) The Telecommunications Act of 1996, IBA Act of 1993 and the Broadcasting Act of 1999, to the extent they were applicable prior to the introduction of the Act, allocated the right to provide specific services over specific technology platforms as evident in the types of licences that could be issued in terms of those statutes. Further, the statutes created restricted markets wherein players in specific markets were protected against competition through the creation of a restrictive licensing framework. Largely, new entrants to new various markets were guaranteed financial viability as they faced little or no competition and had access to pre-existing consumer pools that were not being serviced. Most markets ultimately became Monopolies or Oligopolies where consumers were denied the benefits of a competitive market.

(6) This type of market structure ultimately provided justification for the levying of high annual licence fees as licensees were guaranteed excess profits and consumers were denied the benefits of competition. The fees collected could then be redirected to other initiatives by the Government to ensure that some compensation was afforded to consumers as they have been denied the benefits that may have accrued had the market been competitive. Further, the market structure also created value in the possession of a specific type of licence, thus justifying the imposition/collection of an entry fee in the form of Fixed/Once Off licence fees.

(7) However, the unintended consequences of this approach have included the transfer of these licence fees to the consumer as a cost of providing the service. In the electronic communications sector, this translated itself into the creation of a market with some of the world's highest telecommunications costs.

## 1. THE MARKET

- (8) The Act ushered a new era in the approach to regulating the communications sector at large. This change represents an acknowledgement of the convergence of services and technologies within the communications sector as well as the goal of introducing competition as a mechanism to reduce prices<sup>1</sup>. The Act actively promotes a competitive environment, specifically adopting a standard licensing framework as well as introducing the opportunity for ICASA to introduce pro-competitive remedies under Section 67.
- (9) Under the new open-market structure envisaged by the Act, all licensees have to compete against each other to satisfy total consumer demand. Thus the concept of a protected market no longer exists for any licensee. In this scenario licensees have to compete on both price and quality; these choices were not available to the end-users under the monopolistic market structure. Licensees are therefore not guaranteed monopoly profits. The redistributive function of licence fees under the now repealed Telecommunications Act has been replaced by a more direct approach to improving social welfare, which is the introduction of competition between licensees to ensure greater differentiation of services at reasonable prices. Socio-economic welfare at the end-user level is therefore maximised *a priori* and there is no need for government/regulatory intervention in the form of licence fees, as compared to the rationale under the Telecommunications Act.
- (10) In a totally open environment, licence fees for participation in the market may not be justified. However, there remains a case for licence fees to be levied on a market that requires government intervention or regulation, as it presently is. It is evident from the market structure of the ICT sector in South Africa that pro-active intervention by a regulatory body is required to create the framework for competition. This implies the need for funds to cover the cost of regulating the sector. Therefore, given the objectives of the Act and the current structure of the market, a rationale exists for the levying of licence fees in the ICT sector where the cost is related to the cost incurred in regulating the market.

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<sup>1</sup> See objectives in sections 2(f) and (m) quoted on page 3 above.

(11) The questions that then remain are:

- the level of such fees;
- the activity on which fees are levied; and
- how the fees are calculated.

(12) There are two types of fees to be considered, each with their distinctive roles. The first type of fee is an administrative fee charged to cover costs such as applications, amendments, renewals of licences and so forth. The second type of fee is one designed to cover the cost of regulating the sector and may best be described as an annual licence fee.

## 2. ADMINISTRATIVE FEES

(13) Administrative fees may be set at a level that covers pure activity-based costing. However, this may not be feasible, as demonstrated in the following example:

*“A licensee has changed the location of its headquarters and therefore needs to amend its licence. Such an amendment may mean the changing of two lines in a licence and requires minimal effort on the side of both the licensee and the regulatory body. However, if true activity-based costing were to be applied, a fee on such an action would have to include the portion of both fixed and variable costs incurred by the regulatory body. This is virtually an impossible task and is not practical”.*

(14) In the above example, it is most likely best for the regulatory body not to impose any fee whatsoever. However, there may be other amendments/transfers that have a material impact on the licensed activity. In this case the regulatory body may wish to levy an administrative fee. However, the difficulty of activity-based costing again occurs. It may be more feasible for the regulatory body to apply a fee that acts as a deterrent to frivolous amendments rather than to base the fees on activity-based costing.

## 3. COVERING THE COST OF REGULATION: ANNUAL LICENCE FEES

(15) The first principle is that the annual licence fee may only be imposed on the economic activity linked to the licensed activity. Secondly, annual licence fees may be