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Independent Communications Authority of South Africa
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Attention: Mr Pascalis Adams
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WRITTEN REPRESENTATIONS BY METRO FIBRE NETWORKX (PTY) LTD ON THE DRAFT REGULATIONS REGARDING STANDARD TERMS AND CONDITIONS FOR INDIVIDUAL LICENCES GAZETTED ON 16 MARCH 2022 IN GOVERNMENT GAZETTE NO 46050

1. INTRODUCTION

- 1.1. On 16 March 2022, the Independent Communications Authority of South Africa ("**the Authority**") published the Draft Regulations Regarding Standard Terms and Conditions for Individual Licences ("**Draft Regulations**") under Chapter 3 of the *Electronic Communications Act, 2005* ("**the Act**") and invited interested parties to submit written representations.
- 1.2. The Draft Regulations reflect the Authority's intentions to make amendments to the Standard Terms and Conditions for Individual Licences, 2010 ("**the Regulations**").
- 1.3. Metro Fibre Networkx would like to thank the Authority for the opportunity to comment on the Draft Regulations. We set out our comments on the Draft Regulations below.

2. METRO FIBRE NETWORKX' COMMENTS

- 2.1. Our comments are limited to the amendment proposed to regulation 2 in Schedules 2 and 3 of the Regulations.
- 2.2. The changes in regulation 2, which deals with the notification of change in licensee details and information, have far reaching consequences that will be detrimental to the ICT industry. In particular, the repeal of regulation 2(1)(c) will result in a cumbersome process for making changes in shareholding known to the Authority.
- 2.3. It is intended that, once promulgated, the Draft Regulations will be read in conjunction with 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 ("Draft Processes and Procedures Regulations") (GG.46084).

2.4. Regulation 14C of the Draft Processes and Procedures Regulations provides that:

"(1) *In the event a licensee proposes changes to its shareholding, **however minute**, the licensee must submit to the Authority, prior to implementing the proposed changes, a letter detailing: [our emphasis added]*

(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)".*

2.5. The proposed procedure regarding any shareholding changes in a licensee proposes a new regime that will in effect require licensees to obtain prior approval to effecting even minute changes in its shareholding structure. In the past, a notification to the Authority regarding a shareholding change (that was not a change in control in the licensee) within 7(seven) days of the change taking place was sufficient.

2.6. It is our view that the repeal of regulation 2(1)(c), read with regulation 14C of the Draft Processes and Procedures Regulations, must not be implemented for the following reasons:

2.6.1. the means used to achieve the purpose of sufficiently monitoring changes in shareholding are not reasonable or just;

2.6.2. the amendment is *ultra vires* as it effectively widens the scope of content that the Authority is empowered to regulate under applicable legislation;

2.6.3. the amendment does not further the objectives of the Act;

2.6.4. there are other approaches for regulation of changes in shareholding that have been adopted in other jurisdictions, that are balanced and proportional compared to the Authority's proposed procedure; and

2.6.5. the Draft Regulations do not contemplate the adverse effects on the commercial activities of licensees.

2.7. These reasons are expanded on in the clauses below.

3. REASONABLENESS OF THE PROVISIONS

- 3.1. **It is our view that the prior approval procedure to any changes in shareholding that is proposed in the Draft Regulations in order to allow the Authority to sufficiently monitor and manage the change in shareholding is irrational and not proportional.**
- 3.2. The Draft Regulations amount to administrative action¹ for purposes of the *Promotion of Access to Justice Act, 2000* ("**PAJA**"). The Draft Regulations amount to a decision that is made by the Authority, which is an organ of state. The Authority is empowered to make regulations under the Act and the *Independent Communications Authority of South Africa Act, 2000* ("**ICASA Act**"). In their current form, the Draft Regulations affect Metro Fibre Networkx' right to not have its business operations and functions arbitrarily and/or unnecessarily interfered with. The promulgation of the Draft Regulations would impose legal obligations on Metro Fibre Networkx that would have a negative impact on its business.
- 3.3. The repeal of regulation 2(1)(c) is not in line with section 6(2)(h) of PAJA, in that the decision to amend the Draft Regulations can be said not to be reasonable. To this effect, it is our view that the decision is both irrational and not proportional.
- 3.4. In the Explanatory Memorandum on the Amendment of the Standard Terms and Conditions Regulations for Individual Licences, 2010 as amended ("**Explanatory Memorandum**"), the Authority has indicated that the purpose of the amendment is to enable the Authority to sufficiently monitor and manage the change in shareholding, specifically to the extent that it changes ownership and control over time.
- 3.5. We recognise that the Authority wants to exercise its monitoring powers to ensure compliance with the Act in this regard. However, the connection between the means deployed by the Authority and the ends hoped for is already catered for in the current form of the regulations.
- 3.6. The Regulations enable the Authority to be made aware of every change in the shareholding of a licensee within 7 (seven) days of the change occurring. This enables the Authority to track changes in shareholding in a licensee sufficiently and efficiently, without the need for licensees to seek prior approval regarding the change.

¹ Under PAJA, administrative action means "any decision taken by an organ of state when (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation which adversely affects the rights of any person and which has a direct, external legal effect".

- 3.7. The proposed process and the desired outcome are not proportional to the purposes the Authority has given in the Explanatory Memorandum. Case law illustrates the meaning of proportionality through the saying that "one ought to not use a sledgehammer to crack a nut". We respectfully submit that the Authority needs to strike a balance between eliminating the undesirable effects of the current notification process while aiming to improve the way in which changes in shareholdings are reported. In doing so, we request that the Authority use less severe means to achieve the desired outcomes of the proposed procedure.
- 3.8. The Authority hopes that the proposed prior approval procedure will result in better monitoring of changes in shareholding "to the extent that it changes ownership and control over time". Requiring licensees to obtain prior approval by the Authority for *any minute* changes is a drastic measure to put in place to achieve sufficient monitoring by the Authority for changes in ownership and control.
- 3.9. As stated above, the current procedure in the Regulations is a less administrative process for licensees which achieves the same desired results. Further, there are other approaches that the Authority may consider which are less severe than the proposed prior approval process. We discuss such approaches further below.

4. **ULTRA VIRES**

- 4.1. **It is our view that the Authority will be acting *ultra vires* by requiring all licensees to apply for prior approval before effecting any change in shareholding, as the Act only requires prior approval for changes in control or ownership of a licence.**
- 4.2. In terms of section 13(1) of the Act,
- "An individual licence may not be let, sublet, assigned, ceded or in any way transferred, and the control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority"
[our emphasis added]
- 4.3. Section 13(1) of the Act contemplates two scenarios in which a change that affects an individual licence requires prior approval from the Authority:
- 4.3.1. where the licence 'changes hands'; and

- 4.3.2. where the licence remains in the hands of the licensee, but the person(s) who have a say in the use of the licence has changed.
- 4.4. Any *minute change in the shareholding*, as contemplated in the Draft Process and Procedure Regulations, does not automatically result in a change that would affect either the control of the license or the ownership of the license as contemplated in the Act.
- 4.5. Section 13(1) of the Act, requires prior approval from the Authority when the change is of the control of an individual licence. Any other change that does not amount to a change in the control of the licence does not have to be authorised prior by the Authority.
- 4.6. In terms of statutory interpretation principles, the inclusion of "control" in section 13(1) as it pertains to ownership of a licence, suggests that the Legislature intended to exclude all other changes in ownership of a licence that do not result in a change of control or ownership. Arguably the Legislature was of the view that the Authority must not concern itself with changes that are considered *de minimis*.
- 4.7. To extend the requirement for prior approval to *all changes in shareholding, however minute*, broadens the Authority's powers in terms of the Act, the Authority would be acting *ultra vires*.
- 4.8. Section 13(3) of the Act states that
- "The Authority may by regulation, set a limit on, or restrict, the ownership or control of an individual licence, in order to—*
- (a) promote the ownership and control of electronic communications services by historically disadvantaged groups and to promote broad-based black economic empowerment; or*
- (b) promote competition in the ICT sector".*
- 4.9. The restrictions and/or limitations envisioned section 13(3) of the Act, relate to:
- 4.9.1. any changes in ownership or control that may negatively affect historically disadvantaged groups and/or the promotion of broad-based black economic empowerment; or
- 4.9.2. any changes in ownership or control that may affect competition.
- 4.10. As such, section 13(3) is not a catch-all provision, as it limits the powers of the Authority to promulgate regulations that may restrict or limit changes in ownership or control of an individual licence to the two instances above.

- 4.11. In the Explanatory Memorandum, the Authority stated that the reason for the amendment is that "through a notification [process] the Authority is unable to sufficiently monitor and manage the change in shareholding specifically to the extent that it changes ownership and control over time".
- 4.12. The reason for the amendment does not base the repeal of regulation 2(1)(c) on either of the grounds found in section 13(3) of the Act. While the Authority does indicate that the amendments have been proposed to ensure that changes do not conflict with the objectives and mandate of the Authority under the Act, the reasons do not specify the adverse effects of the current notification process as they relate to furthering broad-based black economic empowerment or competition in the ICT industry.
- 4.13. The Authority's failure to justify the repeal of regulation 2(1)(c) within the ambit of the provisions of section 13(3) effectively grants the Authority powers to restrict and/or limit ownership and control of individual licences that are not contemplated under the Act.
- 4.14. To the extent that the Authority wants to make amendments to the Act or widen the scope of promulgating regulations related to individual licences under section 13 of the Act, the Authority may only do so in terms of section 4(3)(a) of the ICASA Act. The section provides that:
- "the Authority may make recommendations to the Minister on policy matters and amendments to this Act and the underlying statutes which accord with the objects of this Act and the underlying statutes to promote development in the broadcasting, electronic transactions, postal and electronic communications".¹*
- 4.15. Under the ICASA Act, the Authority is empowered to, *inter alia*:²
- 4.15.1. monitor the broadcasting, postal and electronic communications sectors to ensure compliance with the ICASA Act and the underlying statutes;
 - 4.15.2. control, plan, administer and manage the use and licensing of the radio frequency spectrum in accordance with bilateral agreements or international treaties entered into by the Republic;

² See section 4 of the ICASA Act. The listed functions are the most relevant in terms of the Authority's regulatory making powers.

- 4.15.3. develop, monitor and enforce compliance with licence conditions and regulations consistent with the objects of the ICASA Act and the underlying statutes for different categories of licences;
 - 4.15.4. grant, renew, amend, transfer and revoke licenses in accordance with the provisions of the ICASA Act and the underlying statutes;
 - 4.15.5. make regulations on any matter consistent with the objects of this Act and the underlying statutes or that are incidental or necessary for the performance of the functions of the Authority; and
 - 4.15.6. make regulations on empowerment requirements to promote broad-based black economic empowerment.
- 4.16. We note that the amendment and promulgation of regulations is a function that the Authority is empowered to perform under legislation. However, the Authority is not empowered to make amendments to the Act (or the ICASA Act) which the repeal of regulation of 2(1)(c) will effectively amount to, for the reasons discussed above.
- 4.17. Section 1(c) of the Constitution provides that the Republic of South Africa is one, sovereign, democratic state founded on the supremacy of the constitution and the rule of law. The rule of law prohibits arbitrary decision-making and vague legislative provisions. Accordingly, public power can therefore only be validly exercised if it is clearly sourced in law.³
- 4.18. Therefore the widening of the Authority's powers to make regulations related to individual licences and the control and ownership thereof, is contrary to section 6(2)(a)(i) of PAJA. There is no empowering provision that allows the Authority make changes to the Act, and the decision to repeal regulation 2(1)(c) is *ultra vires*.

5. OBJECTIVES OF THE ELECTRONIC COMMUNICATIONS ACT, 2005

- 5.1. **The Draft Regulations contradict the objectives of the Act.**
- 5.2. It is our view that the repeal of regulation 2(1)(c) does not advance the purposes of the Act, particularly the objectives that aim to:

³ See for example *Fedsure Life assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 56-58; *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) par 17; *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 49-50; *Minister of Justice and Constitutional Development v Chonco* 2010 4 SA 82 (CC) para 27.

- 5.2.1. encourage investment, including strategic infrastructure investment, and innovation in the communications sector;⁴
- 5.2.2. provide a clear allocation of roles and assignment of tasks between policy formulation and regulation within the ICT sector;⁵
- 5.2.3. refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public;⁶
- 5.2.4. promote stability in the ICT sector.⁷
- 5.3. The proposed process for reporting changes in shareholding to the Authority will be detrimental to the commercial activities of licensees, especially if the prior approval process results in long waiting periods. In turn, this may have a negative impact on investments and development and innovation in the communications sector.
- 5.4. The separation of powers doctrine delineates functions of the government in order to effect a system of checks or balances between the three branches of government. As an organ under the executive branch, the Authority is tasked to implement and administer the public policy and laws enacted by the legislative branch. As such, where the Authority undertakes to create law and public policy, which is a function of the legislative branch, then that goes against the objectives of the Act to clearly define the policy making powers and regulatory implementation powers.
- 5.5. Moreover, the requirement to seek prior approval from the Authority will result in undue interference in the commercial activities of licensees, specifically where a licensee want to conduct its day to day business through schemes such as:
 - 5.5.1. employee share schemes,
 - 5.5.2. buy-back arrangements; and
 - 5.5.3. other applicable funding models used to improve commercial viability of the business.

⁴ See section 2(d) of the Act.

⁵ See section 2(j) of the Act.

⁶ See section 2(y) of the Act.

⁷ See section 2(z) of the Act.

- 5.6. It is recognised that the Authority must be made aware of changes in the shareholding structure, however the requirement for prior approval for *any minute change*, amounts to an undue interference by the Authority in the commercial activities of the licensee.
- 5.7. The telecommunications sector is known to be a tightly regulated industry, which can inadvertently destabilise sustainable development in the sector. The Draft Regulations add further red tape to the regulation of individual licences, which could affect the promotion of stability in the ICT sector in South Africa.

6. EXAMPLES FROM OTHER JURISDICTIONS

6.1. **Other jurisdictions have been able to adopt notification of changes in shareholding processes that are balanced and achieve the Draft Regulations' desired outcomes without introducing drastic notification requirements for all changes in shareholding.**

6.2. The Communications Authority of Kenya through the Kenya Information And Communications (Licensing And Quality Of Service) Regulations, 2010 ("**Licensing And Quality Of Service Regulations**")⁸ enforces notification and prior consent obligations through the introduction of thresholds to changes in control or ownership.

6.3. Regulation 9 states that:

"Change in shareholding

(1) *A licensee shall ensure that its shareholding complies, at all times with the Government's Communications Sector Policy, published from time to time.*

(2) *A licensee shall notify the Commission of any proposed change in ownership, control or proportion of shares held in it, at least thirty days before the change is effected. Provided that—*

(a) *Any change in shareholding exceeding fifteen per centum of the issued share capital; or*

(b) *The acquisition by an existing shareholder of at least five per centum of additional shares;*

shall require the prior written consent of the Commission and the Commission shall notify the applicant of its acceptance or refusal, stating the reasons for its decision, within thirty days of receipt of the request for consent"

6.4. The Licensing And Quality Of Service Regulations recognise that the regulator must be notified of a change in shareholding, and it also creates a threshold in the change in shareholding. This threshold triggers the requirement for the prior consent from the Communications Authority of

⁸ <https://www.ca.go.ke/wp-content/uploads/2018/02/Licensing-and-Quality-of-Service-Regulations-2010-1.pdf>

Kenya. The inclusion of a threshold in the regulations creates certainty regarding when licensees must apply for prior approval, that can be monitored effectively by the regulator.

- 6.5. The approach adopted in the Licensing And Quality Of Service Regulations establishes a balanced and proportional procedure for reporting changes in shareholding to a regulator in that it allows a regulator to efficiently and sufficiently monitor changes in shareholding structures without being encumbered with the administration of dealing with all changes to licensees' shareholding, however minute.
- 6.6. Unlike in the Companies Act or the Competition Act, there is no definition for "control" in the Act, which has created uncertainty as to when licensees must apply for prior approval. This in our view is the real problem that should be addressed. We respectfully submit that providing clear guidance on the meaning of control would not only provide certainty in the industry, but also aid the Authority in achieving its objectives, without impacting on licensee's business operations.

7. COMMERCIAL PRACTICALITY

- 7.1. **The Draft Regulations fail to consider the practical commercial aspects that will be affected by the proposed prior approval process.**
- 7.2. The Draft Regulations do not propose a time frame in which the Authority will give the licensees the decision, which will likely be detrimental to the day to day conducting of the business of the licensee. At present, the application process to the Authority for various issues related to individual licences and approval thereof has led to long waiting periods for applicants (in many instances 12 months or longer). Given this, it is our view that there is a low feasibility of implementing the proposed amendment effectively, without prolonging commercial transactions unnecessarily. Even if a licensee has to wait 30 days (for example) for an answer from the Authority, in practical terms that would mean that a new employee cannot be added to an employee scheme, or a terminating employee not removed from such scheme for 30 days; or a licensee in urgent need of shareholder funding has to wait 30 days to draw down on shareholder funding that may result in minor shareholding changes.
- 7.3. In particular, the proposed process will have a severe negative impact to commercial transactions, which take place in the ordinary course of business and which may affect the shareholding of a licensees, but do not affect the control or ownership of the licence, such as, but not limited to:
 - 7.3.1. employee share schemes;

- 7.3.2. share buy-back arrangements;
 - 7.3.3. shares held in escrow;
 - 7.3.4. drawdown arrangements; and
 - 7.3.5. other funding models used to raise capital in an entity.
- 7.4. As such, the repeal of regulation 2(1)(c) of the Regulations will have an adverse effect on current procedures and practices that licensees perform as part of their ordinary course of business, which do not affect a change of control or ownership of the license or licensee.

8. CONCLUDING REMARKS

- 8.1. In summary, the Draft Regulations, in our view:
- 8.1.1. violate the provisions of PAJA, as they amount to a decision made by an organ of state that is irrational, not proportional, and *ultra vires*;
 - 8.1.2. the proposed amendments contradict the Act's objectives;
 - 8.1.3. there are other methods that the Authority can use to achieve the purposes of sufficiently monitoring changes in shareholding, which are less stringent than the procedure in the Draft Regulations; and
 - 8.1.4. the Draft Regulations will have far reaching consequences for commercial practices, which the Authority has failed to consider.
- 8.2. For these reasons, Metro Fibre Network respectfully submits that the repeal of regulation 2(1)(c) as contemplated in the Draft Regulations should not be carried through in the final regulations.
- 8.3. Please do not hesitate to let us know if you have any queries in relation these comments. We remain available to meet to discuss any aspect of our comments at a mutually convenient date and time.

Yours sincerely,



Aveshree Padayachee

Head of Legal