

**ICASA'S PROPOSED
AMENDMENTS TO REGULATIONS
REGARDING STANDARD TERMS
AND CONDITIONS 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 regarding Standard Terms and Conditions 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.

SCHEDULE 1: INDIVIDUAL BROADCASTING SERVICES LICENCES

Proposed amendments to regulation 2: Notification of Licensee details and information

- 4 As regards the proposed amendment to regulation 2(1)(c), in the case of a licensee which is a public company, compliance with this provision would not be possible, since the shares of such company are traded on the stock exchange. We therefore propose that (c) be amended so that it reads "shareholding, other than where the Licensee is a public company".

Proposed amendments to regulation 5: Commencement of operations

- 5 We support the Authority's intention as regards its proposed amendments to regulation 5.
- 6 However, we thought it may assist the Authority if we proposed certain amendments to the drafting, so as to ensure that the Authority's intention is as clear as possible, and so as to lessen disputes about the interpretation of this regulation. We therefore propose that this regulation be worded as follows:

¹ Notice 659, Government Gazette No. 38918, 26 June 2015

- "(1) A Licensee must commence provision of the BS specified in its Licence within the periods specified in the paragraphs below, unless the Authority grants, on written application by the Licensee and on good cause shown, an extended commencement period:
- (a) twelve (12) months from the effective date in respect of a free to air sound BS;
 - (b) twenty four (24) months from the effective date in respect of a free to air television BS; or
 - (c) twenty four (24) months from the effective date in respect of a subscription BS;
- (2) An application in terms of (1) for an extension of the commencement period must be submitted by the Licensee to the Authority at least 6 (six) months prior to the expiry of the applicable period in (1).
- (3) The Authority may not grant an extension for a period longer than the applicable period in (1).
- (4) The Authority may not grant a Licensee more than one extension.
- (5) Where a Licensee has not commenced provision of the BS specified in its Licence, within one month of the end of each financial year of the Licensee it must provide the Authority with a letter from the Licensee's external auditors confirming nil licensed service revenue in that year.
- (6) Where a Licensee has not commenced provision of the BS specified in its Licence, and where that Licensee is not legally required to have audited financial statements, within one month of the end of each financial year of the Licensee it must provide the Authority with a letter from an independent accounting officer and a clearance certificate from the South African Revenue Services confirming nil licensed service revenue in that year."

7 Since a number of the substantive provisions in the proposed amendments to regulation 5 are new, the Authority will need to include, at the end of regulation 5, a further sub-regulation providing for a transition period as regards existing BS licensees which, at the time these amended Regulations come into operation, have not yet commenced the provision of the BS specified in their licence. In this regard, we propose that a further sub-regulation (7) be added, which reads as follows:

"Sub-regulations (1) to (6) apply to existing Broadcasting Service Licensees, which, at the time these Amendment Regulations come into operation, have not yet commenced the provision of the BS specified in their licence."

Current regulation 9 and proposed amendments thereto: Provision of information

8 The current wording of regulation 9(1) is far too wide. The power of the Authority to require a licensee to provide any information or documents must be confined to enabling the Authority to monitor and enforce compliance by a licensee with the provisions of its licence, the Electronic Communications Act ("the ECA"), related legislation as defined in that Act, and any regulations made in terms of that Act or related legislation. For example, in assessing compliance with Licence Fee Regulations, the Authority often requests the submission of management accounts. However, management accounts are prepared for specific internal reporting purposes – the format, layout and information vary from company to company depending on the requirements of management and they would be of no assistance in determining whether the correct fees had been paid by a licensee. Sub-regulation (1) accordingly ought to read as follows:

"(1) The Authority may require a Licensee to provide any information or documents so as to enable the Authority to monitor and enforce compliance by the Licensee with the provisions of its Licence, the Electronic Communications Act, related legislation as defined in that

Act, and any regulations made in terms of that Act or the related legislation."

- 9 Furthermore, we wish to point out that in terms of s4C of the ICASA Act, the Authority is already empowered, in the context of inquiries conducted in terms of s4B of that Act, to require from any person such information and documents which may be reasonably necessary for the purposes of such inquiry.
- 10 As regards proposed new sub-regulation (3), there is no requirement in the Compliance Procedure Manual Regulations requiring a licensee to submit an annual compliance report. This proposed sub-regulation (3) should accordingly be deleted.
- 11 As regards proposed new sub-regulation (4), syndication is not regulated in the ECA, the related legislation or regulations made thereunder. It is accordingly impermissible for the Authority to require the provision of any information in connection therewith, and this proposed sub-regulation (4) accordingly ought to be deleted.

Proposed amendments to regulation 13(2): Subscription broadcasting services

- 12 In paragraph 23 below we make some general comments on requirements imposed on licensees concerning recordkeeping and provision of information and documents to the Authority. If the Authority accepts the validity of our comments, then most of regulation 13(2) ought to be deleted, since it duplicates requirements already imposed on licensees in terms of Form 5 (Tariff Reporting) in the Compliance Procedure Manual Regulations.

13 It, despite our comments on avoiding duplication of requirements on licensees, the Authority retains regulations 13(2), then our comments on the proposed amendments are the following: In terms of current regulation 13(2), a subscription broadcasting service Licensee is required to submit to the Authority

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"(a) details of the price(s) for its service and other terms and conditions of the provision of such service within 30 days of commencing such service; and

(b) on a bi-annual basis, a record of the actual services provided and the actual tariffs charged therefore during the previous six months."

14 The first point M-Net and MultiChoice wish to make is that the proposed introduction into (a) and (b) of the word "related" will introduce uncertainty and interpretative difficulties as to what is meant by "related". We therefore propose that in (a) the wording "and other terms and conditions of the provision of such service" be retained, and that in (b) the wording "and the actual tariffs charged therefore" be retained.

15 Second, whilst M-Net and MultiChoice have no objection to being required to provide the Authority with details of the service provided by it and the price(s) and terms and conditions thereof within 30 days of commencing such service, and on a bi-annual basis, a record of the actual services provided and the tariffs charged therefore, we do object to having to provide such information prior to the provision of such services. This proposed amendment would constitute undue interference with the commercial activities of BS licensees, which would be contrary to the statutory requirement in s2(y) of the ECA, namely that the Authority must "refrain from undue interference in the commercial activities of licensees". Paragraph (a) accordingly ought to remain as it is in the current Regulations.

- 16 Third, in the current (b), it is implicit that at the end of the first six months of a licensee's financial year and at the end of the second six months, the licensee must submit to the Authority the requisite information for the preceding six months. There is accordingly no need to propose the insertion of the phrase "by 31 July". This does not make sense in the context of (b) overall.

Proposed amendments to regulation 14: Contraventions and fines

- 17 M-Net and MultiChoice have a number of serious concerns relating to the proposed amendments to regulation 14.
- 18 First, it is important that the Authority retains the opening to current regulation 14(1), which provides: "Upon a determination of non-compliance by the Complaints and Compliance Committee in terms of the ICASA Act, the Authority may impose a fine not exceeding ...", since this allows the Authority to retain a discretion as regards the imposition of a fine.
- 19 Second, in the proposed amendments to sub-regulations (1) and (2) the Authority would be compelled to impose a minimum fine, regardless of the circumstances. Again, this deprives the Authority of the ability to exercise its discretion as to whether or not a fine would be appropriate in the context of all the relevant circumstances.
- 20 More importantly, the proposed fine in sub-regulation (1) that a person could be liable to a fine not exceeding "R5 000 000, 00 (Five Million Rand) or 10% of the Licensee's annual turnover for every day or part thereof during which the offence is continued)" is unreasonable, excessive and completely disproportionate to the objects of the Regulations and the harm that could be caused by a contravention thereof.
- 21 As regards the proposed sub-regulation (4), this does not accord with the overarching approach to the manner in which the Authority may exercise its discretion and the orders it may make, as set out in s17D and s17E of the ICASA Act.

- 22 For all the reasons stated in the preceding paragraphs in this section, we strongly oppose the proposed amendments to regulation 14, and urge the Authority to retain the wording of the current regulation 14.

General comments concerning Regulations

- 23 At a more general level, we would urge the Authority to rigorously go through the current Regulations and the proposed amendments thereto to ensure that:

23.1 No obligations or requirements, including as regards recordkeeping and the provision of information and documents to the Authority, are imposed on a BS licensee which are in any way a duplication or variation of obligations or requirements imposed on such licensees in their licences, elsewhere in the ECA, the related legislation, or any regulations made thereunder.

23.2 If any additional recordkeeping obligations are required, those be strictly limited to ensuring that the Authority is able to monitor and enforce compliance with licence conditions, the ECA, the related legislation, and regulations made thereunder.

An example of where such an assessment is necessary is the current regulation 11, which imposes general obligations on licensees. Another example relates to the obligations imposed on subscription broadcasting service licensees, where what is required in regulation 13(2) is essentially a duplication of what is required in Form 5 (Tariff Reporting) in the Compliance Procedure Manual Regulations.

SCHEDULE 2: INDIVIDUAL ELECTRONIC COMMUNICATIONS NETWORK SERVICES LICENCES AND SCHEDULE 3: INDIVIDUAL ELECTRONIC COMMUNICATIONS SERVICES LICENCES

- 24 As regards the Authority's proposed amendments to Schedules 2 and 3, Orbicom, to the extent applicable, reiterates the points made by M-Net and MultiChoice in relation to Schedule 1.

CONCLUSION

25 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.