



Inspiring Possibilities

13 November 2014

The Independent Communications Authority of South Africa

**ATTENTION: Chairperson, Dr Steven Mncube; Mr Godfree Maulana; Councillor Katharina Pillay;
Councillor Nomvuyiso Batyi**

Block B, Pinmill Farm

164 Katherine Street

Sandton

ecsecns.compliance@icasa.org.za; marketconsolidations@icasa.org.za; chairperson@icasa.org.za;
gmaulana@icasa.org.za; kpillay@icasa.org.za; nbatyi@icasa.org.za

BY HAND AND BY EMAIL

Copy to: Cell C Proprietary Limited
ATTENTION: Mr Graham Mackinnon
gmackinnon@cellc.co.za

Crystal Web Proprietary Limited
ATTENTION: Mr Paul Hjul
paulj@crystalweb.co.za

The Internet Service Providers' Association
ATTENTION: Mr Dominic Cull
dominic@ispa.org.za

Internet Solutions, a division of Dimension Data Middle East and Africa Proprietary Limited
ATTENTION: Ms Nozipho Mngomezulu
noziphomngomezulu@webberwentzel.com

Mobile Telephone Networks Proprietary Limited
ATTENTION: Mr Graham de Vries
graham.devries@mtn.co.za

www.neotel.co.za

Neotel (Pty) Ltd

Reg No. 2004/004619/07

44 Old Pretoria Main Road, Halfway House, Midrand, 1685, Gauteng South Africa
Telephone number +27 (0)11 585 0000 Facsimile number +27 (0)11 585 0001

DIRECTORS: N Srinath* (Non-Executive Chairman) S Joshi**** (Managing Director & Chief Executive Officer) VA Kumar** K Memani FJP Ndoroma**
S Baweja* R Dhawan* SG Ranade*

ALTERNATE DIRECTORS: R Offner** SS Ntsaluba

(*Indian, **Namibian, ****New Zealander)

Telkom SA SOC Limited
ATTENTION: Mr Siyabonga Mahlangu
siyabonga@telkom.co.za

The Wireless Access Providers' Association
ATTENTION: Ms Sumaiyah Makda
sam@ellipsis.co.za

BY EMAIL

Dear Sirs

RESPONSE TO REPRESENTATIONS IN RESPECT OF APPLICATION FOR APPROVAL IN RESPECT OF THE ACQUISITION OF NEOTEL PROPRIETARY LIMITED

1. I refer to the application for approval of the acquisition of Neotel Proprietary Limited ("Neotel") by Vodacom Proprietary Limited ("Vodacom") ("the **Application**"), as contained in our letter of 17 June 2014 and notice of which was published by the Independent Communications Authority of South Africa ("the **Authority**") under General Notice 799 in *Government Gazette* 37998 of 15 September 2014 ("the **Notice**").
2. The following interested parties lodged written representations (collectively "the **Representations**") in relation to the Application:
 - 2.1 Cell C Proprietary Limited;
 - 2.2 Crystal Web Proprietary Limited;
 - 2.3 the Internet Service Providers' Association;
 - 2.4 Internet Solutions, a division of Dimension Data Middle East and Africa Proprietary Limited;
 - 2.5 Mobile Telephone Networks Proprietary Limited;

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S Baweja* R Dhawan* SG Ranade*

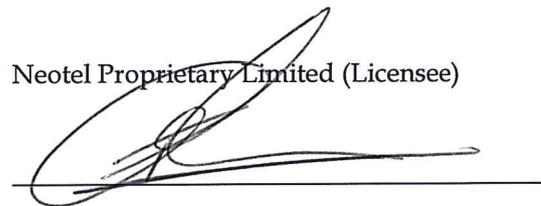
ALTERNATE DIRECTORS: R Offner** SS Ntsaluba

(*Indian, **Namibian, ****New Zealander)

- 2.6 Telkom SA SOC Limited; and
- 2.7 the Wireless Access Providers' Association.
3. The Authority granted Neotel the right to respond to any representations made. The Notice requires that proof of delivery of Neotel and Vodacom's response to the interested parties be delivered to the Authority together with the response. Proof of delivery is attached.
4. Please contact Mr Nkateko Nyoka from Vodacom on 011 848 8008 or nkateko.nyoka@vodacom.co.za and Dr Tracy Cohen from Neotel on 011 585 0729 or tracy.cohen@neotel.co.za if the Authority requires any further information in relation to this application for approval.
5. Neotel thanks the Authority in advance for its kind consideration of this response and the Application, and reiterates its willingness to engage with the Authority in relation to the Application should the Authority regard this as necessary.

Yours faithfully

Neotel Proprietary Limited (Licensee)



Signatory: TRACY COHEN

Capacity: CHIEF OF CORPORATE SERVICES

Date: 13 NOVEMBER 2014

**WRITTEN RESPONSES FROM NEOTEL AND VODACOM ON REPRESENTATIONS
SUBMITTED BY INTERESTED PERSONS ON APPLICATION FOR APPROVAL OF CHANGE
OF CONTROL**

I Introduction

1. Neotel Proprietary Limited (**Neotel**) and Vodacom Proprietary Limited (**Vodacom**), thank the Independent Communications Authority of South Africa (the **Authority**) for the opportunity to submit written responses to the representations received from interested persons in relation to the proposed transaction between Neotel's current shareholders and Vodacom in terms of which Vodacom will acquire the entire issued share capital (100%) of, and all of the Neotel shareholders' loan claims against, Neotel (the **Transaction**), as provided for in the notice published by the Authority in the *Government Gazette* on 15 September 2014.¹

2. Neotel made application to the Authority by way of a letter dated 17 June 2014 (the **Application**):
 - 2.1 in terms of section 13(1) of the Electronic Communications Act 36 of 2005 (the **ECA**) for the Authority's written permission to transfer control of the individual electronic communications network services (**ECNS**) and electronic communications service (**ECS**) licences held by Neotel from Neotel's current shareholders to Vodacom; and
 - 2.2 in terms of section 31(2A) of the **ECA** for the Authority's written permission to transfer control of the radio frequency spectrum licences held by Neotel from Neotel's current shareholders to Vodacom.

3. The Application was signed by each of Neotel's shareholders, being the transferors of their respective shareholding interests, and by Vodacom as the transferee of Neotel's current shareholders' shareholding interests.

4. The details of the individual ECNS and ECS licences and the radio frequency spectrum licences to which the applications relate are set out in the Application.

5. The Authority has received written representations on the Transaction, which were also made available to Neotel, from the following interested parties:

¹ Published under GN 799 in *Government Gazette* 37998 of 15 September 2014.

- 5.1 Cell C Proprietary Limited (**Cell C**);
- 5.2 Crystal Web Proprietary Limited (**Crystal Web**);
- 5.3 the Internet Service Providers' Association (**ISPA**);
- 5.4 Internet Solutions, a division of Dimension Data Middle East and Africa Proprietary Limited (**IS**);
- 5.5 Mobile Telephone Networks Proprietary Limited (**MTN**);
- 5.6 Telkom SA SOC Limited (**Telkom**); and
- 5.7 the Wireless Access Providers' Association (**WAPA**).

6. This submission is made to the Authority by Neotel and Vodacom on a joint basis. Neotel and Vodacom's responses to the various submissions received from the interested parties are set out below.

7. Neotel and Vodacom have identified five broad themes which emerge from the various written representations submitted by the interested parties. These are as follows:
 - 7.1 the proper characterisation of the Transaction;
 - 7.2 the regulatory process followed by Neotel and Vodacom in making application to the Authority for approval of the transfer of control of Neotel's ECNS and ECS licences and radio frequency spectrum licences which will result from the Transaction;
 - 7.3 ownership by historically disadvantaged persons (**HDPs**) and broad-based black economic empowerment (**BBBEE**) more generally, and the effect of the Transaction on empowerment within Neotel;
 - 7.4 access to strategic radio frequency spectrum assets; and
 - 7.5 the extent to which the Transaction will promote competition in the Information and Communication Technology (**ICT**) sector as provided for in section 2(f) of the ECA.

8. Neotel and Vodacom's detailed responses to the written representations have been prepared within these five broad thematic areas. Certain competition issues in relation to spectrum are also addressed in the competition section of the submission.

II The Transaction

9. As described above, the Transaction involves the sale by Neotel's current shareholders of their respective shareholding interests and loan claims in Neotel, to Vodacom.
10. Following the Transaction, Vodacom will hold 100% of the issued share capital in Neotel. The effective shareholding structure of Neotel will, accordingly, be the same as that of Vodacom.
11. Following the Transaction and as described in the Application, Vodacom will acquire beneficial control of Neotel. However, Neotel and Vodacom will continue to be separate juristic persons and licensees. Each of Neotel and Vodacom will continue to hold their respective ECS and ECNS licences and radio frequency spectrum licences and to operate in terms of those licences by providing services to end-users and operating their respective electronic communications networks. The parties at this stage intend for Neotel and Vodacom to enter into various commercial arrangements to co-ordinate and efficiently operate their respective businesses.
12. Although Neotel and Vodacom will be related parties by virtue of the Transaction, it is also possible for such commercial arrangements to be entered into between unrelated parties. This is permissible in terms of the ECA. There is nothing to preclude any other licensee from approaching either Neotel or Vodacom for such access to either party's assets. Accordingly, the change of control in Neotel in and of itself is not a necessary condition for the use by each party of the other party's assets, including physical infrastructure, networks and distribution.

III An overview of the regulatory framework and the contentions of Neotel and Vodacom

13. Section 13(1) and section 31(2A) of the ECA provide that the Authority's prior written permission is required for the transfer of control of an individual licence and a radio frequency spectrum licence respectively.

- 13.1 Section 13(1) of the ECA provides that -

"An individual licence may not be let, sub-let, 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” (italicised emphasis added).

13.2 Section 31(2A) of the ECA provides that –

“A radio frequency spectrum licence may not be assigned, ceded or in any way transferred, and the control of a radio frequency spectrum licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority” (italicised emphasis added).

14. The Transaction will result in the transfer of control of Neotel’s individual ECNS and ECS licences and radio frequency spectrum licences from Neotel’s current shareholders to Vodacom.

15. The prior approval requirements in respect of changes of control were introduced into the ECA by the Electronic Communications Amendment Act 1 of 2014 (the **Amendment Act**), which came into effect on 21 May 2014.

16. Sections 13(2) and 31(3)(c) of the ECA permit the Authority to make regulations prescribing the manner and form in which applications in terms of sections 13(1) and 31(2A) must be submitted. As yet, the Authority has not exercised this power.

16.1 The Authority remains empowered and obliged to consider and decide applications for approval of transfers of control of individual licences and radio frequency spectrum licences notwithstanding the absence of such regulations. This is because the ECA does not require the Authority to publish such regulations. Instead, the ECA empowers the Authority to do so.

16.2 In the absence of any regulations in terms of sections 13(2) and 31(3)(c), when the Authority considers an application for approval of the change of control of an individual licence or radio frequency spectrum licence submitted in terms of section 13(1) or 31(2A) respectively, the Authority must exercise a discretion in determining whether to approve the change of control or not. In exercising this discretion, the Authority must take account of all relevant factors and must be guided by the regulatory objectives stipulated in section 2 of the ECA.

16.3 These regulatory objectives include, but are not limited to, the promotion of BBBEE (as provided for in section 2(h)) and the promotion of competition in the ICT sector (as provided for in section 2(f)). (BBBEE and competition are the regulatory

objectives on which the interested parties have primarily focussed.) Neotel and Vodacom submit that, taking all relevant considerations into account based on the regulatory objectives stipulated in section 2 of the ECA, the Authority should approve the Transaction in terms of section 13(1) and 31(2A) of the ECA.

17. The only regulations that are currently in effect that have any relevance in the context of an application for approval of the transfer of control of an individual licence or radio frequency spectrum licence are the Regulations in Respect of the Limitation of Ownership and Control of Telecommunications Services, 2003 ² (**Ownership and Control Regulations**).

17.1 These Ownership and Control Regulations were published in terms of the Telecommunications Act 103 of 1996 and remain in effect on the basis of section 95(2) of the ECA. They have not been repealed or amended by the Authority. These regulations provide for a process to be followed by licensees when submitting an application to the Authority for the approval of a transfer of control.

17.2 In the absence of new regulations dealing with applications for transfers of control, Neotel submitted the Application in the form prescribed by the Ownership and Control Regulations as well as in terms of sections 13(1) and 31(2A) of the ECA.

18. The Individual Licensing Processes and Procedures Regulations, 2010 ³ (**Processes and Procedures Regulations**) do not apply to applications for approval of the transfer of control of an individual licence. Similarly, the Radio Frequency Spectrum Regulations, 2011 ⁴ (**Radio Frequency Spectrum Regulations**) do not apply to applications for approval of the transfer of control of a radio frequency spectrum licence.

18.1 These two sets of regulations prescribe the process for the transfer of individual licences and radio frequency spectrum licences respectively, from one entity to another entity. They do not prescribe the process to be followed or the criteria to be applied to applications for transfers of control. Both the Processes and Procedures Regulations and the Radio Frequency Spectrum Regulations were made prior to the amendment of the ECA by the Amendment Act.

18.2 At the time that these regulations were made the Authority had no power to approve transfers of control of individual licences or radio frequency spectrum licences. As

² Published under GN R105 in *Government Gazette* 24288 of 16 January 2003.

³ Published under GN R522 in *Government Gazette* 33293 of 14 June 2010.

⁴ Published under GN 184 in *Government Gazette* 34172 of 31 March 2011.

such, the Processes and Procedures Regulations and Radio Frequency Spectrum Regulations were not intended to apply and do not apply to applications for approval of such transfers of control.

18.3 The transfer of control of Neotel's individual ECNS and ECS licences and its radio frequency spectrum licences is not a transfer of those licences from Neotel to Vodacom. Following the Transaction, each of Neotel and Vodacom will continue to operate under and in accordance with their respective licences. As such, the Processes and Procedures Regulations and the Radio Frequency Spectrum Regulations are of no relevance to the Transaction or the Application.

19. Amongst the various relevant considerations that the Authority may take into account in evaluating the Application are BBBEE and competition.

20. In relation to BBBEE:

20.1 There is not, at present, any threshold HDP ownership requirement with which existing licensees must comply. In particular, there is no general requirement that individual licensees must have 30% HDP ownership. The ECA does not impose such a requirement, and nor do any regulations published under the ECA. Nor have such requirements been imposed in any of Neotel's licences.

20.2 When considering empowerment issues, the Authority must do so on the basis of the approach provided for in the Broad-Based Black Economic Empowerment Act 53 of 2003 (**BBBEE Act**) and the Codes of Good Practice published in terms of that Act. As an organ of state the Authority is required in terms of section 10 of the BBBEE Act to apply the Codes of Good Practice and, in particular, the ICT Sector Code. In terms of the BBBEE Act and the Codes, empowerment is a broad concept which is measured on the basis of a number of different elements being ownership, management control, employment equity, skills development, enterprise and supplier development, preferential procurement, and socio-economic development. Empowerment is not restricted to ownership alone.

20.3 Accordingly, when considering whether the Transaction promotes BBBEE, the Authority must examine whether empowerment as provided for in the BBBEE Act and the Codes is enhanced. The Authority's primary focus should not be limited to whether or not levels of ownership by black people are increased or decreased. Moreover, even when measuring levels of ownership by black people the Authority

must do so on the basis of the approach stipulated in the BBBEE Act and the Codes. This requires consideration of a number of ownership indicators including voting rights in the hands of black people and black women, economic interest of black people and black women, participation by broad-based groups, and, most importantly, the net value of any ownership interests held by black people. (Net value is the actual value of the shares held by black people less any debt taken on by the black shareholders in acquiring the shares, as a percentage of the total value of the measured enterprise).

20.4 The Transaction promotes BBBEE. Following the Transaction, Neotel's BBBEE score for ownership will increase due to, amongst other things, the increased points that Neotel will score for net value. On this basis, Neotel's overall BBBEE score should also increase. The Transaction also allows Neotel's current BBBEE shareholder to divest of its investment in the manner that it sees fit. This is consistent with Government's BBBEE policy that black shareholders should have real rather than restricted rights of ownership.

21. In relation to competition:

21.1 In addition to submitting the Application to the Authority in accordance with the provisions of the ECA, Neotel and Vodacom have filed notification of the "merger"⁵ between Neotel and Vodacom with the Competition Commission (**Commission**) in accordance with the provisions of the Competition Act 89 of 1998, as amended (**Competition Act**). As part of that process, Neotel and Vodacom have submitted various documents, including expert reports, in support of the merger. Certain of the interested parties have had access to various documents filed by Neotel and Vodacom with the Commission and have made reference to those documents in their representations to the Authority on the Transaction.

21.2 The effect of the Transaction on competition is a relevant factor to be considered by the Authority, amongst all relevant factors, in exercising its discretion in terms of sections 13(1) and 31(2A) of the ECA. This is because section 2(f) of the ECA provides that "[t]he primary object of [the ECA] is to provide for the regulation of electronic

⁵ The term "merger" has a broad meaning under the Competition Act and occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm, including through (i) purchase or lease of the shares, an interest or assets of the other firm in question, or (ii) amalgamation or other combination with the other firm in question. See section 12(1) of the Competition Act.

communications in [South Africa] in the public interest and for that purpose to . . . promote competition within the ICT sector”.

21.3 However, this does not mean that the Authority is empowered, when considering an application for approval of a transfer of control of a licence, to consider the competition implications to the same extent that the competition authorities consider those implications. This is made clear by the recent amendments to the Independent Communications Authority of South Africa Act 13 of 2000 (the **ICASA Act**) with effect from 16 May 2014. Following those amendments, section 4B(8)(b) of the ICASA Act makes expressly clear that “subject to section 67 of the [ECA] and the terms and conditions of any concurrent jurisdiction agreement concluded between the Authority and the Commission, . . . *the Commission has primary authority to detect and investigate past or current commissions of alleged prohibited practices within any industry or sector and to review mergers within any industry or sector in terms of the Competition Act*” (italicised emphasis added).

21.4 It is thus clear that the primary authority responsible for considering the competition implications of the Transaction is the competition authority.

21.5 Neotel and Vodacom appreciate that, while the Commission has primary responsibility for considering the effects of the Transaction on competition, the Commission will consult with the Authority in fulfilling its mandate. This is in accordance with the memorandum of understanding (the **MoU**) between the Authority and the Commission dated 16 September 2002.⁶ For this reason and given that the question of competition remains a relevant consideration for the Authority, Neotel and Vodacom have responded to the contentions made by interested parties with regard to the effect of the Transaction on competition.

21.6 As is demonstrated below, the Transaction will not have an adverse effect on competition. In fact, it will promote competition and the interests of consumers.

22. Certain interested parties have suggested that the Authority approve the Transaction subject to a condition that Neotel surrender certain of its spectrum assignments.

22.1 Such a condition would not be lawful. The only basis on which the Authority may

⁶ Published under GN 1747 in *Government Gazette* 23857 of 20 September 2002.

⁶ ICT Sector Code, para 6.5.2.

withdraw spectrum assignments is stipulated in section 31(8) of the ECA, being where the licensee fails to utilise the assigned radio frequency spectrum in accordance with the licence conditions applicable to the licence. This is not the case in respect of Neotel.

22.2 As such, it is not open to the Authority either to impose a condition withdrawing spectrum or to initiate a process in the Complaints and Compliance Committee (CCC) for the withdrawal of spectrum.

23. In all the circumstances, Neotel and Vodacom submit that the Authority should grant its permission for the transfer of control of Neotel's individual licences as provided for in section 13(1) of the ECA and for the transfer of control of Neotel's radio frequency spectrum licences as provided for in section 31(2A) of the ECA. As demonstrated, the Transaction will promote BBBEE and competition. In addition, the Transaction will –

23.1 facilitate investment in the communications sector, particularly strategic infrastructure investment (as provided for in section 2(d) of the ECA), given that Vodacom will, as the controlling shareholder of Neotel, be in a position to increase capital investment to maximise the efficient use of Neotel's assets;

23.2 ensure the efficient use of the radio frequency spectrum (as provided for in section 2(e) of the ECA) given that, with increased capital investment, it is likely that there will be increased efficiency in the use by Neotel of its radio frequency assignments; and

23.3 enhance the variety of electronic communications services that are available to consumers, and promote the interests of consumers (as provided for in sections 2(m) and (n) of the ECA).

24. Moreover, the Transaction has been entered into by Vodacom and Neotel's shareholders on the basis of the synergies and complementarities that have been identified in their respective businesses. Having regard to the regulatory objectives that will be promoted by the Transaction, by approving the Transaction the Authority will refrain from unduly interfering in the commercial activities of licensees while taking into account the electronic communications needs of the public (as provided for in section 2(y) of the ECA).

IV Thematic responses to written representations

25. Proper characterisation of the Transaction

25.1 Cell C has argued that the Transaction practically constitutes a *de facto* transfer of Neotel's individual ECNS licences, individual ECS licences, and radio frequency spectrum licences. In this regard, it has stated that –

25.1.1 The Transaction will result in a significant change in Neotel's identity, its equity ownership credentials, its business proposition, service proposition and financial status.⁷

25.1.2 Vodacom will use the Transaction to access and use Neotel's spectrum and Neotel will thus, in a practical sense, cease to exist.⁸

25.1.3 Vodacom will use the Transaction effectively to "take over" Neotel's fibre network.⁹

25.1.4 The Frontier report "clearly states" that Vodacom will use the spectrum of Neotel and, for all intents and purposes, Vodacom will therefore "control" the spectrum of Neotel, which constitutes a *de facto* transfer of the licence or at a minimum, control of the spectrum, requiring the Authority's approval.¹⁰

25.1.5 Vodacom intends to use Neotel's licences as if they were Vodacom's and Neotel would thus be unable to continue operating as an independent entity.¹¹

25.1.6 The Frontier Report indicates that Neotel cannot exist as a licensee separate from Vodacom if the Transaction takes place.¹²

⁷ Cell C executive summary para 1.

⁸ Cell C executive summary para 4, Cell C submission para 4.2.5.

⁹ Cell C submission para 1.2.

¹⁰ Cell C submission para 2.10.

¹¹ Cell C submission para 4.1.4.

¹² Cell C submission para 4.2.1.

25.1.7 Vodacom intends to offer services as a vertically integrated operator. This indicates that it does not intend for Neotel to operate as an independent operator.¹³

25.2 Neotel and Vodacom's responses to these submissions are as follows:

25.2.1 The Transaction does not involve the transfer of any of Neotel's individual licences, as provided for in section 13(1) of the ECA, or radio frequency spectrum licences, as provided for in section 31(2A) of the ECA. Following the Transaction, there will continue to be two separate licensed entities, namely Neotel and Vodacom, both of which will continue to hold their respective licences, and to operate their networks and utilise their spectrum assignments and provide services to end-users under the terms of those licences.

25.2.2 Although there are some common features where (1) a licence is transferred from one entity to another entity and (2) there is a transfer of control of a licence, these remain distinct types of transactions. In the case of a transfer of control, there continue to be two separate entities conducting business. This is not the case where a licence is transferred. In addition, where, as in the context of the Transaction, a licensed entity acquires control of another licensed entity, the two separate entities are required to continue to abide by the terms of their respective separate licences and to comply separately with all other applicable regulatory obligations. These include, for example, requirements to pay annual licence fees and contributions to the Universal Service and Access Fund on the basis of revenues generated, requirements to pay annual fees in terms of the Radio Frequency Spectrum Licence Fees Regulations, 2010,¹⁴ requirements to prepare annual financial statements and to file them with the Companies and Intellectual Property Commission and the Authority, and requirements to interconnect with, and to lease facilities to, other licensed entities in accordance with the requirements of Chapters 7 and 8 of the ECA on a non-discriminatory basis.

25.2.3 As described in Section II above, although Neotel and Vodacom at this stage intend to enter into a commercial arrangement for reciprocal use of each

¹³ Cell C submission paras 4.2.4 - 4.2.5 and 4.2.7.

¹⁴ Published under GN 754 in *Government Gazette* 33495 of 27 August 2010.

other's assets, Neotel and Vodacom will continue to exist as separate legal entities and to comply with their legal and regulatory obligations separately.

26. The regulatory process

26.1 *The procedures stipulated in the Processes and Procedures Regulations should have been followed by Neotel and Vodacom*

26.1.1 Various interested parties submitted that Neotel and Vodacom followed the incorrect process in preparing and submitting the Application to the Authority. In this regard, ISPA and WAPA submitted that Neotel's reliance on the Ownership and Control Regulations has resulted in insufficient information being provided by Neotel in relation to transformation.¹⁵ By contrast, the Processes and Procedures Regulations require detailed information on transformation of licensees and Neotel and Vodacom should have followed the procedures stipulated in the Processes and Procedures Regulations rather than the Ownership and Control Regulations.¹⁶

26.1.2 ISPA and WAPA submitted further that the provisions of the Ownership and Control Regulations are outdated and should not apply to the transfer of control of either Neotel's service licences or spectrum licences. On this basis it was submitted that there is currently no prescribed process in terms of which the Authority should evaluate an application for the transfer of control of an individual licence, nor any clarity on the criteria to be used. The process that Neotel should follow in respect of the change of control of its ECNS and ECS licences is set out in regulations 11 and 12 of the Processes and Procedures Regulations. The information supplied by Neotel in terms of the Ownership and Control Regulations is insufficient for any evaluation of the proposed transfer of control to be made.¹⁷

26.1.3 In this regard ISPA and WAPA submitted that:

26.1.3.1 The concept of a "concentrated market" in the Ownership and Control Regulations is no longer applicable (following the conversion of licences granted under the Telecommunications Act to

¹⁵ ISPA submission paras 13.4, 27, 28, 29 ; WAPA submission paras 12.3, 26, 27, 28 ; IS submission para 3.2.8.

¹⁶ ISPA submission para 29; WAPA submission para 28.

¹⁷ ISPA submission paras 7.3, 7.5, 10, 13.1, 14; WAPA submission paras 7, 9, 12.1, 13.

the new types of licences provided for in the ECA after the ECA came into effect) and the concept of a “telecommunications service category” is no longer applicable (given the horizontal licensing framework introduced by the ECA).¹⁸ In this regard, the Ownership and Control Regulations provide that no approval is required for the transfer of a “control interest” where a licensee does not operate in a “concentrated market”. A “concentrated market” is, in turn, defined as “any telecommunication service category in which: ... (a) there are fewer than five licensees ...”. The “telecommunications service category[ies]” defined in the Ownership and Control Regulations are the various licence categories previously provided for in the Telecommunications Act.

26.1.3.2

The substantive requirement to obtain prior written approval in regulation 4 is no longer applicable due to sub-regulation 4(2)(b) which states that this requirement shall not apply where the market is not a “concentrated market”. Regulation 5 (which sets out the process to be followed by licensees in the event of a change of control) is subject to regulation 4(1) which is no longer applicable. In turn, regulation 7 (which sets out the manner in which applications for approval of the transfer of a control interest must be reviewed by the Authority) is no longer applicable as regulations 5(1) and 4(1) are no longer applicable.¹⁹

26.1.3.3

Regulation 3 of the Ownership and Control Regulations has been repealed by the provisions of the ICASA Compliance Manual Regulations, 2011.²⁰

26.1.3.4

By contrast with the Ownership and Control Regulations, the Processes and Procedures Regulations were finalised within the current legislative and regulatory framework, taking into account the service licensing reality post-2009 (when the licence conversion process was finalised by the Authority). The requirements in the Processes and Procedures Regulations relating to the transfer of ownership of an individual licence encompass and supersede all of

¹⁸ ISPA submission paras 7.1, 7.2; WAPA submission para 7.1.

¹⁹ ISPA submission paras 7.6 – 7.8; WAPA submission paras 7.3 – 7.5.

²⁰ Published under GN 902 of 2011 in *Government Gazette* 34863 of 15 December 2011; ISPA submission para 7.4.

the requirements laid out in the Ownership and Control Regulations and any application submitted for the Authority's approval should at least provide the information required in the Processes and Procedures Regulations.²¹

26.1.3.5 The process for notifying the Authority of changes in control is now determined by clause 2(1)(c) of Schedule 3 of the Regulations Regarding Standard Terms and Conditions for Individual Licences under Chapter 3 of the Electronic Communications Act, 2005²² (**Standard Terms and Conditions**) read with regulation 14(A) of the Processes and Procedures Regulations.²³

26.1.3.6 While ISPA and WAPA concede that the process detailed in regulation 11 of the Processes and Procedures Regulations applies to the transfer of ownership of service licences and that there is a distinction between transfers of licences and changes of control, they assert that the two types of transactions are closely related, having regard to the legal and practical effect of such transactions.²⁴

26.1.4 Neotel and Vodacom's response to these submissions is as follows:

26.1.4.1 In terms of section 13(1) of the ECA, on the one hand, transfers of individual licences require the Authority's prior written permission and, on the other hand, transfers of control of individual licences also require the Authority's prior written permission. It is clear that, in terms of the regulatory scheme, the two types of transactions are regarded as distinct. The fact that the legislature saw fit to specifically include a requirement for transfers of *control* of individual licences to be approved by the Authority makes it clear that the requirement for the Authority to approve transfers of licences (which was always contained in section 13(1) of the ECA) did not cover transfers of *control*. If the transfer of a licence and the transfer of control of a licence amounted to the same thing, there

²¹ ISPA submission paras 13.2 - 13.3; WAPA submission para 12.2.

²² Published under GN R523 in *Government Gazette* 33294 of 14 June 2010.

²³ ISPA submission para 7.5; WAPA submission paras 13 - 14.

²⁴ ISPA submission para 12; WAPA submission para 11.

would have been no need for the ECA to be amended to make specific provision for transfers of control to be approved.

26.1.4.2 The Ownership and Control Regulations are the only regulations that have any relevance in the context of the Transaction and the Application. These Ownership and Control Regulations continue to be in effect as provided for in section 95(2) of the ECA and have not been repealed by the Authority. These Regulations stipulate the approval process to be followed where a licensee undergoes a change of control. As such, these Regulations are directly applicable in the context of the Transaction. However, the Authority's power to grant or reject permission for the transfer of control of an individual licence does not arise from the Ownership and Control Regulations. Instead, it arises directly from section 13(1) of the ECA.

26.1.4.3 The Ownership and Control Regulations are only relevant in the context of the Transaction insofar as they prescribe a form in which applications for the Authority's approval must be prepared and submitted. Neotel followed the process prescribed by the Ownership and Control Regulations and submitted the Application in the form prescribed by those regulations, as this is the only relevant process that has been prescribed at present.

26.1.4.4 It is open to the Authority in due course to (i) amend the Processes and Procedures Regulations (and repeal the Ownership and Control Regulations) to provide for a new process to be followed by merging parties, (ii) amend the Ownership and Control Regulations to specifically align them with the ECA, or (iii) make entirely new regulations in terms of section 13(2) of the ECA to require licensees to follow a particular process when making application for the approval of transfers of control. The Authority has not yet done so. Accordingly, Neotel and Vodacom have followed the only procedure that is currently applicable.

26.1.4.5 The Processes and Procedures Regulations are not applicable in the context of applications for approval of a transfer of control submitted in terms of section 13(1) of the ECA such as the Application. This is

on the basis that the approval process described in regulation 11 of the Processes and Procedures Regulations relates to the transfer of a licence from one entity to another. It does not relate to the change of control of a licensee.

26.1.4.6

The Ownership and Control Regulations, on the one hand, and the Processes and Procedures Regulations, on the other hand, deal with different matters. The Processes and Procedures Regulations deal with licence transfers. The Ownership and Control Regulations deal with changes of control. As such, the Processes and Procedures Regulations do not and cannot supersede the Ownership and Control Regulations. Both sets of regulations are in effect and will apply to the specific matters governed by them.

26.1.4.7

The Authority indicated, in its 2011 Findings Document on the review of ownership and control of commercial services and limitations on broadcasting, electronic communications services and electronic communications network services²⁵ subsequent to the promulgation of the Processes and Procedures Regulations, that it intended to amend the Ownership and Control Regulations to address the process to be followed by licensees where there is a change of control, in the context of the ECA.²⁶ As such, it is clear that the Authority's position is that the Processes and Procedures Regulations do not stipulate the process to be followed where there is a change of control. Indeed, at the time that the Processes and Procedures Regulations were promulgated, the ECA did not provide that any approval was required for the change of control of an individual licensee. As such, the Authority was not in a position to provide, in those Regulations, for an approval process in respect of such transactions.

26.1.4.8

In the absence of any regulations published in terms of section 13(2) of the ECA, the Authority must exercise a discretion as to whether to approve the transfer of control or not. In exercising this discretion, the Authority must take into account all relevant considerations and

²⁵ Published under GN 624 in *Government Gazette* 34601 of 15 September 2011.

²⁶ Findings Document, p 41.

must be guided by the regulatory objectives stipulated in section 2 of the ECA.

26.1.4.9 Clause 2(1)(c) of Schedules 2 and 3 of the Standard Terms and Conditions deals with a post-closing notification after the shareholding of a licensed entity has changed i.e. a notification within 7 days after a transaction has taken effect. As indicated in the Application, Neotel will comply with this requirement in due course.

26.1.4.10 In short, the procedure set out in regulation 11 of the Processes and Procedures Regulations is not applicable in the context of the Transaction.

26.1.5 Cell C and Telkom submitted that the Ownership and Control Regulations do not primarily control the transfer of shares of a licensed entity. They argue that this is primarily controlled by the provisions of the ECA governing the transfer (section 13) and amendment (section 10) of licences, the provisions of the ECA dealing with BBBEE and the Standard Terms and Conditions.²⁷ This submission was made on the following two bases:

26.1.5.1 Cell C claimed that it “doesn’t seem sensible” for regulations published under a repealed statute (the Ownership and Control Regulations are published under the Telecommunications Act, which has been repealed by the ECA) to take precedence over a current statute and regulations promulgated under it.²⁸

26.1.5.2 Telkom made the argument that although the Ownership and Control Regulations may still be in force, they do not regulate the transfer of ownership or control of an individual licence as defined in the ECA. They govern the transfer of licences listed in the definition of “telecommunications service category” in the Ownership and Control Regulations. The Ownership and Control Regulations do not, however, distinguish between individual, class, network or service licences. It is thus difficult to conceive that the Ownership and Control Regulations may be correctly applied in this instance.²⁹

²⁷ Cell C submission paras 1.2, 4.1.2, 4.1.5; Telkom submission para 17.

²⁸ Cell C submission para 4.1.2.

²⁹ Telkom submission para 17.

26.1.6 Neotel and Vodacom's responses to these submissions are as follows:

26.1.6.1 Neotel and Vodacom agree that the requirement for the transfer of control of an individual licence to be approved by the Authority arises directly from section 13(1) of the ECA. This requirement and the Authority's power to approve such transfers of control does not arise from the Ownership and Control Regulations. Neotel's Application was not submitted on the basis that it was required to apply to the Authority for approval in terms of the Ownership and Control Regulations. Instead, the Application was made on the basis of the requirements of section 13(1) of the ECA, as amended. The Ownership and Control Regulations are only relevant insofar as they outline a process to be followed by licensees where there is a transfer of control. Given that these regulations continue to be in effect, Neotel followed the prescribed process and submitted its Application in the form required by the Ownership and Control Regulations. It is incumbent on the parties (Neotel and Vodacom) to follow the prescribed procedure. Neotel and Vodacom cannot elect to follow a different process (such as that set out in the Processes and Procedures Regulations in relation to licence transfers) because it "seems sensible". They must follow the legally prescribed processes and have done so.

26.1.6.2 The fact that the Authority has not, as yet, made regulations dealing with applications for transfers of control of individual licences as provided for now in section 13(1) of the ECA does not mean that the process and criteria provided for in the Processes and Procedures Regulations must be used or is in any way relevant. For the reasons given above, these Regulations simply do not apply in the context of the Transaction.

26.2 *The procedures in the Radio Frequency Spectrum Regulations should have been followed in respect of the transfer of control of the spectrum licences*

26.2.1 Various interested parties submitted that Neotel should have followed the process set out in regulation 10 of the Radio Frequency Spectrum Regulations in seeking approval for the transfer of control of its spectrum licences.³⁰

26.2.2 These submissions were as follows:

26.2.2.1 ISPA and WAPA argued that Neotel erroneously relied on the Ownership and Control Regulations in relation to the transfer of control of its spectrum licences, as those regulations were never intended to govern a transfer of ownership or a transfer of control over spectrum and there is no clear set of criteria in the Ownership and Control Regulations which would guide the Authority as to the manner in which an application in this regard should be evaluated.³¹

26.2.2.2 ISPA and WAPA also argued that an application submitted in terms of section 13 of the ECA does not cover an application for transfer of control of a radio frequency spectrum licence.³²

26.2.2.3 Finally, ISPA and WAPA argued that there is a procedure set out in section 31 of the ECA read with regulation 10 of the Radio Frequency Spectrum Regulations which “explicitly contemplates a separate regulatory process for the transfer of ownership or control of radio frequency spectrum licences” which is the process that should be adopted by the Authority in respect of the Application. While this process applies to the transfer of ownership of spectrum licences and, although ISPA and WASPA recognise that a distinction is drawn between transfers and changes of control, the two types of transactions are closely related having regard to the legal and practical effect flowing from both types of transactions.³³

³⁰ ISPA submission paras 16 - 25; WAPA submission paras 15 - 24; Telkom submission paras 8 - 12.

³¹ ISPA submission para 17; WAPA submission para 16.

³² ISPA submission para 18; WAPA submission para 17.

³³ ISPA submission paras 19 - 23; WAPA submission paras 18 to 22.

26.2.2.4 Telkom submitted that the transfer of control of a spectrum licence is not meant to attract an informal or lighter regulatory process than the transfer of the licence itself, because the Authority is meticulous and detailed in regulating spectrum.³⁴

26.2.3 Neotel and Vodacom's response to these submissions is as follows:

26.2.3.1 Neotel submitted an application comprising two parts: (i) an application for approval of the change of control of Neotel's ECS and ECNS licences (in terms of paragraphs 3.1 and 3.2 of the Application), and (ii) an application for approval of the change of control of Neotel's spectrum licences (in terms of paragraph 3.3 of the Application). As appears from the Application, the application for approval of the change of control of Neotel's ECS and ECNS licences was submitted in terms of section 13 of the ECA; the application for approval of the change of control of Neotel's spectrum licences was submitted in terms of section 31(2A) of the ECA.

26.2.3.2 The Radio Frequency Spectrum Regulations (see regulation 10 in particular) do not provide a process for the approval of changes of *control* of spectrum licences. They deal only with transfers of spectrum licences from one entity to another. This is not what will occur as a result of the Transaction. Section 31(2A) of the ECA clearly distinguishes between (i) the transfer of a spectrum licence from one entity to another and (ii) the change of control of a spectrum licence. As such, a process designed to be followed in respect of the transfer of a spectrum licence is not applicable in respect of a change of control.

26.2.3.3 In terms of section 31(3)(c) of the ECA, as amended, the Authority now has the power to make regulations to "prescribe procedures and criteria for ... permission to assign, cede, share or in any way transfer a radio frequency spectrum licence, or *assign, cede or transfer control of a radio frequency spectrum licence as contemplated in [section 31(2A)]*"

³⁴ Telkom submission paras 9, 12.

(italicised emphasis added). The Authority has not yet made any such regulations.

26.2.3.4

Neotel and Vodacom do not, and did not in the Application, submit that the Ownership and Control Regulations apply to changes of control in relation to spectrum licences. The parties agree that these regulations would never have applied to the change of control of a spectrum licence. However, in the absence of a prescribed process (given that the Radio Frequency Spectrum Regulations do not deal with changes of control) the parties prepared the application in terms of section 31(2A), following the form envisaged by the Ownership and Control Regulations and provided the information required by those regulations in support of their application in terms of section 31(2A) of the ECA. The Authority must consider that application in terms of its broad discretion to regulate the ICT sector taking into account the policy objects set out in section 2 of the ECA.

26.3

The required regulatory framework for the Application to be considered by the Authority has not yet been prescribed and the Authority accordingly cannot consider the Application

26.3.1

Telkom submitted that the regulatory framework in terms of which the Authority may evaluate the Transaction is incomplete at this point in time and that the Authority should consider the legal implications of the absence of regulations contemplated in section 31(3)(c) of the ECA.³⁵ More specifically, Telkom argued that there are currently no regulations in place governing the transfer of control of spectrum licences³⁶ or the transfer of control of individual licences.³⁷ Although the Ownership and Control Regulations remain in effect, they cannot be correctly applied because they do not distinguish between the different types of licences for which the ECA now provides and do not govern the transfer of an individual licence as defined in the ECA.³⁸ According to Telkom, Neotel and Vodacom must follow a prescribed process, for a number of reasons. First, the transfer of control of a spectrum licence should not attract an informal or lighter

³⁵ Telkom submission para 4.

³⁶ Telkom submission para 7.

³⁷ Telkom submission para 15.

³⁸ Telkom submission para 17.

regulatory process than the transfer of the licence itself, because the Authority is meticulous and detailed in regulating spectrum. The transfer of control of spectrum licences should be treated with the “same rigor and oversight” as applications for the transfer of spectrum licences.³⁹ Secondly, it is potentially problematic for the Authority to consider the Application in the absence of the regulatory framework against which permissions for transfers of control may be granted. Thirdly, the promulgation of regulations dealing with transfers of control will ensure certainty and provide a more complete framework to regulate all transactions of this nature.⁴⁰

26.3.2 Neotel and Vodacom’s responses to these submissions are as follows:

26.3.2.1 The fact that the Authority has not yet made new regulations dealing with the procedures and/or criteria to be used in applications for permission to transfer control in respect of licences does not mean that the Authority cannot consider applications for approval submitted in terms of sections 13(1) and 31(2A) of the ECA.

26.3.2.2 The provisions concerned empower the Authority to make regulations, but do not require it to do so. In any event, the absence of the regulations does not deprive the Authority of the statutory power and duty to consider and decide applications for approval.⁴¹

26.3.2.3 If this were not the case, this would have the practical effect that no transactions in the ICT sector involving licensed entities could be undertaken until such time as the Authority prescribed new processes for the submission of such applications. That could never have been the intention of Parliament.

26.3.2.4 The absence of regulations simply means that the Authority must exercise a discretion in determining whether to approve the change of control or not. In exercising this discretion, the Authority must take account of all relevant factors and must be guided by the regulatory objectives stipulated in section 2 of the ECA.

³⁹ Telkom submission paras 9, 12.

⁴⁰ Telkom submission, para 4.

⁴¹ See, for example, *Essack v Pietermaritzburg City Council* 1971 (3) SA 946 (A) 512-514.

26.4 *The Transaction will result in an amendment to Neotel's licences and the amendment procedure in the ECA should be followed*

26.4.1 Cell C submitted that the Transaction practically constitutes an amendment to Neotel's ECNS and ECS licences and must thus be considered on the basis of the factors set out in section 10 of the ECA.⁴² More specifically, Cell C argued that the use by Vodacom of Neotel's fibre constitutes a transfer, or at the very least, an amendment of the Neotel ECNS licence,⁴³ and that a change of a licensee's shareholding is a change of such magnitude that it amounts to an amendment of the licence which should take place in terms of section 10 or 31 of the ECA.⁴⁴ As such, the factors set out in section 10 of the ECA (in relation to the amendment of individual licences) should be taken into account in the consideration of applications submitted in terms of section 13 of the ECA.⁴⁵

26.4.2 Neotel and Vodacom respond as follows to this submission:

26.4.2.1 First, Cell C's arguments are contradictory – on the one hand it argues that there is a *de facto* licence transfer and the licence transfer process should be followed. On the other hand, it argues that the licence amendment process should be followed. These are clearly distinct processes.

26.4.2.2 Second, the ECA provides that a particular process must be followed where there is a change of control of a licensee. Where this process is followed it cannot have been intended that a process to obtain the Authority's approval for changes to the licences resulting from the change of control (the ownership structure set out in the licence) which would be canvassed during the change-of-control approval process, should also be subject to another amendment application. This would duplicate the process already followed in relation to the change of control and would be superfluous. It is difficult to conceive that the intention of the legislature in including the requirement for transfers of control of individual licences to be

⁴² Cell C submission paras 1.2.6, 4.1.6.

⁴³ Cell C submission para 1.2.6.

⁴⁴ Cell C submission para 4.1.6.

⁴⁵ Cell C submission paras 1.2.4 - 1.2.5.

approved was also to require licensees to apply for the amendment of their licences where the only change to the licence (being the shareholding structure) was as a *direct consequence* of the change of control. The fact that the Authority has prescribed a notification process under the Standard Terms and Conditions and the Processes and Procedures Regulations in terms of which licensees have to notify the Authority of changes to their shareholding structures within seven days of such changes occurring confirms that a change to a licensee's shareholding structure is not considered to be a substantive change to the terms of a licence which would require an amendment to the licence.

26.4.2.3

Third, even if it were to be accepted (which Neotel and Vodacom do not) that transfer of control of Neotel from Neotel's current shareholders to Vodacom does result in the amendment of Neotel's individual ECNS and ECS licences, there is no basis on which the Authority should refuse to amend those licences. It is presumed (although it is not entirely clear) that Cell C's argument is that the Transaction, if approved, will result in the amendment of Neotel's ECNS and ECS licences on the basis that the shareholding structure specified in those licences will change. Section 10(1)(c) of the ECA provides in this regard that: "*The Authority may amend an individual licence after consultation with the licensee ... to the extent requested by the licensee, provided that it will not militate against orderly frequency management and will not prejudice the interests of other licensees*". Cell C has not suggested (and on the facts could not suggest) that either of these two grounds of refusal apply in the present context.

26.4.3

Cell C argued further that, in considering the transfer of a spectrum licence, the Authority must consider section 31(4)(d) of the ECA. Its justification for this is that section 31(4) of the ECA, which provides for the circumstances in which spectrum licences may be amended, along with other legislative directions, provides a useful standard on which to base considerations for the approval of a transfer of control of a spectrum licence. For example, section 31(4)(d) of the ECA provides that the Authority may amend a radio

frequency spectrum licence if requested by the licensee concerned to the extent that the request is fair and does not prejudice other licensees.⁴⁶

26.4.4 Neotel and Vodacom submit that this argument is incorrect. The ECA does not provide that the Authority must consider the factors outlined in section 31(4) when considering an application for a licence transfer or a change of control. From a policy perspective, the Authority may regard some of these considerations as relevant but it is not obliged to take these matters into consideration when adjudicating such an application, as it would in the case of an amendment application. In any event, none of the factors in section 31(4) militate against the Transaction. These are also not the only relevant considerations.

26.5 *Notification to the Authority of a change in shareholding is insufficient*

26.5.1 Cell C argued that regulation 10 of the Standard Terms and Conditions requires more than notice in relation to a change in shareholding and requires the Authority to approve the relevant change. It was submitted that this was the approach followed by the Authority in the context of the change of shareholding of Kagiso Media in relation to East Coast Radio and a consistent approach should be adopted in the context of the Transaction. The notice referred to by Neotel in paragraph 10 of the Application is thus insufficient.⁴⁷

26.5.2 Neotel and Vodacom's responses are as follows:

26.5.2.1 As a preliminary matter, regulation 10 of the Standard Terms and Conditions deals with the renewal of individual licences. The reason for the reference to regulation 10 by Cell C is, accordingly, unclear.

26.5.2.2 The reason for Cell C's assertion that the Authority's approval of the Transaction is required (which is not denied) and its suggestion that Neotel and Vodacom have not followed the prescribed requirements is also not entirely clear. As is plain from the Application, Neotel and Vodacom have, in fact, made application to the Authority for

⁴⁶ Cell C submission paras 1.2.5, 2.6.8.

⁴⁷ Cell C submission para 4.1.6.

approval of the Transaction in terms of sections 13(1) and 31(2A) of the ECA. There is no basis for the assertion that Neotel and Vodacom have not properly applied to the Authority for approval. However, the Standard Terms and Conditions to which Cell C refers do not impose a requirement for a licensee to seek the Authority's approval for a change in shareholding. Instead, the Standard Terms and Conditions impose a requirement for a licensee to notify the Authority of a change in shareholding after that change has been effected.

26.5.2.3

In this regard, regulation 14A of the Standard Terms and Conditions and clause 2(1)(c) of Schedules 2 and 3 of the Standard Terms and Conditions deal with a post-closing notification to be made to the Authority after the shareholding of a licensed entity has changed i.e. a notification within 7 days after a transaction has taken effect. Regulation 14A(2)(c) of the Standard Terms and Conditions provides in this regard that: "A licensee must submit the notice within seven (7) days of the change occurring where: ... shareholding" (sic). Clause 2(1)(c) of Schedules 2 and 3 to the Standard Terms and Conditions provide that: "A Licensee must submit written notice to the Authority within seven (7) days of the occurrence of the following changes in its licence: ... shareholder".

26.5.2.4

As indicated in the Application, Neotel will comply with this requirement in due course and will notify the Authority once its shareholding structure has altered, once all the suspensive conditions to the Transaction are met and the Transaction is implemented.

27. Ownership by HDPs and BBBEE generally

27.1 **Ownership by HDPs will be reduced following the Transaction**

27.1.1 Various interested parties referred to the fact that ownership by HDPs in Neotel will be reduced following the Transaction.⁴⁸ Cell C claimed that Vodacom's ownership by black people is less than 5% while Neotel's current

⁴⁸ ISPA submission, paras 27 - 28; WAPA submission, paras 26 - 27.

ownership by black people is greater than 25%.⁴⁹ IS, on the other hand, pointed to Vodacom's current shareholding by HDPs as reflected in its BBBEE certificate at 9.22%, while Neotel's current ownership by HDPs is 19%.⁵⁰ IS suggested that the fact that Neotel did not state whether any steps will be taken to maintain or improve its current levels of ownership by HDPs after the Transaction is approved was presumed to mean that shareholding by HDPs in Neotel will be reduced.⁵¹

27.1.2 Neotel and Vodacom's responses to these points are as follows:

27.1.2.1 First, while it is correct that, pursuant to the Transaction, effective ownership by black people in Neotel will decrease, Neotel's score for BBBEE ownership following the Transaction will not be negatively affected. At present, on the basis of its current BBBEE certificate, Neotel scores 11.48 points for ownership measured under the ICT Sector Code. Following the Transaction and on the basis of Neotel and Vodacom's indicative calculations, Neotel's score for ownership will increase. As such, Neotel's overall score for BBBEE, as measured in terms of the ICT Sector Code in its current form, should increase following the Transaction.

27.1.2.2 The primary reason for the positive impact of the Transaction on Neotel's BBBEE score is:

27.1.2.2.1 the increased points that Neotel will score in terms of the ICT Sector Code for voting rights and economic interest held by black people (due to the fact that the value of the black shareholders' stake in Vodacom exceeds R7.5 billion - established as an equivalent of compliance with the 30% voting rights and economic interest targets set in the ICT Sector Code); and

27.1.2.2.2 the increased points that Neotel will score for net value (being the unencumbered, debt-free value of the interests

⁴⁹ Cell C submission, para 1.12.

⁵⁰ IS submission, para 3.2.8.

⁵¹ IS submission, para 3.2.8.

held by black people as a percentage of the value of the measured enterprise).

27.1.2.3 Second, and more practically, the Transaction will impact Neotel's current BBBEE shareholders positively given that they will be able to realise their investment in Neotel.

27.1.2.4 Quite simply, the fact that the percentage effective shareholding by black people will be decreased is not in and of itself a negative where the current black shareholders in Neotel are able to realise their investment. Black shareholders cannot be locked in forever. This would entirely contradict the objectives of Government's BBBEE policy and the BBBEE Act which is that black investors should be able to realise their investment and should have real ownership rights. This includes the ability to divest of that investment at an appropriate time. The imperative for black shareholders to enjoy real rights of ownership and to be able to realise the value of their investment is emphasised in the revised 2013 Codes of Good Practice published in terms of the BBBEE Act.

27.2 *The existence of a requirement that 30% of an individual licensee and/or transferee must be held by HDPs*

27.2.1 Certain of the interested parties submitted that it is a legal requirement that individual licensees or transferees (who acquire control of an individual licensee) have a particular level of HDP ownership. It was submitted on this basis that the Application should not be granted because Neotel will not comply with this requirement subsequent to the Transaction.

27.2.2 It was submitted by Cell C that the Transaction will result in a reduction in ownership by HDPs but that the ECA and the Standard Terms and Conditions provide that "a licence should be owned by parties with a historically disadvantaged background".⁵² IS submitted that Neotel's shareholding following the Transaction will not meet the 30% empowerment threshold set out in (1) section 9 of the ECA, (2) regulation 12 of the Processes and Procedures Regulations, and (3) the ICT Charter published in terms of

⁵² Cell C executive summary para 5; Cell C submission, paras 1.5, 1.6, 1.12.

the BBBEE Act. The Authority should rely on the 30% threshold referred to in these provisions in considering all current and future transactions presented to it for consideration, including the Transaction, as a benchmark for determining whether the transaction which requires its approval will promote the empowerment of HDPs, including black persons. The Authority is able, other than in cases of the granting, transfer and renewal of individual ECNS licences and individual ECS licences (where the 30% threshold is peremptory), to exercise a discretion on the issue of whether a transaction that requires its approval promotes the empowerment of historically disadvantaged persons (i.e. if it is accepted that the Authority has no discretion in matters relating to the granting, transfer and renewal of licences, where the 30% threshold is peremptory, it follows that the Authority has no discretion in matters relating to transfers or changes in control). To suggest otherwise would render the 30% threshold for the granting, transfer and renewal of individual ECNS and ECS licences nugatory. This will reinforce empowerment in the ICT sector and create certainty in the sector as well.⁵³

- 27.2.3 Neotel and Vodacom's responses to these submissions are as follows:
- 27.2.3.1 There is no specific HDP/BBBEE ownership requirement that persons who control existing individual licences and/or radio frequency spectrum licences must comply with.
- 27.2.3.2 Section 9 (specifically section 9(2)(b)) of the ECA does not impose an ongoing requirement that 30% of a licensed entity must be held by HDPs. Section 9(2)(b) provides that the Authority must specify the level of equity ownership to be held by persons from historically disadvantaged backgrounds in an invitation to apply for an individual licence. However, this is a requirement that applies to every invitation to apply for new individual licences. It has no application to existing individual licensees. The fact that none of the major individual licensees has 30% ownership by HDPs demonstrates this.
- 27.2.3.3 The Standard Terms and Conditions in relation to individual ECNS and ECS licensees do not impose any HDP ownership requirements.

⁵³ IS submission, paras 3.2.6 - 3.2.8.

27.2.3.4 For the reasons discussed above, the Processes and Procedures Regulations (including regulation 12(c) thereof) are simply inapplicable to this matter.

27.2.3.5 It should also be noted that Cell C's argument is different to the submissions it previously made to the Authority as recorded in the Findings Document. In the context of the Authority's ownership and control review initiated in November 2009, Cell C apparently submitted that it was of the view that the 30% requirement should be read in the context of the ECA where it is only a requirement for an application for new licences, and that various principles should be considered before a decision regarding the percentage ownership to be included in possible ownership regulations is made.⁵⁴ Cell C submitted further that an alignment of ownership and control requirements should be conducted in all licence terms and conditions.⁵⁵ As is recorded in the Findings Document, Cell C submitted that all licensees must be required to comply with the same requirements of empowerment and ownership and control, and that once a minimum set of standard empowerment requirements are in place through the BBBEE Sector Codes or regulations, then regulations must be put in place for the licensee to comply with section 13. Cell C indicated that it was of the view that the intention of the legislation is to facilitate a general application of minimum empowerment requirements on all licensees rather than to create regulations that would only be applicable upon the transfer of change of ownership of a licence, in an environment where there are no standard empowerment requirements imposed on similar licences (page 30 of the Findings Document). It appears, accordingly, that Cell C's position regarding the correct interpretation of the ECA regarding HDP ownership requirements has changed from the position that it adopted in the context of the ownership review. No explanation has been provided for this change.

⁵⁴ Findings Document, p 34.

⁵⁵ Findings Document, p 51.

27.2.3.6 It would be unfair and inappropriate for the Authority to refuse to grant the Application on the basis that Vodacom (the transferee) has less than 30% ownership by HDPs, as this would amount to the imposition of a firm 30% HDP ownership requirement on Neotel and Vodacom simply because their transaction is before the Authority, when no such requirement has been imposed generally on all other similarly situated licensees. This would amount to the imposition via the back door of an HDP ownership requirement on Neotel alone, when other licensees in the sector do not presently comply with similar obligations.

27.2.3.7 To the extent that the Authority wishes to impose firm HDP or BBBEE ownership requirements, it must do so uniformly in accordance with the requirements of section 13(3)(a) of the ECA and/or section 4(3)(k) of the ICASA Act, and must allow affected persons a period of time within which to comply. This is consistent with the Authority's policy position as set out in the 2011 Findings Document. The publication of this Findings Document and the positions set out in it gave rise to certain expectations within the ICT sector that, while ownership requirements would be introduced, affected parties would be given a transitional period within which to comply with the new obligations. Departing from those positions on an *ad hoc* basis would be unfair and inconsistent with the expectations of affected parties.

27.2.3.8 The ICT Sector Code does not require that 30% of the ownership interests in a measured entity in the ICT sector must be held by black people. The 30% threshold is a *target* as opposed to a requirement and measured entities will score points for ownership in proportion to their relative achievement of this target.

27.2.3.9 As discussed above, Neotel's overall BBBEE score will increase rather than decrease following the Transaction. It is evident, accordingly, that levels of empowerment within Neotel will in fact go up pursuant to the Transaction. As such, the Transaction promotes

BBBEE, as provided for in section 2(h) of the ECA rather than detracting from it.

27.3 *HDP ownership requirements in the context of radio frequency spectrum licences*

27.3.1 Telkom submitted that the provisions of the Radio Frequency Spectrum Regulations in relation to HDP ownership are relevant to the Authority's consideration of the Transaction and the Application. This is because, had the Transaction included the direct transfer of ownership of the spectrum licence, it would have triggered regulation 10(7) of the Radio Frequency Spectrum Regulations which forbid a transfer in the event of a BBBEE-ownership reduction.⁵⁶

27.3.2 Cell C submitted that transfers of control, or of radio communications licences themselves, are subject to the same requirements on ownership and control as ECNS and ECS licences. The basis for this submission does not appear from Cell C's representations. In this regard, Cell C indicated that it had dealt with this point in section 1 of its submissions, but no reasoning is specifically provided for this assertion in section 1.⁵⁷ In section 2 of its submission, however, Cell C noted that another important provision governing spectrum in the Radio Frequency Spectrum Regulations is that "an application for a spectrum licence will only be considered if historically disadvantaged persons are the direct owners of at least 30% of the applicant".⁵⁸

27.3.3 Neotel and Vodacom's response to these submissions is as follows:

27.3.3.1 First, as recognised by Telkom, regulation 10(7)(c) of the Radio Frequency Spectrum Regulations does not apply to the transfer of control.⁵⁹

27.3.3.2 Second, the requirement in the Radio Frequency Spectrum Regulations that an applicant for a radio frequency spectrum licence must have at least 30% direct ownership by historically

⁵⁶ Telkom submission para 25.

⁵⁷ Cell C submission paras 1.1 – 1.13, 2.9.

⁵⁸ Cell C submission para 2.6.10.4.

⁵⁹ Telkom submission para 25.

disadvantaged individuals, which requirement applies only in the context of the extended licence application procedure, in respect of licences issued for the assignment of spectrum in particular bands and for particular purposes, applies to applicants for such licences. The Radio Frequency Spectrum Regulations do not themselves impose any legal requirement that a person to whom a control interest in a spectrum licence or licensee is transferred must have or maintain a particular level of ownership by HDPs. While it is potentially open to the Authority to make regulations imposing such requirements and to allow affected licensees a period of time within which to comply, the Authority has not yet done so. As such, for the same reasons as are given above in relation to why the transfer of control of Neotel's spectrum licences to Vodacom is not impeded by the fact that Vodacom does not have 30% HDP ownership, there is no basis on which the Authority may refuse to approve the transfer of control of Neotel's radio frequency spectrum licences on the basis that Vodacom, as the acquiring entity, does not meet a particular threshold of HDP ownership.

27.4 *The Authority's discretion to refuse to grant an application which will result in a reduction of HDP ownership*

27.4.1 Various interested parties have argued that, even if the Authority cannot refuse to approve the Transaction on the basis that Vodacom has less than 30% HDP ownership, the Authority nevertheless has a discretion to refuse to grant the Application in light of the fact that ownership by HDPs in Neotel will be reduced following the Transaction. It has been submitted that the Authority cannot allow a reduction in empowerment levels and, accordingly, cannot approve the Transaction.⁶⁰ A number of points have been made in support of these submissions.

27.4.1.1 IS submitted that even if the Authority takes the view that it is not empowered to apply the 30% HDP ownership threshold to the Transaction and to refuse to grant the Application on the basis that Neotel will not have 30% HDP ownership following the Transaction,

⁶⁰ IS submission paras 3.1.2.1, 3.2.6, 3.2.7, 3.2.8, 3.2.9, 3.2.10; Cell C submission paras 1.5, 1.6, 1.12; Telkom submission paras 20 - 27.

it cannot be said that the Transaction will promote the empowerment of HDPs. This is particularly important as Neotel's undertaking in Annexure A to the Application must extend to the empowerment of HDPs, as contemplated in section 2 of the ECA. In the absence of any express undertaking from Neotel regarding maintenance or improvement of the current levels of ownership by HDPs, the Authority cannot find that the Transaction will promote the empowerment of HDPs.⁶¹

27.4.1.2

Cell C submitted that section 4(3)(k) of the ICASA Act, section 5(9)(b) of the ECA (which provides that the Authority "must" in granting a licence, promote BBBEE), section 9(2)(b) of the ECA (which requires the Authority "to include a minimum of 30% equity ownership in terms of regulations under section 4(3) of the ICASA Act") and section 13(3)(a) of the ECA, and the terms and conditions of Neotel and Vodacom's licences require BBBEE to be furthered when the Authority makes decisions. Neotel will not be in a position to comply with empowerment requirements if the ownership and control of Neotel changes, as the licensee will not be as empowered "as it is required to be" under the ECA. To permit a transfer of a licence or control of that licence to pass from an empowered entity to an entity which is not empowered would "run counter to the fundamental provisions on ownership and control set out in the ECA".⁶²

27.4.1.3

Cell C argued further that sections 5(9)(b) and 9(2)(b) of the ECA empower the Authority to impose conditions in relation to ownership and control on individual licensees.⁶³

27.4.1.4

Telkom drew attention to the fact that the objects of the ECA provide for the promotion of BBBEE, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities⁶⁴ and that section 13(3)(a) of the ECA requires the Authority to promote the ownership and control of electronic

⁶¹ IS submission paras 3.2.9 - 3.2.10.

⁶² Cell C submission paras 1.5, 1.6, 1.12.

⁶³ Cell C submission para 1.5.

⁶⁴ Telkom submission para 23.

communications services by historically disadvantaged groups and to promote BBBEE, although the Authority is yet to publish regulations under this section.⁶⁵

27.4.2 Neotel and Vodacom have a number of responses to these arguments:

27.4.2.1 As discussed above, Neotel's BBBEE score for ownership will in fact go up rather than down. Empowerment through ownership by black people will, accordingly, increase rather than decreasing.

27.4.2.2 Moreover, and in any event, the suggestion that a mere reduction in BBBEE ownership must necessarily result in a refusal of the Application is untenable.

27.4.2.2.1 When the Authority exercises its discretion in terms of section 13(1) of the ECA to decide whether or not to approve an application for the transfer of control of an individual licence, the empowerment of black people as provided for in section 2(h) of the ECA in terms of which one of the objects of the ECA is to "promote [BBBEE], with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities" is only one of the relevant considerations which the Authority must take into account in making its decision. (Empowerment is also not limited to the question of BBBEE ownership as we have explained in paragraph 27.1.2 above.)

27.4.2.2.2 In the past, various licensees have, for various reasons, reduced their respective levels of ownership by black people. It is our understanding that Cell C which reduced the percentage of shares held by its BBBEE investor, CellSAF, from 40% to 25% in 2005 following the sale by CellSAF of 15% of the shares in Cell C to Lanun Securities. This transaction was effected, as Neotel and Vodacom understand, for various reasons including to reduce the levels of debt held by the BBBEE investors. In the context of

⁶⁵ Telkom submission para 24.

this transaction, the BBBEE investors were not considered by the licensed entity in which they held shares to be locked-in *ad infinitum* and there was implicitly a recognition that black shareholders, like all other shareholders, must have a reasonable opportunity to manage their investments as they see fit including to divest of those investments at an appropriate time. Cell C was given approval by the Authority for the reduction of HDP ownership. At the time that this transaction was effected Cell C did not have similar concerns in relation to the reduction of black ownership as it appears to have in the context of the Transaction.

27.5 *19% equity stake reserved for HDPs when the second national operator was licensed*

27.5.1 Telkom submitted that at the time that the second national operator (SNO), which became Neotel, was licensed, a 19% equity stake was reserved for a BBBEE applicant, which was identified after the Authority conducted a detailed application process. It was submitted that the acquisition by Vodacom of 100% of the issued shares in the share capital of Neotel will negate the public policy objectives that informed the introduction of the SNO together with the regulatory objective in section 2(h) of the ECA.⁶⁶

27.5.2 Neotel and Vodacom have a number of responses to this submission.

27.5.2.1 First, although a 19% equity stake was reserved for a black investor at the time that the SNO was licensed, the public switched telecommunications service (PSTS) licence and, subsequently, the individual ECNS and ECS licences to which the PSTS licence was converted did not impose a licence condition requiring 19% BBBEE or HDP ownership.

27.5.2.2 Second, at the time that the SNO was licensed the Ownership and Control Regulations regulated any reduction in HDP ownership. As discussed above, in terms of regulation 4(1)(b) of those regulations, a licensee was required to apply to the Authority to approve “a decrease in the ownership interests held by [HDPs] in a licensee

⁶⁶ Telkom submission paras 20 – 24.

within the first two years of initial grant of the licence where the licensee proposed such ownership interests to be held by [HDPs] in its application for a licence in response to an invitation to tender issued by the Minister under section 34 of the [Telecommunications] Act". To the extent that a different requirement was intended to be imposed on the SNO, this would have been stipulated in the licence issued to Neotel. No such requirement was included. By contrast, requirements in relation to HDP ownership were imposed on other licensed entities such as Cell C. As such, the intention of the Minister and the Authority must have been that reductions in the level of ownership by HDPs should be regulated, in the ordinary course, by the Ownership and Control Regulations, which permitted a reduction in ownership by HDPs provided that the Authority's approval was required when HDP ownership interests were reduced in the first two years of the licence.

27.5.2.3

The approval requirement in the Ownership and Control Regulations in respect of a reduction in HDP ownership does not apply in relation to the Transaction given that more than two years have elapsed since the SNO was licensed.

28. No basis for withdrawal of spectrum

28.1 Various interested parties have argued that Vodacom should not be permitted to control Neotel's spectrum assignments and that Neotel's spectrum assignments should be freed up for co-ordinated allocation to all applicants in a fair and reasonable manner as a condition for the Transaction.⁶⁷ A number of justifications have been proffered for this argument.

28.2 Cell C claims that Neotel has underutilised its spectrum assets due to minimal investment in mobile infrastructure to leverage it. MTN states that Neotel serves just 200 000 subscribers from a few hundred sites, i.e. the current use of a significant spectrum portfolio by Neotel is nothing more than an advanced market trial. MTN goes further to say that, if Neotel were permitted to retain its spectrum after the Transaction, it would be receiving a windfall for spectrum that it has hoarded (MTN

⁶⁷ Cell C executive summary para 4; MTN submission p 2, p 4; Crystal Web submission paras 8 - 9.

claims that Neotel has largely not used its spectrum allocation) at the expense of the public.⁶⁸

28.3 MTN and Cell C both suggest that Neotel's spectrum should be returned for allocation or reassignment as part of a co-ordinated allocation of high-demand spectrum to all applicants.⁶⁹ Crystal Web argues that section 31(2A) of the ECA does not contemplate the "bundling" of a spectrum allocation to a licence and that it is not possible for the Authority to transfer a spectrum allocation from one licensee to another without the spectrum in question re-entering a general pool for re-allotment.⁷⁰ Cell C submits that the Authority should engage with the Commission to ensure that Neotel's spectrum is allocated in the public interest.⁷¹

28.4 Neotel and Vodacom submit that the Authority cannot re-assign Neotel's spectrum as a condition for the Transaction. This is for a number of reasons:

28.4.1 The Authority cannot be asked under the guise of "imposing a condition" to bypass the substantive and procedural provisions of the ECA dealing with the withdrawal of a radio frequency spectrum licence.

28.4.2 Section 31(8) of the ECA and regulation 12 of the Radio Frequency Spectrum Regulations deal specifically with this issue. Thus, section 31(8) empowers the Authority to withdraw a licence "when the licensee fails to utilise the assigned radio frequency spectrum in accordance with the licence conditions applicable to such licence". Neotel does not fall within this provision. The spectrum assignments which Neotel holds are not unused spectrum – Neotel's customers are currently receiving services from Neotel using the spectrum in question. This is quite apart from the fact that section 31(8) requires a separate notice-and-comment procedure to be followed. As such there is no possibility of this occurring via these proceedings.

28.4.3 Moreover, the provisions in the ECA and Radio Frequency Spectrum Regulations dealing with the withdrawal of spectrum assignments must be strictly construed i.e. the instances in which spectrum may be withdrawn must be limited to the circumstances stipulated in the relevant provisions.

⁶⁸ MTN submission, p 2.

⁶⁹ Cell C executive summary para 4; MTN submission p 2, p 4.

⁷⁰ Crystal Web submission paras 8 - 9.

⁷¹ Cell C submission, para 3.7.

This is because the forfeiture of spectrum amounts to a deprivation of property which must take place in accordance with the requirements of section 25 of the Constitution of the Republic of South Africa, 1996. Section 25 of the Constitution prohibits any deprivation of property that is (a) arbitrary and (b) not in terms of a law of general application. In *Agri South Africa v Minister for Minerals and Energy*,⁷² the Constitutional Court held that common-law mineral rights (in short, the exclusive right to prospect for and mine minerals) amounted to “property” in terms of section 25⁷³ and that their withdrawal amounted to “deprivation”.⁷⁴ Given that a spectrum licence is, like a mineral right, the exclusive right to do a particular thing that is of economic value (in this case, to transmit at a specified frequency), the forfeiture of that spectrum licence would constitute deprivation of property in terms of section 25.

28.4.4 This means that the forfeiture of spectrum may not be arbitrary and must be in terms of a law of general application. If the Authority were to withdraw any of Neotel’s spectrum assignments as a condition for the Transaction without following the requirements in section 31(8) of the ECA and regulation 12 of the Radio Frequency Spectrum Regulations, it would deprive Neotel of property in a way that is (a) not in terms of a law of general application and (b) arbitrary. The deprivation would not be in terms of a law of general application because it would not be specifically empowered by any law. The deprivation would also be arbitrary, for two reasons.⁷⁵ First, it would be arbitrary because it would be procedurally unfair. Second, the deprivation would be arbitrary because the purported reasons justifying it would be insufficient to meet the high bar set by section 25 of the Constitution.

28.4.5 The Authority thus has no power to impose a condition on its approval in relation to the withdrawal of spectrum assignments.

28.5 In addition, as described above, Neotel will continue to hold the spectrum licences that it currently holds and to make use of the frequencies authorised in terms of those licences.

⁷² 2013 (4) SA 1 (CC).

⁷³ Ibid paras 33, 50.

⁷⁴ Ibid para 53.

⁷⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

29. **No adverse effect on competition**

29.1 We have explained above in paragraph 21 the confined role which competition considerations play in this process and the fact that Parliament has made it expressly clear that it is the Commission (rather than the Authority) which has the primary authority to review mergers.

29.2 Moreover, while MTN, Cell C, IS and Telkom (the **Third Parties**) have all submitted that the Transaction may have an adverse impact on competition, they have not done so with any rigor nor properly applied the accepted framework within which the impact of a transaction on competition should be analysed.

29.3 This framework requires (i) the definition of relevant markets; (ii) the identification of the likely counterfactual (i.e. what would the state of competition in such relevant markets be absent the merger); and (iii) an assessment of the impact of a transaction on consumers rather than competitors. The Third Parties have omitted some or all of these considerations in their submissions, resulting in material flaws in their reasoning. The result is that they have not made credible arguments for the anti-competitive effects of the Transaction. We identify some of the key flaws in their reasoning before going on to address their submissions in detail.

29.3.1 The first category of arguments made by the Third Parties is that access to Neotel's spectrum will give Vodacom an advantage relative to the Third Parties (Vodacom's rivals) which means that they will not be able to compete. There are two significant flaws in the arguments presented by the Third Parties:

29.3.1.1 None of them has done any assessment of the counterfactual. Absent the Transaction, the Third Parties will not have access to Neotel's spectrum. It will remain with Neotel, where it is not being put to the most efficient use. The result of Vodacom gaining control over Neotel is not that the Third Parties will be disadvantaged as is suggested. The result will be that Vodacom will bring more capacity to the market to the manifest benefit of consumers.

29.3.1.2 There is no attempt by the Third Parties to assess the impact of the Transaction on consumers. Their main concern is the impact that the Transaction will have on each of them. In a world where Vodacom is able to compete more effectively, it is logical that the Third Parties will face a greater competitive challenge. Although this may be uncomfortable for Vodacom's rivals, it is valuable from a consumer perspective because the likely result is more effective use of Neotel's spectrum as well as that of the Third Parties.

29.3.2 A second category of arguments is that if the Transaction is implemented, Neotel and Vodacom will be able to engage in exclusionary conduct including bundling of products and foreclosure of rivals in relation to infrastructure and technology. Like the arguments with regard to spectrum, these are not advanced within a proper analytical framework:

29.3.2.1 There is no attempt to define the affected markets. Indeed the arguments seem to be premised on the concept of a single unified telecommunications market (a concept that is not accepted by any competition regulator anywhere in the world). For purposes of competition analysis, market definition should be based on supply and demand substitutability. Fixed and mobile markets are clearly not substitutes - consumers value mobility which fixed networks cannot deliver by definition and mobile networks cannot deliver the same speed and reliability as fixed networks.

29.3.2.2 Competition concerns are highly unlikely in markets where there are no horizontal overlaps i.e. where one party operates in the fixed market and the other in mobile. If there is no increase in market share, there is no increased ability or incentive for firms to engage in anti-competitive conduct. Nor in general terms do issues arise in vertical mergers. The Third Parties do not credibly suggest otherwise in regard to horizontal issues. What they do seem to suggest is that there may be vertical and conglomerate effects in the sense that the combination of a fixed and mobile operator may result in anti-competitive bundling, foreclosure and other anti-competitive conduct of that kind.

29.3.2.3

Again, there is a clear analytical framework for assessing the likelihood of such conduct after a transaction has been implemented which has not been followed by the Third Parties. First, the firms concerned must have an ability to engage in the conduct. In order for a firm to have the ability to engage in anti-competitive conduct, the firm must be a “must have” trading partner for its rivals (in that there are no credible alternatives arising from high market shares). Second, a firm must have the incentive to engage in the anti-competitive conduct. The question in the case of a possible foreclosure concern is whether the firm would gain or lose if it risked giving up trading with its rivals in order to attempt to foreclose them. In principle, if these two tests are met, it is still necessary to demonstrate that customers would be worse off – given the general pro-competitive efficiency benefits of conglomerate mergers.

29.3.2.4

The Third Parties have not explained why this ability would exist despite the fact that the parties face strong competition in both fixed (including from Telkom, IS/MWEB and VOX) and mobile (from MTN, Cell C and Telkom). No explanation is given for why, if Vodacom and/or Neotel engaged in a foreclosure strategy after the implementation of the Transaction, the Third Parties would not simply switch to another service provider.

29.3.2.5

The Third Parties also do not recognise that, even if an ability to foreclose existed, Vodacom and Neotel would only engage in a foreclosure strategy if it were profitable. Such a strategy in relation to wholesale fixed services would result in the loss of substantial wholesale fixed revenues. These revenues would have to be recaptured by way of increased retail fixed revenues in order to make the strategy profitable. The prospects of recapturing sufficient retail sales to compensate for the loss of wholesale revenue is minimal in circumstances where the retail fixed market share is so low.

29.3.2.6

As indicated above, conglomerate mergers are generally regarded as procompetitive, and it is presumed there will be an incentive on the part of a merged entity to reduce prices or otherwise improve its

offering to customers so as to enjoy enhanced earnings. Even if it were possible to show that a firm had the ability and incentive to engage in foreclosure (which the Third Parties have not even attempted to demonstrate) it would still be necessary to demonstrate sufficient effects to outweigh the efficiency benefit.

29.3.3 A third category of arguments is that the Transaction will result in the elimination of potential or actual competition:

29.3.3.1 It is alleged by MTN that Neotel will be eliminated as a potential competitor to Vodacom. This is a bald statement by MTN with no supporting evidence as to the likelihood of Neotel entering the mobile market (particularly taking into account its financial constraints) or any indication as to the time frame within which this entry might occur.

29.3.3.2 It is alleged by IS, again without any factual basis, that Neotel may be required by Vodacom to no longer continue with the provision of fixed-line telephone services to consumers and focus on the provision of data services. However, Vodacom has made it clear that it intends to grow Neotel's fixed-line business. Unless it can be demonstrated that it would be profitable for Vodacom to adopt the strategy suggested by IS (and no attempt has been made by IS to do so) it must be assumed that Vodacom will act in accordance with its stated and rational intention.

29.4 Neotel and Vodacom submit that the submissions by the Third Parties, as to why the Transaction is likely to have an anti-competitive effect, should be assessed in the light of their failure to present or analyse their concerns within the well understood framework used to assess these issues.

29.5 Notwithstanding this, Neotel and Vodacom deal in more detail with each of the three categories of submissions referred to above in order to be of as much assistance to the Authority as possible. In addition, Neotel and Vodacom also deal with the various issues that Cell C has raised with regard to the Frontier report.

30. **Competition issues relating to Spectrum**

30.1 *Radio spectrum is a scarce resource which should be allocated fairly to allow for competition on a more equitable footing*

30.1.1 IS and Cell C point out that radio frequency spectrum in South Africa is a scarce resource.⁷⁶

30.1.2 IS submits that the Authority has gone to great lengths to allocate substantially the same amount of radio frequency spectrum to Vodacom and Neotel's competitors to ensure parity amongst operators and to consequently, ensure that all parties are able to compete effectively.⁷⁷ Vodacom and Neotel, as network operators, each currently hold a significant amount of radio frequency spectrum within the 900 and 1200 MHz frequency bands.⁷⁸ It would be unfair and inequitable for Vodacom to be allowed to gain access to additional spectrum in circumstances where its competitors are unable to access more radio frequency spectrum within the same frequency bands.⁷⁹ This will enable Vodacom to compete unfairly with its competitors insofar as the use of radio frequency spectrum is concerned.⁸⁰

30.1.3 Neotel and Vodacom's responses to these submissions are as follows:

30.1.3.1 It is agreed that high-demand radio frequency spectrum is a scarce resource and it is therefore important that it is used efficiently in the best interests of consumers. However, there is no policy of parity of spectrum allocation in South Africa and such a policy will not yield optimal and cost effective outcomes for consumers.

30.1.3.2 Needs-based spectrum assignment is good practice in well-established markets as this serves consumer interests better (as may be inferred from the draft International Mobile Telephony (IMT) roadmap).

⁷⁶ IS submission, para 3.4.1 and Cell C submission, executive summary, para 4, and para 2.3.

⁷⁷ IS submission, paragraph 3.4.3.

⁷⁸ IS submission, para 3.4.3. This is an error. Neither Neotel nor Vodacom holds spectrum in the 1200 MHz frequency band.

⁷⁹ IS submission, para 3.4.3.1 and Cell C paras 2.2 and 3.5.

⁸⁰ IS submission, para 3.4.4.

- 30.1.3.3 Vodacom currently holds substantially less mobile access spectrum than Telkom and slightly less than MTN⁸¹ (both of whom are its major competitors in the roll-out of LTE). In addition to this disadvantage, Vodacom has 10 million more subscribers than MTN on its 2G network⁸² using up spectrum in the critical 1800 MHz band that is currently the only practical band for Vodacom to deploy LTE.⁸³
- 30.1.3.4 This means that Vodacom will not, in future, be in a position to continue rolling out LTE whilst maintaining a consistent, acceptable and affordable experience, in critical areas over the long term, for its large 2G and 3G customer base. Vodacom is currently re-farming 2x5 MHz and in some cases 2x10 MHz of the 1800 MHz spectrum for its LTE roll-out. However, this is not ideal in the medium to long term and places Vodacom at a significant competitive disadvantage when:
- 30.1.3.4.1 MTN has fewer impediments to deploying 2x10 MHz of 1800 MHz spectrum for its LTE roll-out on a national scale; and
- 30.1.3.4.2 Telkom has 60 MHz of 2.3 GHz TDD spectrum for its LTE roll-out, as well as 20 MHz TDD spectrum in the 1900 MHz band and an equivalent FDD holding to Vodacom in the 1800 MHz band.⁸⁴ Telkom has also announced at MyBB2014 that it will launch LTE Advanced services in December 2014.
- 30.1.3.5 Telkom has access to more usable LTE bands than any other operator. After the implementation of the Transaction, Vodacom will still control less usable LTE spectrum than Telkom.
- 30.1.3.6 This is not a case of Vodacom being placed in a position to compete unfairly insofar as the use of radio spectrum is concerned. Rather, the Transaction goes some way towards alleviating Vodacom's

⁸¹ In June 2014, MTN was assigned a further 1x5 MHz spectrum so that MTN now holds 1x10 MHz contiguous assignment of TDD spectrum in the 2100 MHz band (2010 to 2020 MHz).

⁸² Vodacom currently has 34 million subscribers relative to MTN's 25 million and Telkom's 1.9 million.

⁸³ These 2G customers (whose handsets are not compatible with later generation technologies) will not all fit onto the 900 MHz spectrum band at acceptable quality levels (as is possible for other players, in particular MTN).

⁸⁴ Telkom has had these assignments for a significant period of time.

spectrum constraints relative to MTN and Telkom and starts to redress its impending competitive disadvantage. In other words, it enables Vodacom to continue to compete for LTE services against MTN and Telkom while containing, to some extent, the impact on the services provided to its 2G and 3G customer base.⁸⁵

30.1.3.7 Finally, a competitive process involving several potential acquirers, including MTN and IS, was followed to identify a purchaser of Neotel's shares. Although MTN was interested in buying Neotel and thus placing itself in potentially a better position than Vodacom will be in if the Transaction proceeds, it now submits that the adverse competitive impact is such that the Transaction should only be approved if the spectrum is returned for reassignment.

30.1.3.8 As has been explained above, there is simply no lawful basis for suggesting as MTN and Cell C do, that Neotel's spectrum should be returned for reallocation. In any event, such a move would inevitably delay the use of the spectrum and have an adverse effect on the consumers to whom services are currently provided using that spectrum.

30.2 *Access to Neotel's 90 MHz of spectrum will entrench Vodacom's dominant position in mobile*

30.2.1 MTN and Cell C submit that the Transaction radically changes the landscape, by providing Vodacom with control over Neotel's 90 MHz of high-demand spectrum. This gives the already dominant SA mobile player an additional and substantial cost, capacity and time-to-market advantage relative to its competitors.^{86 87}

30.2.2 Although MTN concedes that consumers will likely benefit from the earlier and wider availability of LTE, they argue that the Authority should be

⁸⁵ Whilst the full details are not yet known, the proposed infrastructure-sharing arrangement between MTN and Telkom may further exacerbate the need for Vodacom to have access to additional spectrum in order to be able to compete effectively on LTE.

⁸⁶ MTN submission, p 3.

⁸⁷ MTN submission pages 2 to 4, and Cell C submission, executive summary, para 4 and para 2.1.

concerned about the competitive impact of providing an already dominant player with such a structural and timing advantage over its competitors.⁸⁸

30.2.3 According to MTN, Vodacom would control twice the amount of prime LTE spectrum (1800 MHz) as compared to the rest of the market, and uniquely would get access to spectrum which provides a significant advantage in geographic coverage and in-building penetration (800 MHz). This combination is suggested to provide an un-replicable advantage as regards LTE coverage and capacity.⁸⁹ In addition, the Neotel WiMax spectrum (2x28 MHz in the 3.5 GHz band) is also capable of being used for LTE purposes.⁹⁰ The implication is that Vodacom would be able to launch a national LTE network (without the need to refarm any of its existing spectrum away from voice) well in advance of any other competitor in the mobile market⁹¹ and that Vodacom would need to build (and maintain) significantly less radio sites in order to serve demand (conversely, significantly more demand can be served out of the same number of radio sites).⁹²

30.2.4 IS submits that Vodacom's ability to accelerate roll-out of LTE services will give it an unfair advantage in the building of a national LTE network, as its competitors will remain in the position where they are unable to properly progress their roll-out of LTE/4G technology in the absence of access to additional frequency spectrum.⁹³

30.2.5 MTN highlights that Vodafone (Vodacom's holding company) objected to the T-Mobile/Orange merger in the UK on the basis that the merged entity would have an unfair spectrum advantage in the 1800 MHz band – the implication is that double standards are now being applied.⁹⁴

30.2.6 Neotel and Vodacom's responses to these submissions are as follows:

30.2.6.1 The extent of the spectrum available for LTE services is substantially overstated by MTN and Cell C. A spectrum holding does not automatically translate into a timing advantage in respect of the

⁸⁸ MTN submission, page 2.

⁸⁹ MTN submission, page 3.

⁹⁰ MTN submission, page 3.

⁹¹ MTN submission, page 3 and Cell C submission, para 2.1.

⁹² MTN submission, page 3.

⁹³ IS submission, para 3.4.3.1.

⁹⁴ MTN submission, p 4.

provision of LTE services. The advantage is dependent on the suitability of the spectrum bands to deploy LTE services within a specific timeframe. Without compatible equipment and handsets having been developed, a particular band of spectrum cannot be used for the deployment of LTE services.

30.2.6.2 MTN and Cell C are therefore incorrect to suggest that the Transaction will result in a radical change in the landscape and provide Vodacom with a structural and timing advantage over its competitors. Taking into account their subscriber numbers, each of MTN and Telkom is able to deploy more spectrum to LTE services than Vodacom.

30.2.6.3 Although access to Neotel's spectrum will go some way towards addressing this disadvantage, there are technical limitations to how much of Neotel's spectrum can be deployed to LTE services:

30.2.6.3.1 Only a small proportion of Neotel's high-demand spectrum may be usable for LTE services in the immediate future. In the 1800 MHz band, only 2x10 MHz of the 2x12 MHz allocation can be used for LTE.

30.2.6.3.2 In the 850 MHz band, if Neotel's 2x4.92 MHz is migrated to 2x5 MHz ITU 3GPP band 20 as part of the Authority's spectrum band re-planning initiative, this spectrum holding could be usable for LTE. However, it is not realistic to expect that this spectrum will become available in the near future because of the complexity of Digital Terrestrial Television (DTT) migration.⁹⁵

30.2.6.3.3 The 3500 MHz band may be usable for LTE but not in the near future.⁹⁶

⁹⁵ 850 MHz has beneficial propagation abilities but based on the challenges associated with the band, it is not usable for LTE for the foreseeable future. This spectrum is also under review in the Authority's draft IMT roadmap which means that large-scale deployment will be delayed.

⁹⁶ Insofar as 3.5 GHz is concerned, there is some global interest but actual market adoption still needs to solidify. The propagation abilities in this band can be considered inferior. As a result, LTE deployment may become prevalent in the longer term but not in the immediate term. Considering that the Authority's draft IMT roadmap is still reviewing the band plan, it is premature to predict the competitive advantage of this band, if any. Telkom

- 30.2.6.4 Therefore only 2x10 MHz of Neotel's 90 MHz of spectrum (a maximum of 20 MHz) could conceivably be used in the short term to provide LTE services. Furthermore, Neotel and Vodacom's 1800 MHz spectrum assignments are not adjacent which does not allow for a contiguous 20 MHz implementation irrespective of any potential agreement reached between Vodacom and Neotel.⁹⁷
- 30.2.6.5 Competitors will be in a position to progress the roll-out of their LTE technology.
- 30.2.6.5.1 MTN and Telkom are already key players in the LTE space and are progressively expanding their network roll-out.
- 30.2.6.5.2 Cell C has previously indicated that it does not intend to invest in LTE. However, more recent statements by acting CEO, Jose Dos Santos, suggest that Cell C is planning to prepare a large percentage of its sites – especially in Gauteng – to be LTE ready during the course of this year. With appropriate investment, it will be in a position to compete effectively.
- 30.2.6.6 In summary, the Transaction will provide Vodacom with an improved cost, capacity and time-to-market position for its LTE services, but it does not represent a substantial or unassailable advantage relative to competitors as regards LTE coverage and capacity as suggested by MTN and Cell C. Rather, it enables Vodacom to compete more effectively with MTN and Telkom going forward in circumstances where it is already taking all feasible steps to maximise its capacity.
- 30.2.6.7 Finally, the circumstances surrounding Vodafone's objection to the T-Mobile/Orange merger in the UK were completely different to those applicable in South Africa. There are several material differences between the two transactions:

opted to return 2x14 MHz of their 3.5 GHz spectrum which is an indication of how it views the value in the short term.

⁹⁷ The support for intra band 1800 MHz carrier aggregation remains uncertain at this stage.

30.2.6.7.1 T-Mobile/Orange was a mobile/mobile transaction, not a fixed/mobile transaction, and it consolidated spectrum, whole networks, retail distribution assets and customer bases.

30.2.6.7.2 The T-Mobile/Orange joint spectrum holdings provided the parties with a very substantial advantage over competitors which meant a substantial qualitative difference in their ability to offer mobile services to customers. There was no suggestion that T-Mobile or Orange faced a unique spectrum constraint or disadvantage versus their competitors

30.2.6.7.3 There was no LTE offering in the market at that stage. This meant that the proposed merger gave one operator the privileged position of providing LTE services without facing any competition from rivals, which were not in a position to provide LTE services at that time. This is in contrast with the situation in South Africa, where both MTN and Telkom are already providing LTE services, and the Transaction will enable Vodacom to redress its spectrum constraints.

30.3 *RAN arrangements are not an adequate alternative to spectrum consolidation*

30.3.1 MTN submits that RAN outsourcing-roaming arrangements (as per the MTN/Telkom transaction) will not appropriately address the competitive imbalance this Transaction creates. MTN indicates that in theory, similar types of cost efficiencies may be achieved, but an important distinction is that there is no reduction in the number of wholesale and retail competitors. As a result competition between operators party to such an arrangement ensures that cost efficiencies are more likely to be passed-through to consumers.⁹⁸

30.3.2 Moreover, MTN claims that since there is no consolidation of frequency spectrum holdings, no detrimental dynamic effect on the market would arise: each MNO that is party to such an agreement would retain its bargaining

⁹⁸ MTN submission, p 4.

power through its spectrum assignments and be able to negotiate similar deals in the future.⁹⁹

30.3.3 Neotel and Vodacom's responses to these submissions are as follows:

30.3.3.1 Given the limited information available regarding the proposed MTN/Telkom transaction, Neotel and Vodacom are not able to provide a final view on the impact of the transaction on competition. However, the following general observations are made on the basis of the information currently available:

30.3.3.1.1 The planned arrangement between Telkom and MTN is being positioned as one of RAN co-operation. This will result in tight operational dependencies between the parties. Although it is claimed that they will continue to compete, as a result of their close co-operation they will not run independent network operations and their ability to compete will be limited.

30.3.3.1.2 The arrangement between MTN and Telkom results in substantially greater collective spectrum than the transaction between Vodacom and Neotel. In addition, it is between two mobile operators. This has more potential to impact on competition than a transaction between a fixed and mobile operator.

30.3.3.2 Without the competitive impetus from Vodacom to drive LTE deployment, it is possible that Telkom and MTN would have no incentive to rapidly deploy the next generation of mobile broadband technology.

31. **Possible anti-competitive conduct of Vodacom after it has established control over Neotel**

31.1 *The Merged Entity will be able to leverage its market power into other markets and engage in exclusionary conduct including the bundling of products*

⁹⁹ MTN submission, p 4.

- 31.1.1 Telkom submits that the Transaction will significantly strengthen Vodacom's overall capability to offer both fixed and mobile services, on either a wholesale or retail basis. Vodacom already possesses an extensive network, as part of its mobile operations, and would now have access to the additional connectivity of Neotel's network.¹⁰⁰
- 31.1.2 Cell C claims that the Merged Entity will be a "super-dominant" operator, which will be able to leverage its increased scale across both fixed and mobile markets and in all probability have the effect of reducing Cell C's ability to compete and increase scale and market share in the foreseeable future. No new entrant will be able to compete.¹⁰¹ The increase in scale that will result for Vodacom from the Transaction is likely to result in the sort of anti-competitive behaviour that Cell C has already complained about in relation to Vodacom, namely the differential in pricing between on-net and off-net services.¹⁰² The merged super-dominant operator is likely to be able to leverage its market power into several different markets.¹⁰³
- 31.1.3 IS submits that the Transaction is part of a broader trend by the "Dominant Players" to engage in acquisitions or enter into arrangements with smaller players in order to strengthen their dominant positions (this is driven by large consumers demanding all-inclusive packages from a single provider). Access to the majority of the technologies required in order to provide these bundled services therefore becomes of paramount importance to compete effectively.¹⁰⁴ The Transaction (and the increase in consolidation in the sector) increases the risk of anti-competitive bundling and raises barriers to entry.¹⁰⁵
- 31.1.4 According to IS, Vodacom will be able to utilise its mobile infrastructure and Neotel's fixed infrastructure to offer a broader spectrum of services to both corporate and household customers. In other words, while Neotel and Vodacom have traditionally operated in the fixed and mobile space, the Merged Entity (controlled by Vodacom) will now be transplanted into the

¹⁰⁰ Telkom submission, para 28.

¹⁰¹ Cell C submission, executive summary, para 8 and paras 2.7 and 3.4.

¹⁰² Cell C submission, executive summary, para 3, also paras 3.4 and 4.2.7.

¹⁰³ Cell C submission, executive summary, para 3, also paras 3.4 and 4.2.7.

¹⁰⁴ IS submission, para 3.3.6 – 3.3.7.

¹⁰⁵ IS submission, para 3.3.8.

services markets, which have traditionally been serviced by the smaller players.¹⁰⁶

31.1.5 Neotel and Vodacom's responses to these submissions are as follows:

31.1.5.1 The Transaction will not alter the parties' position in the mobile market since Neotel is a fixed-line operator – and as such the merger will not affect Vodacom's incentives in relation to the setting of on-net and off-net differentials.

31.1.5.2 The parties would not gain any competitive advantage in the retail markets for fixed-line or mobile services by either foreclosing fixed-line rivals to access Vodacom's mobile offering or by foreclosing rival mobile providers to access Neotel's fixed offering. This is because fixed-mobile bundles can be replicated by any player by way of structural or contractual arrangements.

31.1.5.3 Vodacom's most significant competitors in the mobile market – MTN and Telkom – already have a presence in the fixed market¹⁰⁷ and so are able to offer bundled services should they choose to do so.

31.1.5.4 Fixed-mobile bundles account for a very limited proportion of retail customers' purchases. They currently account for less than 1% of Vodacom's sales. Although growth in the sale of fixed-mobile bundles is expected over the next few years – to the extent that bundling benefits consumers – this is not expected to be sufficient to materially affect the situation described above.

31.1.5.5 Any attempt by Vodacom to leverage its position in the mobile market in order to gain an advantage in the fixed market would be limited by Telkom's entrenched dominant position in the fixed market. Telkom enjoys a number of powerful structural advantages in the fixed market due to its ubiquitous network coverage (combined with a lack of regulated wholesale access arrangements).

¹⁰⁶ IS submissions, para 3.3.9.

¹⁰⁷ The current licensing framework entitles the holder of an individual ECS licence to provide mobile and/or fixed-line services.

31.1.5.6 The fact that after the Transaction, Vodacom and Neotel would become a credible competitor in the “services market” as claimed by IS, can only be seen as a positive for competition, as it will strengthen the parties’ ability to compete in this segment – and in this way serve enterprise and consumer customers better.

31.2 *The Transaction will lead to input foreclosure of rivals in relation to infrastructure and technology*

31.2.1 IS submits that, while convergence in technologies can, at times, be to the benefit of the sector, this move to consolidate poses additional concerns for the remaining smaller players who have typically relied on the dominant players for infrastructure and/or technological capacity and who currently provide important competition.¹⁰⁸

31.2.2 IS and Cell C both express the concern that the Merged Entity is likely to look at ways of reducing the infrastructure and/or technological capacity currently provided to the smaller players. This will increase the risk of anti-competitive foreclosure,¹⁰⁹ as Vodacom will be able to displace smaller players by foreclosing such players from its superior infrastructure.¹¹⁰

31.2.3 Cell C is concerned that due to the Authority’s failure or refusal to enforce or investigate compliance with the Facilities Leasing Regulations, 2010,¹¹¹ the likelihood of access being granted to this fibre and associated facilities by Vodacom to any third parties on non-discriminatory terms and at a reasonable price, is very low.¹¹²

31.2.4 Neotel and Vodacom’s responses to these submissions are as follows:

31.2.4.1 The parties face a large number of strong competitors in the wholesale leased-lines market where they overlap. Neotel estimates that its share of the wholesale leased lines market is only 11%. Vodacom’s share is 1%.

¹⁰⁸ IS submission, para 3.3.8.

¹⁰⁹ IS submission, para 3.3.8 and 3.3.9, and Cell C submission, executive summary, para 6.

¹¹⁰ IS submission, para 3.3.9.

¹¹¹ Cell C executive summary para 6; Crystal Web submission para 13.

¹¹² Cell C submission, executive summary, para 6.

- 31.2.4.2 This implies that the Transaction would not give rise to any ability or incentive to foreclose rival retail providers from accessing their wholesale services in these overlap areas, as this would simply lead these retail providers to switch to any of the other multiple alternative operators offering wholesale services.
- 31.2.4.3 Vodacom's stated strategy is to attempt to retain as much of the business as possible, in circumstances where at least one party (Cell C) has informed Neotel that it will seek alternative supply.
- 31.2.4.4 There are alternative operators that are able to accommodate the additional demand since there are limited capacity constraints associated with the provision of wholesale leased line services in South Africa.
- 31.2.4.5 The outcome of such strategy would be a reduction in the parties' revenues at the wholesale level but not a reduction in the competition that the parties face at the retail level. Therefore there can be no concerns about foreclosure.

32. **Elimination of potential or actual competitor**

32.1 *The elimination of Neotel as a potential mobile competitor*

32.1.1 MTN raises a concern that the assignment of the 90 MHz of high-demand spectrum to Vodacom will remove Neotel as a potential mobile competitor from the market.¹¹³

32.1.2 Neotel and Vodacom's responses to this submission are as follows:

32.1.2.1 Neotel is not a viable potential entrant into the mobile market. It has no plans to enter that market absent the Transaction.

32.1.2.2 The prospect of Neotel entering the mobile services market absent the Transaction is:

¹¹³ MTN submission, page 2.

32.1.2.2.1 purely speculative, and at odds with the fact that it has not done so in the past despite not being spectrum constrained; and

32.1.2.2.2 highly unlikely without a merger or co-operation agreement with one of the mobile operators, particularly taking into account its capital constraints.

32.2 *The elimination of a competitor to Telkom and re-emergence of a fixed-line monopoly*

32.2.1 IS is concerned that Neotel may be required by Vodacom to no longer continue with the provision of fixed-line telephone services to consumers and to focus primarily on the provision of data services.¹¹⁴ This will result in the re-emergence of Telkom's monopoly with regard to fixed-line telephone services – more especially because the licenses which have been issued to Neotel are, for the most part, technology neutral and do not compel it to continue providing fixed-line services.¹¹⁵

32.2.2 Neotel and Vodacom's responses to these submissions are as follows:

32.2.2.1 Vodacom has no plans for Neotel to withdraw from competition with Telkom in the fixed market. In fact, Vodacom intends to grow Neotel's fixed-line business and has stated publically on a number of occasions that the Transaction is intended to provide great choice and better infrastructure for businesses and consumers.

32.2.2.2 As explained in the Frontier report (which has been provided to the Authority), the merger will enhance Neotel's ability to compete with Telkom.

32.2.2.3 Neotel cannot finance the investments needed to significantly expand its competitive reach, first and foremost because it is a highly capital constrained business. The economics of significant network roll-out are not attractive for a standalone Neotel. It lacks the network coverage relative to Telkom, and the capital expenditure

¹¹⁴ IS submission, para 3.5.1.

¹¹⁵ IS submission, para 3.5.1.

required is too substantial in circumstances where Neotel does not have the brand and distribution channels necessary to reach the wider market that would be required in order to justify that expenditure.

32.2.2.4 The acquisition of Neotel by Vodacom will strengthen both its ability and incentive to roll-out more network and challenge Telkom across a wider range of its customer base. Vodacom as a standalone business lacks the fixed network to be a serious competitive threat to Telkom. But it does have the financial resources to invest in order to expand and make better use of Neotel's more developed fixed infrastructure.

32.2.2.5 Fibre to the Home (FTTH) and Fibre to the Business (FTTB) are areas where Vodacom believes that Neotel will be able to improve its offering substantially, to provide more effective competition to Telkom.

32.2.2.6 Even ignoring these benefits, there is no reason to expect that the merger would lead to anything other than a strengthening of position as a competitor to Telkom.

32.3 *Cell C's issues with the Frontier report.*

32.3.1 Neotel and Vodacom gave various parties access to the non-confidential version of the Frontier report which was submitted to the Commission in support of the Transaction (even though they had no obligation to do so).

32.3.2 Cell C disputes the following aspects of the Frontier report:

32.3.2.1 Vodacom's claim that it wants to use Neotel's spectrum and fibre to enhance its competitive position in the market, on the basis that Vodacom already holds more than 50% of the service revenue in the mobile market and its revenue compared to Telkom's is significantly greater.¹¹⁶

¹¹⁶ Cell C submission, executive summary, para 7.

- 32.3.2.2 Vodacom's argument that it needs Neotel's spectrum to remain competitive is disingenuous. The Frontier report submitted to the Commission acknowledges that Cell C's ability to compete is limited – even now – so will clearly be worse off if the transaction proceeds.¹¹⁷
- 32.3.2.3 Competition in the markets in which the Frontier report finds that there are overlaps seems to be entirely overstated.¹¹⁸ The Frontier report states that the merged entity will continue to face MWEB and IS as “strong competitors”. However, these parties do not even operate in the same markets.¹¹⁹
- 32.3.2.4 Although the Frontier report points to two markets, it is recognised, at least impliedly that there is one market – it is stated that Vodacom “lacks the fixed network to pose a serious competitive threat to Telkom”.¹²⁰
- 32.3.2.5 Neotel and Vodacom's reliance on SA Connect as a foundation for the Transaction is inappropriate as the policy has not been in force for even a year yet, nor has it been implemented by any authority at all, nor is it clear how many of the high level policy objectives are to be achieved.¹²¹
- 32.3.3 Neotel and Vodacom's responses to these submissions are as follows:
- 32.3.3.1 Access to Neotel's spectrum in the 2x10 MHz in the 1800 MHz band would enable Vodacom to remain competitive in the provision of mobile LTE services in the near term.
- 32.3.3.2 Vodacom's current ability to compete in the LTE segment is diminished because it serves many more customers in non-LTE segments than its rivals (and hence has a higher market share) without any additional spectrum to serve them.

¹¹⁷ Cell C submission, para 4.2.1 – 4.2.2.

¹¹⁸ Cell C submission, para 4.2.3.

¹¹⁹ Cell C submission, para 4.2.7.

¹²⁰ Cell C submission, para 4.2.4.

¹²¹ Cell C submission, para 4.2.9.

32.3.3.3 Cell C is a weaker competitor in the mobile market than MTN and Telkom, in particular in the LTE segment (as described in para 4.41 of the Frontier report). This is largely a result of Cell C's past decision not to invest in the LTE segment. Cell C's roll-out of LTE is not currently constrained by insufficient spectrum. With appropriate investment, it would be in a position to compete effectively.

32.3.3.4 Cell C seems to be indicating that MWEB and IS are not strong competitors because they are not active in providing mobile services. However, they are clearly competitors in sub-segments of the relevant markets. Cell C also refers to paras 4.113 and 4.116 of the Frontier report. These list Vodacom's main competitors in the fixed-line enterprise segment. In such segment MWEB and IS are strong competitors to the parties for customers while, to the parties' knowledge, Cell C is not.

33. Miscellaneous arguments

33.1 *Confidentiality claims*

33.1.1 Cell C submitted that Neotel is not entitled to claim confidentiality in relation to the sale agreement giving effect to the Transaction (**Sale Agreement**) and that Neotel and Vodacom are using confidentiality as a ruse to frustrate potential objectors by keeping them in the dark as to the precise nature of the Transaction.¹²² Cell C has offered three justifications for this argument. First, Cell C asserts that it is unclear how knowledge of the Sale Agreement would give Neotel's competitors an "unfair competitive advantage".¹²³ Second, Cell C claims that Neotel's argument that confidentiality is necessary to protect the privacy rights of past employees is not correct. Unless Neotel committed to protecting those rights in the past, no privacy legislation or common-law privacy rules oblige Neotel to protect them.¹²⁴ Third, Cell C states that it has not seen any public document that is evidence of the Authority's agreement to Neotel's privacy request and asks for any such document to be provided to Cell C.¹²⁵

¹²² Cell C submission, paras 4.1.7 - 4.1.9.

¹²³ Cell C submission para 4.1.7.

¹²⁴ Cell C submission para 4.1.8.

¹²⁵ Cell C submission para 4.1.9.

33.1.2 Neotel and Vodacom strongly deny that confidentiality is being used as a ruse or in any impermissible way. Neotel has indeed claimed confidentiality in respect of the Sale Agreement and persists in doing so. The Authority has access to the full Sale Agreement, including all annexures. Having reviewed the Sale Agreement and annexures, the Authority granted the parties' request for confidentiality in respect of the Sale Agreement and certain of the annexures to the agreement. The Authority has, accordingly, taken a decision in relation to the parties' confidentiality claim. It is therefore not clear what purpose is served by Cell C's contentions.

33.2 ***Undertaking in Annexure A to the Application***

33.2.1 Cell C argues that Neotel is not competent to give the undertaking in Annexure A to the Application. It should be given by Vodacom. This is because, so goes the argument, Neotel cannot give the undertaking when, after the Transaction, all of its shares will be held by Vodacom. It should be given by Vodacom because Vodacom will control Neotel after the Transaction.¹²⁶

33.2.2 This argument does not hold water. First, the undertaking was submitted in terms of regulation 5(1)(e) of the Ownership and Control Regulations which requires "the licensee" (Neotel) to give the undertaking. The Regulations do not provide that the transferee (being the person acquiring control of the licensed entity) should provide the undertaking and, to the extent that Vodacom were to have provided the undertaking, this would not comply with the requirements of the applicable regulations. Secondly, the change of control of a licensed entity is different from the transfer of the licence/s held by that entity. Where there is a change of control, the licensed entity continues to hold the licence/s in question. While the change in the ownership structure of the licensed entity is a material change, it is not the same as the wholesale transfer of a licence from a particular entity to an entirely new entity.

33.2.3 On the same theme, IS argues that Neotel's undertaking in Annexure A to the Application must extend to the empowerment of HDPs, as contemplated in

¹²⁶ Cell C submission para 4.1.10.

section 2 of the ECA. This is because, in the absence of such an undertaking, the Authority cannot find that the Transaction will promote the empowerment of HDPs.¹²⁷

33.2.4

Neotel and Vodacom offer two responses to this argument. As explained above, no part of the ECA imposes a requirement that licensed entities must have a certain level of ownership by HDPs. Section 2(h) of the ECA simply provides that, in regulating the communications sector, one of the objectives to be taken into account is “[BBBEE], with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities”. Neotel will, in accordance with the undertaking given, comply with all licence conditions and requirements that are imposed on it by law. Secondly, the Transaction will empower black people, as discussed above.

¹²⁷ IS submission, para 3.2.9.