

**SUBMISSION BY THE SOUTH AFRICAN COMMUNICATIONS FORUM (SACF)
TO THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA (ICASA)
ON THE DRAFT GENERAL LICENCE FEES REGULATIONS**

30 November 2012

1. Background information on SACF

- 1.1 The South African Communications Forum (SACF) was founded in April 2001. It is a representative industry forum for role players in the ICT sector for the betterment of the South African nation, through proactive and reactive engagements across the spectrum of critical stakeholders, including all relevant government departments and agencies.
- 1.2 SACF's vision is to unleash the power of the SA ICT industry to create the most enabling ecosystem for a universally connected and prosperous South Africa. SACF serves, promotes and protects the interests of SACF members and other ICT associations, to create an innovative and globally competitive ICT industry, and to accelerate national development, by proactively engaging the government, the regulator and all other stakeholders.
- 1.3 Among the objectives of the SACF is to build greater certainty and reduce business risks through continuous and regular engagement with regulatory and policy authorities.
- 1.4 In support of these objectives, SACF would like to make the following comments on certain aspects of the Proposed Licence Fees.

2. Introduction

- 2.1 The SACF notes that heightening competition in the ICT sector, including increasing the number of new entrants, will have a positive effect on bridging the digital divide. The vast majority of South Africans do not have access to the internet and remain unconnected in an increasingly digital world. New technologies that would reduce the costs of voice and data communication to business and consumers are hampered by the constrained deployment of infrastructure, especially to less commercially viable areas. Increasing competition in the ICT sector and addressing the ICT infrastructure deficit is a matter of particular urgency for South Africa to increase its rate of economic growth and development.

- 2.2 The SACF is of the view that license fees should not significantly hinder the growth and development of the ICT industry. License fees should not be so excessive that they are affordable only by those companies with significant market power, to the detriment of new entrants or smaller companies.

3. General Recommendations

- 3.1 The change in the basis for levying license fees is not consistent with the objectives of the Electronic Communications Act, 36 of 2005 (the “ECA”).** As was noted by ICASA in its position paper on General License Fees published in 2008 (the ‘Position Paper’), the Authority rightly noted that it was required to review the approach to licence fees including “the principles that underpin a regulatory approach to license fees.”

The relevant objectives of the ECA that informed this regulatory review included those aimed at promoting competition within the ICT sectors and towards developing and promoting SMMEs and cooperatives. Informed by these objectives, the Authority compared the impact of having licence fees being levied on gross revenue with the impact of having licence fees levied on gross profit.

After due consideration of the strengths and weakness of each approach, on balance the Authority determined that “[g]iven that the objectives of the Act include promoting competition as well as supporting small business, the optimal financial measure on which to base licence fees appears to be gross profit (of licensed activities).” Further the Authority noted that “[l]icence fees levied on gross revenue are counter the objectives of the Act as they reduce the incentive for firms to enter the ICT sector, harm smaller players in a disproportionate manner and may increase rather than decrease the administrative burden of regulation.”

Given that the Authority had duly considered the two different approaches and had cogently argued that the best method to use in promotion of the objectives of the ECA was to levy fees based on gross profit it is entirely inconsistent that the Authority just a few years later would volte- face and now levy such fees based on annual turnover.

As the Authority itself has noted in its Position Paper, levying licence fees on gross revenue “[n]egatively affects new entrants compared to incumbents as these firms may not yet be breaking even but are still required to pay annual licence fees.” Also as the Authority noted, this method accentuates the trends in the business cycle which is of “particular concern for firms with high fixed costs relative to their variable costs, typically being the smaller firms.”

To justify the change to a method, which in its own opinion is anti-competitive and harms smaller players, the Authority cites administrative challenges rendering in the Authority unable to verify the fees due to it and which has resulted in the Authority receiving a qualified audit opinion during the 2011/2012 financial years.

The members of SACF recognize that the Authority is striving to achieve a clean audit and supports the Authority's efforts in that endeavor. However, we would suggest that other measures such as increasing the Authority capacity to verify compliance would be preferable.

SACF recognizes that the Authority has been challenged by the use of different accounting standards. Internationally headquartered companies might use the International Financial Reporting Standards (IFRS) and South African based companies will likely use the Generally Accepted Accounting Principles (GAAP). ICASA expressed in the accompanying Explanatory Memorandum for the Draft General Licence Fees Regulations, that they felt certain companies engaged in regulatory arbitrage which made it difficult to determine their compliance.

SACF strongly recommends that the Authority rather address any challenges in the implementation of the preferred model namely, licence fees based on the gross profit, rather than changing to an inferior method. ICASA should increase their capacity to monitor and evaluate compliance as well as provide guidance to licensees that will modulate the differences between the reporting standards.

3.2 Basis for the Fees should be clearly defined. ICASA's indicates that levying of annual licence fees remains relevant and justifiable and that the basis upon which annual licence fees are calculated must change as under the previous means for calculation the Authority was not able to verify the fees due to be collected. However no clear framework has been outlined or established for the determination of the fees. If the fees charged are required to support ICASA's operating expenses – then we suppose that these would be covered several times over by the proposed fees. In order to comment adequately on the fees proposed, the policy framework from which the fee structure was derived should be clearly stated as had previously been done in the Position Paper. ICASA should set out the basis for the fee structure and the quantum proposed.

4. Specific Recommendations

4.1 Exemption from paying Annual Licence Fee in the first three (3) years of generation of revenue from licensed services. SACF agrees with and supports a licence fee exemption being given to new entrants. However we are not certain if three years will be sufficient time for a new entrant to become profitable. The regulations should clarify, however, if the payment holiday proposed will apply to licenses already granted or to licences issued before these regulations become final or only to licenses granted after the regulations are finalized. In short, will the regulations have retrospective effect? It should also be noted that even though such new entrants will only be subject to paying licence fees after generating income for three years, they still might not be profitable at the conclusion of that time period. Again this method of levying licence fees will have an anti competitive effect as it will more severely impact new entrants.

4.2 Schedule 2 Annual Licence Fees. The formula set out in schedule 2 refers 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. It is proposed that “activities” be replaced by “services” in schedule 2 because the definition refers to licensed services. This should bring the formula in line with the definition of turnover in the proposed regulations and leave no doubt in the calculations of licence fees.

5. Conclusion

SACF strongly recommends that ICASA not change the basis for applying levies on licence fees but continue levying fees based on gross profit.

SACF would welcome the opportunity to orally present its recommendations to ICASA.