

**ICASA'S PROPOSED
AMENDMENTS TO REGULATIONS
ON LICENSING PROCESSES AND
PROCEDURES FOR INDIVIDUAL
LICENCES**

**REPRESENTATIONS BY M-NET,
MULTICHOICE AND ORBICOM**

7 August 2015

INTRODUCTION

- 1 M-Net and MultiChoice each have an individual subscription broadcasting service licence. Orbicom has an individual electronic communications service licence and an individual electronic communications network service licence.
- 2 M-Net, MultiChoice and Orbicom thank the Authority for the opportunity to comment on the proposed amendments to the Regulations on Licensing Processes and Procedures for Individual Licences ("the proposed amendments").¹
- 3 If the Authority conducts public hearings, we request an opportunity to make oral representations at those hearings.

COMMENTS ON PROPOSED AMENDMENTS TO REGULATIONS

Proposed amendments to regulation 1: Definitions

- 4 We support the proposed definition of "control", namely that it is as contemplated in the Companies Act, 2008, although it is very important that these Regulations make it clear that this definition of "control" is only for the purpose of regulations 11 and 12 of these Regulations, which are specific to the issue of the transfer of control of an individual licence.
- 5 In our view, if one looks at s13(1) of the Electronic Communications Act ("the ECA"), and the definition of "control" as contemplated in the Companies Act, there is no need to introduce into these Regulations a definition of "Transferee", nor a definition of "Transfer of control".
- 6 Furthermore, not only are the definitions of "Transferee" and "Transfer of control" unnecessary, but if the present proposed definitions were included, they would completely undermine a clear reading of s13(1) of the ECA, read with the definition of "control" as contemplated in the Companies Act.

¹ Notice 662, Government Gazette No. 38921, 26 June 2015

7 We therefore propose that the only additional definition to be included in the Regulations is that of "control".

8 Furthermore, based on these representations as regards definitions, if our proposals are accepted, then, in the proposed amendments to the regulations dealing with the transfer of individual licences, any reference to the phrase "transfer of control" ought to be deleted.

Proposed amendments to regulation 5: Submission of applications and other documents

9 In principle we support the proposed amendments, but have some drafting suggestions.

10 First, as regards proposed sub-regulation (5A) we suggest that it be simplified so that it reads:

"The Authority will not consider any application if the applicant is in arrears with respect to any prescribed fees."

The reason for this proposal is that by virtue of s4(1)(c) of the ECA, any charges or fees will be dealt with by way of regulation, and the word "prescribed" is defined in the ECA as meaning "prescribed by regulation made by the Authority in terms of this Act or the related legislation". We would propose the same drafting amendment to regulation 8(3A), regulation 10(4), regulation 11(3) and regulation 14(3).

11 As regards the proposed amendments to sub-regulation (6), we note that a reference to sub-regulation (5) has been left out, and would propose that in any event, it would be simpler to reword this sub-regulation (6) as follows:

"The Authority will not consider any document where the applicant fails to comply with this regulation."

Proposed amendments to regulation 11: Application to transfer an individual Licence

12 For the reasons stated in paragraphs 4 to 8 above, we would strongly urge the Authority to remove from the proposed amendments to the heading of this regulation the words "or to transfer control".

13 We strongly oppose the proposed insertion by the Authority into regulation 12 of a new sub-regulation (4), which the Authority proposes is worded as follows:

"A licence transfer or licence transfer of control application will be evaluated on the basis of the following criteria:

- (a) promotion of competition and interests of consumers; and
- (b) equity ownership by HDPs."

14 The licensing framework in the ECA, regulations made thereunder and Invitations to Apply for assessing applications for individual service licences and the consideration by the Authority of such applications in determining whether or not to grant and issue an applicant an individual service licence is based on what is commonly understood in the electronic communications sector as a "beauty contest" approach. The applicant is assessed on its merits, with reference to the ECA, regulations made thereunder and the ITA. It is important that when considering an application to transfer an individual service licence, the Authority must consider whether the transferee would meet all the requirements the transferor met when it successfully applied for an individual service licence. If the Authority were to deviate from this fundamental principle, it would completely undermine the entire licensing and regulatory framework contemplated in the ECA.

15 We accordingly propose that the suggested new sub-regulation (4) be deleted in its entirety, since it focuses on only two issues, whereas the Authority, as we have already indicated in the paragraph above, ought to consider all the requirements to be met by a successful applicant or transferee – as set out in the ECA, the regulations and the ITA.

Proposed amendments to regulation 12: Restrictions on transfer and renewal of an individual Licence

- 16 We have already suggested, with reference to paragraphs 4 to 8 above, that the phrase "transfer of control" be deleted. Accordingly, there should be no amendment to the heading to regulation 12, and in the opening of that regulation, the phrase "or transfer of control" ought to be deleted.
- 17 We agree with the substitution of the word "must" for "may" as regards paragraph (c), which deals with the minimum equity ownership requirement for HDGs.
- 18 However, we submit that as regards paragraphs (a) and (b), the Authority ought to retain a discretion, and that the word "may" ought to be retained.
- 19 We accordingly propose that regulation 12 be amended so that it reads as follows:
- "(1) The Authority may refuse to renew or transfer a Licence if the Licensee has not complied with one or both 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 the ICASA Act; or
- (b) Where the Licensee has not paid the Licence fees due and payable at the date of the application.
- (2) The Authority must refuse to renew or transfer a Licence if the transferee's equity ownership held by persons from historically disadvantaged groups is less than 30%."

COMMENTS ON PROPOSED AMENDMENTS TO FORMS

General comments

- 20 On numerous occasions in Form O and Form G, the Forms require a signed letter or written undertaking signed by various persons.

21 We submit that as a general principle, all applications to the Authority and all Forms and annexures thereto must be attested before a Commission of Oaths, and that the wording therefor should be the following:

"The deponent has acknowledged that he/she knows and understands the contents of this application and attachments thereto which were signed and sworn before me at on this the day of, the regulations contained in Government Notice No. 1258 of 20 July 1972, as amended by Government Notice No. R1648 of 17 August 1977, as amended having been complied with."

22 We submit that this is an important principle which should be consistently applied. If this proposal is adopted, then the references in all the Forms, including Form O and Form G, requiring signed letters or undertakings could be removed.

23 Where a resolution of an applicant is required, then the Forms should state that it must be a resolution by the requisite body of the applicant as required by law. If this proposal is accepted, then provisions in the Forms, such as the current clause 5.2 in proposed Form O, ought to be amended.

Comments specific to current Form G and the proposed amendments thereof

24 Given what we have stated in paragraph 14 above, the Authority must ensure that Form G requires all the information and documents of the transferor and transferee which would be required by an applicant applying for the licence in question.

25 Furthermore, information and documents should not be requested if they do not relate to such requirements as set out in the ECA, the regulations made thereunder and the ITA. So, by way of example, if our proposal in paragraph 15 above is accepted, we submit that the proposed new clause 10.2 of Form G be deleted.

- 26 As regards clause 6.1 (1.1 thereunder), what is in italics, namely "It is not necessary to ask for this as it's already known what the licence can and cannot be used for. Essentially it's inconsequential." ought to be deleted, since it's extremely important that the services authorised to be provided in terms of the licence are spelt out.
- 27 As regards clause 9, dealing with ownership and control by HDGs, we propose that what is required is more detail, namely that the shareholding, voting rights and economic interest of HDGs be required.
- 28 As regards clause 10, in the heading and in clause 10.1, the words "transfer of control" ought to be deleted.

CONCLUSION

- 29 Once again, M-Net, MultiChoice and Orbicom would like to thank the Authority for the opportunity to make these representations, which we trust will assist the Authority.