THE POWER IS IN YOUR HANDS

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7 August 2015

Mr Peter Mailula

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ICASA

Per e-mail: pmailula@icasa.org.za

Dear Sir

PROPOSED AMENDMENTS TO THE PROCESSES AND PROCEDURES REGULATIONS FOR INDIVIDUAL LICENCES. GOVERNMENT GAZETTE NO 38921 OF 26 JUNE 2015

The above draft regulations have reference. Attached are Cell C's written comments for consideration by the Authority. Cell C confirms its readiness to participate in the public hearing process and any other consultations that might be called by the Authority.

We trust that you find the above in order.

Yours faithfully

Zolile Ntukwana
Executive Head: Regulatory Affairs

CELL C

THE POWER IS IN YOUR HANDS

SUBMISSION TO ICASA

CELL C'S RESPONSE TO THE CONSULTATION ON PROPOSED AMENDMENTS TO THE PROCESSES AND PROCEDURES REGULATIONS

GAZETTE 38921 OF 26 JUNE 2015

Cell C has a material interest in the continued improvement and growth of the regulatory environment in South Africa for electronic communications. Cell C welcomes actions by ICASA that will have this effect and that promote and give effect to the objectives of section 2 of the Electronic Communications Act, 2005 as amended ("**ECA**"). Cell C therefore submits its comments on the amendments ("**the proposed amendments**") proposed by ICASA in Gazette 38921 of 26 June 2015 to the important Processes and Procedures Regulations ("**the Regulations**"), first published in June 2010. Cell C would like to participate in any oral hearings on these proposed amendments.

Our submission is set out in two parts, general and specific.

General comments on the proposed amendments

1. Cell C notes that these amendments follow hot on the heels of the various submissions made by industry and Vodacom Pty Ltd and Neotel Pty Ltd who are seeking to merge their businesses. Those submissions no doubt pointed out some areas of the Regulations which are not adequate for the purpose they are intended to address, and also indicated in what way the Regulations might be exploited. It is appropriate and necessary that a regulatory authority continually monitor the impact and effect of its regulations and take steps to modify them as required, over time.

2. First, Cell C is unable to deduce from the proposed amendments which of the objects of the ECA ICASA is attempting to promote. A reactive approach to regulation is not an appropriate approach. As Cell C has reiterated to ICASA, a regulatory impact assessment is a necessary part of every regulatory intervention. There is no indication from ICASA as to the intended outcome of the proposed amendments.

3. Second, the time it takes ICASA to consider and respond with any decision once applications have been made is concerning. We are aware of processes that have taken up to 2 years to achieve any result.
    a. As important as the form of the proposed amendments will be, the accountability of ICASA and its commitment to reduce and improve its turnaround times when considering applications by industry for approval, are critical.
    b. We have been advised that ICASA's internal "goal" is to make a determination at management level for a decision by the ICASA Council, within 6 months. The Council is not subject to any timeframe whatsoever in the making of decisions.

c. The criteria for decision-making and the process that must be followed within ICASA ought to be streamlined and improved as a priority. In a fast-moving industry where operational decisions can be affected by any delay, a regulatory impasse is simply unacceptable. It is also hard to understand the reason for any such delay.
d. Long delays are out of keeping with international best practise and begs the question as to whether ICASA is properly resourced and able to do its job. It also suggests that the commercial imperatives of industry are not given due attention by the regulatory authority.

4. Third, the proposed amendments are not explained. The reason for making some of the changes is impossible to deduce. For example, on Form O a new section has been introduced as section 4 which requires the applicant to advise "*Where the nature of the services provided by the licensee in terms of the licence has changed, provide updated information on the nature of the services provided:...*".
    a. Licensees operate in a competitive commercial environment where it is necessary to change their service offering all the time to remain attractive. It is unclear whether ICASA requires notification of change to retail offerings, or change to type of service.
    b. In the latter case, this is a technology-neutral licensing regime, which permits the offering by licensees of any service over any technology provided they have the relevant ECS or ECNS licence.
    c. We simply do not know what is meant by this provision and ICASA has not explained it. It is therefore not an appropriate change, it cannot be said to be proportionate as we do not know what it is intended to address, and we are similarly unable to determine if it is sufficient. These are all basic tenets of good regulation. We urge ICASA to review the reasons for its proposed amendments and to explain its actions.

5. Fourth, radio frequency spectrum licences are also individual licences. The proposed amendments do not make it clear that the revised definitions apply only to certain types of licence and not to others. For example, is the definition of "transferee" intended to apply to transfers of radio frequency spectrum licences, which are subject to their own regulations?

6. Fifth, it would be helpful, as we have indicated several times, if ICASA would use marked up text when proposing amendments, rather than simply including all amendments, for example on the Forms attached to this Regulation, as final. This requires additional time and effort in reviewing and comparing the previous set of documents with the current set. As ICASA is making the changes, some sort of highlighting would be easy to implement.

7. Finally, we presume that these proposed amendments are intended to replace the Regulations in respect of the Limitation of Ownership and Control of Telecommunication Services in terms of Section 52,

published in *Gazette* 38921 in 2003, which remain in force by virtue of section 95 of the ECA. We suggest that this be specifically stated so as to avoid the conflicting application of two sets of regulations, as recently observed in the proposed acquisition of Neotel Pty Ltd by Vodacom Pty Ltd.

Specific observations on the proposed amendments

9 Definitions:

9.1 Over the years ICASA has attempted to formalise an ownership and control regime, most notably in the broadcasting sector but also in the electronic communications sector. In 2011 ICASA published a Findings Document in which it examined several aspects of ownership and control and pronounced its views on these matters. It also undertook to examine many of them in more detail in subsequent processes. ICASA has failed to do this.

9.2 In this vacuum, several transactions have taken place with varying responses from ICASA – some permitting transfers with restrictions, some accepting that licensees ought to be allowed time to comply with obligations – such as is the case in the Vodacom Neotel acquisition in which ICASA proposes to allow the parties time to achieve an appropriate equity profile. This is not an easy environment to navigate as a result.

9.3 ICASA has unfortunately made the situation considerably worse with the introduction of the proposed definitions of each of "transferee", "control" and "transfer of control" in the proposed amendments. It would appear that ICASA has not only misunderstood its own mandate, but the nature of a licensee and also not grasped the difference between a corporate and private entity. Our more detailed reasons for saying this are set out below:

a. **"Transferee"**:
   i. A licensee can be a company, therefore there is no need to refer to "licensee or company" as this suggests that ICASA can control companies that are not licensees, which is obviously not correct.
   ii. This definition does not take account of the possibility that a transfer of shares may take place to more than one person or company – in which case the facts would dictate who actually has control, and the definition does not take this into account.
   iii. We see no reason to refer to "indirect control" in this instance, without explanation from ICASA as to its relevance.
   iv. We do not know what ICASA is seeking to achieve by the reference to "increased control" – either there is control or there is not. An example of how deficient this wording is, is that if a person as a result of a transaction acquired 49.9% of a licensee being a company then that person would not be required to make an application in terms of these Regulations as

it does not "Control" the licensee however if that person owned 60% of a licensee being a company and then acquired only another 1% it would be required to make an application in terms of these Regulations. Surely this is not what is intended?

v. We are unfortunately not able to suggest an alternative definition as we do not know what ICASA is seeking to address, prevent, or achieve in this definition.

b. **"Control"**:

i. The Companies Act obviously refers to juristic persons only. The ECA contemplates that a licensee could take another form, for example a natural person. This definition does not take this into account.

ii. "transfer" is a wide concept, whereas "control" is a narrow concept. It appears that ICASA has used "transfer" where it means "control" and vice versa.

c. **"Transfer of Control"**:

i. Many of the comments made in b above are applicable here too.

ii. The transfer of an individual licence must entail a transfer of control. The provisions of section 13 contemplate any kind of transaction resulting in a change to the entity to whom the licence was granted.

iii. Each transaction may need to be assessed on its own facts or ICASA will need to establish a more easily workable definition of "control" before it can define a "transfer of "control"". Even the transfer of shares to one entity or the transfer of one share could nonetheless result in a change in the control of that entity, depending on what voting and other rights that new shareholder has in terms of the agreement they conclude with the seller.

iv. We recommend ICASA liaise with the Competition Commission on the concept of control and transfers.

v. Finally, we are not altogether sure that this definition is required at all, since as we say above, section 13 of the ECA deals with all forms of transaction resulting in any form of transfer.

vi. In addition the words "*shareholding in the issued licence*" are nonsensical in this definition because you cannot have shareholders of a licence.

d. The definition of "transfer" in the 2010 Regulations meaning "assign, cede or transfer a Licence from one person to another" does not work logically with the new phrase "transfer of control". The result is nonsensical since the definition of "transfer" is specific to a licence, but if read with the definition of "transfer of control" this would have the effect of including a change in shareholding. A change in shareholding need not constitute a change in control, and vice versa.

8. Regulation 1 (Definitions):

The definition of "**application**" in subsection (d) only deals with "*to transfer an Individual Licence*". This definition should have been expanded to include the transfer of control of an Individual License and appears to have been a drafting oversight by ICASA.

9. Regulations 5, 8 and 10:

a. The content of new (5A) is inadequate as is. In fact, as a general remark that we will repeat in our submission, any such provision (for penalty, suspension of licence, or revocation) must itself be subject to a clear notice and remedy provision.

b. We are aware that ICASA is empowered to and does permit payment by means of a payment plan. The wording of this regulation and regulations 8 and 10 do not take this into account.

10. Regulation 11:

a. A capital "C" should be used for the defined term "Control" throughout.

b. We do not believe it is possible to give effect to three principles in the way contemplated in (a) and (b) of sub-regulation (4), namely, the promotion of competition, promotion of the interests of consumers, and equity ownership by HDIs.

i. First, it will be the case that one of these is within the context, going to be more important than the others. This should be permissible, in other words, ICASA should take these factors into account but not have to meet each one.

ii. The term "*HDP's*" used in 11(4)b is not defined. The term "*historically disadvantaged persons*" is defined in the Regulations and because the term "*HDP*" is used here, we assume that there is a distinction between "*historically disadvantaged persons* and "*HDPs*" which we do not understand. This needs to be explained.

iii. Second, the relevant standard should be BEE unless ICASA does not plan to issue regulations under section 4(3)(k) of the ICASA Act, and ICASA should advise industry how it will marry the two terms, one of which is broad (HDI) and the other of which is narrow (BEE). Certainty is required on this point for several reasons, including because investors need to know what standard to meet.

iv. Finally, the ordering of the sub-regulations (3) and (4) is reversed.

11. Regulation 12:

    a. Please see our comments above on the definition of "transfer of control" which are equally applicable here.
    b. We suggest that new regulation 12 should also include the words "...without good reason, or has failed to remedy after due notice....".
    c. The proposed amendment does not take account of the provisions of the existing (not amended) regulation 12(c). As "control" in this context is used without a capital, it is unclear if it is intended to mean the same as the new definition of "Control". In addition, the word "Transferee" refers to a person who has already taken control or to whom control has already been transferred. In context, this would imply that approval has already been given, whereas the new regulation requires ICASA to refuse to approve any such application.

12. Regulation 14: please see our comments requiring that notice to remedy be given prior to the application of this provision.

13. The forms

    a. Form C:
        i. In section 3.2, there is a grammatical error in that applicants are required to attach "a research" undertaken supporting the proposed amendments.
        ii. In section 5.1 the words "may need" must be replaced with the words "should" or "must" as this section requires undertakings to be given by the licensee and in this case, due consideration should be given to them by ICASA.
        iii. Section 5.2 does not make sense and we cannot decipher the intended meaning.
        iv. Practical experience has indicated that the process under Form C can take up to 2 years. Although not directly relevant to the content of the form, we suggest that ICASA commit to considering any such application within a reasonable period of time, which should not exceed 6 months.
        v. Finally, the provisions of section 10 of the ECA are very clear as regards amendments to licences. The form should make reference to these provisions.

    b. Form O:
        i. Cell C submits that this form is inadequate for the purpose for which we assume ICASA intends it, namely to facilitate a transfer in terms of section 13 of the ECA. This is because it is headed "Notice" which suggests that ICASA's approval is not required, whereas it is required.
        ii. Section 2.1 requests the applicant to note information that constitutes a change to information in the register. An applicant cannot do this if the register is not properly

iii. maintained by ICASA and up to date. It is not clear why a change in service would require notice to ICASA, for the same reasons set out in our general comments at paragraph 5. The same submission is made in relation to section 4. In addition, a change in service does not constitute a change in shareholding or a transfer of a licence or control, which section 3.13 (see below) seems to indicate the Form is intended to deal with.

iv. Section 3.13 is insufficient in our view to support an application for a "transfer" which is what the definition would suggest that a change of shareholding would constitute. A letter indicating the shareholding structure does not satisfy any of the criteria of section 13.

v. Section 5(a) seems to require an extraordinary amount of information if the intention of Form O is to simply notify ICASA of certain limited changes. If this is intended to tie into the new proposed regulation 11(4) then we submit that it does not do so. There needs to be a direct link to this regulation and the Form. The Form should, as we have set out already, not be a notice, but an application for approval.

vi. Section 5(b) refers to the "contact person as per the licence" but it is entirely possible and plausible that this person would change over time. What is required is a simple notice to ICASA to change the contact details from time to time.

vii. ICASA has no authority to amend the licence as suggested in the final paragraph of the Form. A licence amendment can only be made pursuant to a consultation and agreement with the licensee and not as a penalty. We presume what is meant here is that any changes approved by ICASA may be refused or approval withdrawn if ICASA finds that the applicant has misstated any facts.

c. Form G:

i. There is an internal drafting note that appears to have been inserted in error by ICASA in section 1.1 and a numbering error in the same paragraph.

ii. It is unclear why an undertaking is required in section 1.3 in relation to the type of application when the applicant is using a form that pertains to a number of different types of services?

iii. We suggest the wording of section 1.4 be phrased so as to be consistent with the similar provision contained in the Radio Frequency Spectrum Regulations of 2015, at regulation 10. Specifically the term "*historically disadvantaged groups*" is not defined and because the term "*HDP*" is not used (which is used in the Radio Frequency Spectrum Regulations of 2015) and neither is the term *historically disadvantaged persons*" used as defined in the Regulations, we assume that there is a distinction between "*historically disadvantaged persons*", "*historically disadvantaged groups*" and "*HDPs*" which we do not understand. This needs to be explained.

The ECA does not require a 30% shareholding to be held by persons from historically disadvantaged groups in the case of sub-letting, cession, transfer or transfer of control. The ECA only requires this in relation to the licensing application itself in terms of section 9(2) of the ECA. In this regard, we note that ICASA has yet to formulate regulations as required by this section read with section 4(3)(k) of the ICASA Act. In the Findings Document on Ownership and Control of 2011[1], ICASA also noted that it intended to take further action in this regard and so it is not clear how and why the 30% threshold was inserted as a requirement.

iv. There are no foreign ownership limitations or restrictions in relation to ECS and ECNS licences. We are therefore unclear on the reason for this request and a similar request in sections 5.2.2 and 6.7 regarding citizenship particularly as we cannot find a relevant power granted to ICASA to do anything about this.

v. In section 4.4 we suggest adding "business rescue". In any event, these events are likely to be grounds for terminating the licence rather than transferring it.

vi. Section 5.2.1 refers to a "partner", and section 6 specifically refers to licensees which are natural persons, which suggests that licensees can be corporate or private entities, as we have set out in our response to the definitions above. These definitions should be amended as we have suggested.

vii. The provisions of section 7 are confusing. It would seem that some terminology is better-suited to public bodies under the PFMA (accounting officer in 7.4 and 7.8) than to the private sector. In addition, we are unable to find the source of ICASA's powers to do anything with all of this information and the reason why it might be important in the context of the application. For example, what is ICASA proposing to do if a licensee is listed on the stock exchange, which information is sought in section 7.3? it is not possible for any accounting officer to provide the "undertaking" referred to in 7.8 as this is not a competency of such an officer. As with all regulatory processes and procedures, the questions asked and information sought by ICASA should be directly relevant to the approval sought by the applicant. It is our view that this is not the case in section 7.

viii. A similar submission can be made in relation to section 8 where information sought is in some cases only relevant to new licensees (8.6, 8.9 and 8.10). If this information is sought because ICASA concedes that Cell C's argument regarding the nature of an individual licence is correct (i.e. that it granted only to a specific person based on their specific experience) then we submit that ICASA's findings on the Vodacom/Neotel merger are legally flawed. We request that ICASA clarify the reasoning behind the request for this information as part of a transfer (or cession or assignment) application.

[1] *Gazette* 34601 of September 2011.

ix. The heading of Section 9 refers to "*Histoically (sic) Disadvantaged Persons*" whereas the body of that section refers to "*historically disadvantaged groups*". See our comments in clause 14.c.iii above that are of equal application here.

x. Section 10 would benefit from some guidelines being published by ICASA to indicate on what basis an application might be considered or would be rejected. The term "economic efficiency" in this context is vague and unhelpful. ICASA is requested to clarify the meaning of this term. We note that if ICASA applies a test in one instance, the same test should be consistently applied.

Cell C looks forward to achieving a set of documents in co-operation with ICASA, that can form the basis of a clear and consistent regulatory toolkit for certain applications.