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REASONS DOCUMENT

Amendment Regulations on the Processes and Procedures in respect of Applications, Amendments, Renewals, Surrender and Transfer of Individual Licences and applications for Special Temporary Authorisations in terms of the Electronic Communications Act, 2005, as amended.

[___March 2023]

1. ACKNOWLEDGEMENTS & BACKGROUND

1.1. The Independent Communications Authority of South Africa ("the Authority") hereby acknowledges and thanks all stakeholders who have participated in the process aimed at amending of the Processes and Procedures Regulations for Individual Licences, 2010, published on 14 June 2010 in Government Gazette Number: 33293 of 2010, as amended ("the Regulations").

The following stakeholders have submitted written representations to the draft amendment Regulations:

1.1.1. African Media Entertainment ("AME");

1.1.2. MTN Group Ltd ("MTN");

1.1.3. Cell C Limited ("Cell C");

1.1.4. Telkom SA SOC Limited ("Telkom");

1.1.5. Primedia Pty Ltd ("Primedia");

1.1.6. Vodacom Pty Ltd ("Vodacom"); and

1.1.7. Internet Service Provider Association ("ISPA").

1.2. The purpose of the amendment is to provide clarity on the Authority's processes and procedures with regard to Individual Licences.

1.3. The Reasons Document sets out the reasons for decisions of the Authority on the amendment of the Regulations.

1.4. On 24 March 2022 the Authority published the draft Amendment Regulations for public input.

1.5. In developing the Reasons Document, the Authority has considered the written submissions received by it as well as oral submissions made during the public hearings held on 14 September 2022. The Authority is charged with the obligation to formulate regulatory policy independently, in terms of what it judges to be in the broader public interest. The principles

underpinning this public interest are laid out in section 2 (a) and (b) of the ICASA Act, (Act No.13 of 2000), as amended.

1.6. The positions (**in bold**) form the basis for finalising the Regulations.

AMENDMENTS TO THE REGULATIONS

2. Amendment of regulation 1: Definitions

2.1. Regulation 1 of the Regulations is hereby amended by the substitution of paragraph (d) of the definition for "application" of the following paragraph:

"(d) to transfer or to transfer control of an Individual Licence; "

2.1. (a) Stakeholders' comments

- **AME** submits that the definition of "applicant" should be amended because currently the Regulations contemplate various applications, but there are others that might be made to ICASA that are not dealt with in the Regulations. AME's suggestion is that the definition of "applicant" should be amended to read, "a person who has submitted an application in terms of these Regulations". AME states that the definition of "licensee" can be omitted as it is defined in primary legislation, namely the ECA. Further, AME points out that the definition of "transfer" should be amended to align with all the other regulations that ICASA has amended and the proposed amendments to regulation 4(1)(c) and regulation 11 of these Regulations. According to AME, the definition should read, "means assign, cede or transfer or transfer control of a licence from one person to another".

- **ISPA** submits that the term "individual licence" is defined without capitalisation in the Electronic Communications Act 36 of 2005 ("the ECA") and should be used in this form in the Draft Amendment Regulations. This term does not need to be defined.
    - The term "licence" is not defined in the ECA but the term "service licence" is defined. The latter term – without capitalisation – is the

correct term to use in the Draft Amendment Regulations.

- The term "special temporary authorisation" is not defined in the ECA. The Authority should either insert a definition or use this term without capitalisation.
- The term "applicant" is defined without capitalisation but is used in the body of the Draft Amendment Regulations in capitalised form.

- **Cell C** is in support of the insertion. Cell C further suggests that section 9(13) of the ECA be inserted in the regulations, as a supporting statement to the change. Section 9(13) of the ECA should be inserted in the regulations in support of the proposed amendment.

- **Telkom** submit that it has noted the amendment of the definition of "application" to include an application to not only transfer an individual licence, but also to "transfer control of an Individual Licence." This is in line with section 13 of the ECA which prohibits the transfer or the transfer of control of an individual licence without prior written consent of the Authority and we do not have a difficulty with this amendment.

2.1. (b) Decision by the Authority

The Authority notes the stakeholders' comments regarding the amendment of definition of "application" on "(d) to transfer an Individual Licence" to "(d) to transfer or to transfer control of an Individual Licence." This is in line with section 13 of the ECA which prohibits the transfer or the transfer of control of an individual licence without prior written consent of the Authority.

The Authority is of the view that the current definition of "applicant" is accurate in that any application which is outlined in the Regulations is in terms of the Act. The Regulations only serve to outline the applicable processes and procedures.

The Authority agrees with stakeholders' inputs to align the definition of transfer with Section 13 of the ECA and the amendments introduced by

way of the Regulations and has accordingly amended the definition of transfer to read as follows:

Regulation 1 of the Regulations is hereby amended by the substitution of the definition for 'transfer' after the definition of "these Regulations" with the following definition:

"transfer-means assign, cede or transfer or transfer of control of a licence from one person to another".

2.2. Regulation 1 of the Regulations is hereby amended by the substitution of the definition for 'historically disadvantaged persons' with the following definition:

"Historically Disadvantaged Persons ("HDP") – means women, 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".

2.2. (a) Stakeholders' comments

- **AME** states that regulation 2(2) is unnecessary because the Regulations cannot and do not provide for all types of applications and processes. AME submits that ICASA has failed to provide explanation for the proposed change in the Class Processes Regulations. AME points out that ICASA has failed to give a good and sufficient reason for changing the definition of "historically disadvantaged groups" in these Amendments. AME submits that the final Regulations on Limitation of Ownership by Historically Disadvantaged Groups, published on 31 March 2021, have NO explanation for and NO amendment of the definition of "historically disadvantaged persons". AME states that until such time as ICASA explains and gives reasons for the amendment proposed to the definition of "historically disadvantaged persons" in the Amendments, the proposed amendment should be struck.

- **AME** states that its proposal for the definition of "historically disadvantaged groups/individuals/persons" is that the wording must be left as it is, and as it has been since these Regulations were first published in 2010. AME states that there can be no good reason to amend it and ICASA has given none in any of the regulations.

- **ISPA** has noted the proposed substitution of the definition of "historically disadvantaged persons" and that the explanatory memorandum notes that this is being done to "align it with definition of historically disadvantaged persons as contained in the Class Processes and Procedures Regulations". The explanatory memorandum to the relevant draft amendments to the Class Processes and Procedures Regulation, published for comment on 9 March 2020, states only that this "proposed amended definition is in line with the Draft Historically Disadvantaged Persons and Broad Based Black Economic Empowerment Regulations". The Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDG) and the application of the ICT Sector Code, 2021 ("the Control and Ownership Regulations 2021"), Appendix 1 (Methodology to be used to compile Credible Assurance Report), however, sets out factors which the Authority will consider when determining whether a licensee is compliant with the 30% HDG equity ownership requirement.

  ""*2.1 In order to determine whether an Individual Licensee has complied with the HDG Equity Requirement, the Authority will consider the Individual Licensee's shareholding structure to ascertain whether:*
  2.1.1 A minimum of 30% of the total ownership equity in an Individual Licensee is held by:
  2.1.1.1 Black People;
  2.1.1.2 Women, who are citizens of South Africa;
  2.1.1.3 People with disabilities, who are citizens of South Africa; and/or
  2.1.1.4 Youth, who are citizens of South Africa."

- This is effectively the definition of HDG which individual licensees are required to comply with. ISPA submits that the Control and Ownership Regulations 2021 are the primary regulatory document governing transformation and ownership

issues. Definitions to be adopted in other regulatory instruments – including the Draft Amendments Regulations and the Class Processes and Procedures Regulations 2010 as amended – should be aligned with the treatment of HDGs in the Control and Ownership Regulations 2021. ISPA requests the Authority to adopt a definition of HDP which is consistent with the Control and Ownership Regulations 2021.

- **Cell C** recommends that in addition to this definition, the Authority must ensure that it harmonise the various definitions from existing legislation such as BBBEE Act and the HDI regulations. This will ensure that the regulatory interventions meet the broader BBBEE intended outcomes.

- **MTN** submits that the proposed new definition of HDP is problematic in both principle, and practice**.** The qualification criteria proposed by ICASA perpetuates a grave indignity on those HDP's and HDG's who, in terms of the proposed regulations, now must prove and demonstrate their historical disadvantage to the Authority, without any form of guideline or framework. The proposed added criteria present a challenge in its implementation, in that it is not clear how both the Authority and Licensees will assess or determine whether a person was unfairly discriminated against based on race, gender, disability, sexual orientation or religion vis-à-vis persons and groups who were not unfairly discriminated against before 1996. The proposed amendments to the definition of HDPs disregard the fact that discrimination is systemic and did not (and has not) simply disappeared with the commencement of the South African Constitution. MTN believes the reference to 1996 to be arbitrary, as it suggests that unfair discrimination and the effects of unfair discrimination ceased after 1996. The Draft Regulations also seem to have broadened the definition of HDPs by including persons that experienced unfair discrimination based on sexual orientation and religion as additional categories of people that can qualify as HDPs. MTN is concerned that broadening the definition of HDP in this fashion (and calculating HDP ownership on this basis) will prove immensely difficult for licensees, as licensees will be required to obtain private information from their shareholders pertaining to the sexual orientation and religion of that shareholders, together with disclosures relating to unfair

discrimination experienced prior to 1996. MTN believes that these disclosures are overly invasive and undermine the privacy rights of shareholders.

- **Telkom** further notes the amendment of the definition for 'historically disadvantaged persons' to align it with the amended definition in the Class Licensing Processes and Procedures Regulations, 2021. The proposed definition read as follows: "Historically Disadvantaged Persons ("HDP") – means women, 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. Telkom supports the alignment and harmonisation of the definitions in order to promote regulatory uniformity and thus certainty. However, it appears that the Draft Processes and Procedures Regulations are not aligned with the Authority's 2021 HDG Regulations. In terms of the 2021 HDG regulations, the HDG equity requirement is not applicable to class licensees (as per section 3(1) of the 2021 HDG regulations), although class licensees have to comply with a minimum B-BBEE Contributor Status Level as referred to in the 2021 HDG regulations. Further, in terms of the 2021 HDG regulations, in assessing Compliance with the HDG Equity Requirement contemplated in the regulations, the Authority will consider an individual licensee's shareholding structure to ascertain whether a minimum of 30% of the total ownership equity in that licensee is held by Black People; women, who are citizens of South Africa; people with disabilities, who are citizens of South Africa; and/or youth, who are citizens of South Africa. Accordingly, the Authority may take into account shareholding by Black People when assessing the HDG Equity requirement, and it will be problematic if Black People are excluded from the definition of Historically Disadvantaged Persons as proposed in the Draft Processes and Procedures regulations. Telkom therefore propose that the definition of Historically Disadvantaged Persons in the current Processes and Procedures regulations, 2010 (as amended) be retained as below: "historically disadvantaged persons" means South African citizens who are Black people, women or people with disabilities and that Black people are defined to include Africans, Indians and Coloureds."

- The definition for HDP in the Draft Processes and Procedures Regulations are not aligned with the Authority's 2021 HDG Regulations. Suggestion: The definition of Historically Disadvantaged Persons in the current Processes and Procedures regulations, 2010 (as amended) be retained as below: "historically disadvantaged persons" means South African citizens who are Black people, women or people with disabilities and that Black people are defined to include Africans, Indians and Coloureds."

2.2. (b) Decision by the Authority

The Authority has aligned the Regulations with Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDG) and the application of the ICT Sector Code, 2021 ("the HDG Regulations 2021"). and has accordingly deleted the definition as well as all references to HDP in the Regulations. The Regulations instead make reference to the HDG and the HDG Equity Requirement as per the ECA and the HDG Regulations. The Authority has by way of this amendment deleted the definition of Historically Disadvantaged Persons that was referred to in the 2010 Regulations.

2.3. The Definition of "Control"

After considering stakeholder input regarding the issues relating to the absence of clear guidelines as to what would constitute "control", the Authority sent correspondence to stakeholders who made written representations in response to the Regulations to solicit inputs regarding the insertion of the following definition for "control":

"A person controls a licence if that person:

(a) beneficially owns more than one half of the issued share capital of the Licensee, in the case of an ECS and ECNS licence and 20% in the case of a Broadcasting licence;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the Licensee, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;

(c) is able to appoint or to veto the appointment of a majority of the directors of the Licensee;

(d) is a holding company, and the Licensee is a subsidiary of that company as contemplated in section (3) (1) of the Companies Act, 2008(Act No. 71 of 2008);

(e) in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in the close corporation;

(g) has the ability to materially influence the policy of the Licensee in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)."

2.3. (a) Stakeholders' comments

MTN support the Authority's proposal that a definition be included in the draft regulations for "control". Furthermore, MTN agrees with the Authority's proposal to align the definition with section 12 of the Competition Act of 1998 (as amended). Subsection (a) of the proposed definition contains an adjusted shareholding for broadcasters, in that should a shareholder beneficially own more than 20% of the issued share capital of a broadcasting licensee, that shareholder would be deemed to have control of the broadcasting licensee. MTN submits that the adjusted shareholding pertaining to broadcasters seems arbitrary, and it is not clear what the rationale is for creating a distinction between broadcasters and other licensees.

MTN further submits that the Authority's intention may have been to cater for scenarios where a person might be able to materially influence the broadcasting licensee in a manner similar to that of a 51% shareholder even where the shareholder has a lower shareholding (e.g., 20%). MTN submits that the 20% limit for shareholders in broadcasting licensees at subsection (a) of the definition is unnecessary since this scenario is already provided for in subsection (g) of the Authority's proposal.

"(g) has the ability to materially influence the policy of the Licensee in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)."

In addition, there may be circumstances where a 20% shareholding in a broadcasting licensee does not, in fact, allow the shareholder to exercise any material influence over the broadcasting licensee (e.g.: a community broadcaster which is privately owned), and thus that shareholder would not actually have any control over the broadcasting licensee. In this case, subsection (a) would be prejudicial.

Therefore, MTN submits that the reference to 20% shareholding in broadcasting licensees be removed from subsection (a).

Telkom agree with the Authority's proposed use of the definition in the Draft Amendment Regulations regarding Process and Procedures in respect of Applications, Amendments, Renewals, Surrender and Transfer of Individual Licences of 2022, and have no further comments or amendments in respect of the definition.

ISPA argues that the proposal to utilise an amended version of the definition of "control" found in the Competition Act is therefore – in principle – welcome and supported. ISPA's view is that licensees and markets will benefit from the increased certainty which a clear definition will bring. ISPA indicates that it has no suggested amendments to the proposed definition, however has concerns about the lawfulness of inserting such a definition in a regulatory instrument but makes no submissions in this regard other than to request that the Authority explicitly consider whether its proposal can be lawfully implemented. ISPA argues that the best way to address the issue remains the insertion of an appropriate definition in the Electronic Communications Act 2005 ("the ECA").

ISPA assumes that this has been or will be raised with the Department of Communications and Digital Technologies. ISPA has noted precedent delivered by the Competition Tribunal and Competition Appeal Court relating to the interpretation of the Competition Act definition which will be helpful to licensees in understanding the approach taken by the Authority. The proposed definition must however be applied and interpreted within the context of the ECA. A major contextual difference is that the Competition Act and regulations thereunder

provide for notification thresholds. It is explicitly recognised that mergers and acquisitions involving smaller players generally do not trigger the jurisdiction of the competition authorities because such transactions have a limited impact on competition with an industry or industries and that there are no such mechanism exists in the ECA.

Again, this is an amendment to the ECA which the Authority may wish to consider for future implementation. In the interim, ISPA cautions the Authority against adopting an over-wide mandate in respect of transactions affecting the equity of licensees. 10. A final concern relates to the difference between control over a licensee and control over a licence, which ISPA has raised in prior submissions.

Primedia is of the view that the attempt, via correspondence addressed to certain individual stakeholders, to introduce a draft new definition of control (one not provided for to date in any regulation much less actual governing legislation) as proposed in the Letter, is in direct contradiction with the requirements of the ECA and of the ICASA Act, 2000 (the ICASA Act) as well as the Promotion of Administrative Justice Act, 2000 (PAJA).

Any attempt by ICASA to define control, if indeed ICASA has the discretion to do so by way of a regulation, must be the subject of a rigorous gazetted public notice and comment procedure with an appropriate period (certainly longer than seven calendar days) within which the public is invited to make its submissions.

Primedia submits that the proposals made by ICASA in the Letter are extremely contentious and are not settled law. In this regard:

- The 20% threshold proposed for broadcasting services has been the subject of, inter alia:
    - a High Court judgment and order, later rescinded with the consent of all parties; and
    - a complaint to the Complaints and Compliance Committee (the CCC) in which the CCC's own findings (case 391/2019) were rejected by the ICASA Council.
- **Primedia** submits that it is at a loss to understand the reference to Annexure A (Memorandum Regarding Control) which is said to be an annexure to the Regulations on Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Codes in the

ICT Sector1 (the HDG Regulations) and which it states (at paragraph 3.2 of the Letter) contains "the Authority's viewpoint on control". There is no Annexure A to the HDG Regulations. We assume that what ought to have been referenced is the Findings and Position Paper on the Enquiry into Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Codes in the ICT Sector2 (the Position Paper). In this regard:

- **Primedia** requested for a copy of Annexure A;
- **Primedia** notes that there was no agreement reflected in the Position Paper with ICASA's "bright line of 20%" shareholding constituting "control". Indeed, as is clear from paragraph 18.10 of the Position Paper, none of the broadcasters who made submissions, that is, Kagiso Media, Primedia, and Multichoice, supported the proposed 20% threshold. More significantly, both Primedia and Multichoice raised serious jurisdictional concerns about just such an approach. At paragraph 18.10.14 the Position Paper states:

  Multichoice and Primedia noted that "control" was not defined in the ECA and that a regulation cannot be used to interpret the Act under which it was made.

  The Position Paper further reflects Primedia's position (at paragraph 18.10.16) as follows:

  Primedia submitted that the word "control" as used in section 13(1) must be interpreted in its own right in line with the ordinary principles of statutory interpretation. On this basis, "control" should be interpreted in line with its ordinary meaning….Ultimately, this should be decided by a court.

- **Primedia** submits that ICASA, in the Position Paper did not appear to have taken cognisance of the very clear disagreement of all the broadcasting respondents who commented on these issues and Icasa indicated its intention to adopt a definition of control with a bright line threshold of 20% but failed to provide any basis for this position.

- **Primedia** is of the respectful view that the Position Paper developed in respect of a particular regulatory process cannot be relied on in an entirely separate regulatory process and we note that the HDG Regulations did not, in the end, contain a definition of control, whether of 20% of otherwise.

- **Primedia** argues that in any event, substantive submissions on the proposed definition of "control" of broadcasting licensees are, Primedia respectfully submits, not appropriate at this stage because what is critical are the processes and procedural questions that are animated by the proposal in the Letter. Notwithstanding the provisions of paragraph 4 above, each of the ECA, the ICASA Act and PAJA requires a gazetted Notice and Comment procedure for proposed regulatory provisions, including amendments. Primedia is concerned that the effect of the Letter is that ICASA is proposing a different process to that legislatively required by engaging in a non-public, non-gazetted, seven-day (and therefore too short) request for submissions from certain hand-picked stakeholders.

- **Primedia** respectfully submits that the proposed changes to the Draft Process Amendment Regulations set out in the Letter from ICASA must be gazetted for public notice and comment in accordance with the requirements of the ECA, the ICASA Act and PAJA, and we trust that ICASA will proceed to gazette the proposed amendment for public notice and comment and Primedia looks forward to participating in that process.

2.3. (b) Decision by the Authority

The purpose of the further consultation was aimed addressing some concerns raised by stakeholders relating to a lack of clear guidelines as to what would constitute control. While some stakeholders supported the insertion, the Authority noted inputs from stakeholders regarding the Authority's discretion to do so by way of regulation as well as the appropriate process which would need to be undertaken. As outlined in Annexure A to the Explanatory Memorandum to HDG Regulations, the Authority follows the approach to control set out in the Competition Act,

1998 and is also guided by Section 66 (5) of the ECA as it pertains to commercial broadcasting licenses. Notwithstanding, the Authority has decided to address the issues relating to the insertion of a definition of control by way of a separate process. This process will involve the consultation of the Minister in terms of section 3(9) of the ECA.

3. Amendment of regulation 4 of the Regulations:

Regulation 4 of the Regulations is hereby amended by the substitution of paragraph (c) of sub-regulation (1) for the following paragraph:

"(c) Form G: Application to transfer ownership and/or control of an individual Licence (Regulation 11);"

3 (a) Stakeholders comments

No comments were received from stakeholders for regulation 4.

3 (b) Decision by the Authority

Sub-regulation 4(1)(c) is amended to reflect: "(c) Form G: Application to transfer ownership and/or control of an individual Licence (Regulation 11);" so as to align it with section 13 of the ECA which, in addition to speaking transfer of an individual licence, also speaks about transfer of control in an individual licence.

4. Amendment of regulation 5 of the Regulations:

4.1. Regulation 5 of the Regulations is hereby amended by the substitution of sub-regulation (1A) for the following sub-regulation:

"(1A) Applicants must submit either one (1) soft copy of the original application electronically (e.g., email) or two (2) hard copies (including an original) of the application as well as a soft copy of the application using external storage device."

4.2. Regulation 5 of the Regulations is hereby amended by the substitution of sub-regulation (2) for the following sub-regulation:

"(2) Where any document is required in terms of these Regulations, it must be submitted to the Authority before 16h00 during working days. Further, if a document is submitted after 16h00, the document will be considered to have been received on the next day."

4(a) Stakeholders' comments

- **AME** points out that Regulation 5 (1A) does not make sense. According to AME, the amendment proposes that an applicant submit EITHER 1 soft copy of the original application "electronically (i.e., by email)" (which is already implied by the word 'soft') OR 2 hard copies (including an original) of the application AS WELL AS a 'soft' copy of the application using an external storage device.
- **AME** does not see the second option necessary. It argues that the second option is intended to afford persons without access to the internet the opportunity to make submissions on paper. AME asks the question why the Authority also requires a "soft copy" on an external storage device.
- **ISPA** welcomes and strongly supports the proposed amendments to sub-regulation 5(1A).
- **Cell C** is in support of the proposed amendment. Cell C provides that it supports the fact that licensees will have the option to apply either electronically or physically.
- **Telkom** welcomes the provision for submission of applications electronically as proposed in the amended sub-regulation 5(1A). Telkom have some concerns with regards to the amendment of sub-regulation 5(2) to provide that if a document is submitted after 16h00, the document will be considered to have been received on the next day. There are instances where a submission is made a few minutes late due to circumstances beyond the control of the licensee such as technical glitches which we may experience during submission. We propose that in these circumstances, the licensee be permitted to request the Authority to consider acceptance of the document as within the deadline. The Authority may then decide whether or not to grant the license an indulgence. We propose the addition of sub-regulation (3) below: *(3)*

Notwithstanding regulation 5(2) above, where any document required in terms of these Regulations is submitted after 16h00 due to circumstances beyond the control of the licensee, an Applicant shall be permitted to raise such circumstances to the Authority and the Authority shall decide whether to accept the submission as being filed timeously.

4 (b) Decision by the Authority

The Authority notes stakeholders support of the proposed amendments outlined in Regulation 5 (1A). This insertion is aimed at streamlining the application submission process, making allowance for electronic submission where physical submission is not possible. Regulation 5(2), the aims to clarify instances of uncertainty regarding when a document is deemed to be received in instances of late submission. The Authority is not persuaded by stakeholders' submissions that provision should be made for submissions received after the cut-off time as this would result in the abuse of the Regulations. Stakeholders are provided with adequate time to prepare submissions and/or provide documents which may be required from time to time and must ensure that they have taken the necessary steps to comply with the prescribed time periods. The Authority accordingly maintains the proposed amendments to Regulations 5 (1A) and 5(2) as published.

4.3. Amendment of regulation 5(5A) in the Regulations

The following regulation is hereby amended by the substitution of regulation 5(5A) of the Regulations with the following:

"5A. The Authority will not consider any application if the Applicant is in arrears with respect to any fees and/or is not compliant with any other applicable regulations or the Act."

4.3 (a) Stakeholders' comments

- **AME** states that Regulation 5(5A) unfortunately does not make sense either. It provides that ICASA does not have to consider an application if the applicant "is in arrears with fees…. AND/OR is not compliant with any other applicable regulations or the Act". AME points out that legally, the second criterion is incapable of application unless ICASA has taken a decision under section 17 of the ICASA Act to refer a licensee to the Complaints and Compliance Committee ("CCC") and has taken a decision following their recommendations, that the licensee is non-compliant. AME argues that if this process highlighted above is not followed, it might be possible for any unit within ICASA to randomly assert that a licensee is not compliant with something (which could be of the least important nature), and therefore that ICASA will not consider an application by that licensee. According to AME, this would obviously be unfair and unreasonable. AME states that the explanatory memorandum provides at paragraph 1.5.3 that this amendment is "*to ensure that Applicants/Registrants are in overall compliance with the relevant Regulations as well as to streamline requirements for applications/Registrations*". This is not correct. These Amendments are in relation to regulations applying to individual licensees. There are no "registrations" or "Registrants" in the context of individual licensees. This term only applies to only class licensees and this Regulation doesn't deal with class licensees.

- **ISPA:** ISPA requests that the Authority amend the proposed sub-regulation 5(5A) to make it clear that the Authority will not consider any application only where a finding of non-compliance has been made by the Complaints and Compliance Committee (CCC) and remains unremedied or not complied with by the Applicant. The correct language to be used is as is set out in the proposed Regulation 12, subject to the submissions made below in respect of that Regulation.

  "5(5A). The Authority will not consider any application if the Applicant has not complied with one or more of the following: (a) where the Licensee has been found guilty of a contravention by the CCC and has not complied with the order by the Authority in terms of section 17 of ICASA Act; or (b) where the Licensee is in arrears with respect to any fees."

- **Primedia** proposes Regulation 5A to read as follows: *"The Authority will not consider any application if the Applicant is in arrears with respect to any fees and/or the Complaints and Compliance Committee has found the Applicant to be (is) not compliant with any other applicable regulations or the Act".* Primedia put an emphasis on ruling of the CCC and not merely upon the say so of a licensing officer of ICASA, as stated below: "It is critical to stipulate that this must be contingent upon a finding of non-compliance with other applicable regulations or the Electronic Communications Act, 2005 (Act) by ICASA's Complaints and Compliance Committee and not merely upon the say so of a licensing officer of ICASA."
- **Vodacom** propose the following amended wording for consideration. *"The Authority may decide not to consider any application if the Applicant is in arrears with respect to any fees and/or is not compliant with any other applicable regulations or the Act. In making the decision, the Authority will take into account the materiality of the non-compliance, reasons for non-compliance and steps taken by Applicant to rectify such non-compliance"*
- While Vodacom agrees that Licensees should be compliant with relevant regulations, disqualification of an applicant may be harsh and disproportionate if non-compliance is immaterial, or Applicant has taken steps to rectify non-compliance.

4.3 (b) Decision by the Authority

Having regard to stakeholder inputs, The Authority has amended Regulation 5(5A) to emphasise that findings of non-compliance by the Authority will be preceded by a recommendation by the CCC.

5. Amendment of regulation 10 of the Regulations:

Regulation 10 of the Regulations is hereby amended by the deletion of paragraphs (a) and (b) of sub-regulation (3).

5 (a) Stakeholders' comments

Primedia proposes a deletion of paragraphs (a) and (b) of sub-Regulation 10 (3). Primedia notes the proposed deletion, however states that it is critical to point out

that the whole of Regulation 10(3) be deleted. Suggests it reads as follows: "*Regulation 10 of the regulations is hereby amended by the deletion of [paragraphs (a) and (b) of] sub- regulation (3)".* In the current form*, 10(3) will read as follows: (3) An application for the renewal of a licence must further set out full particulars of:(a) deleted; and (b) deleted., leaves licensees in doubt as to what full particulars are required, causing confusion to the Applicant – so delete in toto.*

Vodacom submit that it would not make sense to delete paragraphs (a) and (b) without deleting the paragraph.

5 (b) Decision by the Authority

The Authority agrees with the proposals from stakeholders and has accordingly deleted regulation 10 (3) in its entirety.

6. Amendment of regulation 11 of the Regulations:

6.1. Regulation 11 of the Regulations is hereby amended by the substitution of paragraph (a) of sub-regulation (2) for the following paragraph:

"(a) publish a notice in the Government Gazette and the Authority's website of the application to transfer the Licence;"

6.2. Regulation 11 of the Regulations is hereby amended by the substitution of sub-regulation (3) for the following sub-regulation:

"(3) The Authority will not consider an application if the licensee is in arrears with respect to any fees and/or is not compliant with any other applicable regulations or the Act."

6 (a) Stakeholders' comments

- **AME** states that **Regulation 11(2)** gives ICASA the option, in its discretion, and "*as a matter of procedural fairness*", to publish notices of applications to transfer licences, invite interested persons to make submissions, and so on (sub-regulation 11(2)(a) to (d)). AME points out that it considers it so important to ventilate all applications made to it – in the public interest and believe this regulation should indicate that ICASA will, in all cases, publish the notices of applications to transfer licences. AME submits that Regulation 11(3)

uses the phrase "AND/OR". According to AME, this phrase does not provide certainty and it allows for the exercise of discretion by ICASA without any point of reference or explanation.

- **ISPA** submit that with regard to the proposed sub-regulation 11(3), ISPA refers to its comments above relating to sub-regulation 5(5A). If it is the intention of the Authority that this proposal applies to all applications, then it should include this as a separate regulation rather than repeating it in respect of each form of application.

- **Primedia** suggests that proposed section/regulation 11(3) is amended to reads as follows: *"The Authority will not consider any application if the Applicant is in arrears with respect to any fees and/or the Complaints and Compliance Committee has found the Applicant to be [is] not compliant with any other applicable regulations or the Act".* Primedia thinks it is critical to stipulate that this must be contingent/subject upon a finding of non-compliance with other applicable regulations or the Act by ICASA's Complaints and Compliance Committee and not merely upon the say so of a licensing officer of ICASA.

- **Telkom** notes the proposed amendments in respect of regulations 11 and 12. Telkom have no difficulty with the Authority publishing a notice of an application to transfer a licence on its website as well as in a Government Gazette as contemplated in regulation 11(2)(a) or the publication of an ITA on the Authority's website and the lodging of applications through an online process. Telkom notes that in terms of the proposed subregulation 11(3), the Authority will not consider any application, "if the Applicant is in arrears with respect to any fees and/or is not compliant with any other applicable regulations or the Act." Telkom is of the view that subregulation 12(a), which states that the Authority may refuse to renew or transfer a licence if the licensee has been found guilty of a contravention by the CCC and has not complied with the order by the Authority in terms of section 17 of the ICASA Act, is sufficient. This clause provides legal certainty as it requires a finding of non-contravention by the CCC and an order by the Authority as contemplated under section 17 of the ICASA Act. The insertion of subregulation 11(3) to

afford the Authority the right to refuse an application relating to a licence if a licensee is in arrears with any fees, and/or is not compliant with any applicable regulations or the ECA is overly broad. The same argument applies to subregulation 12(b) which also cites non-compliance with the Compliance Procedure Manual Regulations as a basis for refusing an application relating to an individual licence. While Telkom does not have a difficulty that the Authority refused an application relating to a licence where the applicant is in arrears with fees due and payable to the Authority, we are of the view that the remainder of the proposed amendment should be deleted. The proposed clauses provide only a general reference to a contravention without referring to a finding by a decision-maker such as ICASA or the CCC. While Telkom appreciates that the Authority intends to ensure compliance with all regulations under the ECA, non-compliance should be stipulated as being pursuant to findings of such non-compliance by the Authority and / or the Complaints and Compliance Committee. Further, each regulation published by the Authority has its own clauses dealing with contraventions, and it is not conducive to legal certainty to tie the contravention of any other regulation or the ECA as a whole, not the right of ICASA to refuse an application to amend, transfer or renew a licence. In addition to this, reference to the Compliance Procedure Regulations seem misplaced as the latter regulations prescribe reporting formats for other regulations, while the Draft Processes and Procedures Regulations already prescribe a reporting format specific to the regulations, in Schedule 1. Telkom therefore proposed the following amendments to subregulation 11(3) and 12(b). 11(3): *The Authority will not consider any application if the Applicant is in arrears with respect to any fees*." 12(b): *The Authority may refuse to renew or transfer a Licence if the Licensee is in arrears with respect to any fees*." Telkom submits that "**Not compliant**" and "**Not Compliance**" on the amendment sub-regulations 11(3) and 12(b) generally reference to a contravention without referring to a finding by decision-maker. Telkom suggest the following wording: *11(3): The Authority will not consider any application if the Applicant is in arrears with respect to any fees." 12(b): The Authority may refuse to renew or transfer a Licence if the Licensee is in arrears with respect to any fees."*

- **Vodacom** suggest the following wording: *3) The Authority may decide not to consider an application if the licensee is in arrears with respect to any fees and/or is not compliant with any other applicable regulations or the Act. In making the decision, the Authority will take into account the materiality of the non-compliance, reasons for non-compliance and steps taken by Applicant to rectify such non-compliance"*

6 (b) Decision by the Authority

The amendment of Regulation 11 sub-regulation (2) (a) of aims to provide stakeholders with an additional platform to access the applications received by the Authority.

The Authority has considered the views of stakeholders in relation to sub regulations 11 (3) wherein it was stressed that non-compliance should be determined in terms of Section 17 E of the ICASA Act and has accordingly revised the sub regulation as follows:

(3) "The Authority will not consider any application if the Applicant is:

(a) in arrears with respect to any fees due and payable to the Authority;

(b) found to be non-compliant by the Complaints and Compliance Committee ("CCC") with regards to the applicable regulations and/or the provisions of the Act and has failed to remedy the non-compliance ."

The amendment is aimed at emphasising that a finding that a licensee is non-compliance would be made by the Authority following a recommendation by the CCC.

The Authority noted that regulation 11(3) and (4) in the 2016 regulations were not in numerical order. The Authority has accordingly rectified this error by way of these amendment regulations. The reference to HDP in 11 (4) (c) has been amended to align with the ECA and HDG Regulations as outlined in paragraph 2.2 (b) of the Reasons Document above.

7. Substitution of regulation 12 of the Regulations:

7.1. The following regulation is hereby substituted for regulation 12 of the Regulations:

"The Authority 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 of a contravention by the CCC and has not complied with the order by the Authority in terms of section 17 of ICASA Act;

(b) where the Licensee is in arrears with respect to any fees and/or is not compliant with any other applicable regulations or the Compliance Procedure Manual Regulations or the Act; or

(c) where the ownership and control of the Transferee (in a transfer application) or Applicant (in a renewal application), by historically disadvantaged persons is less than the percentage prescribed by the Act and the Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDGs) and the application of the ICT sector code, 2021."

7 (a) Stakeholders' comments

- **AME** submits that Regulation 12 requires amendment so that each reference to "transfer" also includes a reference to "*or transfer of control of*". AME states that regulation 12(2), inserted in the 2018 amendments, ought to be removed in light of the publication of the Ownership Regulations, 2021 (defined above). This is because they are at odds with ICASA's most recent amendments to exclude from the definition of "B-BBEE Contributor Status Level" any reference to Statement 102 and other deeming provisions in relation to ownership which are included in the ICT Sector Code. AME submits that Regulation 12(b) refers to the "Compliance Procedure Manual Regulations" in (b) but this reference is not defined. AME states that in fact, it does not know why these regulations are referred to specifically as the words, "any other applicable regulations" are adequate to include the "Compliance Procedure Manual Regulations" and the specific reference can therefore be deleted. Further, AME states that the sub-

regulation also refers to "or the Act", so it is impossible to tell which of the 3 options (applicable regulations, the Compliance Procedure Manual Regulations, OR the ECA) ICASA is likely to choose – creating further uncertainty. AME points out that Regulation 12(c) refers to "the percentage prescribed by the Act AND the Regulations in respect of the Limitation of Control and Equity Ownership by historically disadvantaged groups and the application of the ICT Sector Code, 2021". According to AME, this is not workable.

- **ISPA** submits that a licensee can only be in a state of non-compliance with applicable regulations if such a finding has been made by the CCC. The proposed sub-regulations 12(a) and 12(b) are contradictory in this regard. ISPA requests consideration of the following amendment:
  "12. The Authority may refuse to renew or transfer a License if the Licensee has not complied with one or more of the following:
  (a) where the Licensee has been found guilty of a contravention by the CCC and has not complied with the order by the Authority in terms of section 17 of ICASA Act;
  (b) where the Licensee is in arrears with respect to any fees; and/or is not compliant with any other applicable regulations or the Compliance Procedure Manual Regulations or the Act;
  (c) where the ownership and control of the Transferee (in a transfer application) or Applicant (in a renewal application), by historically disadvantaged persons is less than the percentage prescribed by the Act and Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDGs) and the application of the ICT Sector Code, 2021."

- **Primedia** notes the proposed substitution of regulation 12 (b) of the 2010 Regulations, but thinks it is critical to stipulate that this must be contingent upon a finding of non-compliance with other applicable regulations or the Act by ICASA's Complaints and Compliance Committee and not merely upon the say so of a licensing officer of ICASA and is in any event unnecessary given the existing provisions of 12(a) of the 2010 Regulations. Primedia suggests that proposed **Regulation 12(c)** be amended to read as follows: *"The following regulation is hereby substituted for Regulation 12(c) of the*

*Regulations: "Where the ownership and control of the Transferee (in a transfer application) or Applicant (in **the** renewal application), by historically Disadvantaged persons is less than the percentage prescribed and the Act and the Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDGs) and the application of the ICT sector code, 2001".*

Telkom supports the amendment of sub-regulation 12(1)(c) which does attempt to align the Draft Processes and Procedures regulations with the 2021 HDG regulations. The sub-regulation provides that the Authority may refuse to renew or transfer a licence where the ownership and control of the Transferee (in a transfer application) or Applicant (in a renewal application), by HDPs is less than the percentage prescribed by the Act and the Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDGs) and the application of the ICT sector code, 2021.

7 (b) Decision by the Authority

The Authority has similarly taken the views of stakeholders in terms of regulations 12(1) (b) and 12 (c) and has revised them as published in the regulations. The Authority has amended the requirements in relation to regulation 12 (1) (c) to align the provisions with the HDG Equity Requirement as prescribed in the Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups. ("HDG Regulations")

The Authority has decided to retain regulation 12 (2), as it provides an explicit process for the transfer applications lodged by wholly owned state entity.

8. Substitution of regulation 13 of the Regulations:

The following regulation is hereby substituted for regulation 13 of the Regulations:

"**13 Surrender of an individual Licence (section 12 of the Act)**

(1) A licensee may surrender its Licence by submitting a notice as set out in Form I.

(2) The notice referred to in sub-regulation (1) must be submitted in no less than ninety (90) days prior to the date determined by the licensee, on which the surrender of its licence will take effect and on which it will cease to provide the services in respect of which the licence was granted.

(3) A Licensee may not cease providing services prior to having submitted a notice for the surrender of its licence to the Authority.

(4) A licensee that intends to surrender its licence must take appropriate steps to inform its end-users/listeners/viewers of its intention to cease providing its services two (2) months prior to the cessation of such services. The abovementioned notification to end-users/listeners/viewers and contemplated period shall take place within the ninety (90) days as set out in sub-regulation (2).

(5) All amounts due and payable to the Authority must be paid within one calendar month of the date on which the service provided in terms of the licence is discontinued, except where the Authority, upon the request by the licensee and on good cause shown, extends the said time in this regard."

8 (a) Stakeholders' comments

- **AME** states that it agrees with the amendment proposed to Regulation 13 which deals with surrender of a licence.

- **ISPA** submits that the proposed provisions do not take into account the commercial realities which are often present when a licensee decides to surrender a licence. In most cases the surrender will be a result of commercial stress which does not afford a licensee an opportunity to provide 90 days' notice to the Authority.
- A licensee in this position will not be able to comply with the requirements set out in sub-regulation (1) – (4).
- It is further the case that a large number of surrenders to do not involve the cessation of licensed services. This occurs, for example, where Licensee A surrenders its licence when it is being acquired by Licensee B: it is the intention of the parties that service provision will continue seamlessly utilising the licence of Licensee B. In these circumstances there is no need to communicate to end-users that there will be a cessation of services.

- **Telkom** does not have a difficulty with the addition to provide that a licensee that intends to surrender its licence must take appropriate steps to inform its end-users/listeners/viewers of its intention to cease providing its services two (2) months prior to the cessation of such services.

8 (b) Decision by the Authority

The Authority has considered submissions which relate to the adequacy of the 90 days (days as defined in the ECA) notification period wherein the arguments are that the 90-day notification period does not take into "account the commercial realities" when a licensee surrenders their licence.

The Authority is of the view that the period of notification had to take into account various factors, including customers/listeners/viewers. The amendment serves to protect customers/listeners/viewers by providing timelines within which the licensee must (1) inform customers/listeners/viewers of its intention to cease operations and (2) within that timeframe to address and resolve customers/listeners/viewers concerns regarding their services.

It would be undesirable to enable an environment wherein a licensee "closes shop" leaving customers/listeners/viewers in the lurch. Therefore, to mitigate against such, the Authority has placed a notification period which it deems sufficient for a licensee to wind up and address all its requirement and obligations in terms of its licence terms and conditions.

The rationale for one calendar month in respect of payments is premised on how debtors are aged in terms of the International Financial Reporting Standards.

9. Amendment of regulation 14A of the Regulations:

9.1. Regulation 14A of the Regulations is hereby amended by the substitution of sub-regulation (2) and (3) for the following sub-regulation:

"(2) A licensee must submit the notice within fourteen (14) working days of the change occurring where:

(a) name, and/or trading name or contact details of the licensee changes; (Legal to advise)
(b) Type of the service/s provided in terms of the licence (only applicable to ECS and ECNS);
(c) shareholding (Refer to 14 (C) below);
(d) Principal place of business; and
(e) Postal address.

(3) A notice submitted to the Authority in terms of sub-section (2), outside the prescribed 14 days, must be accompanied by a fee as may be determined by the Authority from time to time."

9.2. Regulation 14A of the Regulations is hereby amended by the addition of the following sub-regulation:

"(4) The name and\or trading name of the licensee may not be changed to the extent that it may conflict or be confused with the name and \or trading name of another licensee."

9. (a) Stakeholders' comments

- **AME** points out that the amendment to regulation 14A does not align with the requirements in the Standard Terms Regulations at regulation 2 in that these Regulations state that regulation 14A only applies to ECS and ECNS licensees where the nature of the services changes (sub-regulation (b)). In the Standard Terms Regulations, the changes appear to be included in relation to broadcasting services as well – putting these two Regulations in conflict with one another. Please advise which services the Regulations are intended to apply to**.**

- **Cell C** recommends that Regulation 14 (A) (2) be aligned with regulation 2(1) of the Standard Terms and Conditions for Individual Licences regulations, which deals with written notice of change. Cell C recommends that regulation

14A should only consist of subsection c. Cell C submits that the alignment is necessary to avoid duplication of efforts when a licensee submits notification of changes. Cell C recommends that on Regulation 14 (A) (3), the time within which to submit a notification should be 20(twenty) business days as opposed to the proposed 14(fourteen) days. Cell C notes further that section 5(7) of the ECA does not provide for the prescription of fees for late notification. Cell C submits that the reason for the proposed 20(twenty) days is that it would provide licensee sufficient time to submit written notice and therefore remove the need to impose a penalty fee for missing the 14-day period.

- **Primedia** notes that the proposed change in section14A (4) but thinks it is important to clarify that the name and/or so-called trading name of a Licensee) has nothing to do with the name of the broadcasting service which is operated by the Licensee. It is important to clarify that 14A(4) is not about name change of a station, but name change of the Licensee. ICASA's Complaints and Compliance Committee (CCC) recently held in Kagiso and Primedia vs Classic FM (Cases 427 and 423/2021) the change of name of a station requires a licence amendment application (at paragraph [31]) and so we think it imperative that the Draft Amendments specify that section 14A (4) does not relate to the change of name of a station but only to the change of name of the Licensee. Case of Classic FM thought that 14A (4) argued that trading name of the Licensee is effectively the station name. Illustration made by the CCC ruling of the said case, ruling [31] A station is a completely separate entity from a licensee as can be illustrated by a licensee such as the SABC which operates a number of radio stations, for example Metro FM, SAFM and others. Each of these stations is obliged to clearly identify itself on air by its name at intervals of not more than 30 minutes. Should SABC decide to change its name, changing that name would require it to "notify" ICASA. However, changing the name of Metro FM, or any of its other stations, for instance, would require the licensee to make an application to ICASA for an amendment to the licence. In that regard name change of the Licensee requires a notification and for change of name of the Licensee's trade name is an amendment application. Primedia suggests that Regulation 14A (4) be amended to reads as follows: (4) "*The name and/or trading name of the Licensee (note that this is not the name of the broadcasting service/station name, a change to which requires a licence*

amendment application), may not be changed to the extent that it may conflict or be confused with the name and/or trading name of another licensee".

- **Telkom** note the additional time for submission of a change of information, lengthened from 7 to 14 days. As to the prescribed fee that will apply if a submission is made outside the period, Telkom propose guidelines as to how the fee will be determined and that licensees have the opportunity to make submissions regarding late submissions outside of their control.
- **Vodacom** request clarity on 14 (A), as is unclear what us meant by the "type of the service/s" that is provided by ECS and ECNS licensees, since all services provided by such licensees would be ECS and/or ECNS services. Given that the licences are technology neutral.

9.(b) Decision by the Authority

The Authority has decided to maintain the 14 (fourteen) days (days as defined in the ECA) after considering the feedback from stakeholders.

The Authority has decided to delete the provision relating to trading name (i.e the reference to trading name in Regulation 14A(2) (a)). Changes relating to trading name (i.e the station name of a licensee must be processed by way of an amendment application in accordance with Section 10 read with Regulation 9 of the Individual Processes and Procedures Regulations. This position has been affirmed by the High Court in the matter between *Hot 1027 FM Pty Ltd and ICASA and others*[1] wherein the court held that the licence terms and conditions, which include the name station, fall outside Regulation 14(A) and must, therefore be amended in accordance with the procedure prescribed in section 10(2) read with section 9(2) to (6) of the ECA.[2] The Authority has also deleted the addition of Regulation 14 A (4).

[1] Case no 2358/2022 in the High Court of South Africa, Gauteng Division, Pretoria
[2] *Ibid para* 80.

10. Insertion of regulation 14B in the Regulations

The following regulation is hereby inserted in the Regulations:

(1) In the event that a licensee makes changes to its shareholding, the licensee must submit along with its notification (Form O), an Affidavit detailing:

(a) Current shareholding;

(b) Proposed changes in shareholding; and

(c) Past shareholding changes since the issuance of the licence.

(2) If the Authority determines that the submitted changes amount to changes in ownership/transfer of control, the Licensee will be instructed to make a submission in line with regulation 11 read with regulation 12.

(3) If the Authority determines that the submitted changes do not amount to changes in ownership/transfer of control, the Licensee will be instructed to make a submission in line with regulation 14 (A).

10 (a) Stakeholders' comments

- **AME** submit that the insertion of a new regulation 14B (which should probably be numbered 14B) is not aligned with sections 2(y) and (z) of the ECA.

- **ISPA** submit that it has made submissions on the proposed new process relating to changes of shareholding in its response to the invitation to comment on Draft Amendments to the Standard Terms and Conditions for Individual Licences published by the Authority on 23 March 2022 ("the Draft Standard Terms and Conditions Regulations"). In the explanatory memorandum to the Draft Standard Terms and Conditions Regulations the Authority states the following:

  "It has been noted that the notification process is susceptible to abuse or incorrectly applied to the extent that it alters or changes ownership. Through a notification the Authority is unable to sufficiently monitor and manage the change in the shareholding specifically to the extent that it changes ownership and control over time. Any shareholding changes have the effect of changing the shareholding structure of that entity and such changes may conflict with

the objectives and mandate of the Authority as found in the ECA. Thus, the process of any changes in shareholding will be subject to approval by the Authority and will be guided and prescribed in the Process and Procedure Regulations for Individual Licences."

- The Authority's position that "any change in shareholding will be subject to approval by the Authority" is in direct conflict with section 13 of the ECA. Where a change in shareholding does not amount to a change in control then ICASA's approval is not required. The Authority points to abuse by licensees when the core reason for the difficulties currently being experienced are directly due to the failure of the Authority to lay down clear guidelines for licensees as to what will constitute a transfer of control over a licence (something which the Authority has publicly recognised).
- The Authority has further failed to respond to licensees who have submitted a notification of a change of shareholding several years ago in circumstances where the Authority may consider an application for transfer of control to have been the correct procedure.
- As a result, there are numerous licensees facing referral to the Complaints and Compliance Committee (CCC) or which have already been ordered to reverse transactions entered into more than five years ago. The Authority is still not offering clear guidelines on what constitutes a transfer of control over a licence: rather it seeks to introduce an internal process during which an internal determination will be made regarding whether a transfer of control is contemplated in a transaction or across a series of transactions.
- Neither the Draft Amendment Regulations nor the Draft Standard Terms and Conditions Regulations provide any insight into the basis on which the Authority will make such determination. No indication is given as to the time in which the determination will be made. The length of time taken by the Authority to process applications for transfers of control over an individual licence is already completely at odds with commercial reality. The law applicable to what constitutes a transfer of control in an entity can be extremely complex and it is commonplace for licensees to consult with senior counsel for guidance when considering changes in ownership. This is particularly the case where a licensee has institutional investors that exit according to their own investment mandates.
- The following submission on this point was received from an ISPA member:

- *The proposed process regulations, rather than assisting in the path to compliance will hamper companies conducting the ongoing management of their business and shareholders in achieving their compliance objectives. There are many cases where small or large transactions are necessary, efforts to improve their B-BBEE compliance through forming employee share option programmes, requirements to buy back shares where a shareholder has to exit, the sale of shares where an estate of a shareholder is required in the execution of the estate, sales to empowered shareholders to increase the companies HDG equity holding to meet compliance requirements, and any other share transactions that shareholders may need to do in the course of business. The proposed process regulation hampers rather than encourages.*
- ISPA calls on the Authority to:
    - Undertake a process to develop clear guidance for licensees on the factors which it will take into account in determining whether a change of shareholding amounts to a transfer of control.
    - Taking into account the confusion which has been a feature of transfers of control over licences, exercise regulatory forbearance by declaring a limited period amnesty to licensees seeking to update records of their shareholding with the Authority. This would require the Authority to forego referral of such licensees to the CCC for non-compliance, subject to such licensees making application to ICASA for approval for any transfer of control that has already occurred.
- The proposal that the Authority may determine a "fee" for late notifications is not supported as this is not a fee but a penalty.
    - The Authority maintains that this fee is intended to deter licensees from submitting late notifications and to promote the integrity of the Authority's database and records.
    - No guidance is provided as to the proposed amount of this fee.
    - ISPA understands that administrative fees charged by the Authority must be related to the cost incurred: the lateness of a submission does not result in additional costs so there is no cost-based justification for the proposal.
- ISPA notes that sub-regulation requires a licensee to notify the Authority where "[T]ype of the service/s provided in terms of the licence (only applicable to ECS and ECNS)".

- ISPA does not understand this sub-regulation. An IECS licence specifies that a licence may provide ECS of national scope, it does not break this down into the type of ECS (e.g., voice or Internet access).
- An IECNS licence specifies that a licensee may provide ECNS of national scope, it does not break this down into the medium over which ECNS is provided (e.g., fibre or fixed or mobile spectrum).

- **MTN** submit that the substitutions of regulation 14C are undesirable in its current form. MTN states that the Authority has not prescribed any timelines which will be applicable to its consideration of whether the change in shareholding communicated to the Authority amounts to a change in ownership or control, or not. This means that the Authority is under no obligation to communicate its decision in this regard within certain timeframes. Consequentially, the absence of clearly communicated or prescribed timeframes has the potential to place changes in the ownership of shareholders in limbo. MTN proposes that the regulation should include timeframes in which the Authority will communicate its decision to Licensees, such timeframes should not exceed a period of two weeks from receipt of change of notification. The Draft Regulations do not set out the framework of factors that will be considered by the Authority in determining whether a change in shareholding amounts to a change in ownership/control.

- **MTN** state that the substitutions of regulation 14C may be in conflict of the powers of the Authority. Unless the transaction constitutes a change of control of the licensee, the ECA contains no empowering provision that would allow the Authority to involve itself in transactions between shareholders of a Licensee and third parties. It is unclear on which empowering provision the Authority relies on to exercise its' power, to approve (or consider) every share transaction concluded by the shareholders of licensees. The absence of such an empowering provision leaves the Draft Regulations susceptible to judicial review.

- **MTN** further submit that the substitutions of regulation 14C provide no remedies for recourse. There is no internal mechanism or remedy by which a licensee may readily query or challenge a decision by the Authority, that a

change in shareholding amounts to a change of control (in instances where the licensee disputes that a change of shareholding amounts to a change of control of a licensee). The absence of such an internal mechanism infringes on a number of administrative rights as well as eroding legal and administrative consistency and predictability, which is a necessary component for the development of the ICT sector.

- **MTN** concludes by saying that the substitutions of regulation 14C are inconsistent with the administration of public entities**.** The proposed amendments in the Draft Regulations would be overly burdensome on all licensees that are public companies. Public companies (whose shares are freely tradeable by members of the public), would be required to notify the Authority of every share transaction, which is an onerous and impossible administrative burden.

- **Telkom** note that reference is made to sub-regulation 14C regarding notification of changes in shareholding in regulation 14A and is concerned regarding the amended sub-regulation 14C(1) which provides that a licensee must, in the event that it proposes changes to its shareholding, however minute, submit to the Authority, prior to implementing the proposed changes, a letter detailing current shareholding; proposed changes in shareholding; and past shareholding changes since the issuance of the licence. Telkom as a publicly listed company trades shares on a daily basis held by minor shareholders in the free float and by major shareholders such as institutional investors. As publicly listed JSE companies undergo changes to their shareholding on a daily basis, such notification would not only be cumbersome but also practically impossible. With regards to a change in the free float stock (shares traded daily), we propose that only significant reductions be notifiable. With regards to shareholding held by institutional investors, we propose that notification should be aligned with JSE Stock Exchange rules, so that only significant share movements triggering SENS announcements should be noted to the Authority for example assess changes to HDG equity, not movements in normal course of trade. Telkom submits that as publicly listed JSE companies undergo changes to their shareholding on a daily basis, such notification would not only be cumbersome but also practically impossible.

- **Telkom** further note that the proposed amendment to sub-regulation 14C(2) provides that if the Authority determines that the submitted changes amount to changes in ownership/transfer of control, a licensee will be instructed to make a submission in line with the application of transfer of an individual licence as contemplated in amended regulations 11 and 12. If the Authority determines that the submitted changes do not amount to changes in ownership/transfer of control, the licensee will be instructed to submit an application for change of information. There are no timelines for the Authority to revert as to whether it considers a change in shareholding a transfer of control/ownership. It is also unclear whether this transfer of control/ownership is aimed at a change in HDG and / or B-BBEE equity as referred to in the 2021 HDG regulations. The Explanatory Memorandum offers no explanation for the proposed changes but simply repeats the proposed amendment. Telkom submits that there are no timelines for the Authority to revert as to whether it considers a change in shareholding a transfer of control/ownership.
- Furthermore, Telkom submits that Changes in shareholding (regulation 14C) of the 2021 HDG regulations provides that the licensee shall notify the Authority where a transfer or multiple transfers over 24 months results in a decrease of the number of shares held by HDGs or Black People of 5% or more of the issued share capital of a licensee and / or dilution of rights attaching to those shares. We propose that the Processes and Procedures regulations align with the 2021 HDG regulations and that licensees are only obliged to report a transfer or multiple transfers over 24 months which result/s in a decrease of the number of shares held by HDGs or Black People of 5% or more of the issued share capital of a licensee, and that any other change in shareholding does not require notification. Further, in terms of the Threshold for Major B-BBEE Transactions gazetted by the Minister of Trade and Industry in Government Gazette 40898 of 9 June 2017, the threshold for major B-BBEE deals to be registered with the B-BBEE Commission is R25 million. This illustrates the necessity for thresholds to ensure that reporting by licensees is aligned with the intended purpose of relevant legislation and regulations. The 2021 HDG regulations provides that the licensee shall notify the Authority where a transfer or multiple transfers over 24 months results in a decrease of the

number of shares held by HDGs or Black People of 5% or more of the issued share capital of a licensee and / or dilution of rights attaching to those shares.

- With regards to prior approval for changes in shareholding, a distinction should further be made between a change in the free float stock and a change in the shareholding held by institutional investors. Only significant reductions in BEE equity due to changes in free float while with regards to institutional shareholding, while any changes in institutional shareholding resulting in a reduction of BEE equity should be aligned with JSE Stock Exchange rules. Government ownership should also be taken into account when determining HDG equity ownership. Telkom submits that Government shareholding is different from private sector shareholding or individual equity ownership, as dividends earned by government are paid into the National Revenue Fund towards the support of government objectives, including promotion of B-BBEE and HDGs.

- **Vodacom** propose adding sub-regulation (4), for the Authority's consideration: "(4) The determination referred to in (2) and (3) above will be made within thirty (30) days of the Licensee notifying the Authority of the proposed changes referred to in (1). The proposed changes would be deemed not to amount to changes in ownership/transfer of control, if the Authority has not responded to the contrary within the thirty (30) days' timeframes."

- **Vodacom** submits that the Authority commits to a reasonable timeframe within which it will consider any proposed changes by the licensee in the licensee's shareholding in order to mitigate against unnecessary time delays in executing the proposed changes. And that such changes be deemed not to amount to changes in ownership/transfer of control, if the Authority has not responded within this timeframe, and dealt with in accordance with 14 (A).

- **Vodacom** propose following amendment "*(1) In the event a licensee proposes and has control with respect to the changes to its shareholding, however minute, the licensee must submit to the Authority, prior to implementing the proposed changes, a letter detailing:" Licensee may not be in control of changes to its' shareholding – for example when a Licensee is a listed entity*

on the JSE and its shares publicly traded. The Authority must also consider whether the requirement for licensees to annually report requirements imposed in terms of the Regulations in respect of the limitations of control and equity ownership by historically disadvantaged groups (HDG) and the application of the ICT sector code.

10. (b) Decision by the Authority

The Authority considered all the inputs received from stakeholders concerning the new insertion of regulation 14(B) in which the Authority has proposed that licensees submit a letter to the Authority on the proposed changes to the shareholding prior to the implementation of the shareholding structure.

The Authority has decided to maintain the current regulatory notification regime in respect of shareholding. However, the number of days for submission of notification has changed from 7 days to 14 days.

With regards to changes to publicly traded shares, the Authority has introduced annual notification time periods to limit the administrative burden that will come with notification related to JSE listed companies.

11. Substitution of regulation 15 of the Regulations:

The following regulation is hereby substituted for regulation 15 of the Regulations:

"*15. Publication of the notice for online application process*

The Authority may by means of an Invitation to Apply (ITA), published in the Government Gazette and the Authority's website, allow applicants to lodge applications through an online application process on the date to be determined by the Authority."

11 (a) Stakeholders comments

No comment from the stakeholders.

11 (b) Decision by the Authority

The purpose of this amendment is to enable the Authority to publish ITAs both on its website and in the Government Gazette.

12. Transitional Provisions

12(a) Stakeholders' comments

ISPA submits that regulations cannot have retrospective effect. The correct position is that amendments effected through the Draft Amendment Regulations should only apply to applications submitted to the Authority after the date on which the Draft Amendment Regulations come into force.

12 (b) Decision by the Authority

The Authority confirms that the amendments to the Regulations will apply prospectively upon publication in the Government Gazette.

13. Regulation 9

13 (a) Stakeholders' comments

AME states that Regulation 9 has not been amended, however, it refers to Form C, which has been amended. Form C says in section 1.2, "*Nature of services authorised to be provided in terms of the Licence: Check the Reasons Document. Confirm the service to be provided*." According to AME, there is no reference to Form C in the explanatory memorandum. AME states that at this point in the application form, it is necessary to state the service "*to be provided*".

13 (b) Decision by the Authority

The Authority notes AME's comments and confirms that the wording "*Check the Reasons Document. Confirm the service to be provided*." was published erroneously in the Draft Amendment Regulations. This error has been corrected in the final regulations.

14. Schedule 1, Form G

14 (a) Stakeholders' comments

- ISPA requests that the Authority consider creating separate application forms for applications for transfer of ownership of a licence and applications for transfer of control of a licence.
- In this regard ISPA notes that a transfer of control of ownership involves an existing licensee and is therefore – from an administrative point of view – a simpler process which focusses on the new shareholding of the existing licensee.
- The existing Form G was developed exclusively to accommodate applications for transfer of ownership of licences, not for transfers of control of licences.
- ISPA submits that the two types of application have substantial differences, and each should have a dedicated application form.

14 (b) Decision by the Authority

The Authority notes ISPA' submission for the separation of Form G for transfer of ownership of the licence and transfer of control of the licence. The Authority has amended Section 1.3 of Form G (that section 1.3 of Form G), to allow for applicants to specify whether they are seeking to apply for a transfer of control or a transfer of ownership.