

11 August 2015

**Independent Communications Authority of South Africa**

**Attention:** Mr Peter Mailula

E-mail: [pmailula@icasa.org.za](mailto:pmailula@icasa.org.za)

Dear Sir,

**WAPA SUBMISSIONS IN RESPECT OF THE DRAFT AMENDMENT INDIVIDUAL PROCESSES AND PROCEDURES REGULATIONS 2015**

1. We refer to the Draft Amendment Individual Processes and Procedures Regulations 2015 published as General Notice 662 in Government Gazette 38921 of 26 June 2015 (“the Draft Regulations”) and to the Authority’s invitation to comment thereon, and we set out the WAPA submission below.

**GENERAL REMARKS**

2. WAPA currently has 226 members, the majority of whom hold Electronic Communications Network Services (ECNS) Licences and Electronic Communications Services (ECS) Licences. These members will be subject to the Draft Regulations, and they accordingly have a direct interest in the Draft Regulations. WAPA accordingly sets out its comments and concerns on the Draft Regulations herein.
3. WAPA members welcome the revision of the existing Individual Processes and Procedures Regulations<sup>1</sup> (“the Regulations”), as they recognise that there are sections of the Regulations that would benefit from revision following the amendments to the Electronic Communications Act 36 of 2005 (“the ECA”) introduced by the Electronic Communications Amendment Act 1 of 2014 (“the ECAA”) in May 2014.
4. However WAPA is not sure if the Draft Regulations adequately address the issues found in the Regulations following the changes introduced by the ECAA. WAPA’s detailed responses to the Draft Regulations are set out hereunder, but WAPA is concerned that the proposed amendments have not taken adequate note of the problematic sections of the Regulations following the changes introduced by the ECAA.

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<sup>1</sup> Published as General Notice R522 in Government Gazette 33293 of 14 June 2010.

## DEFINITIONS (S1)

5. The ECAA provides that an individual licence may not be let, sub-let, assigned, ceded or in any way transferred, and the control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority.<sup>2</sup>
6. Given the lack of definition of the various terms in this section – specifically ‘let’, ‘sub-let’, ‘assigned’, ‘ceded’ and ‘control’ – there has been a fair amount of uncertainty in industry about exactly what the Authority had intended to cover with this amendment.
7. The Draft Regulations inserts definitions for ‘transferee’, ‘control’ and ‘transfer of control’. While this attempt by the Authority is appreciated, WAPA respectfully submits that these definitions are at odd with each other.
  - 7.1. ‘Control’ is as set out in the Companies Act, 71 of 2008<sup>3</sup> (“the Companies Act”). For the sake of brevity, the relevant section is set out herein:

*a person controls a juristic person, or its business, if-*

    - (a) *in the case of a juristic person that is a company-*
      - (i) *that juristic person is a subsidiary of that first person, as determined in accordance with section 3(1)(a); or*
      - (ii) *that first person together with any related or inter-related person, is-*
        - (aa) *directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or*
        - (bb) *has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;*
    - (b) *in the case of a juristic person that is a close corporation, that first person owns the majority of the members’ interest, or controls directly, or has the right to control, the majority of members’ votes in the close corporation;*
    - (c) *in the case of a juristic person that is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; or*
    - (d) *that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c).*
  - 7.2. In the Draft Regulations, the Authority defines ‘transfer of control’ as “transfer of shareholding in the issued licence to a new shareholder”. This appears to indicate that the transfer of any shareholding would be a transfer of control, rather than a transfer of shareholding which would result in a change of control as set out in the definition of ‘control’. It is accordingly submitted that the Authority either delete the definition of

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<sup>2</sup> Section 13.

<sup>3</sup> Section 2(2).

'transfer of control', alternatively that the definition be corrected to ensure that it does not contradict the definition of 'control'.

- 7.3. It is submitted that the definition of 'transferee' in the Draft Regulations is unnecessarily verbose, which could lead to complications. For example: the requirement in the ECA is that the proposed assumption of control requires the Authority's prior written approval; the definition of 'transferee' includes a person who would acquire/establish "increased control" – it is uncertain whether the Authority intends to require that a minor change of shareholding, which would result in increased control by a party which already controls the licensee, should also be submitted to the Authority for its prior written permission. Another example: 'control' as contemplated in the Companies Act is clear, and the inclusion in the definition of 'transferee' of "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" is superfluous.
  - 7.4. WAPA respectfully submits that the Authority should follow the Companies Act insofar as determining which transactions will constitute a 'change of control', and should steer clear of muddying the waters in this regard.
8. WAPA submits that the Authority should take the opportunity to define 'let', 'sub-let', 'assign' and 'cede' as well, to ensure that it's clear which situations require the Authority's prior written permission.

#### **APPLICATION TO TRANSFER OR TO TRANSFER CONTROL OF AN INDIVIDUAL LICENCE (S11)**

9. The Draft Regulations specify that an application for transfer or transfer of control will be evaluated on the basis of promotion of competition and interests of consumers, and equity ownership by HDPs.
10. There has been some uncertainty in industry over whether the HDP ownership requirement would apply in the case of transfers of control as well, and the certainty this amendment brings is appreciated.
11. It is submitted that any new entrant to the market would promote competition and the interests of consumers. If the Authority wishes to assess specific aspects in this regard, it is recommended that the Authority specify information which is to be reflected in the business plan to be included with the application for transfer or transfer of control of an Individual licence.

#### **RESTRICTIONS ON TRANSFER AND RENEWAL OF AN INDIVIDUAL LICENCE (S12)**

12. The Draft Regulations indicate that the Authority must refuse to renew, transfer or transfer control of an Individual licence where the licensee has not met the specified conditions, including "where the transferee's ownership and control by historically disadvantaged persons is less than 30%".

13. It is submitted that the Authority should consider simplifying the process and shortening the timelines for applications for transfers of control, where the transfer of control is intended to meet this ownership requirement.

#### **UNTITLED (S15)**

14. The Draft Regulations indicate that the Authority may allow applicants to lodge application through an online process following Notice in the Government Gazette.
15. WAPA requests clarity on whether the applicant would still be required to submit hard copies as set out in the proposed amendments in the Draft Regulations to section 5 if this online process is introduced.

#### **SHORT TITLE AND COMMENCEMENT**

16. While some of the proposed amendments as set out in the Draft Regulations will operate smoothly if they come into effect immediately, others will be less successful in the transitioning. It is recommended that the Authority have a phasing-in timeline, in which they can ensure that their internal processes are ready to deal with the changes.

#### **FORM C**

17. The Draft Regulations edit section 5.2 of Form C to require the attachment of a resolution "authorising persons not more than 2 to sign the application, which person(s) must liaise with the Authority during the registration process."
18. It is uncertain why the persons signing the application are required to liaise with the Authority during the process. It is submitted that the Authority would prefer to liaise with the contact person designated on the licence and/or the party submitting the application to the Authority; the person authorised to sign the application in the resolution wouldn't necessarily have the appropriate authority to liaise with the Authority in this regard.

#### **FORM O**

19. The Draft Regulations make provision for two (2) contact persons' details (3.3, 3.4, 3.11 and 3.12). It is uncertain why two (2) contact persons should be required. It is submitted that the second contact person should be indicated as 'Optional'. It should be noted that Form G only requires one (1) contact person.
20. The Draft Regulations require, in respect of shareholding, a signed letter with the breakdown of the shareholding structure to be changed (3.13). It is uncertain if this is just badly worded, so it appears to be requesting the old shareholding structure ("the shareholding structure to be changed"). It is submitted that the wording be amended to clarify the information required. It is also uncertain who is required to sign the letter; it is submitted that the Authority clarify this too. In practice, the Authority also requires additional information regarding the

shareholders, e.g. HDP status and total HDP ownership percentage, and it is submitted that this section should specify all information that the Authority will require in this regard.

21. The Draft Regulations require a resolution authorising the person signing the notice, to be signed by the contact person on the licence (section 5b). It is uncertain why the Authority would require the contact person to sign the resolution. The contact person may not be someone who can sign such a resolution, i.e. where the contact person isn't a director/member of the company.
22. The Draft Regulations require CIPC registration documents to accompany notifications of changes of name (section 5c). It is submitted that CIPC confirmation certificates in respect of changes of name would perhaps be better suited. It is also recommended that the Regulations require CIPC confirmation certificates where the licensee has changed entity type; the Authority requests these in practice, and it would be simpler to require the relevant documentation to accompany the notification.
23. The Draft Regulations require a resolution authorising persons not more than 2 to sign the application, which person(s) must liaise with the Authority during the registration process (5.2). As noted above, it is uncertain why the persons signing the application are required to liaise with the Authority during the process. It is submitted that the Authority would prefer to liaise with the contact person designated on the licence and/or the party submitting the application to the Authority; the person authorised to sign the application in the resolution wouldn't necessarily have the appropriate authority to liaise with the Authority in this regard.

#### **FORM G**

24. We note that this application form will, in terms of the Draft Regulations, apply to applications to sub-let, cede, assign, transfer and transfer control of an Individual licence. While we appreciate that this form will cover all of these scenarios, we reiterate the requests above that the Authority define 'let', 'sub-let', 'cede' and 'assign', and that the definitions of 'transferee' and 'transfer of control' be deleted or amended to avoid confusion.
25. The insertion in section 1.1 seems to be an internal note, and should be deleted prior to finalisation. For the record, we agree with the internal note.
26. Section 1.3 requires a written undertaking to be attached to the application form, indicating whether this is an application for sub-letting, cession, transfer or transfer of control. It is submitted that it would be preferable to have this indication upfront on the application form itself, perhaps as a list where the applicant can check the relevant box; this would also enable the Authority to process the application more easily on receipt thereof.
27. Section 1.4 indicates that any application for sub-letting, cession, transfer or transfer of control with less than 30% HDG equity ownership will not be considered. It is submitted that the application form seeks to introduce something which is not covered in the Draft Regulations themselves; the Draft Regulations do not contemplate HDG equity ownership for sub-letting and cessions, and regulation 12 only provides for the Authority refusing transfer, transfer of control or renewal of the licence where the licensee does not meet the HDG requirement.

While it is not entirely certain what the Authority will consider to be sub-letting or cession (see previous comments), it is also uncertain why the HDG requirement is being introduced for these situations (and not for assignment) in the application form rather than in the Draft Regulations.

28. Sections 6.1 and 7.1 have been edited to require (1) for natural persons, an indication of ownership interest, identity and address and (2) for juristic persons, an indication of all shareholders and the percentage shares held by each shareholder. It is submitted that the wording in this section is unclear, as it seems to indicate that if the applicant is a natural person, then one is to provide the natural person's ownership information, and if the application is a juristic person, then one is to provide the shareholder details of the applicant. Currently, the names, ID/registration numbers, shareholding percentages and physical addresses of all shareholders are provided (where the applicant is a juristic person, as this section would not be applicable if the applicant is a natural person). The Authority is requested to clarify what it means here.
29. Sections 6.2 and 7.2 require a written undertaking signed by the Accounting Officer to confirm the shareholding set out in sections 6.1 and 7.1. It is uncertain why the Accounting Officer is required to confirm shareholding. Note that the Accounting Officer is likely to be unaware of the shareholding make-up of a company, so is unlikely to be in a position to confirm this. The company secretary may confirm these details, or the share register may be attached to confirm these details – it is recommended that the Authority consider these alternatives.
30. Sections 6.6 and 7.8 (HDI ownership), 6.8 and 7.10 (foreign ownership), 6.10 and 7.12 (interest by any shareholder in any other licensees/licences), 6.12 and 7.14 (applicant/transferee interest in another licensee), 7.4 (stock exchange listing) and 8.1-8.5 (suitability of transferee) all also require a written undertaking by the Accounting Officer confirming same to be attached. As above, it is submitted that the Accounting Officer would have no way of confirming this information and thus cannot be expected to submit an undertaking relating to same; for example, the Accounting Officer would not be aware of interests of shareholders in other licences. It is recommended that the Authority reconsider these requirements and how to seek confirmation of the specified information.
31. Section 8.6 requires details of the transferee's 5-year business plan. As the comprehensive business plan (in terms of section 8.7) is to be attached, it is uncertain why details are also required in this section. If the Authority is requesting an executive summary of the business plan in this section, it is recommended that the section wording be amended to reflect this request.
32. Section 8.9 requires the provision of a detailed network architecture layout plan and roll-out plans, including timeframes and roll-out targets. It is uncertain why the Authority requires this separately from the comprehensive business plan required in section 8.7. If this is to form part of the business plan, perhaps the Authority should indicate that information relating to this is required therein. It is also uncertain how the transferee is to provide timeframes when the Authority is unable to provide an indication as to how long it will be before the licence transfer is approved and when the transferred licence will be issued; if this is to be provided, the

Authority needs to provide definitive timeframes for its processes to allow for the applicant to provide its timeframes for roll-out.

33. Section 8.10 requires detailed proposed commercial agreements to be made available in terms of roaming, interconnection, facilities leasing. It is uncertain why the Authority would require this at this point in the process. Most parties will not engage with the transferee until they have the licences, and such parties also have standard agreements which they would require the transferee to sign; it is uncertain how the Authority expects the transferee to obtain these at this stage of the process. If the Authority had intended for the transferee to supply details of its intentions with regard to roaming, interconnection and facilities leasing, this would be better contained in the business plan required in section 8.6, and the Authority should specify that this should form part of the business plan instead.
34. Section 9 requires details of ownership and control to be held by historically disadvantaged groups. The current application form requires an indication of HDG shareholding in this section. This amendment seems to require something that might be better included in the business plan. In any event, if the transferee meets the minimum requirement in this regard (which it needs to do in terms of the draft regulations or the application will be rejected), it is uncertain why it would also need to include details of ownership and control (the latter is not queried elsewhere) to be held (one presumes in the future) by historically disadvantaged groups.
35. Section 10 requires detailed reasons for the proposed sub-let, cession, transfer or transfer of control, with an indication of how (a) promotion of competition and interests of consumers and (b) economic efficiency will be achieved. It is again uncertain why this should not be included as part of the comprehensive business plan required in section 8.6 instead.

#### **ADDITIONAL COMMENTS**

36. The Draft Regulations do contain a few spelling errors or typos, and the Authority is requested to address these before finalising the Regulations.
37. The forms in the Draft Regulations are not consistently numbered, and the Authority is requested to address numbering inconsistencies before finalising the Regulations.

#### **CONCLUSION**

38. WAPA thanks the Authority for its efforts herein, and requests that the Authority afford it the opportunity to make oral presentations at any public hearings which it may elect to conduct in connection with this process.

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WAPA REGULATORY ADVISORS