

WRITTEN SUBMISSIONS BY BOWMAN GILFILLAN INC. ON THE AMENDMENT
INDIVIDUAL PROCESSES AND PROCEDURES REGULATIONS, 2015

I Introduction

1. Bowman Gilfillan Inc. (**BG**) thanks the Independent Communications Authority of South Africa (the **Authority**) for the opportunity to submit comments on the draft Amendment Individual Processes and Procedures Regulations, 2015 (the **draft Amendment Regulations**).
2. BG regularly advises and acts for clients in the communications sector. As such, developments in the regulatory framework applicable to the sector are of particular interest to BG. It is on this basis that BG wishes to make submissions on the draft Amendment Regulations.
3. BG does not require an opportunity to make oral submissions at any public hearings that may be held in respect of the draft Amendment Regulations.
4. BG welcomes the draft Amendment Regulations in light of BG's understanding of the various shortfalls in the current Individual Licensing Processes and Procedures Regulations (as amended), 2010¹ (the **Processes and Procedures Regulations**) following the commencement of the Electronic Communications Amendment Act 1 of 2014 (**EC Amendment Act**), which amended the Electronic Communications Act 36 of 2005 (**ECA**) to, amongst other things, impose new authorisation requirements for transfers of control in an individual licence, where previously, no prior authorisation was required.
5. The Processes and Procedures Regulations, as they are currently drafted, are silent on the prescribed processes and procedures to be followed for any application made in respect of a transfer of control in an individual licence. BG, accordingly, supports the draft Amendment Regulations which, as BG understands, seek to address this issue.
6. BG takes this opportunity to make, amongst others, the following submissions on the draft Amendment Regulations, as discussed in more detail in Parts II and III of this submission -
 - 6.1 BG submits, as discussed in more detail in Part II, that the authorising provisions in terms of which the draft Amendment Regulations are made, with particular reference to sections 13(3) and 13(5) of the ECA, require that an inquiry in terms of section 4B of the Independent Communications Authority of South Africa Act 13 of 2000 (**ICASA Act**) must be undertaken before the imposition of new requirements in relation to ownership and control of individual licences. It is not apparent from the draft

¹ Published under GN R522 in *Government Gazette* 33293 of 14 June 2010.

Amendment Regulations that such an inquiry has been undertaken. While the Authority undertook an inquiry in 2009 in relation to ownership and control, culminating in the publication of the Findings Document on the Review of Ownership and Control of Commercial Services and Limitations on Broadcasting, Electronic Communications Services and Electronic Communications Network Services,² the recommendations made in the context of that inquiry were different from the requirements that are now sought to be introduced. As such, a further inquiry in terms of section 4B of the ICASA Act is necessary.

6.2 BG submits, in respect of the proposed amendments made in regulations 1 to 10 of the draft Amendment Regulations and as further discussed in Part III, that –

6.2.1 the amendments, which, as BG understands, were made to provide for applications for transfers of control in individual licences licence, have not fully captured all the instances in which control may transfer from one entity to another, and the additional definitions have been inconsistent in capturing the various nuances in this regard;

6.2.2 the repetition of the wording of regulation 12 of the current regulations, with specific reference to regulation 12(c), is not appropriate in the context of a transfer of control in a licence.

6.3 BG submits, in relation to the amendments made in regulation 12 of the draft Amendment Regulations, that various parts of Form G, as further discussed in Part III, are not suitable for an application for a transfer of control in a licence; and, certain parts of Form G contain additional criteria for an application for transfer of control in a licence which appear to repeat the criteria contained in the Radio Frequency Spectrum Regulations 2015 (**Spectrum Regulations**).³

II Authorising provisions in terms of which the draft Amendment Regulations are made

7. The draft Amendment Regulations indicate that they are made in terms of section 5(7) of the ECA. While the draft Amendment Regulations do, as provided for in section 5(7) of the ECA, set out procedural aspects and requirements in relation to transfers of, and transfers of control in, individual licences, the draft Amendment Regulations also contain substantive provisions in respect of ownership and control of licensees. This is on the basis that draft regulation 6.2 proposes to amend regulation 12 to provide as follows: “The Authority must

² Published under GN 624 in *Government Gazette* 34601 of 15 September 2011 (the **Findings Document**).

³ Published under GN 279 in *Government Gazette* 38641 of 30 March 2015.

refuse to renew, transfer or transfer control of an individual Licence if the Licensee has not complied with one or more of the following ... (c) Where the Transferee's ownership and control by historically disadvantaged persons is less than 30%." (underlined words indicate the proposed amendments to the Processes and Procedures Regulations).

8. This change will mean that:
 - 8.1 the Authority will no longer have any discretion to approve a transfer or transfer of control application where the transferee does not or licensee will not have 30% ownership by historically disadvantaged persons (**HDPs**);
 - 8.2 transferees and licensees in respect of which there is a change of control will be required to have at least 30% "ownership and control" by HDPs.
9. The changes proposed to be introduced by the draft Amendment Regulations, accordingly, seek to regulate ownership and control of licensees and transferees.
10. The Authority is clearly empowered to make regulations that limit or restrict the ownership or control of an individual licence, in terms of section 13(3) of the ECA, which provides that -

"...the Authority may by regulation, set a limit on, or restrict, the ownership or control of an individual licence, in order to -
 - (a) promote the ownership and control of electronic communications services by historically disadvantaged groups and to promote broad-based black economic empowerment; or
 - (b) promote competition in the ICT sector."
11. Section 13(5)(b) of the ECA requires that regulations may only be made in terms of section 13(3) after the Authority has conducted an inquiry in terms of section 4B of the ICASA Act, which may include, but is not limited to, a market study.
12. No such inquiry has been conducted by the Authority prior to the proposed introduction of new requirements in the Processes and Procedures Regulations which will make it a requirement for any transferee or licensee which is subject to a transfer of control to have at least 30% "ownership and control" by HDPs. The Authority previously conducted an inquiry in 2009 in relation to ownership and control of broadcasting service, electronic communications network service, and electronic communications service licences. This inquiry was initiated by the publication of a Discussion Document on Ownership and Control

in November 2009⁴ and culminated in the publication of the Findings Document in 2011. In the context of this inquiry, the Authority found that a 30% HDP ownership requirement should be imposed on licensees and that they should be afforded a period of time within which to comply with this requirement. The Authority did not find that new HDP ownership requirements should be imposed at the point when a particular licence is transferred from one licence-holder to another or when a licensee undergoes a change of control.

13. It is submitted that prior to a new requirement being imposed that transferees and licensees which are the subject of a transfer of control must have 30% HDP ownership, an inquiry in terms of section 4B of the ICASA Act should be conducted. This will afford the Authority a proper opportunity to assess the impact of the imposition of any such requirement and to consider whether or not it is practicable and appropriate given the state of the market.

III Specific comments on the draft Amendment Regulations

14. Definitions

14.1 *Definition of Transferee*

14.1.1 The draft Amendment Regulations define “Transferee” as meaning –

“... a person who, as a result of the transaction, would directly or indirectly acquire or establish direct or indirect control or increased control over all or the greater part of a licensee or company, or all or the greater part of the assets or undertaking of a licensee or company” (underlined emphasis added).

14.1.2 The underlined reference to “or company” is, in our view, unnecessary as the Processes and Procedures Regulations and the draft Amendment Regulations (if they come into effect as they are currently drafted) would not and cannot apply to any other entity but a licensee. In addition, section 13(1) of the ECA provides, in essence, that the transfer of a licence or the transfer of control of “an individual licence” requires the Authority’s prior written permission. As such, there is no basis for the Authority to require approval for the transfer of assets or undertaking of a licensee to another person, where the individual licence in terms of which that licensee operates is not transferred. For example, a sale of business in terms of which a licensed entity transfers a part of its business which does not relate to the provision of licensable services, does not, in terms of section 13(1) of the ECA, require the Authority’s prior approval. The proposed definition of “transferee”, however, suggests that a

⁴ Published under GN 1532 in *Government Gazette* of 17 November 2009.

person who acquires such a business from a licensed entity would be a “Transferee”. This is not consistent with the ECA and should, if it is submitted, be amended.

14.1.3 The definition of “Transferee”, as it is currently drafted, also only relates to a transferee in the context of a transaction involving the transfer of control of a licensee (licence-holder) i.e. the person who acquires a controlling interest in a licensee. It does not cover a new licensee to which a licence is transferred i.e. where there is a transfer of a licence rather than a transfer of control.

14.1.4 In terms of section 13(1) of the ECA, it is only the transfer of a licence or the transfer of “control” of a licensee that is subject to the Authority’s prior approval. The acquisition of an ownership interest that does not amount to control or that does not lead to the acquirer having control does not require the Authority’s prior approval. As such, the definition of “Transferee” should not include “a person who, as a result of the transaction, would directly or indirectly acquire or establish ... increased control over all or the greater part of a licensee” (underlined emphasis added).

14.1.5 Moreover, BG submits that, for the sake of clarity and consistency with the definitions contained in the draft Amendment Regulations, the definition of “Transferee” should make reference to the defined term “Control”.

14.2 *Definition of Transfer of Control*

14.2.1 The draft Amendment Regulations define “Transfer of Control” as meaning – “... the transfer of shareholding in the issued licence to a new shareholder;”

14.2.2 BG submits that this definition is problematic for the following reasons –

14.2.2.1 An issued licence does not have shareholding. A licensee which holds an issued licence may have shareholding. As such, the definition of “Transfer of Control” is inaccurate in its current formulation as there can never be a “transfer of shareholding in [an] issued licence”.

14.2.2.2 A licensee which holds a licence may have shareholders, if it is a company. A licensee may, however, also not be a company or could be a company that does not have shareholders e.g. a non-profit company. It could, for example, be an individual or a trust. The

proposed definition does not provide for these other types of structures.

14.2.2.3 The proposed definition does not encompass the various ways in which control in an entity may change (e.g. directly or indirectly, for example, by agreement), as contemplated in the definition of "Control" in the draft Amendment Regulations. As it is currently drafted, it will only be triggered if there is a change of control by way of a change of shareholding.

14.2.2.4 The proposed definition does not make reference to the defined term "Control", and, as it is currently drafted, it is, in fact, inconsistent with the definition of "Control".

15. Amendment of Regulation 12 of the Regulations

Ad regulation 6.1

15.1 BG suggests the following strike-out, of the following typographical error and additional wording in the proposed amendment –

"Restrictions on transfer, **transfer of control** and renewal ~~on an~~ individual licences"

15.2 *Ad regulation 6.2.1*

15.2.1 The draft Amendment Regulations propose that regulation 12 of the Processes and Procedures Regulations be amended to read as follows –

"The Authority **must** refuse to renew or transfer **or transfer of control of** a Licence if the Licensee has not complied with one or more of the following:

- (a) Where the Licensee has been found guilty of a contravention by the CCC and has not complied with the order by the Authority in terms of section 17 of ICASA Act; or
- (b) Where the Licensee has not paid the Licence fees due and payable at the date of the application; or
- (c) Where the Transferee's ownership and control by historically disadvantaged persons is less than 30%."

15.2.2 In the case of a transfer of control, the "transferee" is the person or persons to whom control has been transferred e.g. a new shareholder in the licensee. The licensee, on the other hand, is the entity which holds the licence, which is the same entity which held the licence prior to the transfer of control. It

seems likely that the intention is that, where there has been a transfer of control, it is the licensee that should have at least 30% HDP ownership rather than the transferee, which is the owner/s of the licensee. We suggest that this regulation is amended to cater for transfers of control.

16. Substitution of Form C of the Regulations

Ad section 4.2 of Form C of the Regulations

BG submits that it is unnecessary to require the details of the amendments to any radio frequency spectrum licence as this will be done in a separate application as contemplated in section 4.1.

17. Substitution of Form G of the Regulations

17.1 *Ad section 6*

BG notes the following typographical error in the numbering of this section, which should start at 1 and follow with 1.1.

17.2 *Ad section 1.1*

BG notes that what appears to be an internal draft note that should be removed.

17.3 *Ad section 1.3*

BG submits that a written undertaking, as required in the current draft Form C, is unnecessary. Applicants should simply be required to describe the nature of the application.

17.4 *Ad section 1.4*

BG suggests that this section is unnecessary as the ownership and control requirements are set out in the body of the draft Amendment Regulations.

17.5 *Ad section 8.6*

BG submits that these provisions are not suited to an application for transfer of control as the transferee's own business plan is irrelevant.

17.6 *Ad section 8.7*

BG submits that these provisions are not suited to an application for transfer of control as the transferee, in this context, would not have its own business plan in relation to the business of the licensee in which it intends to obtain an interest.

17.7 *Ad section 8.9*

BG submits that these provisions are not suited to an application for transfer of control as the transferee, in this context, would not have its own network layout plan and roll-out plans in relation to the operation of the licensee in which it intends to obtain an interest.

17.8 *Ad section 8.10*

BG submits that these provisions are not suited to an application for transfer of control as the transferee, in this context, would not have any proposed commercial agreements in relation to the licensee in which it intends to obtain an interest.

17.9 *Ad section 9*

17.9.1 BG notes, and proposes the underlined amendment, of the following typographical error -

“OWNERSHIP AND CONTROL BY HISTORICALLY DISADVANTAGED PERSONS”

17.9.2 BG submits that this section, as it is currently drafted, does not indicate the subject of the requirement (i.e. in respect of the transferee or the licensee) and is possibly a duplication of section 7.7, in relation to the transferee.

17.9.3 BG suggests that this be clarified and proposes that the details of the ownership and control of the licensee to be held by HDPs following the proposed transaction be set out here.

17.10 *Ad section 10.2*

“Economic efficiency” is not one of the criteria that the Authority is required to consider in relation to a transfer of, or transfer of control in, a licence. This appears to have been taken from, the criteria set out in regulation 15(5)(e) of the Spectrum Regulations, and is not applicable in this context.

IV Conclusion

18. BG is grateful for the opportunity granted to it to make these submissions and is happy to assist in clarifying or elaborating on any of them.