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Our Reference: ISV 001/14
PAH Hjul

Your Reference: N/A

Per Email EcsEcns.Compliance@icasa.org.za
Date: 15th October 2014

Submissions on the acquisition of Neotel by Vodacom as invited by GN 799 "Electronic Communications Act (36/2005): Application for approval of the acquisition of Neotel (Pty) Ltd by Vodacom (Pty) Ltd"

Mr Godfrey Maulana

1. Crystal Web hereby submits for consideration by the Independent Communications Authority of South Africa (the Authority or ICASA) representations as invited by General Notice 779 published in the Government Gazette 37998 of the 15th of September 2014 *Electronic Communications Act (36/2005): Application for approval of the acquisition of Neotel (Pty) Ltd by Vodacom (Pty) Ltd* (the invitation) paragraph 4.
2. It is our understanding that the due date for representations is today, the 15th October 2014 as it is the 21st working day succeeding the date of appearance in the Government Gazette of the notice. This timeframe is notwithstanding the fact that the notice only appeared on the ICASA website on the 29th September 2014.
3. It is presumed that the document bundle appearing on the ICASA website as the application – consisting of a 15 page document titled "Application for Approval in Respect of the Acquisition of Neotel Proprietary Limited" and a annexure "Undertaking by Neotel Proprietary Limited" represent the documents before the Authority on which to consider the application.
4. A copy of this submission set has been sent by way of electronic mail to Dr Tracey Cohen as required by section 7 of the invitation.
5. Appended to this covering letter please find:
 - a. Crystal Web submission set;
 - b. covering letter;
 - c. proof of email transmission to Dr Cohen



6. Our position in summary is to submit that the Authority ought not to act as a barrier to the completion of a transaction that would result in the ownership interest of Neotel being transferred to Vodacom but that the undertaking appearing together with the application is insufficient to ensure the smooth future security of the spectrum allocation held by Neotel. It is our view that the transaction does not give rise to ownership concerns but rather that Neotel have not provided any indication as to the future governance of Neotel as an autonomous ECNS licence holder with obligations to interconnect and lease out facilities on a non-discriminatory basis.

7. In the event that the Authority convenes public hearings on this acquisition Crystal Web would appreciate an opportunity to participate and requests that such public hearings be open to live streaming and broadcast on similar terms as proceedings of the Supreme Court of Appeal (as regulated by Practice Direction 1 of 2009 *Expanded Media Coverage of the Proceedings of the SCA*). It is further requested that oral submissions by way of teleconference be possible.

Yours Truly

Paul Hjul

SUBMISSIONS ON ACQUISITION OF NEOTEL BY VODACOM

Paul AH Hjul

Crystal Web (Pty) Ltd

Principal Submissions: The Authority ought not to act as a barrier to the completion of a transaction that would result in the ownership of Neotel being transferred to Vodacom. However the undertaking appearing together with the application is insufficient to ensure the smooth future security of the spectrum allocation held by Neotel. It is our view that the transaction does not give rise to ownership concerns but rather that Neotel have not provided any indication as to the future governance of Neotel as an autonomous ECNS licence holder with obligations to interconnect and lease out facilities on a non-discriminatory basis.

15th October 2014

INTRODUCTION

1. This submission set is prepared in response to an invitation by the Independent Communications Authority of South Africa (the Authority or ICASA) for representations on the Application brought by Neotel to modify their ownership structure such that Vodacom (Pty) Ltd will acquire full ownership and control of Neotel (Pty) Ltd.
2. Same invitation appears in General Notice 779 published in the *Government Gazette* 37998 of the 15th of September 2014 “Electronic Communications Act (36/2005): Application for approval of the acquisition of Neotel (Pty) Ltd by Vodacom (Pty) Ltd” (the invitation) at paragraph 4:

Interested parties are invited to lodge written representations in relation to the Application within twenty one (21) working days of the date of publication of this notice in the Government Gazette.

3. Crystal Web is an interested party by virtue of being an Internet Service Provider (a reseller of ECS services).

OWNERSHIP CHANGE OF NEOTEL AND THE IECNS AND IECS LICENCES

4. The application before the Authority has been brought by Neotel as is required by section 13¹ of the Electronic Communications Act² (the Act) which regulates both changes of ownership of individual licence holders and the transfer of individual licences (individual licences being licences of a national character and discernable from class licences):
 - a. Section 13(3) of the Act provides power for the Authority to make regulations on the ownership or control of an individual licence:

The Authority may be regulation, set a limit on, or restrict, the ownership or control of an individual licence, in order to - ...
 - b. The Authority has not embarked on a procedure in terms of section 13(5) of the Act to promulgate regulations under section 13(3). However regulations relating to the ownership and control of an entity holding an individual licence were promulgated under the repealed Telecommunications Act³ have been carried over by virtue of section 95 of the Act. Such regulations appear in *Government Gazette* 24288 of the 16th January 2003 as No. R. 105

¹ As well as section 31(2A) discussed later

² Act 36 of 2005, as amended

³ Act 103 of 1996, repealed by the Act – Schedule p116 GG 28743 of 18 April 2006

“Regulations in Respect of the Limitation of Ownership and Control of Telecommunications Services in terms of section 52” (the Ownership Regulations).

- c. Any conflict between the Ownership Regulations and the Act are to be resolved in favour of the Act. It must be borne in mind that the Ownership Regulations were promulgated with a fundamentally different regulatory framework envisaged to that of the Act.
- d. The Ownership Regulations prescribe a process for the transfer of ownership interests in a licensee. Neotel have made an application following same process.
- e. The Ownership Regulations at regulation 4 prescribe that “prior written approval” of any transfer of ownership interests which results in a transfer of a control interest (as defined in the regulations) occurs. It is submitted that this transaction set clearly falls within the parameters of a situation wherein the provisions of regulation 4(1)(a) of the Ownership Regulations apply.
- f. I submit that in substance if not in form Neotel has as a licensee sought approval as envisaged by regulation 4(1) of the Ownership regulations and that no basis within the Ownership Regulations arises to preclude the change of ownership and that the Authority is obliged to grant such written permission.
- g. In terms of section 13(1) of the Act “prior written permission” of the Authority is required for an individual licence to be transferred. Neotel have applied in prayer 3 of the invitation for the licences held by Neotel to be transferred.
- h. It is submitted that the acquisition of Neotel by Vodacom would not represent a transfer of the licence as the licence is issued to Neotel a juristic person enjoying full legal and economic agency. It is therefore submitted that the prayer in paragraph 3.1 of the Application cannot and should not be granted. I submit that the provisions of section 13(1) find no application in a circumstance such as the present where the corporate structure of a licensee is altered without the licence being transferred.
- i. It is therefore submitted that all that is required to be granted by the Authority is prior written approval in terms of section 4(1) of the Ownership Regulations which is required by virtue of such regulations standing as the regulations which serve to restrict the ownership or control of an individual licence in terms of section 13(3) of the Act.

- j. It is submitted that as the transfer would not diminish the ownership of and control of services by historically disadvantaged groups (s13(3)(a)) and would in fact promote competition in the ICT sector (discussed later) (s13(3)(b)) that the Authority is obligated to grant the approval under the Ownership Regulations.
- k. Subsequently it is submitted that the acquisition of Neotel by Vodacom must be approved by the Authority in accordance with section 13(3) of the Act read together regulation 4(1) of the Ownership Regulations.

INTENT OF VODACOM AND NEOTEL IN TRANSACTION

- 5. It is not clear in the Application and surrounding documents whether Vodacom intends retaining Neotel as a going concern.

- a. Paragraph 2 of the Invitation provides:

(a) Vodacom SA (Pty) Ltd will only acquire the entire share capital of Neotel (Pty) Ltd

(b) Neotel (Pty) Ltd will remain a company and licensee;

(c) Neotel (Pty) Ltd will retain all its licenses the Authority granted.

- b. Paragraph 7 of the Application merely provides:

[W]hile control of Neotel will transfer as a result of the proposed acquisition, the proposed Acquisition will not result in the transfer of any licences held by Neotel to Vodacom or to any other person. As such, Neotel will remain the licence holder in respect of each of those licenses. The proposed Acquisition will result only in the beneficial control of the licence holder, Neotel, being transferred from the Sellers to Vodacom.

- c. In contrast however paragraph 13 of the Application provides:

consideration of the Parties' applications for prior written permission in respect of the transfer of control of Neotel's IECNS and IECS licenses and radio frequency spectrum licences pursuant to the proposed Acquisition.

- 6. I submit that the wording of the prayer appearing in paragraph 13, as well as the prayers in paragraph 3, introduces an ambiguity as to the intent of the permission sought. The Application does not seek to transfer control of the IECNS and IECS licence from one entity to another but rather would result in a change in the ownership and control of a licensed entity. I submit that the ambiguity arises as a result of a change in the discourse and terminology as to the holding of a licence from the inception of Neotel as "the SNO" to the regime in the Act. The licences issued are in

favour of Neotel and not the “Sellers” to the commercial transaction for which approval in terms of the Ownership Regulations is required.

SPECTRUM ALLOCATIONS

7. Neotel seek in their prayer in paragraph 3.3 of the Application for a transfer of the spectrum licences from the sellers to Vodacom. In so doing Neotel depend on a lack of regulations relating to section 31(2A) of the Act to invoke the same procedure as are applicable for section 13(3).
8. I submit that such an approach is correct in the circumstances but needs to be considered in line with the difference in wording between section 13(1) and section 31(2A):
 - a. Section 13(1) provides for the transfer of the licence and does not expand its scope to the parameters of prohibiting or regulating anything beyond the plain precepts of the text.
 - b. Section 13(3) on the other hand prescribes that in addition to the powers of the Authority envisaged by section 13(1) the Authority has the power to promulgate regulations restricting the ownership and control of a juristic entity holding an individual licence.
 - c. Section 31(2A) follows a similar vein to section 13(3) and moves further to provide:

A radio frequency spectrum licence may not be assigned, ceded or in any way transferred, to any person without the prior written permission of the authority

“in any way transferred” I submit encompasses the present situation as there is a material change in the beneficial ownership of the holder of the licence and consequently that unlike that situation with respect to section 13(1) it is necessary for approval to be granted.
 - d. However the amendment to the Act providing for section 31(2A) does not encompass the allocation of radio frequency spectrum for which the Act does not provide any provision for transfer at this time. The existing provisions relating to spectrum licences are a necessary condition in order to operate radio equipment and to make use of an allocation but there is no bundling of a spectrum allocation to a licence.

9. It is therefore submitted that it is not possible for the Authority – even if it was disposed to doing so – to transfer a spectrum allocation from one licensee to another without the spectrum in question re-entering a general pool for re-allotment.
10. I submit that while not necessary to the disposal (by way approval) of the Application before the Authority it would be apposite for the Authority to clearly state that under prevailing law and regulation spectrum cannot be transferred between licence holders and must be surrendered to the Authority if the spectrum license for which the allocation is made ceases to exist.

OBSTACLE IN REGULATION 2(1) OF THE OWNERSHIP REGULATIONS

11. If the Authority adopts the position that Vodacom and Neotel currently have licence in the “same telecommunication service category” and that such category is in a concentrated market then it may not permit the transaction due to the provisions of regulation 2(1) of the Ownership Regulations.
12. I submit that such a holding would be erroneous and that regulation 2(1) is antiquated and out of tandem with the Act.

SIGNIFICANCE OF NEOTEL AS A “GOING CONCERN” OR AUTONOMOUS JURISTIC PERSON

13. Vodacom holding a controlling interest in Neotel will undoubtedly place Neotel under Vodacom’s stable and that the governing structures and interests of Vodacom will naturally exercise control over the management and strategy of Neotel. However the threshold of autonomy as a juristic person advanced here relates to issues of governance and not ownership or beneficial interest. It is unfortunate that Neotel has not taken the public into their confidence as to future governance of Neotel and Vodacom have made no indication – or undertaking – as to the appointment of directors and company officers at Neotel on acquisition.
14. With Neotel preserved as an independent economic agent whose board and management as guided by applicable company law implementing the strategic direction of its owning enterprise it is likely that a strategic course which would see Neotel introducing a range of wholesale services and offerings for IECNS licence holders as would be required by Vodacom. The consequences of such wholesale service offerings on facilitating network interconnection as envisaged by the Act are considerable and to the advantage of the development of the industry.
 - a. By way of example if Neotel were to invest in rolling out an LTE RAN in order to support Vodacom’s data needs such a RAN would be available as a

service to Vodacom and ought be made available on the same pricing model to other operators on the same terms. In the process the market participants develop wholesale offerings and pricing rather than causing the regulator to price fix.

- b. While concerns have been expressed by WISPs and other clients of Neotel at the proposed transaction, a change in the ownership structure does not modify Neotel's contractual obligations to existing clients.
- c. Neotel is in a materially different position to Vodacom with respect to market share which is of relevance to the prevailing regulation of Call Termination Rates.

15. It is submitted that Neotel under Vodacom's aegis would be publicly beneficial. There is inevitable consolidation and convergence in the industry and this transaction is unlikely to be the last such consolidation. However if a precedent is set that allows an entity with deep pockets to acquire spectrum through the back door a major problem in the industry will be created.

16. It is therefore submitted that while the Authority has no jurisdiction to prescribe to the Vodacom group how they should manage their corporate structures and governance that it would be apposite to implore the group to put in place appropriate measures that will ensure good corporate governance at Neotel (Pty) Ltd moving forward. Further that should there be a collapse of governance at Neotel such that section 14 of the Act applies the spectrum allocations will revert to the general pool.

APPLICATION PROCEEDURE AND PUBLIC HEARINGS

17. While it is submitted that the Authority should grant the application to authorize the change in ownership and that there is no rational basis for the Authority to oppose the Application there is a considerable public interest in transparency of process and this should translate into the Authority being seen to be transparent in the handling of the Application.

18. It is therefore submitted that the Authority should hold public hearings and conduct such public hearings with the media present and able to live stream such proceedings if an organization volunteers to carry the responsibility on an open access and pooling basis. It is submitted that the Authority should as a communications regulator and public body adopt standing proceedings for the live streaming (over the internet or by means of broadcast) of all public proceedings of the Authority – including the Complaints and Compliance Committee.



Dr Tracy Cohen
44 Old Main Pretoria Road
Halfway House
Midrand
1685

Our Reference: ISV 001/14
PAH Hjul

Your Reference: N/A

Per Email tracey.cohen@neotel.co.za
Date: 15th October 2014

Submissions on the acquisition of Neotel by Vodacom as invited by GN 799 “Electronic Communications Act (36/2005): Application for approval of the acquisition of Neotel (Pty) Ltd by Vodacom (Pty) Ltd”

Dr Tracey Cohen

1. Kindly see attached Crystal Web’s submissions for consideration by the Independent Communications Authority of South Africa (the Authority or ICASA) representations as invited by General Notice 779 published in the Government Gazette 37998 of the 15th of September 2014 *Electronic Communications Act (36/2005): Application for approval of the acquisition of Neotel (Pty) Ltd by Vodacom (Pty) Ltd*. A copy of the submissions is sent to you
2. It is our understanding that the due date for representations is today, the 15th October 2014 as it is the 21st working day succeeding the date of appearance in the Government Gazette of the notice. This timeframe is notwithstanding the fact that the notice only appeared on the ICASA website on the 29th September 2014.
3. If you could kindly acknowledge receipt of the documents in good order.

Yours Truly

Paul Hjul

Paul AH Hjul

From: Paul AH Hjul <paulj@crystalweb.co.za>
Sent: 15 October 2014 03:33 PM
To: 'Tracy Cohen'
Subject: RE: Request for Information: Acquisition of Neotel
Attachments: Cohen -- Crystal Web Submissions - Neotel Acquisition 15 October 2014.pdf

Sensitivity: Confidential

Dear Dr Cohen

Kindly see attached

From: Tracy Cohen [mailto:Tracy.Cohen@neotel.co.za]
Sent: 09 October 2014 09:03 AM
To: Paul AH Hjul
Subject: RE: Request for Information: Acquisition of Neotel
Sensitivity: Confidential

Dear Mr Hjul,

Thank you for your email and willingness to participate in the process.

ICASA have defined a process in the Government Gazette of 15 September 2014 and accordingly, I must advise you to obtain the documentation from the Authority as per the process prescribed in that regulation.

Yours sincerely,



Dr. Tracy Cohen | Chief Corporate Services Officer
Neotel (Proprietary) Ltd, 44 Old Pretoria Main Road, Midrand, Gauteng, South Africa.
☎ +27 11 585 0729 | 📠 +27 11 585 3729 | 📞 +27 82 999 0202
✉ tracy.cohen@neotel.co.za | 🌐 www.neotel.co.za

From: Paul AH Hjul [mailto:paulj@crystalweb.co.za]
Sent: Wednesday, October 08, 2014 9:57 PM
To: Tracy Cohen
Subject: Request for Information: Acquisition of Neotel
Sensitivity: Confidential

Dr Cohen

I am writing to you in connection with the Notice 799 of 2014 appearing in the Government Gazette of the 15th September 2014, "General Notice: Application for approval of the acquisition of Neotel (Pty) Ltd by Vodacom (Pty) Ltd.

The Notice provides both that interested parties may make representations to the Authority (ICASA, the regulator) (para 4) and to have sight of the Application (para 3). What the Notice does not provide for is a particularly convenient or modern means of evaluating the documentation and making informed submissions if any.

I am therefore requesting electronic copies of the documents involved – including any documents which you deem apposite but which were not filed with the regulator – as redacted to protect commercial interests (and commercially sensitive information even if disclosed to the regulator isn't sought) together with consent for publishing such documents on the MyBB forum.

I am making this request both in order to inform personal inputs (if made) to the regulator on the subject and as part of deciding whether Crystal Web (Pty) Ltd will be making any inputs. I would also like to have the content appearing on the MyBB forum of which I am a member and which has been a contributor to other regulatory processes.

Whilst not necessary as part of the request, my overall position on the acquisition of Neotel by Vodacom as a going concern is one of favouring the transaction. I am of the view that the ownership of Neotel by Vodacom, as well as the forming of a strategic plan for Neotel that is part of the Vodacom group is to the benefit of the industry which is consolidating. I am however strongly of the opinion – and the description of the transaction suggests that this opinion is shared by the relevant legal teams – that Neotel's iECN and iECS licensing as well as all spectrum allocations are dependent on Neotel remaining a "going concern" or an autonomous juristic and corporate entity; moreover due to the obstacle to obtaining an individual license (the direction from the Minister) that consolidation moves reducing a player with an iECN licence that has taken hold (albeit limited hold) in the market does have competition law related matters. I have a particular interest in the fact that Neotel being absorbed into Vodacom would eliminate any civil claim by Neotel against Vodacom which would follow a finding of Vodacom and MTN having embarked on anticompetitive behaviour with respect to call termination rates with Neotel's fixed call termination disadvantage over mobile. In essence it is my submission that ICASA does not have any legitimate basis to proscribe the transaction but may engage on those elements of the transaction that affect the essential character required to hold an individual ECN and ECS licence and further that the transaction transferring ownership interest does not affect the contractual relationships between Neotel and customers (of particular importance here are WISPs) and that the concerns are a question of governance rather than ownership. In this respect what is absent from the salient features of the agreement is how Neotel will be governed from a corporate governance perspective moving forward, para 2(a) indicates that Vodacom will be acquiring the entire share capital only, however the change in ownership has a governance implication set which is not commented on at all.

Kind Regards

Paul Hjul
071 956 5953

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Neotel is a level 3 contributor to B-BBEE
