

SUBMISSION BY SENTECH LIMITED

ON THE
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA'S
DRAFT GENERAL LICENCE FEES REGULATIONS
PUBLISHED UNDER NOTICE 887 OF 2012 IN GOVERNMENT GAZETTE 35819 ON 24
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A. INTRODUCTION

1. Sentech thanks the Independent Communications Authority of South Africa (Authority) for the opportunity presented to make written comments on the Draft General Licence Fees regulations published under notice 887 of 2012 in Government Gazette No. 35819 on 24 October 2012.

B. POSITION PAPER ON GENERAL LICENCE FEES

2. On 6 March 2009 the Authority published a Position Paper on general licence fees under notice 239 of 2009 in Government Gazette number 31993. This publication followed consultations that the Authority had with industry on the Draft General Licence Fees regulations. The regulations were finalised and published under notice 345 of 2009 on 1 April 2009 in Government Gazette number 32084.
3. At paragraph 15 of the Position Paper, the Authority stated the following: "*the first principle is that the annual licence fee may only be imposed on the economic activity linked to the licensed activity.*" Economic activity is not defined in the Position Paper. However, the Position Paper acknowledges that the payment of fees should allow for recoverable costs incurred in the provision of the licensed activity.
4. The strengths of the basis of payment of licence fees under the current regulations were clearly outlined in page 9 of the Position Paper.¹ The strengths of levying fees on the basis of gross profit far outweighed those of gross revenue.
5. For the purposes of this submission gross revenue bears the same meaning as turnover proposed in the draft general licence fees. Sentech believes that the levying of fees on the basis of gross profit should remain unchanged because it was informed by prevailing market conditions of the time and those conditions still obtain.
6. The Authority further acknowledges that licence 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.² The same conclusion is reached at paragraph 17 of the position paper. As a matter of emphasis "*levying fees*

¹ See Table 2 of the Position Paper

² Page 8 of the Position Paper

based on gross revenue is anti-competitive and harmful towards smaller players in relation to levying fees based on gross profit.”³

7. Sentech believes that much thought went into deciding to levy fees on the basis of gross profit under the current regulations and cannot see any compelling reason to change the basis of levying of fees to gross revenue (which has the same meaning as turnover). In addition, the proposed levying of annual fees on the basis of turnover is against the Authority's position paper which sets out reasons for calculation of annual licence fees based on gross profit.
8. The Authority concluded that *“given that the objectives of the Act include promoting competition as well as supporting small businesses, the optimal financial measure on which to base licence fees appears to be gross profit (of licensed activities).”⁴* From the reading of this conclusion and consideration of the markets nothing significant has changed to warrant the change that is contemplated. If anything, the economic landscape has changed negatively and the review of the current regulations and the proposed new calculation may exacerbate financial performance of licensees further.

C. DRAFT GENERAL LICENCE FEES REGULATIONS

9. Ostensibly, the reason for the review of the current regulations is the *“administrative challenges relating to collecti[on of] annual licence fees”⁵*. Sentech believes that these challenges will not be resolved by changing the regulations. The Authority needs to do more than changing the regulations. The Authority must be capacitated to deal with this challenge because the same administrative challenges may present themselves even if the basis of calculating the fees is changed.
10. The Authority must clarify whether turnover will include costs incurred in the provision of a licensed service, government grants and subsidies. Sentech would like to point out that if grants and subsidies are included then this regulation will defeat the objective of these funds namely, to ensure successful implementation of projects that are in the public interests such as broadband and other universal and access ideals.
11. The Authority may review the definition of gross profit with the sole purpose of providing an exhaustive list of recoverable costs in the provision of licensed services.

³ Page 9 of the Position Paper

⁴ *ibid*

⁵ Page 15 of the Draft General Licence Fees Regulations, 2012

The list can then be revised periodically to take into account new developments in respect of technology and its impact on the costs of provision of services. In that case, guidelines to compute the annual licence fees payable will serve such a purpose in the most appropriate way. This will require of the Authority to undertake a thorough study of the activities involved in the provision of a particular service and appropriately categorizing which of the activities are susceptible to fees under the regulation.

12. Although the Authority has attempted to assuage the impact of the proposed levying of fees based on turnover by introducing a payment holiday in the draft regulation, the real consequence of such change may be market failure or stagnation.
13. Sentech submits that an effective and competitive way of encouraging entry into the markets is calculation of licence fees on the basis of gross profit. As is currently the case if a licensee does not make profit no fees are payable. The three years payment holiday proposed in the draft regulation is too little because in most cases new businesses take well over three years before they reach breakeven point.
14. Whilst it is accepted that the introduction of a payment holiday may lower or even remove barriers to entry into the markets, the sustainability and viability of licensees should be kept in mind. The new method of calculation will burden licensees (whether new or existing) financially. The Authority's objective of encouraging or lowering barriers to entry may not be realised if the draft regulations are finalised in their current form.
15. Two important considerations deserve mention here. The Authority decided to levy annual licence fees on the basis of gross profit because this will avoid double taxation and the method is neutral in relation to new entrants versus incumbents as *[licence fee]* is only based on profits, i.e. competition neutral.⁶
16. The formula set out in schedule 2 of the draft general licence fees regulations 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 calculation of licence fees.

⁶ See page 9 of the Position Paper

D. CONCLUSION

17. As mentioned above, the substitution of gross profit with turnover will more than double annual licence fees payable. This will negatively affect the sustainability of licensees; big or small.
18. Sentech believes that the proposal to reduce percentage payable from 1.5% to 0.75% is an acknowledgment by the Authority that the calculation based on turnover will burden the licensees financially. However, what the Authority is not recognizing with this reduction is that 0.75% is still substantially higher than what is payable under the current regulations. The best the Authority can do in the circumstances will be to reduce the proposed percentage to 0.5%.

End...