



Wireless Access Providers' Association of South Africa
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4 May 2020

Independent Communications Authority of South Africa
Attention: Mr P Mailula, Ms F Hlongwane – Project Leaders
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WAPA SUBMISSION ON THE DRAFT REGULATIONS IN RESPECT OF THE LIMITATIONS OF CONTROL AND EQUITY OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUPS AND THE APPLICATION OF THE ICT SECTOR CODE

Introduction

1. The Wireless Access Providers' Association of South Africa ("WAPA") welcomes the opportunity to comment on the Authority's Draft Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups and the application of the ICT Sector Code¹ ("the Draft Regulations").
2. Given the context within which the Draft Regulations have been published, reference must necessarily be made to the Findings Document and Position Paper on the Inquiry into Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code in the ICT Sector, January 2019² ("the Findings Document and Position Paper").
3. Whilst WAPA generally supports any effort to develop the law and provide certainty on the subject of ownership and control of licences, it wishes to make the specific submissions detailed below.

About WAPA

4. WAPA was formed in 2006 as a non-profit organisation representing the interests of Wireless Internet Service Providers ("WISPs") in both urban and rural locations in South Africa.
5. WAPA promotes technical and business best practices for fixed-wireless deployment and engages in policy work to promote efficient and equitable spectrum allocation and assignment, wholesale service provision and SMME enablement.

¹ Notice 91, GG 43021, published 14 February 2020

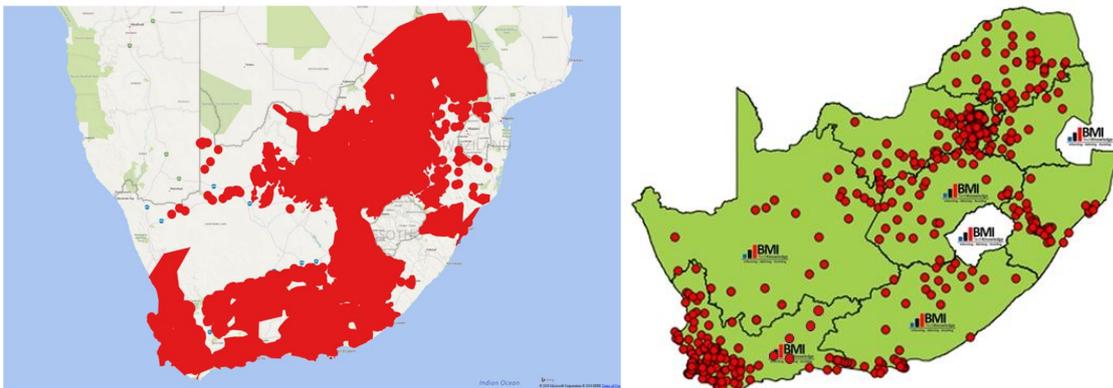
² Notice 85, GG 42234, published 15 February 2019

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Tim Genders (Chairperson), Eric Thwala (Deputy Chair), David Anderson (Treasurer), Paul Colmer, Karel Venter,
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6. WAPA currently represents more than 220 organisations, encompassing both large and small operators, as well as supporting industries such as equipment vendors and software providers. WAPA wishes to note that the majority of its membership currently holds Class licences, with these variants of ECS and ECNS licences typically representing the only available option to SMME entrants to the market.
7. WAPA's members predominantly operate in peri-urban and rural areas which often lack affordable and/or reliable access to broadband Internet. As a class, WISPs serve to drive down the cost to communicate and increase broadband penetration.



(WAPA 2018 census – coverage map and member location)

8. WAPA members have developed experience in rolling out low-cost connectivity fixed wireless broadband access (typically under R500 per month uncapped Internet access at 5 Mbps lines) to over half a million customers across South Africa.
9. WAPA members provide both:
 - 9.1. Access services: WISPs build and operate fixed wireless – and sometimes wired – connections directly to homes and businesses throughout South Africa; and
 - 9.2. Backhaul services: WISPs build and operate the long-distance networks which link remote areas to the communications infrastructure of larger operators.
10. WAPA members have a proven track record of price reduction and service innovation in the provision of broadband services to areas which, as a consequence of perceived commercial non-viability, have been largely neglected by the large operators.
11. WAPA works to promote the model of community-based SMMEs covering small areas and interconnecting with each other to achieve ubiquitous coverage. This fosters job creation and skills development and transfer, and results in deepening broadband penetration in South Africa through local networks developed to serve local environments.

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12. In light of continued growth within industry WAPA has found itself in the position to provide support in the form of training and mentorship for youths, subsidies for black-owned WISPs looking to become WAPA members and, latterly, cash flow support for WISPs providing COVID-19 disaster relief in rural areas.

Purpose of the Regulations (Regulation 2)

13. Given continued uncertainty by industry on the subject, WAPA recognises the need for greater alignment between the application of current ownership requirements by Historically Disadvantaged Groups ("HDGs"), as established by the Electronic Communications Act³ ("the ECA"), and the application of the Revised ICT Sector BBEEE Code, but notes that previous submissions have emphasised the need for flexibility in reaching transformation targets during the course of such an alignment.
14. WAPA notes that the approach adopted by the Authority in the Draft Regulations has done little to align the two sets of requirements and rather elects to rigidly impose them alongside each other as separate yet overlapping obligations to be imposed on licensees.
15. WAPA submits that the Authority, through revisions to the Draft Regulations, should adopt an approach which grants existing licensees greater flexibility in reaching transformation targets.

Application of 30% HDG Equity Requirements (Regulation 3)

16. WAPA welcomes the exemption of Class licensees from the need to satisfy the 30% HDG equity requirement. Notwithstanding this exemption WAPA holds the view that Class licensees should be expected to undertake a process of transformation but that this process should take heed of prevailing socio-economic factors experienced by most Class licensees who are, at least in the case of WAPA's membership, typically single owner or sole proprietor SMMEs. Measures to transform Class licensees should therefore allow for flexibility in achieving transformation targets.
17. WAPA notes the contents of sub-regulation 3(3) but would ask that the Authority expand on or otherwise define the phrase "verification agency" and provide clarity on the standards to be met and/or framework to be followed in order for a verification agency to be "recognised" and "accredited".
18. Save to note the difficulties inherent in enforcing equity requirements in publicly traded/listed licensees, WAPA would ask the Authority to clarify the requirements for and parameters of the "independent assurance report" referred to in sub-regulation 3(8). Whilst the Draft Regulations are silent on the issue, WAPA wishes to understand whether there is an expectation for independent assurance reports to be prepared by the verification agencies contemplated in sub-regulation 3(3).

³ Act 36 of 2005

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19. WAPA understands the rationale for this provision and that it flows from the decision of the High Court in its judgement on the consolidated matters between various licensees and the Authority reviewing the Authority's decision to approve the transfer of control application brought by Neotel in respect of its acquisition by Vodacom⁴.
20. It stands to reason that where Individual licensees are currently non-compliant with existing HDG equity ownership obligations they may be required to make application to the Authority in order to become compliant. WAPA holds the view that the current formulation of sub-regulation 3(3) serves to frustrate compliance with the broader objects of the Draft Regulations and that it should accordingly be amended to clarify that applications will be accepted and processed by the Authority where such applications are made to remedy existing non-compliance by Individual licensees.
21. Insofar as sub-regulation 3(5) is concerned, WAPA has been referred to developments in the mining sector relating to the "once empowered always empowered" rule as it is expressed in the Mining Charter 2018⁵. Following protracted legal and political contests it has now been settled as a matter of policy in that sector that previous empowerment transactions will be recognised for the purpose of compliance with BEE equity ownership requirements, notwithstanding the subsequent exit of the empowerment partner in a manner which dilutes BEE equity ownership.
22. In reaching this policy position compelling arguments relating to the need to create investment certainty and avoid restrictions of rights of exiting partners were adopted.
23. WAPA submits that the Authority should adopt a similar approach with regard to the application of the 30% HDG equity ownership requirements, subject to the imposition of rational limitations and safeguards to control abuse as seen in the mining sector.

Application of B-BBEE Requirements on Licences (Regulation 4)

24. WAPA notes the intention of the Authority to impose both a 30% black ownership and a minimum level 4 B-BBEE status as the threshold for compliance "on application" by "all applicants".
25. Insofar as the minimum threshold for B-BBEE status is concerned, WAPA notes that the position adopted by the Draft Regulations represents a significant departure from the position adopted in the Findings Document and Position Paper, which contemplated a mandatory minimum of level 6:

⁴ Telkom SA Soc Limited v Mncube NO and Others; Mobile Telephone Networks (Pty) Ltd v Pillay NO and Others; Cell C (Pty) Limited v The Chairperson of ICASA and Others; Dimension Data Middle East & Africa (Pty) Ltd t/a Internet Solutions v ICASA and Others (55311/2015; 77029/2015; 82287/2015) [2016] ZAGPPHC 93 (26 February 2016) @ para 80, available from <http://www.saflii.org/za/cases/ZAGPPHC/2016/93.html>

⁵ Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018. Available from https://www.gov.za/sites/default/files/gcis_document/201809/41934gon1002.pdf

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17.19.... For this reason, the Authority is of the opinion that a mandatory minimum B-Status Level Six in terms of the Revised ICT Code will be compulsory for all licensees and must be maintained for the duration of the licence.

...

18.14.15. ...the Authority is of the opinion that a mandatory minimum B-BBEE Status Level Six will be compulsory for all licensees which status level must be maintained for the duration of the licence.

26. No reasons have been advanced by the Authority for the departure in the Draft Regulations from the position originally established by the Findings Document and Position Paper. Given that the new position is likely to have considerable practical and economic ramifications and furthermore represents a more onerous obligation than was originally contemplated by the Findings Document and Position Paper.
27. WAPA submits that it is incumbent on the Authority to ensure that the decision to expand the B-BBEE minimum level obligation has been taken rationally and with due regard to the effect this is likely to have on SMMEs in general and Class licensees in particular.
28. WAPA respectfully submits that the Authority has failed to consider the structure of various verticals and value chains present within industry as a whole. The majority of WAPA's membership are SMMEs who interconnect with and/or purchase from a considerably smaller pool of upstream operators. Whilst the broader B-BBEE framework takes these asymmetries in status into account, the Authority's construction of the Draft Regulations imposes a disproportionately onerous obligation on SMMEs to maximise points across other sections of their B-BBEE scorecards.
29. Whilst "application" and "applicants" are not defined by the Draft Regulations, WAPA notes – when considering the interpretation and broader context provided by the ECA as read with the Class Licensing Processes and Procedures Regulations (as amended) 2010⁶ and the Individual Licensing Processes and Procedures Regulations (as amended) 2010⁷ – their typical use:
 - 29.1. In the case of Class licensees, to matters concerning amendment, surrender or transfer of a licence; and,
 - 29.2. In the case of Individual licensees, to matters concerning initial applications for an Individual licence together with matters concerning amendment, renewal, transfer and special temporary authorisation.
30. WAPA furthermore draws the Authority's attention to section 5(7)(a)(ii) of the ECA which provides that the Authority "must prescribe regulations setting out the documentation that applicants or registrants

⁶ Notice 526, GG 33297, published 14 June 2010

⁷ Notice 522, GG 33293, published 14 June 2010

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in the case of class licences, must include with their applications or registrations". [Author's emphasis added]

31. It is therefore clear that the ECA contemplates a distinction between processes concerning applicants and registrants, with the former typically involving Individual licensees and the latter involving Class licensees.
32. WAPA accepts that references to "application" and "applicants" within sub-regulation 4(1) must necessarily refer to Individual licensee but would ask that the Authority clarify whether it is also intends for the obligation to extend to registrants of Class licences.
33. Mindful of the above, WAPA notes that the unqualified use of "Licensee" in sub-regulation 4(4) would, despite the resultant conflict with existing definitions, amount to the imposition of the obligations detailed in sub-regulation 4(1) on both Class and Individual licensees.
34. It is submitted that the imposition of a 30% black ownership requirement on Class licensees would be incongruous with the exemption provided to Class licensees by sub-regulation 3(1), particularly when considering that "Black People" as defined form a subset of "Historically Disadvantaged Individuals". Should the Authority intend for regulation 4 to apply to "Licensees" as a whole, WAPA notes that Class licensees would then be subjected to an obligation which is more onerous than a preceding obligation from which they are already exempt. WAPA respectfully submits that this interpretation would amount to an absurdity and would ask that the Authority provide clarity on prior to finalisation of the Draft Regulations.

Effects on the Class licence framework

35. WAPA has observed that Class licences tend to be held by SMMEs consisting of single owner, private companies and close corporations, with a not-insignificant portion of Class licences being held by sole proprietors (i.e. the registrant is a natural person) directly.
36. It has furthermore been WAPA's experience that entrants to the market favour Class licences for their perceived value for money (with administrative simplicity forming part of the value proposition).
37. WAPA opposes the expansion of limitations on ownership and control to Class ECS and ECNS licences issued by the Authority under Chapter 3 of the ECA, and holds the view that this is contrary to the clear intention of the ECA to create a licensing category with limited rights and an on-demand licensing system which is quick, inexpensive and requiring only local registration as a prerequisite.
38. The cost of compliance includes the imposition of a direct regulatory cost burden on Class licensees in the form of the requirement to obtain a verification certificate from an accredited BEE verification agency

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as contemplated by sub-regulation 4(2) and 4(3). For SMMEs with limited staff capacity and internal expertise in complying with BEE requirements, these costs can be significant.

39. Should WAPA's understanding of the applicability of regulation 4 (as a whole) be correct – namely that it would be the Authority's intention to impose both a 30% black ownership and a minimum level 4 B-BBEEE status requirement on Class licensees together with a host of related obligations pertaining to upkeep and verification of compliance – it would voice its concern that the Authority appears to be acting reflexively to the perception that the Class licence framework is being exploited by larger providers in the hopes of avoiding transformation requirements.
40. Mindful that HDG equity ownership obligations have traditionally taken cognisance of fact that Class and Individual licensees both represent and cater to differing sectors of the ICT industry and the market respectively, WAPA holds the view that:
- 40.1. Any concerns regarding exploitation of the current framework should be addressed with the licensees concerned on a case-by-case basis rather than by applying a blanket requirement on all licensees, with a blunt approach likely to have unintended negative outcomes.
- 40.2. Such a motivation would implicitly acknowledge that the size and/or annual revenue of a licensee is a factor being considered by the Authority, despite statements to the contrary.
- 40.3. There is precedent for the adoption of a more nuanced approach in the form of the Value-added Network Services (VANS) Regulations published by the Authority on 20 May 2005⁸, which required the following:
- 4. Empowerment*
- 4(1) A licensee shall within 12 months of issue of licence, demonstrate a minimum of 15 percent equity ownership by historically disadvantaged persons, and achieve a 30 percent equity ownership within 24 months of issue of the licence.*
- (2) The provisions of sub-regulation (1) shall only apply where the licensee's annual license fee income is greater than R1 000 000.*
41. Notwithstanding the above, it bears mentioning that the comparatively low barrier to entry for the registration of Class licences currently encourages entry into the industry by Black People (who would otherwise meet the requirements contemplated by regulation 4), who will now also need to bear the cost of the expanded obligations.
42. WAPA respectfully submits that the Authority should reconsider the rationale behind what it seeks to achieve through regulation 4, mindful of the outcomes which are likely to follow from the imposition of inadvertently onerous obligations on Class licensees.

⁸ Available from https://internet.org.za/regs_vans_2005.html

Transfer of Control or Transfer of Ownership of a Licensee (Regulation 5)

43. WAPA submits that references in the heading and the body of this regulation to a “transfer of control of a licensee” and “transfer of ownership of a licensee” are incorrect. Section 13(3) of the ECA explicitly refers to “the ownership or control of an individual licence”. It does not refer to the ownership or control of an individual licensee.
44. Whilst the point raised above may at first gloss appear superficial, WAPA submits that the difficulties faced by the Authority in forging a coherent legal framework for the processing of applications for transfer of ownership of licences and transfer of control in licences have arisen precisely because of the Authority’s failure to distinguish between a “licence” and a “licensee”. WAPA submits that:
 - 44.1. A licensee is a person – generally a juristic one.
 - 44.2. A licence embodies a set of rights and obligations that the licensee must comply with.
45. South African law requires the separation of the person from the rights and obligation enjoyed by and imposed on the person.
46. It is therefore necessary that the Authority ensure that its approach, both in the formulation of the Draft Regulations and in general, is aligned with the clear language of sections 13 and 31 of the ECA.
47. Should the Authority seek to review its approach as outlined above, WAPA notes that the submissions made below in respect of the definitions of the terms “control” and “control interest” would no longer be relevant. These submissions should therefore be read in the alternative, i.e. as applicable where the Authority does not amend its approach to align with the explicit wording of the ECA (or seek to have the ECA amended to align with the approach in the Draft Regulations).

Definition of “control”

48. The Draft Regulations define “control” with reference to the definition adopted in the Competition Act⁹ (“the Competition Act”).
49. WAPA has been advised that it is not permissible in law to attempt to adopt, by way of a regulation, the definition of a term which is not otherwise defined in the principle legislation (in this case, the ECA).
50. Irrespective of the suitability of such a definition, WAPA submits that the proposed definition can only be introduced through amendment of the ECA.

⁹ Act 89 of 1998

Definition of "control interest"

51. WAPA notes that the definition proposed is an adaptation of the definition of "control" set out in the Competition Act.
52. The Authority has however elected to change the percentage threshold for beneficial control of a firm from 50% + 1 to 20% for both companies and close corporations.
53. WAPA cannot find any motivation for this decision to vary from the referenced definition. It however appears likely that the Authority has considered provisions of the ECA relating to broadcasting service licensing. This is not a valid basis for setting the bar for a "control interest" at 20% as the history and current reality of broadcasting is fundamentally different from that relating to ECS and ECNS.
54. In the ICASA Regulations in respect of the Limitation of Ownership and Control of Telecommunication Services in terms of section 52 of the Telecommunications Act 103 of 1996, published on 16 January 2003 ("the 2003 Regulations") the corresponding threshold is set at 25%.
 - 54.1. The 2003 Regulations were drafted in response to a completely different licensing and market structure. This is directly reflected in the notion of "concentrated markets" and the fact that only seven licensees had, at that time, the right to operate and make capacity available on telecommunications infrastructure.
 - 54.2. How has the Authority determined that a reduction in the threshold for determining what constitutes a "control interest" is appropriate considering the current horizontal licensing framework and liberalisation of infrastructure rights post licence conversion in 2010?
55. The effect of setting the bar this low is to bring a large volume of transactions within the scrutiny of the Authority. No justification or regulatory impact assessment has been offered in the face of the direct costs this is likely to cause to Individual licensees or the delays it will cause in finalising what would otherwise be day-to-day transactions.
56. This cost is particularly prohibitive for SMMEs, many of which will be required to file applications for transfers of control if the Draft Regulations are finalised as is. This follows from the fact that there is currently no requirement for 30% ownership by Black People; obtaining this requires at least a 30% change in shareholding or members' interest, i.e. a control interest as defined.
57. WAPA notes that considerations of control in general must be separated from considerations of control by Black Persons. This is to be achieved through application of the Revised ICT Sector Code.
58. WAPA furthermore submits that the 20% threshold is not saved by use of the words "in the absence of evidence to the contrary". The default assumption is that any change of shareholding or members' interest of more than 20% will require at the very least that the Authority be satisfied as to why such a

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change should not be regarded as a transfer of control. No indication is provided as to how this is to be done and what forms of evidence the Authority will consider persuasive. Again, there will be costs and delays occasioned for no discernible good reason.

59. In the Findings Document and Position Paper the Authority finds that it is "clear that certainty regarding when a change in shareholding triggers a requirement for the Authority's consent and when a mere notification will be acceptable is important"¹⁰, which is a view that WAPA endorses fully.
60. The proposed regulation 5 does nothing to clarify the current position as to whether an applicant in this position should make application for a transfer of ownership of a licence or transfer of control over a licence.
61. WAPA submits that the correct threshold to be set out is that contained in the Competition Act, i.e. more than half of the shares or members' interest.
62. Moreover, it is the Competition Authorities who are concerned about concentrations of ownership and control and who are utilising new powers afforded through recent amendments to the Competition Act to address such concerns. WAPA submits that the preferred outcome is for the Authority to defer to the established mergers and acquisitions jurisdiction of the Competition Commission in respect of matters of control.

Contraventions and Penalties (Regulation 8)

63. Whilst WAPA both understands and supports the need for sanction in the case of non-compliance with the Authority's regulations (in general), it is unreasonable and irrational for the Authority to equate inaccurate information – which must necessarily include inaccurate information provided in good faith/by mistake by a given licensee – with misleading information, particularly where both events may result in a 24 month prison sentence.
64. Notwithstanding the difficulty inherent in ensuring compliance with the broader aims of regulations 3 and 4, WAPA questions the reasonableness and/or lawfulness of the penalties contemplated by sub-regulation 8(2) when considering that non-compliance may result from factors outside the licensees' control (e.g. the death of a shareholder).

¹⁰ Findings Document and Position Paper para 13.9

Transitional Period (Regulation 9)

65. Twenty-four months is too short a period in which to reasonably expect compliance, particularly given the proposed sanctions to be imposed where a licensee does not – at the date of publication of finalised Draft Regulations – have the required HDG or level 4 certification or 30% ownership by Black Persons.
66. As discussed above, setting the benchmark for a “control interest” at 20% will result in many Individual licensees having to file applications for transfer of ownership of a licence or transfer of control of a licence in order to attain 30% ownership by HDGs and/or 30% by Black People.
67. WAPA submits that:
 - 67.1. This period should be extended to 60 months or five years from date of finalisation of the Draft Regulations, in both sub-regulation 9(1) and 9(2).
 - 67.2. Given the lengthy period of time taken for the Authority to finalise any required approval for a transfer of ownership of a licence or transfer of control of licence, compliance should be linked to the submission by a licensee of an application or notification which would result, if approved in the case of the former and when submitted in the case of the latter, in the licensee becoming compliant with equity ownership requirements.
68. The requirement to show 50% compliance within 12 months is impractical as it is impossible to achieve and must be reassessed.
 - 68.1. WAPA as is unclear what “50% of a level 4 BEE rating” means in practical terms. What is the target to be achieved with reference to the applicable scorecard and how will this be assessed?
 - 68.2. For the reasons set out above, it is unreasonable to expect the transactions required for compliance to be completed within a 24-month period, much less a 12-month period.
69. WAPA notes – by way of offering a reference point for the Authority – that the Implementation Guidelines for the Mining Charter 2018¹¹ state that a mining right holder must increase its BEE shareholding from a minimum of 26% to 30% once-off or progressively within a 5-year transitional period.
70. The need to afford a realistic time period for compliance is of course exacerbated by the economic recession South Africa is entering into as a result of the COVID-19 National Disaster. Compliance which requires sourcing investors with the necessary appetite to invest in licensees at this time will be extremely difficult.

¹¹ Implementation Guidelines for the Broad Based Socio- Economic Empowerment Charter for the Mining and Minerals Industry, 2018, para 4.2. Available from https://www.gov.za/sites/default/files/gcis_document/201812/42122gon1399.pdf



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Repeal of prior regulation

71. In the Findings Document and Position Paper the Authority expresses its intention to repeal the ICASA Regulations in respect of the Limitation of Ownership and Control of Telecommunication Services in terms of section 52 of the Telecommunications Act published on 16 January 2003.

72. This appears to have been omitted from the Draft Regulations and should be inserted.

Conclusion

73. WAPA thanks the Authority for its consideration of these submissions.

74. Should circumstances permit and the Authority elects to conduct public hearings, WAPA confirms its wish to participate.

Regards,
WAPA EXECUTIVE COMMITTEE