



**Submission to Independent Communications Authority of South Africa on the
Amendment Individual Processes and Procedures Regulations 2015
("Amendment Regulations 2015") – Government Gazette No. 38921 dated
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INTRODUCTION

1. Neotel welcomes the opportunity to comment on the Amendment Individual Processes and Procedures Regulations 2015 (**the Amendment Regulations 2015**).
2. Neotel congratulates the Independent Communications Authority of South Africa (“**the Authority or ICASA**”) for issuing the Amendment Regulations 2015, and for adopting a consultative process in preparing them.
3. As you are aware, Neotel is a South African infrastructure, communications and services provider, with global reach. Neotel offers a range of innovative electronic communication products and it has an extensive optic fibre cable network which provides its customers with access to high-speed internet connectivity. Neotel is in the business of connecting people and enterprises in South Africa to themselves and connecting South Africa to the world – mature or emerging – to enable commerce. Neotel also has access to all five undersea cables connecting South Africa and has played a significant role in connecting South Africa to the world. In light of this, Neotel believes that it is in a position to provide meaningful comment on the Amendment Regulations 2015 with a view to shaping the future of ICT regulation in South Africa.
4. While Neotel supports the consultation process on the Amendment Regulations 2015, Neotel further affirms its commitment to take part in any subsequent consultations that may be held, which may include public hearings.
5. Neotel’s submission is structured in eleven (11) parts, as follows.
 - 5.1 In “Part A”, a general commentary is provided.
 - 5.2 “Part B” deals with the legislative framework, which Neotel believes is important in considering the issues raised by the Amendment Regulations 2015.
 - 5.3 In “Part C”, addresses retrospectivity. Here, we conclude that it is impossible nor legally permissible to apply the Amendment Regulations 2015 retrospectively.
 - 5.4 “Part D” considers specific comments and provides reasons why we think the Authority must pay attention to specific provisions of the proposed regulations.
 - 5.5 “Part E” deals with the issue of the Authority’s powers not to consider any amendment, renewal and/or transfer of control of individual licence if the licensee or registrant is in arrears with respect to any prescribed or legislated fees. We conclude that there may be instances that warrant the Authority to reconsider its position in this regard.

- 5.6 “Part F” focuses on “definitions” and proposes some amendment to the “definitions”.
- 5.7 “Part G” proposes some amendments to the purpose of the regulations to bring it in line with the 2014 ECA Amendment.
- 5.8 “Part H” urges the Authority to amend Form G to align it with changes introduced by the 2014 ECA Amendment.
- 5.9 “Part I” provides a hypothetical example of a situation which could result in transfer of control applications being considered negatively to the detriment of the transferee and HDPs in particular. We urge the Authority to consider the likelihood of such implications, if any.
- 5.10 “Part J” deals with the suitability of transferee.
- 5.11 We then summarise our views and conclude in “Part K”.
6. Our comments on the Amendment Regulations 2015 are set out below.

PART A: GENERAL COMMENTS

7. In order to make meaningful comments on the Amendment Regulations 2015, Neotel respectfully submits that it is advisable to understand the legislative framework (including the historical background) governing the electronic communications sector. It is for this reason that we set out below the legislative framework, which is primarily based on the Electronic Communications Act 36 of 2005 (**ECA**) as recently amended by the Electronic Communications Amendment Act 1 of 2014 (**ECA Amendment 2014**). The legislative framework is important in that it lays the foundation for the Amendment Regulations 2015.

PART B: LEGISLATIVE FRAMEWORK

8. The ECA seeks to achieve a number of objectives including but not limited to the promotion of competition and the promotion of broad-based black economic empowerment (B-BBEE). The promotion of the latter objective has been introduced by the ECA Amendment Act 2014 (which came into operation on 24 May 2015). Section 5(7) of the ECA empowers ICASA to prescribe regulations setting out the process and procedures for applying for transfer of individual licences, amongst others. In granting a licence, ICASA must promote B-BBEE in accordance with the requirements of the ICT

Charter (see section 5(9) of the ECA). In terms of section 9(1) of the ECA, any person may - upon ICASA's Invitation to Apply (ITA) – apply to ICASA for an individual licence in a prescribed manner. Section 9(2) makes it mandatory for ICASA to give notice of the licence application in the Government Gazette. In that notice, ICASA must do two things. First, it must invite interested parties to apply and submit written representations in relation to the licence application within the period mentioned in the notice. Secondly, ICASA must include the percentage of equity ownership to be held by persons from historically disadvantaged groups (HDGs), which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act. The ICASA Act 13 of 2000 (**ICASA Act**) was amended by the ICASA Amendment Act 2 of 2014 (**ICASA Amendment 2014**), which came into effect on 16 May 2014. Section 4(3)(k) of the ICASA Act provides that ICASA may make any regulations on empowerment requirements to promote B-BBEE. Prior to the ICASA Amendment 2014, ICASA was required to make empowerment regulations in terms of the B-BBEE Act 53 of 2003 (**B-BBEE Act**). The ICASA Amendment 2014 is now silent on whether the empowerment regulations should be made in terms of the B-BBEE Act or any other related legislation.

9. It is clear from the provisions of section 9(2)(b) that this section deals only with the content of the ITA for new individual licences **AND NOT** for applications for amendments, renewals and transfers of control. It simply requires that ICASA indicate in every ITA for a new licence what the minimum empowerment level is. Therefore, it is only when ICASA issues an ITA for individual licences that any person or entity interested in applying for such licence holds no less than 30% of equity ownership of HDGs.
10. Section 13 of the ECA introduces new requirements governing the transfer of individual licences or transfer of change of ownership in those licences. From 21 May 2014, no control of an individual licence may be assigned, ceded or in any way transferred to any other person without the prior written permission of ICASA (see section 13(1)). Further, such application must be made in the prescribed manner (see section 13(2)). Section 13(3) of the ECA empowers ICASA, through regulations, to set a limit on, or restrict, the ownership or control of an individual licence for purposes of:
 - (a) promoting B-BBEE and the ownership and control of electronic communications services by HDGs; or
 - (b) promoting competition in the ICT sector.

11. Further, section 13(5) requires that the regulations contemplated in section 13(3) must be made subject to two conditions, as follows:
 - (a) with regard to the objectives of the Act, the related legislation and where applicable, any other relevant legislation; and
 - (b) after ICASA 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. Section 13(6), which is a newly introduced provision, provides that the provisions of section 9(2) to (6) apply, with the necessary changes, to section 13. Section 9 deals with the application for and granting of individual licences. As explained above, section 9(2)(b) prescribes the content for ITA issued by the Authority in relation to new licences.
13. Neotel believes that it is for these reasons that ICASA has now sought to amend the existing Individual Licences Processes and Procedures Regulations of 14 June 2010 (**Individual Licensing Processes and Procedures Regulations 2010**) in order to align it with the current legislative framework, as summarised below.
14. While the legality of the regulations is not questioned, Neotel considers it necessary to deal with whether the Amendment Regulations 2015 applies retrospectively. For reasons articulated below, it is respectfully submitted that the Amendment Regulations 2015 cannot apply retrospectively. We examine this issue below.

PART C: WHAT IS THE COMMENCEMENT DATE OF THE AMENDMENT REGULATIONS 2015?

15. Neotel respectfully submits that the determination of this question is relevant for a number of reasons. For example, may opponents argue that all transfer of control transactions that are currently considered by the Authority ought to be dealt with under the Amendment Regulations 2015. We argue that this proposition cannot be true for a number of reasons.
16. Clause 9 (entitled “Short Title and Commencement”) of the Amendment Regulations 2015 stipulates that these regulations will come into operation upon publication in the Gazette.
17. Neotel notes that the current Regulations are merely a “Draft” or “Proposed Regulations” published solely to solicit public comments. This is evident from page 3 of the Gazette which expressly states as follows:

“Interested persons are hereby invited to submit written representations with regard to the proposed regulations. Written representations must be submitted to the Authority within thirty (3) working days from the date of publication of this notice...” **(Our emphasis)**

18. What the Authority has simply done in this instance is to apply the provisions of section 4(4) of the ECA which calls upon the Authority to publish, not less than 30 days before any regulation is made, such regulation in the Gazette together with a notice declaring the Authority’s intention to make the proposed regulation and inviting interested parties to make written representations on the regulation.
19. In Neotel’s view, the published Regulations are merely an indication from ICASA of the type of regulations they intend implementing in the near future. As such, it cannot be said that they apply “retrospectively”. In addition, it cannot be argued that the proposed regulations came into effect on the date of publication in the Gazette, i.e., on 26 June 2015.
20. Neotel reiterates its submission that ICASA never intended this regulations to be the “final regulations” hence they have been published for public comment. Legally, the proposed regulations would only become effective upon finalisation by the Authority in consultation within the public, including persons affected directly by these regulations such as electronic communications services and network services licensees. Put simply, the proposed regulations cannot be applied in their current form until and unless consulted upon publicly and thereafter finalised by the Authority. See section 4(4) of the ECA in this regard.
21. It is only after the Authority has (a) received and evaluated comments or representations on the proposed regulations, (b) effected the proposed changes, where necessary; and/or (c) after the conduct of public hearings in respect of the proposed regulations that the Authority will then implement the proposed regulations in their final form (see also section 4(6) of the ECA). Still, the final regulations would have to be published in the Gazette in order to be effective.
22. In practice, this means that the proposed regulations cannot apply “retrospectively” particularly to transactions that have been filed with the Authority prior to the coming into operation of the proposed regulations. The reasons for this is two-fold:
 - 22.1 It is only now that the Authority seeks to amend the Individual Licensing Processes and Procedures Regulations 2010 to provide for a process to apply for approval in

respect of the transfer of control of an individual licence. This is because, by their wording, the Individual Licensing Processes and Procedures Regulations 2010 in their current form only govern the transfer of licences AND NOT the transfer of control of licences.

- 22.2 It is only through the promulgation of the ECA Amendment 2014 that the Authority now has the powers to approve or disapprove transfers of control of individual licences. Although ICASA has the powers to now promulgate the regulations governing the transfer of control of licences however it has not yet done so. It may be argued, unreasonably so, that until such time that ICASA promulgates regulations it cannot evaluate applications currently pending before it. We submit as follows. In line with caselaw,¹ the absence of these regulations does not preclude ICASA from considering and determining the applications currently before it. This is because there is nothing in the language of sections 13(2) and 13(3) that suggests that the absence of regulations means that the Authority is precluded from exercising its statutory powers in terms of section 13(1), for example. In addition, ICASA is required to exercise its section 13 powers with reference to the objectives of the ECA. As such, it would be grossly unreasonable for the Authority to consider pending applications before it simply because of the absence of regulations.
23. Further, the publication of the Authority's October 2014 Notice² (**the October Notice**) does not assist the Authority either, in order to apply the proposed Amendment Regulations 2015 retrospectively to transactions currently being assessed by the Authority.
24. First, the October Notice refers only to transfers of licences AND NOT to transfers of control in licences. The October Notice is linked to the Authority's power to approve licence transfers in terms of the Individual Licensing Processes and Procedures Regulations 2010. The Individual Licensing Processes and Procedures Regulations 2010 cannot be applied because regulation 2(1) makes it clear that the Regulations prescribe "the process and procedures for amending, transferring, surrendering and

¹ See *Minister of Defence and Others v South African National Defence Force Union and Another* 2014 (6) SA 269 (SCA) at paras 9-13; *Verstappen v Port Edward TB* 1994 (3) SA 569 (D); *Lategan v Koopman en andere* 1998 (3) SA 457 (LCC) at para 4.

² GN 881 in *Government Gazette* 38087 of 10 October 2014.

renewing individual licences”. Indeed the Individual Licensing Processes and Procedures Regulations 2010 were in line with the provisions of the ECA as they stood at the time when they were enacted.

25. Second, the October Notice expressly states that it only applies to applications made after the date of its publication, i.e., 10 October 2014. It is therefore clear that the October Notice is only intended to apply prospectively.
26. Neotel respectfully submits that it could not thus have been the intention of the Authority to apply the proposed regulations to pending applications before the Authority. As such, it also follows that the proposed regulations cannot be applicable to applications already due for finalisation by the Authority, and where public hearings have already been conducted. To this end, see the judgment of the Supreme Court of Appeal in *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission*³ which is instructive in this regard. Here, the Court opined that “the principle is the same whether the application has just recently been made or just recently been heard”.
27. To conclude, both the Individual Licensing Processes and Procedures Regulations 2010 and the October Notice apply only to licence transfers and not to transfers of control of licences. Further, it is clear that the Amendment Regulations 2015 do not apply to applications currently pending before the Authority. It is merely a “Draft” with a clear intention of soliciting inputs from the public after which the Authority would consider, amend the proposed regulations (if necessary) and publish the Final Regulations in the Gazette.

PART D: SPECIFIC COMMENTS

28. It is clear that the intention of the Authority is to align its current regulations with the recent changes introduced as a result of the ECA Amendment Act 1 of 2014. Neotel applauds the Authority for this initiative. In order to strengthen the proposed regulations and also to avoid any ambiguity and future legal challenges that may be occasioned by

³ 1999 (4) SA 1 (SCA).

the proposed changes, Neotel proposed that the following proposals be considered by the Authority when finalizing the regulations.

29. In the sections below, we provide comments on specific provisions of the proposed Amendment Regulations 2015.

PART E: NO CONSIDERATION OF AMENDMENT, RENEWAL AND TRANSFER OF CONTROL IF THE LICENSEE OR REGISTRANT IS IN ARREARS WITH RESPECT TO ANY FEES PRESCRIBED BY THE AUTHORITY OR LEGISLATED IN TERMS OF TH ACT

30. Neotel notes that the Authority intends not to consider any application – be it for amendment, renewal and/or transfer of control of licences – if the licensee/applicant or registrant is in arrears with respect to any fees prescribed by the Authority or legislated in terms of the ECA (see regulations 5A, 8(3A), 10(4), 11(3), and 14(3)).
31. While Neotel understands that they may legitimate reasons for doing so, it is submitted that there may be instances that do not warrant the Authority invoking these provisions. For example, in situations where there is a pending dispute on fees with the Regulator and where the applicant/licensee or registrant has entered into a payment plan with the Authority. There may be other instances that warrant that the Authority should not refuse to consider such applications. Neotel is in no way suggesting that the Authority should not refuse to consider any of the aforesaid applications in instances where the applicant/licensee or registrant has not paid its application or administrative fees in line with the proposed regulations.
32. In light of the above, it is suggested that the proposed regulations be amended to cater for situations mentioned above.

PART F: DEFINITIONS

33. It is respectfully submitted that the Authority should consider amending the definition of ‘application’ to give it to the recent ECA changes. That is, “application” should also be expanded to include the transfer of control of licences. In other words, there should be category (f) added to the definition of application, as follows:

“application” means an application: “...(f) to transfer control of an individual Licence”.

34. Further, to make it clear to which licence the proposed regulations apply to, it is suggested that a definition of “individual licence” be included as follows: “individual licence” has its meaning as defined in the ECA. Alternatively, this can be lumped together with the definition of “application” as follows: “application” means an application (a) for an Individual Licence; (b)...(c)...(d)...(e)...or (f) to transfer control of an individual licence, while “Individual Licence” has its meaning as defined in the ECA, as amended.

PART G: PURPOSE OF THE REGULATIONS

35. While it is clear that the Authority seeks to align the Individual Licensing Processes and Procedures Regulations 2010 with the recent 2014 ECA amendment, it is proposed that regulation 2(a) be amended to include the transfer of control of individual licences, as follows:

“The purpose of these Regulations is to regulate and prescribe:

The process and procedures for amending, transferring, surrendering, renewing Individual Licences and transferring of control of Individual Licences”

PART H: THE PRESCRIBED FORMS

36. To align regulation 4(1)(c) with the changes introduced through the 2014 ECA Amendment, it is proposed this regulation be amended as follows:

“Form G: Application to sub-let, cede, assign, transfer and transfer of control of an individual licence”

PART I: RESTRICTIONS ON TRANSFER, TRANSFER OF CONTROL AND RENEWAL ON AN INDIVIDUAL LICENCES

37. Regulation 12(c) of the Individual Licensing Processes and Procedures Regulations 2010 empowers the Authority to refuse to renew, transfer or transfer of control of an

individual licence where “the Transferee’s ownership and control by historically disadvantaged persons is less than 30%”.

38. “Transferee” is defined in the Amendment Regulations 2015 as “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”.
39. Neotel supports and remains committed to transformation of the ICT sector. Neotel would however like to obtain clarity from the Authority in the interests of all licensees in regard to certain aspects of transfer. We postulate a scenario below for consideration.
40. Let us assume hypothetically that licensee Company A, currently controlled by Shareholder X (as to 70%, with no HDP or BEE shareholding) and shareholder Y (HDP or BEE shareholder, as to 30%). Assuming shareholder B (a new shareholder/buyer, with no HDP or BEE shareholding and which would be the transferee in the context of the regulations) enters into a share purchase agreement with shareholder X (the current majority shareholder) in terms of which Shareholder B would acquire 70% in licensee Company A. We assume that Shareholder Y does not want to sell its 30% HDP or BEE stake and would thus remain in licensee Company A as a 30% HDP or BEE shareholder post-merger.
41. Having regard to the hypothetical scenario above, it is unclear how the Authority would deal with such a transfer. In other words, would the Authority require that the new buyer/shareholder/transferee B should also have HDP or BEE 30% equity prior to assuming sole or joint control in licensee Company A? We raise this example because the regulations seem to suggest that HDP or BEE 30% equity level must be achieved at transferee level as opposed to the licensee company level. It should be noted that it may not be easy in some instances to fully or immediately comply with BEE/HDP equity requirement at either transferee or licensee company level. As such, the proposed regulations should be flexible to accommodate merging parties in such instances while promoting the participation and ownership of HDPs/BEE partners at the same time.
42. In addition, Neotel is of the view that requiring a 30% BEE or HDP equity upon renewal of an existing licence may yield un-intended results. To this end, we propose that upon renewal of a licence the Authority should ensure that the BEE or HDP equity shareholding does not reduce or go below the existing level at a particular point in time.
43. Neotel respectfully submits that the Authority should consider whether there is indeed a likelihood of this happening and if so, devise a means within which any negative

consequences may be avoided or dealt with properly in line with the purpose and objectives of the underlying statute.

PART J: FORM G - SUITABILITY OF TRANSFEREE

44. Neotel notes that Form G has been amended to require, *inter alia*, that the transferee must provide (1) detailed network architecture layout plan and roll-out plans indicating timeframes, and (2) detailed proposed commercial agreements to be made available in terms of roaming, interconnection and facilities leasing.
45. While there may be commercial considerations when the transferee considers a new venture such as the transfer of control in an individual licence, it does not automatically mean that the merging parties would have already finalised the documents that are now required by the Authority through this amendment. Some of the commercial agreements envisaged in a process such as this usually takes time, and it may not be practically possible for the transferee to produce such documents upon submission of the application for the transfer of control of licence, for example. As such, Neotel respectfully submits that the Authority should not penalize the transferee as failure to submit detailed documents or reports may not be solely attributable to the transferee.

CONCLUSION

46. Neotel appreciates the consultative approach adopted by the Authority in this regard.
47. Neotel remains at the disposal of the Authority to clarify any aspect relating to this submission and wish the Authority well with further deliberations in finalising the Amendment Regulations 2015.
48. Neotel confirms its commitment to take part in any subsequent consultations that may be held.