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GENERAL NOTICE

Independent Communications Authority of South Africa

General Notice

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GENERAL NOTICE

NOTICE 346 OF 2009

Independent Communications Authority of South Africa
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Private Bag X10002, Sandton, 2146

**INDEPENDENT COMMUNICATIONS AUTHORITY
OF SOUTH AFRICA**

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

- (1) On 6 March 2009 in Notice No. 239 in Government Gazette Number 31992, the Authority published a position paper on General Licence Fees. The Authority also published a second draft of the General Licence Fees regulations **Notice No. 239** published in **Government Gazette Number 31992**. The Authority invited interested parties to submit written representations on the draft regulations.
- (2) The closing date for submissions was 20 March 2009 and Authority has decided not to hold hearings.
- (3) The Authority hereby publishes the attached supplementary position paper to reflect further decisions pursuant to the additional comments received.

A handwritten signature in black ink, appearing to read 'Paris Mashile'. The signature is fluid and cursive, with a large initial 'P'.

Paris Mashile
Chairperson
ICASA

A. BACKGROUND

- (1) On 06 March 2009 and in Notice No. 239 published in Government Gazette Number 31992, 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 set at 20 March 2009.
- (3) The Authority received 24 submissions and the concerns raised therein generally spoke to the following issues:
- (a) Retrospective application of the licence fees;
 - (b) Greater clarity regarding the definition of Gross Profit;
 - (c) Application of Regulation 4 of the draft regulations;
 - (d) Exemption from Licence Fees for Broadcasters in respect of costs for dual-illumination during digital migration;
 - (e) Gradual/Phased increase/decrease of the licence fees;
 - (f) Exemption of the SABC; and
 - (g) Over-recovery versus over-payment.

B. RESTROSPECTIVE APPLICATION OF THE LICENCE FEES

- (4) A number of submissions urged the Authority to consider a retrospective application of the Licence Fees Regulations, in order to be on par with the completion of the Licence Conversion Process.
- (5) The Authority has considered the proposal and it has decided that such a position will not be in the best interest of fostering competition in the ICT sector. The retrospective application will adversely affect the smaller entities that had no substantial fees due at the time of issuing of the converted licences. Furthermore, the common law discourages

retrospective application of the law and there are no exceptional circumstances in this instance to justify an exception.

C. MEANING OF GROSS PROFIT

(6) It appeared that various interpretations of Gross Profit have been formulated as gleaned from the submissions and a proposal was made that the draft regulations clarify this aspect.

(7) The submissions also proposed that Gross Profit be substituted with one of the following:

- (a) Net profit after tax;
- (b) Earnings before interest and tax; or
- (c) Operating profit.

(8) The Authority has taken note of the proposals and has revised the definition of Gross Profit to mean:

"Total revenue generated from licensed services, less total costs directly incurred in the provision of such services".

D. APPLICATION OF REGULATION 4 OF THE DRAFT REGULATIONS

(9) After a review of the National Small Enterprise Act No. 102 of 1996, the Authority is of the view that the exemption for small enterprises applies to those licensees that satisfy the turnover threshold as per the requirements for the classification as a small enterprise in the transport, storage and communications sector.

E. COSTS OF DUAL-ILLUMINATION

(10) Certain submissions raised concerns on additional costs related to digital migration and requested that such licensees be exempt from the payment of annual licence fees during this period.

(11) The Authority is of the view that the costs of dual-illumination are included in the total costs directly incurred in the provision of broadcasting services and therefore there is no need to create a separate dispensation for the affected broadcasting licensees as they will be able to deduct such costs prior to the payment of the licence fees.

F. GRADUAL PHASED INCREASE/DECREASE OF THE LICENCE

(12) Various submissions propose that the Authority consider a phased approach to the implementation of the licence fees. The proposal stems from the request for an asymmetric licence fee approach to foster competition.

(13) The Authority is of the view that the gross profit approach to levying fees is automatically asymmetrical as it encumbers Licensees relative to their profitability, and therefore it may not be advisable to consider a phased approach.

G. EXEMPTION OF THE SABC

(14) Various submissions have indicated that the SABC must not be exempt from the payment of licence fees.

(15) The Authority has decided to abide by its decision in 2005 regarding the SABC licence review process. As part of the licence amendment process, the Authority considered the matter and decided that the SABC should be exempt from the payment of Annual Licence Fees and Administrative Fees as captured in paragraph 37.5 of the reasons for the Authority's decision dated 7 June 2005¹.

H. OVER-RECOVERY VERSUS OVER-PAYMENT

(16) The Authority has adopted the following approach:

¹ "Reasons for the decision on the amended licence conditions for the SABC's television and sound broadcasting services" dated 7 June 2005. The amendment process was in terms of the now repealed section 22 of the Broadcasting Act 4 of 1999 (as amended).

- (a) In instances where overpayment has occurred, the excess amount must be carried over to the next financial year. Where there has been under payment, an invoice will be generated for the shortfall. An adjustment will be effected to reconcile the amount paid as against the amount already collected².
- (b) Where there has been an over recovery of the licence fees, the Authority cannot enforce/administer refunds as the money collected would already have been paid to Treasury.

I. NOTIFICATION FEES

- (17) The Authority has decided that no application fees will be due in respect of notifications required in terms of the licences or in terms of the Standard Terms and Conditions Regulations. Notifications should be submitted in terms of the manner prescribed in the Process and Procedures Regulations.

² It should be noted that over-payments are only possible in respect of quarterly payments and not annual payments as the annual payments are already based on completed financials.