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GENERAL NOTICE

NOTICE 135 OF 2014

Independent Communications Authority of South Africa
Pinmill Farm, 164 Katherine Street, Sandton
Private Bag X10002, Sandton, 2146

**NOTICE OF INTENTION TO MAKE REGULATIONS TO AMEND THE ICASA
GENERAL LICENCE FEES REGULATIONS, 2012**

The Independent Communications Authority of South Africa (the Authority), hereby gives notice of the Authority's intention to make regulations to amend the ICASA General Licence Fees Regulations, 2012, as published under General Notice 299 in Government Gazette 36323 of 28 March 2013, in terms of section 4(7)(b), read with sections 4(1)(c)(iv-v) and 5(7)(a)(iii), of the Electronic Communications Act, 2005 (Act No. 36 of 2005), as set out in the Schedule.

Interested persons are invited to submit written comments or written representations with regard to the proposed amendment regulations, within **ten (10) calendar days** from date of publication of this notice by post, hand delivery, facsimile transmission or electronically (in Microsoft Word format) at any of the following addresses:

For the attention of: **Godfree Maulana: Manager ECS/ECNS Compliance**

Post: **Independent Communications Authority of South Africa**
Private Bag X10002
Sandton
2146

or deliver to: **Block B, Pinmill Farm**
164 Katherine Street
Sandton

or email to: gmaulana@icasa.org.za; ecsecns.compliance@icasa.org.za

or fax to: **011 566 3216**

Please note that comments received after the closing date may be disregarded. All written representations submitted to the Authority pursuant to this notice will be made available for inspection by interested persons at the Authority's Library and copies of such representations will be obtainable on the payment of the prescribed fee.



DR STEPHEN MNCUBE
CHAIRPERSON

ICASA GENERAL LICENCE FEES AMENDMENT REGULATIONS, 2014**SCHEDULE****1. Definitions**

In these regulations —

“the ICASA General Licence Fees Regulations, 2012” means the ICASA General Licence Fees Regulations, 2012, as published under General Notice 299 in Government Gazette 36323 of 28 March 2013.

2. Amendment of section 1 of the ICASA General Licence Fees Regulations, 2012

Section 1 of the ICASA General Licence Fees Regulations, 2012 is hereby amended —

(a) by the substitution for the definition of “Licensed Service” of the following definition:

“**Licensed Service**” as defined in the Electronic Communications Act under “broadcasting service”, “electronic communications service” and “electronic communications network service”, and as contained in the relevant licence;”.

3. Commencement

These Regulations shall come into operation retrospectively with effect from 1 April 2013.

EXPLANATORY MEMORANDUM

NOTICE OF INTENTION TO MAKE REGULATIONS TO AMEND THE ICASA GENERAL LICENCE FEES REGULATIONS, 2012

1. Introduction

- 1.1 The draft Amendment Regulations have been published to amend the ICASA General Licence Fees Regulations, 2012 (published under General Notice 299 in *Government Gazette* 36323 of 28 March 2013) and, in particular, to amend the definition of a "**Licensed Service**", with retrospective effect from 1 April 2013.

2. Background

- 2.1 The Authority published the ICASA General Licence Fees Regulations, 2012, which repealed the ICASA General Licence Fees Regulations, 2009 (published under General Notice 345 in *Government Gazette* 32084 of 1 April 2009), on 28 March 2013.

- 2.2 The ICASA General Licence Fees Regulations, 2012, contain the following definition of a "Licensed Service" –

"**Licensed Service**' 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".

- 2.3 The Authority is of the view that the definition of a "Licensed Service" can be interpreted in two ways –

- 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.

2.3.2 The definition of a "Licensed Service" could also be interpreted as providing that revenue generated from certain listed items are expressly excluded from the definition of a "Licensed Service". These listed charges include interconnection and facilities leasing charges, agency fees, the resale of electronic communications services, service provider discounts, and government grants and subsidies. 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.

2.4 There is clearly potential for confusion in relation to the two possible interpretations of the definition of Licensed Service. It is important for the Authority to address and resolve this confusion as a matter of urgency so as to provide certainty for licensees before the licence fees for the period of 1 April 2013 to 31 March 2014, as currently regulated in terms of the ICASA General Licence Fees Regulations, 2012, become due and payable.

2.5 The Authority has decided to make the draft Amendment Regulations in response to the confusion in respect of the definition of a "Licensed Service" and in the public interest. The effect of the proposed Amendment Regulations, which are intended to be effective retrospectively, is to amend the definition of a "Licensed Service" with effect from 1 April 2013.

3. **Basis of the decision to make the draft Amendment Regulations**

3.1 Section 4(1) of the ECA permits the Authority to make regulations "with regard to any matter which in terms of [the ECA] or the related legislation must or may be prescribed, governed or determined by regulation". Section 4(4) of the ECA requires that, as a general rule, the Authority must give notice of its intention to make any regulation and invite written representations at least 30 days before the regulation is made. Section 4(7)(b) of the ECA contains an exception to this rule: if the public interest requires that a regulation be made without delay, the requirements imposed by section 4(4) of the ECA need not be complied with. This means that the Authority is able to rely on section 4(7)(b) of the ECA, where the public interest requires that a regulation be made without delay, to not give any prior public notice of the proposed regulation or to adopt shortened time periods in the making of the proposed regulations.

3.2 Given that sections 4(1)(c)(iv-v) and 5(7)(a)(iii) of the ECA allow the Authority to make the ICASA General Licence Fees Regulations, 2012, and

given that the making of the draft Amendment Regulations are related to the Authority's powers under the ECA, section 4(1) also allows the Authority to make the draft Amendment Regulations.

- 3.3 Further, the public interest requires that the Amendment Regulations be made, with retrospective effect, as soon as possible. The potential for confusion in relation to the definition of a "Licensed Service" should be resolved without any further delay, and must be resolved prior to the licence fees for the period between 1 April 2013 and 31 March 2014, becoming due and payable (i.e. before 1 April 2014). In particular, the Amendment Regulations will, in part, clarify the Authority's position in respect of whether interconnection and facilities leasing charges, for example, are amounts that should be deducted from the revenues generated by a licensee to determine the base amount on which licence fees are levied. However, a failure to take steps to urgently resolve the confusion regarding the exclusion of various charges and fees from amounts on which licence fees are calculated, will have ongoing adverse effects for licensees in respect of the calculations of their licence fees, and for the Authority in respect of its collection of licence fees. The retrospective application of the Amendment Regulations is, in the Authority's assessment, necessary to make it clearer what the relevant amounts are on which annual licence fees are levied for the period between 1 April 2013 to 31 March 2014.
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