



South Africa's new Service Licence Fees

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The Electronic Communications Act (EC Act) passed by Parliament in 1995 ushered in the possibility of a new, competitive market structure for the provision of electronic communications networks and services in South Africa. Although the realization of a new competitive market place relied on the successful conversion of existing licenses, which took place in January 2009, there are a number of other processes that had to be completed as well.

One of these processes was the promulgation of licence fees. The Independent Communications Authority of South Africa (Icasa) recently published regulations setting out licence and application fees. In this article, we discuss these regulations.

EC ACT

Section 4 of the EC Act concerns regulations generally. It provides Icasa the authority to make regulations concerning the payment of fees for the granting of licenses and applications for amendment, renewal, transfer or disposal of licenses.

Section 5(7) specifically requires Icasa to prescribe regulations setting out the licence fees applicable to individual and class electronic communications network services (ECNS), electronic communications services (ECS) and broadcasting services (BS) licenses.

THE PROPOSED FEE REGULATIONS

Icasa published draft licence fees for public comment on 22 September 2008. After the closing date, it withdrew that notice, indicating that it would not consider any written comment in that proceeding.

Icasa issued new draft licence fees on 24 October 2008. That draft set out application fees, including for requests to provide exempt services. It also set out licence fees as a percentage of adjusted gross revenue, for iECNS and iECS licenses, 3%, for iBS, 2%, and for class ECNS and ECS, 1.5%.

Icasa proposed a third draft in Notice 239 of 2009 published in Government Gazette 31992 dated 6 March 2009. The proposed annual licence fee for all licenses (excluding certain broadcasting licenses and small businesses) was 1.5 percent of gross profit.

THE FINAL FEE REGULATIONS

Icasa recently issued final regulations regarding licence fees, in Notice 345 of 2009 published in Government Gazette 32084 dated 1 April 2009.

Application Fees

Icasa chooses to call application fees, administrative fees. It indicates in its Position Paper, published as Notice 239 of 2009 in Government Gazette 31993 dated 6 March 2009, that the imposition of administrative fees will be based on the principle of 'deterring frivolous processes'.

Application fees for individual licenses will be set out in the relevant invitation to apply issued by Icasa. Application fees for amendments and transfers of licenses are R50 000. This, although Icasa must hold a consultative process for amendment applications in terms of the EC Act, and may choose to hold (or not) a consultative process for transfer applications in terms of its own regulations. Ironically, a change of control of a licensee would require an amendment application, as ownership is set out as a licence conditions, where a transfer of a license (which would most often result in a change of control), would require a transfer application. It would seem that even a name change would require an amendment application, as the name of the licensed entity is also set out as a licence condition.

Applications for renewal of individual licenses will cost R5000. However, it is unclear when renewals will take place as many of the licenses issued in the licence conversion process do not have expiry dates set out in them, although the EC Act states that individual licenses may be issued for a period not exceeding 20 years.

Application fees for class licenses are R10000 for ECNS and ECS licenses, R3000 for community BS licenses and R500 for special event BS licenses.

Applications for amendment and transfer will cost R10000 and for renewal, R5000, for ECNS and ECS licenses. For community BS licenses, amendments and renewals will cost R1000 and transfers, R3000.

Application fees for special temporary authorizations (limited to a three month period) are R5000.

Icasa may adjust application fees by a maximum of the Consumer Price Index annually, to be published in the Government Gazette.

Licence Fees

Licence fees, according to Icasa's Position Paper, are based on the cost of regulating the industry.

The licence fee for individual ECNS, ECS and BS licenses, and class ECNS and ECS licenses is set at 1.5 percent of gross profit. Gross profit is total revenue generated from the licensed services less total costs directly incurred in the provision of those services.

However, some licensees are exempt from payment of the annual licence fee, namely community BS licensees, public BS licensees and licensees that are considered small enterprises in terms of the annual turnover limitations set out in the National Small Enterprise Act, which is currently set at R13 000 000.

The outstanding portions of both annual and once off fixed licence fees which were set in previous licensing regimes are due and payable on a pro rata basis up to 31 March 2009.

ISSUES

There are some contentious issues raised by these newly published fee regulations.

One is the exemption of the public broadcaster, the South African Broadcasting Corporation, from the payment of fees. The objection is not that the public broadcaster should not be exempt when it is acting as the public broadcaster, the argument is that it should not be exempt when it is acting as a commercial broadcaster in competition with other commercial broadcasters.

Another issue is the apparent over-recovery of costs based on the cost of regulation calculated by Icasa based on past year's data. To cover the costs of regulation, the fees should be set at 1.1 percent of gross profit rather than 1.5 percent. Icasa justifies the 1.5 percent by stating that the costs of regulation will necessarily increase. There is an element of an argument that the budget allocations given to Icasa in the past were not sufficient for Icasa to regulate the industry effectively, as well.

CONCLUSION

Given that there remain controversial issues in the newly published fee regulations, it is not clear that they will remain in force without a challenge in the courts. However, if they do, South Africa will be one small step closer to a competitive market structure.

There remain many other issues that Icasa must regulate, including interconnection, rights of way, and spectrum licensing. The longer it takes, the more entrenched dominant players will become, effectively thwarting potential new entrants' impact on the market structure. We urge the industry not to challenge the fee regulations allowing Icasa the opportunity to now focus its attention on other pressing matters.

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