

16 May 2022

**Independent Communications Authority of South Africa**

Attention: Mr Peter Mailula

Per email: [PMailula@icasa.org.za](mailto:PMailula@icasa.org.za)

Dear Sir

**ISPA SUBMISSIONS: DRAFT 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**

1. The Internet Service Providers' Association of South Africa (ISPA) refers to the Draft 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, published in Government Gazette 46084 on 24 March 2022 ("**the Draft Amendment Regulations**") and sets out below its written submissions.
2. ISPA's submissions are limited to provisions relating to individual electronic communications network service (IECNS) and individual electronic communications service (IECS) licences.
3. ISPA confirms its willingness to participate in any public hearings which the Authority may decide to conduct prior to finalising the draft amendments.
4. **Regulation 1: Definitions**
  - 4.1. The Authority uses the terms "Individual Licence", "Licence" and "Special Temporary Authorisation" in capitalised form but without defining these terms under Regulation 1.
  - 4.2. ISPA submits that:
    - 4.2.1. 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.
    - 4.2.2. The term "licence" is not defined in the ECA but the term "service licence" is<sup>1</sup>. The latter term – without capitalisation – is the correct term to use in the Draft Amendment Regulations.

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<sup>1</sup> ECA section 1: "*service licence*" means a licence authorising the holder to provide any service contemplated in Chapter 3

4.2.3. The term “special temporary authorisation” is not defined in the ECA. The Authority should either insert a definition or use this term without capitalisation.

4.3. The term “applicant” is defined without capitalisation but is used in the body of the Draft Amendment Regulations in capitalised form.

## 5. Amendment of definition of “application”

5.1. ISPA supports the proposed amendment but suggests that a clear distinction be made in the definition between transfer of ownership and transfer of control. This can be done by splitting out subsection (d) as follows:

*“application” means an application:*

*(a) for an individual licence;*

*(b) to amend an individual licence;*

*(c) to renew an individual licence;*

*(d) to transfer ownership of an individual licence;*

*(e) to transfer control of an individual licence; or*

*(f) for a Special Temporary Authorisation.*

5.1.1. This list of applications should be consistently reflected throughout the Draft Amendment Regulations. For example, sub-regulation 2(1)(a) should read:

*“(a) The processes and procedures for applying for, amending, renewing, transferring ownership of, transferring control of or notifying the surrender of an Individual Licence”.*

5.2. ISPA notes that it is still not possible to apply directly to the Authority for an IECS licence notwithstanding that there is no legislative prohibition on the Authority issuing an invitation to apply (ITA) for such licences and entertaining applications which comply with the terms of the ITA.

5.2.1. ISPA wrote to the Authority on 5 October 2020 setting out relevant legal considerations and requesting that the Authority issue such an ITA<sup>2</sup>. Despite follow-ups ISPA has not received the courtesy of a substantive response to this correspondence.

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<sup>2</sup> ISPA confirms that it has also written to the Minister of Communications and Digital Technologies to request that she consider issuing a policy direction to the Authority in terms of section 3 of the ECA empowering it to issue a standing ITA for individual electronic communications network services (IECNS) licences.

- 5.2.2. A standing ITA would allow applicants to approach the Authority directly for IECS licences required for national service provision, facilitating market entry and transformation.
- 5.2.3. Regulation 8 (Application for an individual licence) sets out the process for applying for an individual licence in response to such an ITA.

## 6. Substitution of definition of “historically disadvantaged persons”

- 6.1. 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”.
- 6.2. 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”.
- 6.3. 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.”
- 6.4. This is effectively the definition of HDG which individual licensees are required to comply with.
- 6.5. 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.

6.6. ISPA requests the Authority to adopt a definition of HDP which is consistent with the Control and Ownership Regulations 2021.

**7. Regulation 3: Scope of the Regulations**

7.1. The reference to licence conversion is unnecessary in 2022.

7.2. ISPA requests that the Authority consider stating simply that the Regulations apply to individual licences (noting the comment above regarding the definition of this term in the ECA).

**8. Regulation 5: Submission of applications and other documents**

8.1. ISPA welcomes and strongly supports the proposed amendments to sub-regulation 5(1A).

8.2. 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.*

**9. Regulation 11: Application to transfer or to transfer control of an Individual License**

9.1. With regard to the proposed sub-regulation 11(3), ISPA refers to its comments above relating to sub-regulation 5(5A).

9.2. 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.

**10. Regulation 12: Restrictions on transfer and renewal of an Individual License**

10.1. 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.

10.2. 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.”

#### 11. Regulation 13: Surrender of an Individual Licence

- 11.1. 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.
- 11.2. A licensee in this position will not be able to comply with the requirements set out in sub-regulation (1) – (4).
- 11.3. It is further the case that a large number of surrenders 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.

#### 12. Regulation 14(A): Notice of change of information in respect of an individual licence & Regulation 14(C): Changes of Shareholding

- 12.1. ISPA 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”).
- 12.2. 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.”*

- 12.2.1. 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.
  - 12.2.2. 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).
  - 12.2.3. 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.
  - 12.2.4. 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.
- 12.3. 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.
- 12.3.1. 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.
  - 12.3.2. 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.
  - 12.3.3. 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.

12.4. 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.*

12.5. ISPA calls on the Authority to:

12.5.1. 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.

12.5.2. 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.

12.6. The proposal that the Authority may determine a “fee” for late notifications is not supported as this is not a fee but a penalty.

12.6.1. 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.

12.6.2. No guidance is provided as to the proposed amount of this fee.

12.6.3. 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.

12.7. 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)”.

12.7.1. 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).

12.7.2. 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).

### **13. Transitional provisions**

13.1. 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.

### **14. Schedule 1, Form G**

14.1. 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.

14.2. 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.

14.3. The existing Form G was developed exclusively to accommodate applications for transfer of ownership of licences, not for transfers of control of licences.

14.4. ISPA submits that the two types of application have substantial differences, and each should have a dedicated application form.

### **Conclusion**

15. ISPA trusts that the above is of assistance.