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Ms Refiloe Motsoeneng
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Per email: transformation@icasa.org.za


Dear Ms Motsoeneng

RE: INTERNET SOLUTIONS SUBMISSION ON THE EQUITY OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUPS AND THE APPLICATION OF THE ICT SECTOR CODE

Please find the attached Internet Solutions' submission in respect of the Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code.

Please do not hesitate to contact the writer hereof should you have any questions.

Yours sincerely,

PP


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1. Introduction

Internet Solutions is a division of Dimension Data Middle East & Africa, a subsidiary of Dimension Data, which is a global systems integrator, which strives to offer a superior client service experience for clients and partner organisations.

Internet Solutions welcomes the opportunity to make its written submission to ICASA in respect of the Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code. We believe that this is an important and critical intervention by ICASA considering that ICASA is tasked with ensuring that there is a meaningful participation of historically disadvantaged groups in the ICT sector.

2. Background: ICASA and the Legislative Framework on BBBEE

ICASA is tasked with broadening the meaningful participation of blacks, women, youth and people with disabilities in the ICT sector. It is on these basis that ICASA is conducting an inquiry to determine how it should promote the broad-based black economic empowerment (BBBEE) and equity ownership of HDGs as contemplated in the Electronic Communications Amendment Act, 2014 ("the ECA"), vis a vis the ICT Sector Code ownership requirements.

2.1 The Electronic Communications Amendment Act, 2014

The ECA seeks to achieve a number of objectives in its regulation of the electronic communications industry, which are set out in section 2 of the ECA. These include but are not limited to the promotion of competition and the promotion of BBBEE. The promotion of the latter objective was introduced by the ECA Amendment Act, 2014.

In the regulation of ownership and control of licensees in the electronic communications industry, ICASA is required to adhere to the following objectives:

- encourage investment, including strategic infrastructure investment, and innovation in the communications sector (section 2(d));
- promote competition within the ICT sector (section 2 (f));
- promote the broad-based black economic empowerment of historically disadvantaged persons, including Black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities (section 2 (h));
- ensure that broadcasting services and electronic communications services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in the Republic (section 2 (k));
- promote the interests of consumers with regard to the price, quality and the variety of electronic communications services (section 2 (n)); and
- develop and promoting SMMEs and cooperatives (section 2 (p)).

In terms of sections 4(3) (j) read with sections 4(3)(k) of the ICASA Act, ICASA may make regulations on any matter, which is consistent with the objects of the ICASA Act, including on empowerment

requirements in terms of BBBEE Act, 2003. Section 5(7) of the ECA empowers ICASA to prescribe regulations setting out the process and procedures to apply to transfer of individual licences, amongst others. In granting a licence, ICASA is required to promote BBBEE in accordance with the requirements of the ECA.

Furthermore, in terms of section 13 (4) of the ECA, ICASA may prescribe regulations imposing restrictions on ownership or control of an individual licence to promote the ownership and control of electronic communications services, as well as competition by historically disadvantaged groups in the ICT sector.

Section 9 of the ECA on the application for and granting of individual licences, states further that:-

"(1) Any person may, upon invitation by the Authority, subject to the provisions of [the ECA], apply for an individual licence in the prescribed manner.

(2) The Authority must give notice of the application in the Gazette and...

(b) include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such higher percentage as may be prescribed."

2.2 The Licensing Processes and Procedures Regulations, 2010

Furthermore, Regulation 11 of Licensing Processes and Procedures Regulations, 2010 as amended ("the Procedure Regulations") provide that a licence transfer or licence transfer of control application will be evaluated on the basis of promotion of competition in the ICT sector as well as equity ownership by HDP's.

Regulation 12 of Procedures Regulations provides the restrictions on transfer and renewal of an individual licence in that ICASA *"may refuse to renew or transfer a licence where, amongst others, the licensee or transferee's ownership and control by historically disadvantaged persons is less than 30%."*

2.3 The Standard Terms and Conditions for Individual Licensees, 2010

In terms of Regulation 1A of the Standard Terms and Conditions, 2010, (Standard Terms and Conditions), a licensee may not, without the prior written approval of ICASA, change its shareholding, which results in a reduction of equity ownership and/or control below 30% by historically disadvantaged groups in the licence below the 30% threshold or where the 30% threshold is not yet held.

2.4 The Radio Frequency Spectrum Regulations, 2015

The Radio Frequency Spectrum Regulations, 2015 (Spectrum Regulations) also provide a procedural and regulatory framework for the transfer of control of radio frequency spectrum licences. In terms of Regulation 15 (1), ICASA may not approve the assignment, cession, or transfer of control of a radio frequency spectrum licence where the transfer of control would result in the reduction of equity ownership below 30% held by historically disadvantaged persons or the reduction of the BBBEE status below level 4 or below the transferor's BBBEE status level.

3. ICASA Questions and Answers

The Application of HDG Equity Requirement

5.1.2 *Should class licensees have HDG equity requirements similar to those of Individual licensees? Explain the rationale for the position proposed. In your opinion, how should the equity requirement be imposed on class licensees?*

Internet Solutions is of the view that historically disadvantaged person's equity requirements, which are applicable to individual licensees, should also apply to class licensees on the basis that there is no difference between class and individual licences other than the fact class licensees are provincial whereas individual licensees are national. There is no basis against which class licences should be exempted from HDG equity requirements. The objectives of the ECA should be advanced to all licensees.

As stated above, Spectrum Regulations require the assignment, cession, or transfer of control of a radio frequency spectrum licence to meet the 30% equity ownership held by historically disadvantaged persons. The 30% equity ownership imposed by Spectrum Regulations do not differentiate between categories of licensees. The inclusion of BBBEE requirements as a disqualifying measure is consistent with the ECA's objective to promote direct ownership and control by historically disadvantaged persons. In order to promote consistency across all licence categories in the telecommunications sectors, ICASA should be consistent in the application of HDG equity requirements.

It is our submission that the 30% threshold referred to in these provisions ought to be relied on by ICASA, in all current and future licence transfers and transactions, which are presented to it for its consideration, as a benchmark for determining whether the transaction which requires its approval will promote the empowerment of historically disadvantaged persons, including black women, as stated in the ICT Sector Codes.

Applying this threshold uniformly will not only reinforce the importance of the empowerment of historically disadvantaged persons in the ICT sector and ICASA's commitment to the realisation of this objective, it will also create certainty within the sector in regard to the threshold that will need to be met in order for any transaction to be deemed to be promoting the empowerment of historically disadvantaged persons. As it stands, ICASA is able, other than in cases of the granting, transfer and renewal of IECNS and IECS licences, where the 30% threshold is peremptory, to exercise a discretion on the issue of whether a transaction that requires its approval promotes the empowerment of historically disadvantaged persons. If it is accepted that ICASA has no discretion in matters relating to the granting, transfer and renewal of IECNS and IECS licences, it must follow that the same threshold should apply in matters relating to transfers or changes in control.

5.1.3 *Should the Authority consider income levels and size of the entity as criteria for differentiation in the imposition of the HDG requirement?*

Internet Solutions is of the view that ICASA should take cognisance of the BBBEE ICT Sector Code in addressing this question. The BBBEE ICT Sector Code exempts micro enterprises which meet the ten (10) million threshold and below. Such micro enterprises are deemed to have BBBEE status of "level

four” contributor with a BBBEE recognition level of 100%. In addition, a micro enterprise which has sixty percent (60%) black people as beneficiaries qualify for “level one” with a BBBEE recognition level of 135%, whereas a micro enterprise with fifty-one percent (51%) black people as beneficiaries qualify for “level two” contributor with a BBBEE recognition level of 125%.

It is understood that ICASA is expected to take into consideration these exemptions when drafting its BBBEE Regulations, and ensure that its Regulations are aligned with the BBBEE Act and the ICT Sector Codes, notwithstanding that ICASA should not lose sight of equity, ownership and control elements as mandated by the ECA. We are further of the opinion that no differentiation criteria should be applied to classify licensees on the basis that HDG equity requirements are government measures, which are aimed at redressing economic imbalances in terms of ownership and control of licensees.

This is to ensure that there is meaningful participation by the majority of black South Africans in the ICT sector, including women, youth and people with disabilities. Therefore, in strengthening its regulatory muscle, additional exemptions other than those provided for by the BBBEE ICT Sector Code should not be applied by ICASA if meaningful participation by the majority of black South Africans is to be realized to properly address economic imbalances in the ICT sector.

5.1.4 *Should the minimum legislated requirement remain at 30% or should it be increased? If so, what targets do you propose and why?*

The ICT sector code’s overall ownership target of 30% correlates with the ECA 30% minimum equity ownership requirement held by historically disadvantaged individuals. As such, the current 30% minimum HDI equity threshold is suitable as a required starting point for compliance, which can then be revised by the Regulator at a later stage. This is not to say that licensees should not aim to achieve targets above 30%.

5.1.5 *Should the Authority require licensees to seek prior approval in instances where:*

5.1.5.1 *a change in shareholding results in reduction of equity ownership by HDG’s below 30%; and*

5.1.5.2 *where the licensee does not meet the 30% minimum requirement, and change in shareholding that affects the percentage of equity ownership by HDG’s.*

ICASA has regulatory measures already in place in the two instances listed above on the basis that a change of shareholding in the licence triggers a notification. Licensees are required in terms of Regulation 1 of the Standard Terms and Conditions, to submit a written notice to ICASA within seven (7) days in instances where there is a change in shareholding, amongst others. In terms of Regulation 1A of the Standard Terms and Conditions, a licensee may not, without the prior written approval of ICASA, change its shareholding, which results in a reduction of equity ownership and/or control in the licence below 30% threshold by historically disadvantaged groups below the 30% or where the 30% threshold is not yet held.

However, it is important to add that any licensee, which changes its shareholding structure, prior to the individual licences’ twenty years expiry period (2009-2029), should be required to comply with the 30% equity ownership and/or control threshold by historically disadvantaged groups. This requirement

should be applicable irrespective of whether or not the change in the shareholding structure is as a result of a licence transfer. It is therefore not possible for a licensee to change its shareholding structure without notifying ICASA of the said changes.

5.2 *How should the HDG equity ownership requirement be applied to publicly traded entities, without discouraging HDG's from participating in share schemes?*

HDG equity ownership requirements should apply uniformly irrespective of the manner in which the entity is trading.

6. How Should Compliance With The HDG Requirement Be Verified?

6.4.1 *What proof should the Authority consider appropriate to confirm compliance with the HDG requirements?*

The BBBEE certificate should be deemed sufficient proof of BBBEE compliance as it would reflect points, which determine whether or not the entity has met HDG requirements.

6.4.2 *What proof would in your view be appropriate to confirm the compliance of publicly traded entities provide with the HDG equity/ownership requirement?*

The BBBEE certificate should be deemed sufficient proof of BBBEE compliance as it would reflect points, which determine whether or not the entity has met HDG requirements.

7. What Constitutes Ownership And What Constitutes Control?

In light of the foregoing, and taking into account the Companies Act, 2008 (Act No. 71 of 2008) and the Competition Act of 1998 (Act No. 89 of 1998).

7.7.1 *Is the definition of a control interest as set out in 7.3 above still valid?*

The current definition is valid for the purpose of the ECA, which is silent on the matter.

7.7.2. *In your view, what constitutes control and how should the Authority define it. Set out the basis for your argument.*

Internet Solutions is of the view that ownership of a majority voting interest, which in turn is the condition for controlling a financial interest in the business constitutes control. In most instances, ownership of more than 50% of the issued share capital, which translates into 50% actual voting power in an entity, is required to achieve control. This autonomous power and benefits, whether direct or indirect, are derived from ownership. This definition is not exhaustive as control is exercised in many forms, including management control, which could be represented through minority control.

The ICT Sector Code measures the management control contributions to BBBEE on the basis that a measured entity meets the targets for participation of black people and black women at board, executive management, senior management, middle management, junior management levels and black employees with disabilities.

ICASA may provide a definition of what constitutes control interest should it opts to promulgate regulations to promote BBBEE. However, ICASA has to take into consideration the ICT Sector Code

and apply its management control key measurement principles when constructing the said definition. In addition, ICASA should take cognisance of the following principles for purposes of implementing the definition of control:

- i) the capacity to exercise a power of ownership in an entity.
- ii) the capacity to manage the financial and operating policies of the entity.
- iii) direct or indirect majority voting power (board participation).

7.7.3. *Are you of the view that the Authority should define ownership?*

Internet Solutions is of the view that ICASA may provide a definition of what constitutes ownership should it opt to promulgate regulations to promote BBBEE. However, ICASA has to take into consideration the ICT Sector Code and apply its ownership key measurement principles when constructing the said definition. In terms of the ICT Sector Code, the measured entity meets the ownership contribution to BBBEE if such measured entity has black people, including black women, who hold their rights of ownership as direct participants or as participants through some form of entity.

Any form of entity could be a company, close corporation, co-operative, any form of juristic person recognised under South African law, a partnership or other association of natural persons, a broad-based ownership scheme, an employee share ownership programme, and/or trust.

In addition, ICASA should take cognisance of the following principles for purposes of constructing a definition of ownership:

- i) direct or indirect voting rights.
- ii) economic interest.
- iii) net value

Any other approach by ICASA which fails to take cognisance of the BBBEE ICT Sector Codes would result in confusion and inefficiencies.

7.7.4. *In your view, what constitutes Ownership and how should the Authority define it. Set out the basis for your argument.*

See our response on 7.7.3.

7.7.5. *Are you of the view that the transfer of 100% share capital in a licensee amounts to transfer of control or transfer of ownership?*

Full ownership and control in a business are too distinct from each other. Hence, the transfer of 100% share capital triggers a significant change in shareholding, which also translates to a change in control and ownership of the entity.

Internet Solutions is of the opinion that the controlling interest is the majority shareholding stake, which translates into a majority voting power. Therefore, it is undisputed that a transfer of 100% share capital in a licensee amounts to transfer of control or transfer of ownership on the basis that control could be achieved with 50% + 1 share of the equity. A transfer of control involves a change from below 50 percent ownership to 50 percent or more ownership in a licensee or the transfer of controlling interest in the

ownership of a licensee to another party irrespective of whether or not the transferee changes the name of the licensee. Again, the transfer of shares would result in a change in shareholding, which implies a transfer of control and ownership.

8. Application of the ICT Sector Codes

8.1. *The ECA requires the Authority to promote BBBEE and the BBBEE Act compels all organs of state and public entities to apply the applicable sector codes. How should the Authority go about doing this? Explain the rationale that underpins your view.*

It is trite that ICASA is obliged to seek to achieve the objectives set out in section 2 of the ECA in its regulation of the electronic communications industry, including its regulation of ownership and control of licensees in the electronic communications industry. The BBBEE Codes of Good Practice and the ICT Sector Codes are legally binding on all organisations, entities, the state and state-owned entities operating in the ICT Sector in South Africa, including statutory bodies.

ICASA could promote BBBEE and the BBBEE Act requirements when appointing suppliers, granting or transferring licences, as well as when it is making concessions. This means that ICASA has to conclude business dealings with BBBEE-compliant suppliers, which will then compel any BBBEE non-complaint supplier to be compliant to maintain its level of business success.

In addition, ICASA should enforce the 30% HDI shareholding when transferring, ceding or renewing licences as is currently the case.

8.2. *Should the Authority apply the Codes to all applications i.e. including service, spectrum, type-approval and number applications?*

Internet Solutions is of the view that ICASA should apply BBBEE ICT Sector Codes on licence transfer, cession, or renewal, as well as when the licensee changes its shareholding structure for whatever purpose. This means that the BBBEE ICT Sector Codes should apply on licences only and not on type approvals or number applications on the basis that the latter does not affect the operating licence, and should not be treated like an operating licence. Type approvals or number applications are just additional means to achieve the end, and it would not make any logical sense to apply the sector codes on type approval and/or number applications. Internet Solutions is completely opposed to such unnecessary regulatory restrictions.

8.3. *Should the Authority require BBBEE certificates to be submitted as part of licensees' annual compliance requirements?*

Internet Solutions is of the view that it is an unnecessary exercise to require the submission of BBBEE certificates as part of licensee's annual compliance requirements on the basis that BBBEE certificates do not form part of licence terms and conditions. Further, the ICASA Standard Terms and Conditions Regulations and Procedure Regulations do not make reference to such additional BBBEE compliance requirements.

While all entities operating within the ICT sector in South Africa are compelled to comply with the 30% HDG threshold and the BBBEE ICT Sector Codes to remain competitive, they are not legally compelled

by the ICT Sector Codes to be BBBEE compliant. Hence, the codes are referred to as the codes of good practice. The submission of BBBEE certificates should not be regarded as a compliance requirement on the basis that the failure to provide any BBBEE certificate or to even meet the expected ratings does not result in some form of a punitive measure, and should not, as that is not what was intended by the empowering statute.

Again, there are processes which trigger the 30% HDG threshold requirement i.e. licence transfer, cession, or renewal as well as when there are changes in the licensee's shareholding structure. Therefore, we are of the view that ICASA should request BBBEE certificates when such processes/instances are triggered. ICASA should not impose unnecessary regulatory constraints on licensees.

9. General

9.1. *Stakeholders are invited to submit any other commentary deemed to be useful or necessary to assist the Authority in the Inquiry and Findings.*

The ECA and the Regulations thereto make it clear that ICASA must refuse to grant a licence, renew a licence or transfer a licence in circumstances where the ownership and control by historically disadvantaged persons in the licensee or the transferee (as the case may be) is less than 30%. With regard to changes in control of a licensee, while it is clear that changes in control will require the prior written approval of ICASA and that ICASA will, in considering applications relating to changes in control, take into account BBBEE requirements, it is unclear what thresholds or factors ICASA will take into account in determining whether a transaction relating to the change of control of a licensee properly promotes BBBEE other than 30% black shareholding. For example, ICASA may have to take into consideration that women and people with disabilities are properly represented to effectively promote the objectives of the ECA and the BBBEE Act.

It is also important to note that section 9 of the ECA speaks of ownership as a separate and distinct element of empowerment that must be satisfied when complying with the ECA and the BBBEE Sector Codes. However, the ECA does not necessarily address all the five pillars provided in the BBBEE ICT Sector Codes i.e. ownership, management control, skills development, enterprise and supplier development, and socio-economic development. Therefore, ICASA should focus on "ownership" in the promotion of BBBEE requirements as required by its empowering legislation.

9.2. *With the exclusion of applications regarding individual licences, the Authority proposes to apply either HDG ownership requirements or the Codes, to all applications and processes.*

9.3. *Please provide your view whether this is the correct approach, or whether both HDG ownership and the Codes should apply to all applications and processes that do not involve individual licences?*

As indicated above in 5.1.2, Internet Solutions is of the view that historically disadvantaged person's equity requirements, which are applicable to individual licensees, should also apply to class licensees. However, Internet Solutions is opposed to the application of the HDG 30% threshold and BBBEE ICT

Sector Codes to all applications and processes, including type approval or number applications. Internet Solutions is of the opinion that the application of HDG 30% threshold and BBBEE ICT Sector Codes to all applications and processes does not constitute a correct approach as per our submission in 5.1.2 and 8.2 above. The HDG 30% threshold and BBBEE ICT Sector Codes should apply solely on licence transfer, cession, or renewal as well as when there are changes in the licensee's shareholding structure.

9.3.1. *What should be the minimum level of BBBEE certification?*

ICASA should not impose any minimum BBBEE certification on the basis that entities are not obliged to get BBBEE certified. It is and should remain an optional exercise.

9.3.2. *Should HDG requirements or the application of the Codes be made mandatory and not be triggered only by an application of some other regulatory process?*

As indicated above in 8.2 and 9.3, Internet Solutions is opposed to ICASA's proposal to apply the HDG 30% threshold and BBBEE ICT Sector Codes on all applications, such as type approval or number applications. This is premised on the fact that type approvals or number applications do not constitute an operating licence. They are additional requirements to an operating licence depending on services rendered by the licensee. As such, these could constitute a discriminatory factor by ICASA against licensees, which require type approvals or additional numbers as opposed to licensees which do not require such to render services.

In addition, the ECA does not empower ICASA to apply the HDG 30% threshold on existing licensees. Section 9(2)(b) of the ECA allows ICASA to regulate ownership limitations on new licence applications, as well as transfer of ownership/change in shareholding in terms of sections 13(3)-(5). As such, the HDG 30% threshold and BBBEE ICT Sector Codes should be triggered by a licence transfer, cession, or renewal, as well as when there are changes in the licensee's shareholding structure as mandated by ICASA.

9.3.3. *The Authority proposes that with individual licence applications, both HDG ownership requirements as well as the Codes should be applied. Please provide your view whether this proposed approach should apply? Provide reasons for your position.*

Internet Solutions is opposed to ICASA's proposal on the basis stated in 5.1.2 and 8.2, 9.3 and 9.3.2 above.

9.3.4. *What should be the minimum level of BBBEE certification?*

This question has already been raised and we have provided a detailed submission in in 9.3.1.

9.3.5. *Should HDG requirements or the application of the Codes be made mandatory or should it be triggered by an application of some other regulatory process?*

This question has already been raised and we have provided a detailed submission in 9.3.2.

9.3.6. *In response to growing public and government sentiments in this regard, should the Authority impose timeframes for compliance by all of its licensees for requirements for empowerment?*

The question in this instance would be, what are licensees expected to comply with if we are to correctly argue that ICASA does not have powers to regulate ownership limitations on existing licensees other than in instances where there is a licence transfer, cession, or renewal as well as when there are changes in the licensee's shareholding structure. This is the legal standpoint, which ICASA has promoted with respect to HDG 30% threshold since its inception. In addition, compelling existing licensees, irrespective of type, to comply with empowerment requirements is impractical and has no legal basis.

9.3.7. *What in your view would be an appropriate timeframe? Provide the rationale informing the period required to ensure compliance.*

Internet Solutions is not in a position to provide timeframes on the basis that regulatory processes, such as licence transfer, cession, or renewal as well as changes in the licensee's shareholding structure, should trigger the 30% HDG threshold requirement. All individual licences are due for renewal in 2029. Any other licensee, which would be BBBEE non-compliant at the time, would then be required to comply with 30% HDG threshold requirement or lose its operating licence.

4. Public Hearings

Once again, we would like to take this opportunity to express our appreciation for the intervention that ICASA has made with regards to the promotion of competition and the promotion of BBBEE. Internet Solutions would welcome the opportunity to orally present its recommendations to ICASA. We look forward to a positive outcome.