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GENERAL NOTICES • ALGEMENE KENNISGEWINGS

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**NOTICE 767 OF 2018****AMENDMENT OF THE PROCESSES AND PROCEDURES REGULATIONS FOR INDIVIDUAL LICENCES, 2010**

The Independent Communications Authority of South Africa ("the Authority") hereby amends the Licensing Processes and Procedures Regulations for Individual Licences, 2010 in terms of Sections 4 (7)(b); 5 (7) and 9(2)(b) of the Electronic Communications Act No.36 of 2005, as amended read with section 4(3)(k) of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000), as amended, to the extent reflected in the Schedule.

A handwritten signature in black ink, appearing to read 'R. Mohlologa', is placed over a light grey rectangular background.

RUBBEN MOHLALOGA
CHAIRPERSON

ELECTRONIC COMMUNICATIONS ACT, 2005 (ACT NO 3 OF 2005)**REGULATIONS**

The Independent Communications Authority of South Africa has, under sections 4(7); 5(7) and 9(2)(b) of the Electronic Communications Act, 2005 (Act No. 36 of 2005), as amended, and section 4(3)(k) of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000), as amended, made the Regulations in the schedule.

SCHEDULE**1. Definitions**

In these regulations "the Regulations" means the regulations published by Government Notice No R. 522 (Government Gazette No. 33293) of 14 June 2010, as amended by Government Notice No. R. 154 (Government Gazette No. 39871) of 30 March 2016.

2. Substitution of regulation 12 of the Regulations

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

"12. Restrictions on transfer and renewal of an individual licence

(1)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; or

(b) Where the Licensee has not paid the licence fees due and payable at the date of the application; 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 30%.

(2) The provisions of paragraph (c) above do not apply where the Transferee (in a transfer application) or Applicant (in a renewal application) is:

(a) a wholly owned state entity, which is subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999); and

(b) provides documentation proving either that the Transferee or the Applicant:

- i. has been granted broad-based black economic empowerment ("BBBEE") facilitator status; or
- ii. has Management and Control by black persons which is no lesser than 60%."

3. Transitional Provisions

These Regulations also apply to all pending individual licence transfer and renewal applications received by the Authority before the effective date of the Regulations.

4. Short Title and Commencement

These Regulations are called the Licensing Processes and Procedures for Individual Licences Amendment Regulations, 2018 and will come into operation upon the date of publication in the Government Gazette.



**AMENDMENT OF THE PROCESSES AND PROCEDURES REGULATIONS FOR
INDIVIDUAL LICENCES, 2010**

REASONS FOR DECISION

NOVEMBER 2018

INTRODUCTION

1. The Independent Communications Authority of South Africa (“the Authority”) has amended regulation 12 of the Processes and Procedures Regulations for Individual Licences, 2010 (“the Regulations”).
2. The purpose of this reasons document is to outline the Authority’s reasons regarding its decision to amend the Regulations.

LEGISLATIVE FRAMEWORK

3. In reviewing and amending regulation 12 of the Regulations, the Authority was guided by the Broadcasting Act, 1999 (Act No 4 of 1999) (“the Broadcasting Act”), the Independent Communications Authority of South Africa Act, 2000 (Act No,13 of 2000) (“the ICASA Act”), the Electronic Communications Act, 2005 (Act No 5 of 2005) (“the ECA”) and the Amended BBBEE ICT Sector Code¹ (“Amended Code”).

The Broadcasting Act

4. Section 3 (1)(c) requires the South African broadcasting system to promote ownership, control and management of broadcasting services by persons from historically disadvantaged groups.

¹ Published in Government Gazette 40407 of 7 November 2016.

The ICASA Act

5. Section 4(3)(k) empowers the Authority to make regulations on empowerment requirements to promote broad-based black economic empowerment.

The ECA

6. Section 9(2)(b) requires the applicants for individual licences to have 30% equity ownership by persons from historically disadvantaged groups (HDGs). This section also empowers the Authority to prescribe other conditions or higher percentages in terms of section 4(3)(k) of the ICASA Act.

Amended Code

7. Paragraph 3.6 of Statement AICT100 of the Amended Code empowers the Minister of Trade and Industry to designate certain Organs of State or Public Entities as BBBEE Facilitators deemed to have ownership held: (a) 100% by Black People; (b) 40% by Black Women; (c) 20% by Black Designated Groups; (d) without any acquisition debts; and (e) without any third-party rights. Furthermore, paragraph 2.3 of Statement AICT200 of the Amended Code, which prescribes the criteria used for deriving the score for Management Control, requires 60% of Black employees in senior management as a percentage of all senior management.

THE PROCESS

8. The Authority is enjoined to regulate, amongst others, broadcasting and electronic communications in the public interest.² Section 4(7)(b) of the ECA empowers the Authority to make regulation which the public interest requires should be made without delay.

² Section 2 of the ICASA Act.

9. In relation to the process adopted for amending regulation 12, the Authority considered section 4(7)(b) of the ECA that empowers the Authority to make any regulation which the public interest requires without delay.
10. Having considered the implications that the wholly owned state entities ("SOEs") will not be in a position to meet the 30% HDGs requirements for purposes of applying or renewing individual licence and that it is critical for the SOEs to conduct business and/or deliver services to the public in relation to the ICT Sector – The Authority reasoned that it is in the public interest to amend regulation 12 of the Regulation without delay.

DISCUSSION

11. Regulation 12 of the Regulations currently provides as follows:

"12. Restrictions on transfer and renewal of an individual Licence

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; or*
- (b) Where the Licensee has not paid the Licence fees due and payable at the date of the application; or*
- (c) Where the Transferee's ownership and control by historically disadvantaged persons is less than 30%."*

12. Regulation 12 of the Regulations is applicable to the transfer and renewal of Individual Broadcasting Service, Electronic Communications Services and Individual Electronic Communications Network Services licences.
13. As indicated above, the ECA empowers the Authority to prescribe other

Amended Code empowers the Minister of Trade and Industry to designate certain Organs of State or Public Entities as BBBEE Facilitators. The effect of BBBEE Facilitators is that the designated Organs of State or Public Entities are deemed to have 100% black ownership.

14. The Authority has reasoned that in relation to the SOEs, it is reasonable to require these entities to provide evidence that they have been granted BBBEE Facilitator status in terms of paragraph 3.6 of Statement AICT100 of the Amended Code, alternatively they have 60% management and control by black persons as provided for in paragraph 2.3 of Statement AICT100 of the Amended Code.
15. The prescribed conditions for SOE's in regulation 12 therefore address the inequality which has previously arisen between SOEs and other stakeholders that must comply with the HDI requirement as provided for in section 9(2)(b) of the ECA.

CONCLUSION

16. On 20 November 2018, the Council of the Authority has decided to approve the amendments of regulation 12 of the Regulations.
17. The amended regulation will allow wholly owned state entities that require individual licences to confirm their HDI status and consequently provide ICT services to the public subject to the prescript of the ECA and the applicable regulations.

