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**Independent Communications Authority of South Africa**

**Attention: Ms F Hlongwane (Project Leader) and Mr T Ndhlovu (Project Manager)**

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**ISPA SUBMISSION ON DRAFT AMENDMENT REGULATIONS REGARDING STANDARD TERMS AND CONDITIONS FOR CLASS LICENCES UNDER CHAPTER 3 OF THE ELECTRONIC COMMUNICATIONS ACT 36 OF 2005**

**Introduction**

1. The Internet Service Providers' Association of South Africa ("ISPA") has noted the invitation to comment on draft amendments to the Regulations Regarding Standard Terms and Conditions for Class Licence published in the Government Gazette on 5 March 2020 ("the Draft Amendment Regulations").
2. ISPA's submissions are set out below.

**ISPA's interest in the Draft Amendment Regulations**

3. ISPA's membership includes many holders of class electronic communications network service (CECNS) licences and/or class electronic communications service (ECS) licences.
4. As such ISPA has been requested to represent the interests of such members in this process. No submissions have been made in relation to proposed amendments to provisions governing class broadcasting service licences.

**Substitution of definition of "Effective Date"**

5. ISPA submits that the Draft Amendment Regulations should – in addition to the definition of "Effective Date" insert clear references on the licence document to:
  - 5.1. The date on which a licence was first issued; and
  - 5.2. The date on which a licence was renewed (if applicable).
6. There is a typographical error in the proposed definition:  
"Effective Date" means [is] the date specified in the licence which may be a past, present or future date from the date of signature;"

**Notification of change in licensee details and information**

7. ISPA welcomes:
  - 7.1. The removal of the obligation to notify the Authority of changes to shareholding of a class licensee.
  - 7.2. The lengthening of the period to submit notifications from 7 days to 14 days.

8. Further, the ECA does not oblige holders of class licences to seek the prior approval of the Authority for changes in control and ownership. Such an obligation cannot be created in secondary legislation. The purpose and practical implications of the proposed addition of Regulation 2(2) is therefore not clear.

#### **Commencement of Operations**

9. ISPA has no difficulty with the proposed amendment other than to remind the Authority that most if not all CECNS and CECS licensees derive revenue from a mixture of licensed and non-licensed services (e.g. the sale of electronic communications equipment which is completely deregulated). A SARS tax clearance certificate does not make such a distinction and will therefore be of extremely limited value in determining whether a licensee has derived revenue from licensed services or not.<sup>1</sup>
10. ISPA submits that an affidavit from an independent accounting officer should be sufficient where the licensee is otherwise not required to have audited financial statements. This affidavit should make clear reference to revenue from licensed services (i.e. the provision of ECS and ECNS).
11. The reference to the tax clearance certificate should be deleted.
12. ISPA requests that the Authority consider amending the period in which an application for an extension is to be submitted. It may be difficult for a licensee to know halfway through the period allowed for commencement of services whether it will be able to commence or not.
- 12.1. For class ECNS licensees from twelve months prior to expiry of the period allowed for commencement of operations to six months prior to the expiry of such period.
- 12.2. For class ECS licensees from six months prior to expiry of the period allowed for commencement of operations to three months prior to the expiry of such period.

#### **Metering and billing arrangements**

13. ISPA notes that the majority of the requirements in the existing Regulations and the proposed amendments are:
- 13.1. Not relevant to class ECNS licensees, who by definition do not provide retails services / services to the public.
- 13.2. Not relevant to class ECS licensees, which are not permitted to obtain numbers directly from the National Numbering Plan.

#### **Contraventions and Penalties**

14. The Authority proposes the following:
- “Any person that contravenes these Regulations, except Regulation 4 and 5 is liable to a fine not exceeding 10% of its annual turnover.”

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<sup>1</sup> See Explanatory Memorandum para 2.3.1: “Requesting letters (confirmation from auditors) and/or tax clearance in terms of the proposed sub-regulations (4) and (5) will assist the Authority to confirm whether the licensee is operational because they are liable to pay for USAF and Licence Fees.” (our emphasis)

- 14.1. The proposed sanction is unduly harsh, and no rationale has been provided for the variation from the more nuanced position in the existing Regulations. It should not be the position that a licensee can be effectively shut down through the imposition of a sanction.
- 14.2. The Authority has no power to impose a fine based on anything other than revenue from licensed services. We note, for example, that First Rand Bank Limited is the holder of a class licence: does the Authority propose to levy a fine of 10% of the entire revenue of First Rand Bank?
- 14.3. What, if any, sanctions apply in respect of proven contraventions of Regulations 4 and 5?

**Regulation 7: Services to be provided by the Licensee**

15. Although it does not form part of the proposed amendments, ISPA requests that the Authority carefully consider Regulation 7 in the existing Regulations pertaining to CECNS licences.

“The licensee must construct, operate and maintain an ECN as well as provide ECNS in the licensed service area.”

- 15.1. This statement is incorrect in law.
- 15.2. There is nothing in the ECA which requires that the holder of a CECNS licence must construct, operate and maintain an electronic communications network.
- 15.3. Further, there is nothing in the ECA which holds that an ECNS licence is required to construct an ECN.
- 15.4. The service licensed is ECNS which can be crisply defined as the act of making capacity on an electronic communications network available to oneself or a third party for resale or for the provision of ECS.

**Conclusion**

16. ISPA trusts the above will be helpful and records its interest in participating in any related process further to the finalisation of the Draft Regulations.

Regards,

ISPA