Internet Service Providers' Association

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Independent Communications Authority of South Africa

Attention: Mr Peter Mailula

E-mail: pmailula@icasa.org.za

Dear Peter

SUBMISSIONS IN RESPECT OF THE "DRAFT AMENDMENT CLASS PROCESSES AND PROCEDURES REGULATIONS 2015"

1. ISPA refers to the Draft Amendment Class Processes and Procedures Regulations 2015 published as General Notice 658 in Government Gazette 38917 of 26 June 2015 ("**the Draft Regulations**") and to the Authority's invitation to comment thereon.

2. ISPA welcomes the intention to review the Class Licensing Processes and Procedures Regulations (as amended) 2010[1] ("**the existing Regulations**"), currently applicable in respect of class licences and licence exemptions.

CONSIDERATION OF APPLICATIONS/REGISTRATIONS

3. The Draft Regulations indicate that the Authority will not consider applications or registrations if the applicant/registrant is in arrears on any fees prescribe by the Authority or legislated in terms of the Electronic Communications Act 36 of 2005 ("**the ECA**"). ISPA understands the rationale for this position but is concerned that the need for the Licensing Division to liaise with other Divisions of ICASA to establish whether there are fees outstanding will slow down the processing of class licence registrations and create challenges in meeting the thirty (30) working day period set out in section 17(3) of the ECA for the processing of registrations.

4. The Authority should therefore ensure that - prior to the implementation of final amendments to the existing Regulations - efficient processes are in place to establish whether there are arrear fees outstanding.

5. ISPA has noted the increase in hard copies required to be included in a registration or application and wishes simply to lodge its objection in principle to the introduction of this requirement. ISPA submits that the cost of making such copies as the Authority requires should be subsumed in the registration or application fee payable. While the Authority has not produced a costing to show how the fees payable were arrived at, this costing presumably originally did include the internal reproduction of an application or registration by the Authority and it is not clear why this cost

[1] General Notice 526 of 201, GG 33297, 14 June 2010

should now be borne by applicants and registrants. ISPA submits that an electronic copy together with the physical original should be sufficient.

AMENDMENT OF REGULATION 10 OF THE EXISTING REGULATIONS

6. The Authority has proposed amending Form H to the Existing Regulations as discussed below, but it has not sought to effect corresponding amendments to Regulations 4 and 10 of the existing Regulations. These are required by the amendments effected to section 16(6)[2] of the ECA by the Electronic Communications Amendment Act 1 of 2014 ("**the ECAA 2014**").

7. ISPA suggest the following amendments:

4. The prescribed forms

(1) The prescribed forms in these regulations are as follows

….

(e) Form H: Application to cede, let, sub-let or transfer a class licence (Regulation 10);

10. Application to cede, let, sub-let or transfer a class licence (section 16(6) of the Act)

An application to cede, let, sub-let or transfer a licence must be:

(a) in the format as set out in Form H;

(b) accompanied by the applicable fee; and

(c) submitted by the Licensee.

8. ISPA wishes to highlight to the Authority that the amendment to section 16(6) introduced by the ECAA 2014 on 21 May 2014 does not require that the prior approval of the Authority be obtained for the transfer of control of a class licence. The position in respect of class licences is thus different from that applicable to individual licences.

FORM H

9. The title of this form requires amendment as follows:

APPLICATION TO SUB-LET, CEDE, ASSIGN~~,~~ OR TRANSFER ~~AND OR TRANSFER OF CONTROL~~ OF ~~AN INDIVIDUAL~~ A CLASS LICENCE

10. The deletion of reference to "transfer of control" is as a consequence of there being no statutory basis in the ECA for the parties to a transfer of control of a class licence obtaining the prior written approval of the Authority.

11. Form H in its entirety should be reviewed to ensure that it does not purport to cater for applications for transfer of control of a class licence.

[2] (6) No class licence may be ceded, let, sub-let or transferred without the prior written approval of the Authority, provided that if the Authority has not refused or denied the cession, let, sublet or transfer within 30 days after notice has been given to the Authority, approval shall be considered to have been given.

12. For example: under the heading of the proposed Form H there is text setting out applicable definitions. Taking into account the submissions above regarding prior approval for transfers of control of class licences, ISPA suggests the deletion of this text, alternatively the following amendments:

~~15.~~ Definitions

The following definitions apply to this Form H:

~~In these regulations~~ "the Regulations" means the ~~regulations published by Government Notice No.33293, as amended by Government Notice No R. 522 of 14 June 2010~~ Class Licensing Processes and Procedures Regulations 2010 as amended.

~~"Transferee" means a person who, as a result of the transaction, would directly or indirectly acquire or establish direct or indirect control or increased control over all or the greater part of a licensee or company, or all or the greater part of the assets or undertaking of a licensee or company;~~

~~"Control" is as contemplated in the Companies Act, Act No.71 of 2008, as amended;~~

~~"Transfer of Control" means transfer of shareholding in the issued licence to a new shareholder;~~

13. ISPA submits the proposed amendments to Form H have the effect of over-complicating the completion thereof.

    13.1. Sections 7.2 and 8.2 (confirmation of shareholding), 7.4 and 8.4 (listing) 7.5 and 8.7 (HDI ownership), 7.7 and 8.8 (foreign ownership), 7.9 and 8.10 (interest by any shareholder in any other licensees/licences), 7.10 and 8.13 (applicant's/transferee's interest in another licensee) and 9.1-9.5 (suitability of transferee) all also require a written undertaking by the Accounting Officer confirming same to be attached.

    13.2. Further, ISPA submits that the Accounting Officer would have no way of confirming this information and thus cannot be expected to submit an undertaking relating to same; for example, the Accounting Officer would not be aware of interests of shareholders in other licences. It is recommended that the Authority reconsider these requirements and how to seek confirmation of the specified information.

    13.3. Section 9.6 requires details of the transferee's 5-year business plan. As the comprehensive business plan (in terms of section 9.7) is to be attached, it is uncertain why details are also required in this section. If the Authority is requesting an executive summary of the business plan in this section, it is recommended that the section wording be amended to reflect this request.

    13.4. Section 9.9 requires the provision of a detailed network architecture layout plan and roll-out plans, including timeframes and roll-out targets. It is uncertain why the Authority requires this separately from the comprehensive business plan required in section 9.7. If this is to form part of the business plan, perhaps the Authority should indicate that information relating to this is required therein. The same applies to the information requested in section 9.10.

14. ISPA requests that the Authority bear in mind that Form H in its entirety must be submitted in the form of an affidavit sworn to by both the applicant and the transferee. Both of these parties are accordingly subject to the criminal offence of perjury in the event that there is a false statement in the application. The high number of confirmations and undertakings required is without benefit and simply increases the cost of making the application and the time taken to process it.

FORM L

15. Proposed sub-regulation 5.2 requires the person designated as the contact person on a class licence to sign the notice. ISPA - noting that the entire form to be submitted is already to be in the form of a sworn affidavit – does not understand the rationale for this requirement. The contact person listed on a licence is often an administrative contact rather than an executive contact and it may not always be possible or desirable to have this person sign the required resolution.

16. Proposed sub-regulation 5.3 requires CIPC registration documents to accompany notifications of changes of name. ISPA submits that CIPC confirmation certificates in respect of changes of name would be more appropriate for this purpose.

17. In practise the Authority requires CIPC confirmation certificates where the licensee has changed entity type, e.g. converted from CC to (Pty) Ltd and ISPA submits that it would preferable to specify this requirement explicitly in the final regulations.

SHORT TITLE

18. Regulation 15 of the existing Regulations ("Short title and Commencement") states that the short title of the existing Regulations is "class licensing processes and procedures regulations (as amended) 2010".

19. The Draft Regulations propose the short title "Amendment Class Processes and Procedures Regulations 2015".

20. ISPA suggests that – following convention and the need for consistency and clarity – the short title should be "Class Licensing Processes and Procedures Amendment Regulations 2015".

DELAYED IMPLEMENTATION

21. ISPA has observed over time that difficulties experienced in the implementation of new law and regulations can be greatly reduced by allowing for staggered implementation of provisions which require the Authority to design and incorporate an internal process or which industry need to be made aware of so that they have an opportunity to comply.

22. ISPA submits that it would be prudent and helpful to all parties to delay the commencement of the new Licensing Process and Procedure Regulations until one month after their publication in the Government Gazette. ISPA cannot identify any prejudice to the Authority or any other party flowing from such an approach.

23. This would require only a small adjustment to the proposed amendment to regulation 10:

10. Short Title and Commencement

These regulations are called the ~~Amendment Class Processes and Procedures Regulations 2015~~ Class Licensing Processes and Procedures Amendment Regulations 2015 and will come into operation one calendar month after publication in the Government Gazette.

ADDITIONAL COMMENTS

24. The interpretation of regulations of this nature and the completion and submission of the forms provided is already a relatively complex administrative task. This is complicated by incorrect clause numbering and references, particularly as regards the forms provided.

25. ISPA requests that the Authority take steps to publish a full set of regulations incorporating all amendments so that these are set out in a single document. Providing a simple, single set of regulations which are easy to follow will assist licensees and registrants to comply with the Authority's requirements.

26. ISPA submits that the Authority should:

    26.1. Host a workshop for licensees subsequent to the finalisation of the Draft Regulations on the implementation of the amended existing Regulations. The agenda for such workshop should include providing clarity on the queries raised in this and other submissions.

    26.2. Develop and publish a practise note on the implementation of the amendments to the existing Regulations, informed by the outcomes of the workshop.

    26.3. This would be facilitated by delayed implementation of the amendments.

CONCLUSION

27. ISPA thanks the Authority for its efforts herein, and confirms that it wishes to participate in any further proceedings undertaken pursuant to the finalisation of the Draft Regulations.

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ISPA REGULATORY ADVISORS