

Attention: Mr Peter Mailula (PMailula@icasa.org.za)

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Independent Communications Authority of South Africa

350 With-Hazel Avenue

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3 May 2020

Dear Sirs

Submissions by Kagiso Media (Proprietary) Limited on the Draft Regulations in Respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDGS) and the Application of the ICT Sector Code

1. Introduction

1.1 Kagiso Media (Proprietary) Limited ("**Kagiso**") owns, directly or indirectly, shares in the following commercial sound broadcasting licensees:

1.1.1 Jacaranda FM (Pty) Ltd;

1.1.2 East Coast Radio;

1.1.3 Radio iGagasi (Pty) Ltd;

1.1.4 Radio Heart 104 (Pty) Ltd; and

1.1.5 Central Media Group (Pty) Ltd.

1.2 Kagiso also holds an indirect economic interest in Kaya FM (Pty) Ltd.

1.3 These submissions relate to General Notice 91 of 2020 issued by the Independent Communications Authority of South Africa ("**ICASA**") on 14 February 2020 under

Directors: NL Sowazi (Chairman) DMT Adomakoh AD Bonamour S Crouse M Danisa PJ Makosholo AP Maralack ZC Nevhutalu B Ngonyama S Pather
KB Schoeman PJ Uys (All Non-Executive)

Company Secretary: DS Mtshali

Government Gazette No. 43021 ("**the General Notice**"), in terms of which ICASA (i) published the Draft Regulations in Respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDGS) and the Application of the ICT Sector Code (the "**Draft Regulations**"), (ii) invited interested parties to submit written representations to ICASA on the Draft Regulations by no later than 16h00 on 3 April 2020 (subsequently extended to 4 May per ICASA media release dated 1 April 2020).

- 1.4 Kagiso, as a key stakeholder in the broadcasting sector, is an interested party under the General Notice and welcomes the opportunity to make these submissions relating to the Draft Regulations.
- 1.5 The General Notice also requires interested persons to indicate, in their representations, whether they require an opportunity to make oral representations in the event that ICASA elects to hold public hearings in respect of the Draft Regulations. It is the view of Kagiso that the Draft Regulations warrant a public hearing as the matters dealt with in this submission, and presumably in other submissions lodged by other interested parties, cannot be adequately dealt with by ICASA in the absence of a public hearing. Kagiso accordingly requests that (i) ICASA hold public hearings on the Draft Regulations, and (ii) Kagiso be provided with an opportunity to make oral presentations on these submissions at the public hearings.

2. **Purpose of the Draft Regulations**

- 2.1 As we understand it, the purpose of the Draft Regulations is to promote equity ownership by historically disadvantaged groups ("**HDGs**") and to promote broad-based black economic empowerment ("**B-BBEE**") with the view being to, *inter alia*, facilitate diversity and transformation in the ICT sector. In particular, the Draft Regulations seek to, amongst other things, amend the ownership requirements applicable to licensees under the ECA to include both equity ownership by historically disadvantaged persons ("**HDPs**") and HDGs, as well as equity ownership by black people.
- 2.2 Without repeating the entirety of the Draft Regulations in this submission, Kagiso notes that the Draft Regulations:
 - 2.2.1 introduce, in the definition section of the Draft Regulations, a definition of a "control interest" and state that a person will be deemed to have a controlling interest in a

licensee if that person, *inter alia*, directly or indirectly has beneficial ownership of 20% or more of the issued share capital of a licensee, which appears to be a departure from previous positions adopted by ICASA and as articulated in previous publications; and

2.2.2 require individual licensees to ensure that their equity ownership held by HDGs/HDPs and black people is at least 30% at any given time during a license period - regardless of the size or income level of the individual licensee.

3. **Kagiso's concerns**

3.1 Kagiso is aware and supportive of the need to diversify and transform the ICT sector. However, it goes without saying that any regulation that is enacted by ICASA to facilitate the realisation of this objective must be reasonable, rational and must be in line with ICASA's powers as prescribed in the Electronic Communications Act, 36 of 2005 (the "**ECA**").

3.2 For the reasons set out below, it is Kagiso's submission that certain of the matters dealt with in the Draft Regulations fall outside the ambit of what may be considered reasonable and/or rational in the circumstances. In this regard, Kagiso is particularly concerned about the following aspects of the Draft Regulations:

3.2.1 the purpose, ambit and application of the definition of a "control interest";

3.2.2 the manner in which the term HDGs has been defined in the Draft Regulations;

3.2.3 the reference to equity ownership in the context of ownership by HDGs and black people; and

3.2.4 the ongoing obligation placed on individual licensees (including Kagiso) to maintain 30% equity ownership by HDGs and black people.

3.3 We have structured this submission as follows:

3.3.1 first, we provide a description of the current equity ownership requirements that are applicable to licensees under the ECA; and

3.3.2 second, we deal in turn with each of Kagiso's concerns as set out in paragraph 3.2 above.

4. Current equity ownership requirements

4.1 The Electronic Communications Act

4.1.1 The ECA (and the regulations thereto) makes reference to broad-based black economic empowerment and the empowerment of persons from "historically disadvantaged groups" in a number of places. In particular, the ECA currently sets out certain ownership requirements relating to HDPs and HDGs.

4.1.2 Section 2 of the ECA (as amended) provides that one of the main objects of the ECA is to, *inter alia*, promote broad-based black economic empowerment ("**B-BBEE**"), with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities. We note that the ECA defines B-BBEE to have the same meaning as given to it in the B-BBEE Act. Notably, this provision in the ECA (prior to the amendment of the ECA in 2014) previously referred to the 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."

4.1.3 In addition, section 9 of the ECA, which relates to applications for, and the granting of, individual licences (including commercial broadcasting licences) provides that:-

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

(2) [ICASA] 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"

4.1.4 Section 13(6) renders the provisions of sections 9(2) to 9(6) of the ECA (including the 30% equity ownership requirement in section 9(2)(b)) applicable to the applications for the transfer of, or for the transfer of control of an individual licence, with the necessary changes.

4.1.5 Moreover, Regulation 12 of the Licensing Processes and Procedures Regulations, 2010, published on 14 June 2010 under *Government Gazette* Number 33293, ("**Procedure Regulations**") provides that:-

"[ICASA] may refuse to renew or transfer a licence if the licensee has not complied with one or more of the following:

- (a) *Where the licensee has been found guilty by the [Complaints and Compliance Committee] and has not complied with the order by [ICASA] 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; or*
- (c) *Where the licensee or transferee's ownership and control by historically disadvantaged persons is less than 30%.* (our emphasis).

4.1.6 The provisions of Regulation 12 of the Procedure Regulations were reinforced by ICASA in Notice 881 of 2014 (as published under Government Gazette 38087 on 10 October 2014) where ICASA stated that ICASA does not have a discretion to approve an application for the transfer of an individual licence where the transferee has less than 30% equity ownership held by historically disadvantaged groups and that all individual licence applications which do not have at least 30% equity ownership by historically disadvantaged groups will not be approved.

4.1.7 ICASA has also prescribed certain HDP requirements in the Radio Frequency Spectrum Regulations published under the ECA¹ (the "**Radio Frequency Spectrum Regulations**"). In particular, an applicant responding to an invitation to apply issued by ICASA in respect of radio frequency spectrum shall be disqualified where such applicant "*has less than 30% thirty percent) equity ownership by Historically Disadvantaged Persons (HDP) or is below a level 4 contributor (B-BBEE status) in terms of the Codes of Good Practice published in terms of section 9(1) of the B-BBEE Act.*"²

4.1.8 In addition, where a licensee wishes to transfer a radio frequency spectrum licence, it must first obtain the prior approval of ICASA for such transfer. When considering such a transfer application, ICASA is required to consider, among other things, "*equity ownership by HDPs.*"³ ICASA may not approve the transfer of a radio

¹ Published under General Notice 279 in *Government Gazette* 38641 of 30 March 2015 (as amended from time to time)

² Radio Frequency Spectrum Regulations, section 7(3)(d)

³ Radio Frequency Spectrum Regulations, section 12(6)(b)

frequency spectrum licence (or the control of such radio frequency spectrum licence) *"if such transfer will result in the reduction of equity ownership by HDPs to be less than 30%."*⁴

4.1.9 We note that the ECA currently does not itself define HDGs or HDPs. However, the Procedure Regulations define "historically disadvantaged persons" as *"South African citizens who are Black people, women or people with disabilities and that Black people are defined to include Africans, Indians and Coloureds."*⁵

4.1.10 What is particularly noteworthy in the context of the Draft Regulations is that the ECA currently only prescribes requirements relating to equity ownership held by HDPs and HDGs in licensees and does not prescribe any mandatory requirements in respect of a licensee's B-BBEE status (save in respect of radio frequency spectrum licences issued by ICASA under the Radio Frequency Spectrum Regulations). The Draft Regulations seek to alter this position.

5. Control

5.1 The definition of 'control interest'

5.1.1 The ECA currently does not define control and what constitutes control for purposes of the provisions in the ECA. However, the Draft Regulations define a "control interest" to mean *"in the absence of proof to the contrary, that a person directly or indirectly: (a) has beneficial ownership of twenty percent (20%) or more of the issued share capital of the Licensee; (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the Licensee or the ability to control, either directly or indirectly or through an affiliate, the casting of a majority of those votes of the Licensee; (c) is able to appoint or veto the appointment of a majority of the directors of the Licensee; (d) in the case the Licensee is a subsidiary, is a holding company of that subsidiary, as contemplated in section 3(1)(a) of the Companies Act, 2008 (Act No. 71 of 2008); (e) in the case where the Licensee is a trust, has the ability to control a majority of the votes of the trustees, to appoint the majority of the trustees, to appoint or change the majority of the beneficiaries of the trust; (f) in*

⁴ Radio Frequency Spectrum Regulations, sections 12(9)(c) and 15(8)(c)

⁵ The Procedure Regulations, section 1

the case where the Licensee is a close corporation, owns twenty percent (20%) or more of the members interest, or controls or has the right to control the members' vote in the close corporation; or (g) has the ability to direct or cause the direction of the management or policies of the Licensee in a manner similar to any of paragraphs (a) to (f), whether through the direct or indirect ownership of issued share capital, by contract, by securities or otherwise.”⁶

5.1.2 The Draft Regulations also include a number of other definitions pertaining to issue of "control". For example, the Draft Regulations define:

5.1.2.1 **“Affiliate”** to mean *“(a) in relation to a juristic person – (i) any person who has a direct or indirect ownership interest or control interest in the juristic person; (ii) any person in whom the juristic person has a direct or indirect ownership of control interest; or (iii) any person in whom a person contemplated in sub-paragraph (i) has a direct or indirect ownership interest; and (b) in relation to a natural person, a parent, spouse or child of the relevant natural person”⁷;*

5.1.2.2 **“Issued Share Capital”** to mean *“with respect to any person, all shares, interests, participations or rights or other equivalents (however designated, whether voting or non-voting, ordinary or preferred) in the equity or capital of such person, now or hereafter issued”⁸;*

5.1.2.3 **“Ownership Interest”** to mean *“any direct or indirect ownership of issued share capital of five per cent (5%) or more in a licensee”⁹;*

5.1.2.4 **“Transfer”** to mean *“assign, cede, sell, convey, settle, alienate, or otherwise transfer, in whole or in part, whether or not for value, any interest in a licence or licensee from one person to a different person”¹⁰; and*

⁶ Draft Regulations, section 1

⁷ Draft Regulations, section 1

⁸ Draft Regulations, section 1

⁹ Draft Regulations, section 1

¹⁰ Draft Regulations, section 1

- 5.1.2.5 **“Transfer of a Control Interest”** to mean “...*the same meaning as ‘transfer’, except that such transfer of a control interest shall occur when a control interest in a Licensee is transferred from one person to a different person*”.
- 5.1.3 However, the purpose of these definitions in the Draft Regulations, including "control interest", is unclear, as these definitions are not used in the substantive provisions of the Draft Regulations (i.e. in the body of the Draft Regulations). To the extent that the intention behind including these definitions is to introduce, amend or otherwise alter these concepts under the principal text of the ECA, Kagiso notes that it is not legally competent for ICASA to seek to introduce, amend or alter these concepts in the ECA through the Draft Regulations. The ECA is an act duly promulgated by the South African Parliament and signed by the President of South Africa. Accordingly, any addition or amendment to the provisions of the ECA would need to be passed as an act of Parliament and signed by the President of South Africa. As a result, the Draft Regulations alone are not capable of introducing new provisions of the ECA. In this regard, ICASA is only empowered to pass regulations that give effect to the provisions of the ECA in a manner expressly contemplated under the ECA or the Independent Communications Authority of South Africa Act, 2000 and may not amend the ECA through regulations. It should therefore not be competent for ICASA to introduce a definition of a control interest (which is currently not in the ECA) through the Draft Regulations.
- 5.1.4 To the extent that ICASA's intention is indeed to define control for purposes of the ECA as set out in the Draft Regulations, it is Kagiso's submission that this would have far reaching implications for a number of players in the sound broadcasting industry, including Kagiso.
- 5.1.5 As noted above, Kagiso holds shares in a number of licensees which hold commercial sound broadcasting licences issued under the ECA. In this context, Kagiso notes that section 65 of the ECA contains various limitations on the control of commercial broadcasting services. In particular, section 65(2)(a) of ECA stipulates that:¹¹

¹¹ Emphasis added.

"No person may be in a position to exercise control over more than two commercial broadcasting service licences in the FM sound broadcasting service."

- 5.1.6 Should ICASA amend the Draft Regulations so as to make the definition of "control interest" in the Draft Regulations applicable to section 65(2)(a) of the ECA, this would result in a licensee, such as Kagiso, being prohibited from holding 20% or more of the shares in more than two FM broadcasting licensees.
- 5.1.7 This approach could potentially impact the sound broadcasting industry as a whole, given that a number of players within the industry (including many black-empowered entities like Kagiso) have deliberately structured their shareholding so as to hold between 20% and 24.9% of the shares in various broadcasting licensees. The reason for this is that, as explained below,¹² the ECA's predecessor - the Independent Broadcasting Authority Act, 1993 ("**the IBA Act**") - provided that a person was (rebuttably) presumed to control a company if he or she held more than 25% of the equity shareholding in a commercial sound broadcasting licensee.
- 5.1.8 It would be highly disruptive, and potentially prejudicial to the interests of HDP participants in the broadcasting industry, for the shareholding structures of sound broadcasting licensees to be revisited at this stage, given that the current shareholding structures required careful negotiation with a view to ensuring meaningful black economic empowerment and transformation of the industry. It would, for instance, mean that Kagiso would need to reduce its stake in certain sound broadcasting licensees, to the potential detriment of black economic empowerment. This is an outcome which would clearly not be in line with the purpose of the Draft Regulations.

5.2 **The provisions of the IBA Act**

- 5.2.1 The IBA Act contained similar control restrictions to those currently contained in the ECA.¹³ For example, section 49(2)(a) of the IBA Act specified that no person shall

¹² At paragraphs 5.2.1 to 5.2.5.

¹³ Sections 48 to 50 of the IBA Act.

"be in a position to exercise control over more than two commercial FM sound broadcasting licences".

- 5.2.2 Unlike the ECA, the IBA Act defined "control". The general definitions section of the IBA Act provided that *"a person shall control, have control or be in a position to exercise control over, a broadcasting licensee ... inter alia in the circumstances contemplated in paragraphs 1, 2 and 3, respectively, of Schedule 2 to the Act"*.¹⁴
- 5.2.3 Schedule 2 to the IBA Act, in turn, set out a comprehensive definition of control, while item 3 of Schedule 2 provided as follows:
- "Without derogating from the provisions of any law or from the common law, and in the absence of proof to the contrary, a person shall be regarded as being in control of, or being in a position to exercise control over, a company if he or she has equity shareholding in the company exceeding twenty-five percent or has other financial interests therein equal to at least twenty-five percent of its nett assets."*
- 5.2.4 Section 50 of the IBA Act dealt with cross-media control in similar terms to section 66 of the ECA and included a deeming provision along the lines of section 66(5) of the ECA. In particular, section 50(2)(d) of the IBA Act stated that *"[a] 20% shareholding in a radio or television licence shall be deemed to constitute control"*.
- 5.2.5 Accordingly, the position under the IBA Act was that, while a 25% shareholding was rebuttably presumed to constitute control for other purposes, the position was stricter in relation to cross-media ownership (with 20% shareholding (irrebuttably) deemed to be control in the latter context). The 20% deeming provision thus clearly applied only to cross-media restrictions.
- 5.2.6 The inclusion of a similarly-worded deeming provision in the section of the ECA dealing with cross-media limitations (i.e. section 66(5) of the ECA) thus simply meant that the legislature retained the 20% deeming provision in relation to cross-media control. There is no indication that, in doing so, the legislature intended that the 20% deeming provision would henceforth apply to all other control restrictions

¹⁴ Section 1(2) of the IBA Act.

in the ECA. The inclusion of the 20% deeming provision in the Draft Regulations would amount to ICASA subverting the position adopted by the legislature in this instance and would result in significant disruption to current HDG participants in the sound broadcasting industry. For this reason, Kagiso maintains that (save for section 66(5) of the ECA) the common-law concept of control should continue to apply to the ECA and in particular, section 65(2)(a) of the ECA. This is consistent with the principle of statutory interpretation that legislation changes the existing law no more than is necessary.¹⁵

5.3 **The right to property and the presumption that legislation encroaches on existing rights as little as possible**

5.3.1 It is apparent from the discussion above that the IBA Act contemplated that persons were permitted to hold interests of 20% or more in more than two commercial FM sound broadcasting licences. In reliance upon this regime, a number of industry participants, including Kagiso, acquired interests of between 20% and 25% in such licensees.

5.3.2 To include a provision or definition in the Draft Regulations that has the effect of lowering the permissible shareholding threshold to 20% for purposes of section 65(2)(a) of the ECA would mean that those participants would be deprived of their right to continue holding their current shareholding stakes. Kagiso and others would be required to dispose of a portion of their shares in various broadcasting licensees.

5.3.3 Such an outcome would be contrary to the presumption of statutory interpretation that legislation is, where possible, to be interpreted in a manner that encroaches upon existing rights as little as possible. As the Court stated in *Transvaal Investment Company v Spring Municipality*, it is "*a well-established rule in the construction of statutes that where an Act is capable of two interpretations, that one should be preferred which does not take away existing rights, unless it is plain that such was the intention of the Legislature*".

5.3.4 For the reasons set out in these submissions, we are of the view that any attempt to apply the definition of "control interest" (i.e. 20%) in the Draft Regulations to

¹⁵ Lourens du Plessis *Re-Interpretation of Statutes* (2002) at 177-181.

section 65(2)(a) of the ECA would be unreasonable and would unnecessarily hamper the rights of the current incumbents in the industry. This would result in an interpretation that is not only inconsistent with the general presumption of statutory interpretation discussed above, but which is also not supported by the proper approach to statutory interpretation mandated by the Constitution. It must be emphasised on this score that an interpretation which applies the 20% deeming provision to section 65 of the ECA interferes with the constitutional right to property. Such an interpretation would compel Kagiso and other industry participants to dispose of a portion of their shareholding in various FM sound broadcasting licences, which would constitute an infringement of their rights to property in section 25 of the Constitution. That being the case, it is incumbent on ICASA to act (and interpret statutory provisions) in a manner which best promotes the spirit, purport and objects of the Bill of Rights. We submit that this would only be achieved if ICASA avoids a situation where references to control in section 65 are amended to refer to 20% shareholder, as is currently suggested in the Draft Regulations.

5.3.5 Such an approach would also be consistent with the objects of the ECA, which include encouraging investment in the communications sector, promoting broad-based black economic empowerment, and promoting stability in the ICT sector. All of these objects are compromised by adopting an overly restrictive approach to the limitations on control in section 65 of the ECA as such an approach reduces the scope for established HDG players, such as Kagiso, to continue to invest and participate in the broadcasting industry in a meaningful manner.

5.4 **The limitations on control of commercial sound broadcasting services**

5.4.1 Kagiso has a non-controlling interest in a number of commercial sound broadcasters, as further described in paragraph 1.1. In Kagiso's view, the current restrictions set out in section 65 of the ECA preclude investors in commercial sound broadcasters from properly realising the full potential of their investments. This is because the low control threshold contemplated in the ECA limits the benefits of investing in multiple commercial sound broadcasters as:

- 5.4.1.1 the low control threshold precludes investors from implementing a co-ordinated commercial approach between the commercial sound broadcasters in which they hold an interest;
- 5.4.1.2 prevents investors in multiple commercial sound broadcasters from providing a meaningful contribution to the strategy and operations of the commercial sound broadcasters, which may deprive commercial sound broadcasters from receiving the guidance of leading media houses such as Kagiso;
- 5.4.1.3 precludes the consolidation of media assets in a meaningful way and which enables commercial sound broadcasters to compete with the public broadcaster's commercial service, and other fast-growing and less regulated digital media entities; and
- 5.4.1.4 investors that are publically listed on a stock exchange are unable to grow their market capitalisation, resulting in limited benefits for their shareholders.
- 5.4.2 Kagiso notes that ICASA has previously proposed relaxing the restrictions applicable to the control of multiple commercial broadcasting services. In particular, ICASA previously proposed that the restriction be reformulated so that no person "shall be in a position to exercise control over more than thirty-five percent of the number of licensed commercial sound broadcasting services."¹⁶
- 5.4.3 While the proposal made by ICASA was never implemented, Kagiso is of the view that a relaxation of the control restrictions applicable to commercial sound broadcasters would be in line with the objectives stated in section 2 of the ECA as a relaxation would, among other things:
 - 5.4.3.1 encourage investment and innovations in the communications sector;
 - 5.4.3.2 promote competition within the ICT sector;

¹⁶ *Notice in terms of section 28 of the Independent Broadcasting Authority Act, No. 153 of 1993, inviting written representations on proposed legislative amendments set out in Part D of the position paper titled 'the review of ownership and control of broadcasting services and existing commercial sound broadcasting services' published by ICASA in Government Gazette 25919 on 15 January 2004, notice no. 40 of 2004.*

- 5.4.3.3 promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public; and
- 5.4.3.4 refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public.
- 5.5 While the restrictions may have been appropriate at the time of deregulation in 1995, ICASA must consider whether the limited growth opportunities in a maturing, yet regulated, market, remain still appropriate. Kagiso submits that a review of the control and ownership requirements set out in the ECA, as contemplated in the Draft Regulations, should also seek to unlock the full economic potential of the ICT sector, including sound broadcasting services.

6. HDGs and HDPs

6.1 The definitions of "HDGs" and "HDP"

- 6.1.1 As stated above, the Draft Regulations seek to, among other things, amend the ownership requirements applicable to licensees under the ECA.
- 6.1.2 The Draft Regulations define "Historically Disadvantaged Persons" to mean "*black persons, women and persons with disabilities and youth, who before the Constitution of the Republic of South Africa, 1996 came into operation, were disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion*"¹⁷ (our emphasis). HDGs are defined by the Draft Regulations to mean "*historically disadvantaged groups and has the same meaning as 'Historically Disadvantaged Persons' in [the Draft Regulations]*".¹⁸
- 6.1.3 In Kagiso's view, the Draft Regulations have reduced the scope of the current definitions of HDPs and HDGs in the Licensing Processes and Procedures Regulations, 2010, published on 14 June 2010 under *Government Gazette* Number 33293, ("**Procedure Regulations**"), which defines "historically disadvantaged persons" as "*South African citizens who are Black people, women or people with disabilities and that Black people are defined to include Africans, Indians and*

¹⁷ Draft Regulations, section 1

¹⁸ Draft Regulations, section 1

Coloureds." Specifically, a strict reading of the Draft Regulations suggests that in order to qualify as an HDG or HDP under the Draft Regulations, a black person, woman, youth or person with a disability must have been disadvantaged by unfair discrimination on the specific basis of race, gender, disability, sexual orientation or religion prior to the commencement of South Africa's Constitution in 1996. This may, for example, exclude black persons, women and persons with disabilities and youth from the definition of HDPs under the Draft Regulations if they were not disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion prior to 1996 or if they were born after 1996.

6.1.4 Based on the current wording in the Draft Regulations, it seems that a licensee, in demonstrating its compliance with the 30% HDG requirements (as addressed in more detail in paragraph 6.2 below), may be required to demonstrate that black persons, women and persons with disabilities and youth that have equity ownership in the licensee also satisfy this additional requirement (i.e. that they were disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion). This additional requirement, in our view, introduces an element of subjectivity into the definition of HDG/HDP as it is unclear from the Draft Regulations what criteria will be applied or will be of relevance to the issue of whether a person was disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion. This seems to be an issue that will now require evidence on a case by case basis - which may prove to be particularly cumbersome for licensees to achieve. This position is especially problematic where black people are concerned as it is common cause in South Africa that black people were by law historically disadvantaged on the basis of race. Accordingly, requiring a black person to demonstrate disadvantage by unfair discrimination (as is the requirement in the Draft Regulations) would go against the very essence of what is commonly known in South Africa.

6.1.5 Moreover, the definitions of HDG and HDP in the Draft Regulations may also be interpreted to broaden the ambit of these terms when contrasted against the current definitions under the ECA (read with the Procedure Regulations). For example, it is arguable that a homosexual white male, who was a youth prior to 1996, may fall within the ambit of an HDP on the basis that, prior to 1996, he was: (i) a youth; and (ii) subject to discrimination on the basis of his sexual orientation. Similar

considerations may also apply to white males that were members of minority religious groups that were purportedly discriminated against prior to 1996. Kagiso submits, however, that applying the broader interpretation of HDG and HDP (and calculating HDG/HDP ownership on this basis) may prove to be particularly challenging for licensees as the disclosures required to demonstrate a licensee's HDG ownership percentage may well be considered to be overly invasive (for example, a constitutional challenge may arise where a licensee requires details concerning the sexual orientation of its shareholders in order to disclose and utilize these details for purposes of calculating HDG or HDP equity ownership). This is particularly relevant, given the penalties contemplated under the Draft Regulations for the provision of false, misleading or inaccurate information, which are severe. As a consequence, it is Kagiso's view that broadening the ambit of an HDP as currently contemplated in the Draft Regulations may present some constitutional issues for licensees and in particular, may encroach upon the shareholders' rights to privacy under South African law.

6.2 The amendments pertaining to equity ownership by HDGs

6.2.1 In relation to equity ownership by HDGs, the Draft Regulations provide that:

6.2.1.1 on application, a holder of an individual licence *"is required to provide [ICASA] with proof, by way of a certificate from a recognised and accredited verification agency, confirming its ownership equity held by the HDGs, which may not be lower than 30%"*¹⁹;

6.2.1.2 a holder of an individual licence *"must ensure that its ownership equity held by HDGs is not lower than 30% at any given time during the licence period"*²⁰;

6.2.1.3 holders of a class licence are *"exempted from the application of the 30% HDG requirement"*²¹;

¹⁹ Draft Regulations, section 3(3)

²⁰ Draft Regulations, section 3(5)

²¹ Draft Regulations, section 3(1)

- 6.2.1.4 *"the 30% HDG equity requirement is applicable to all individual licensees, regardless of their size or income level" and "applies to all sorts of applications pertaining to individual licences, including new applications, transfers, renewals and amendments"*²²; and
- 6.2.1.5 *"publically trading/listed licensees must submit an independent report indicating compliance with the HDGs equity requirement"* on an annual basis.²³
- 6.2.2 As noted above, the Draft Regulations have amended the definitions of HDPs and HDGs. In order to achieve the 30% HDG equity ownership requirement under the Draft Regulations, licensees may have to implement measures to identify which of their shareholders are black persons, women or persons with a disability and youth. In addition, when identifying these persons, licensees may need to identify which of these people were disadvantaged by unfair discrimination on the specific basis of race, gender, disability, sexual orientation or religion prior to the commencement of South Africa's Constitution in 1996. As mentioned in paragraph 2 above, it is presently uncertain how a licensee (or ICASA) may determine that a person was disadvantaged on the basis of race, gender, disability, sexual orientation or religion prior to 1996. Put differently, it is unclear whether an objective test considering whether a shareholder is a member of a category of persons that were disadvantaged prior to 1996 is required, or whether a subjective test will be applied (in other words, whether the specific shareholder was disadvantaged on the basis of the above factors prior to 1996).
- 6.3 In our view, to require a subjective test would place an impossible administrative burden on licensees, as it would require licensees to interrogate (and subsequently disclose) the histories of individual shareholders.

²² Draft Regulations, sections 3(6) and 3(7)

²³ Draft Regulations, section 3(8)

7. The amendments pertaining to equity ownership by black people

- 7.1 Compliance with the Broad-based Black Economic Empower Act 53 of 2003 (the "**B-BBEE Act**") is currently not a requirement under the ECA, although there are requirements imposed upon licensees (among others) under the ICT Sector Codes.²⁴
- 7.2 The Draft Regulations provide that "[o]n application, all applicants must have a minimum of 30% equity ownership by black people and have a minimum level 4 B-BBEE status"²⁵ (our emphasis). In addition, a licensee "must ensure that its ownership equity held by black people is not lower than 30% at any given time during the licence period" (our emphasis).²⁶
- 7.3 Accordingly, in addition to the requirements relating to equity ownership by HDGs, the Draft Regulations seek to introduce a 30% ownership requirement by black people, as well as a level 4 B-BBEE status requirement, to licensees. Furthermore, unlike the HDG 30% ownership requirement, the Draft Regulations do not exempt holders of class licences from having to adhere to the requirement relating to equity ownership by black people and the B-BBEE level 4 requirement.
- 7.4 The definition of "black people" has not been amended by the Draft Regulations and will thus be determined with reference to the provisions of the B-BBEE Act (read together with the ICT Sector Codes). However, we are concerned about the reference to the B-BBEE status having to be "*calculated on a flow-through principle*". Strictly articulated, this provision in the Draft Regulations is difficult to interpret as it is not possible to calculate a "*B-BBEE status*" on "*a flow-through principle*". The flow-through principle is one of the calculation methodologies in the ICT Sector Code utilised for purposes of determining the extent of black ownership in a measured entity. On the basis that the "flow-through" concept is intended to be applicable to determining the extent of black ownership in a measured entity, this would exclude the recognition of (i) the continuing consequences principle; (ii) the modified flow-through principle, and (iii) certain empowering transactions, among other things.

²⁴ Published under General Notice 91 in *Government Gazette* No. 43021 on 14 February 2020 ("**ICT Sector Codes**")

²⁵ Draft Regulations, section 4(1)

²⁶ Draft Regulations, section 4(4)

- 7.5 The Draft Regulations refer to "30% ownership by black people" and "ownership equity... held by black people". This reference to equity as well as the reference to "flow through principle" as referred to above, in our view, suggests that what will be of relevance for purposes of the Draft Regulations is actual ownership by black people and not any "notional" or "deemed" ownership (as provided for in the ICT Sector Codes). Put differently, it seems that the Draft Regulations do not make provision for any mechanism by which the 30% equity ownership requirement may be achieved, save for actual equity ownership by black people. Should this interpretation be adopted, it is our understanding that the majority of licensees will be in immediate contravention of the Draft Regulations upon their commencement as many licensees have calculated their ownership by black people taking into account notional or deemed ownership.
- 7.6 In addition, the Draft Regulations require licensees to achieve 30% equity ownership by both HDGs and black people, which, in Kagiso's view, appears to result in overlap between these two concepts (save in the context of class licence holders, in respect of which the HDG requirement is not applicable under the Draft Regulations). In addition, Kagiso has concerns that the 30% equity ownership by black people requirement in the Draft Regulations may be unlawful (in its current form), as discussed in more detail in paragraph 8 below.
- 7.7 Kagiso submits that, rather than maintaining references to both HDGs and black people, a more appropriate mechanism to resolve these interpretative definitions is to align the ECA to the requirements of the ICT Sector Code (and the B-BBEE Act more generally), as opposed to retaining the requirements applicable to HDGs, which are unique to the ECA.

8. Portions of the Draft Regulations are ultra vires

- 8.1 Section 10 of the B-BBEE Act requires ICASA, as an organ of state, to apply the ICT Sector Codes in determining the qualification criteria for the issuing of licences, concessions or other authorisations. Section 10(3) of the B-BBEE Act states that states that an enterprise in a sector in respect of which the Minister of Trade and Industry (the "**Minister**") has issued a sector code of good practice in terms of section 9, may only be measured for compliance with the requirements of broad-based black economic empowerment in accordance with that code. In the current circumstances that means

that all licensees may only be measured for compliance with the requirements of B-BBEE in terms of the ICT Sector Codes.

- 8.2 Section 9(6) of the B-BBEE Act states that organs of state or public entities may only specify qualification criteria for procurement and other economic activities (including licensing) which exceed those set out in codes of good practice, if permitted to do so by the Minister, by way of a notice in the Government Gazette. This means that ICASA (and other organs of state) can only deviate from the ICT Sector Codes in determining qualification criteria for the issuing of licences, concessions or other authorisations, if permitted by the Minister by way of a notice in the Government Gazette. Section 10(2) of the B-BBEE Act states that the Minister may allow an organ of state to deviate from applying the relevant code of good practice if particular objectively verifiable facts or circumstances applicable to the organ of state necessitates a deviation.
- 8.3 The Draft Regulations provide that "*[o]n application, all applicants must have a minimum of 30% equity ownership by black people and have a minimum level 4 B-BBEE status*"²⁷ (our emphasis). In addition, a licensee "*must ensure that its ownership equity held by black people is not lower than 30% at any given time during the licence period*" (our emphasis).²⁸
- 8.4 Accordingly, in Kagiso's view, the Draft Regulations seek to introduce qualification criteria for procurement and other economic activities (including licensing) which exceed those set out in codes of good practice. In the absence of consent from the Minister, in the prescribed form, such a deviation may, in Kagiso's view, result in a contravention of the B-BBEE Act.
- 8.5 to the Draft Regulations qualify the manner in which a licensee's B-BBEE status is calculated. As noted above, in terms of section 10(3) of the B-BBEE Act, once the Minister has issued a code of good practice in terms of section 9 in respect of a particular sector, enterprises in that sector may only be measured for compliance with the requirements of broad-based black economic empowerment in accordance with that code. Consequently, Kagiso is of the view that all licensees may only be measured for compliance with the requirements of B-BBEE in terms of the ICT Sector Codes and the B-BBEE Act does not

²⁷ Draft Regulations, section 4(1)

²⁸ Draft Regulations, section 4(4)

permit the deviations to the measurement principles and formula contemplated in the Draft Regulations.

9. Conclusion

9.1 Given the concerns raised in these submissions, Kagiso submits that ICASA ought to reconsider the provisions in the Draft Regulations in the context of the concerns set out herein.

9.2 Kagiso looks forward to engaging further with ICASA on these concerns.

Yours faithfully

A handwritten signature in black ink, appearing to read "Nick Grubb", enclosed in a thin black rectangular border.

Nick Grubb
Chief Executive: Radio

Submission Sent Electronically