



# Telkom Submission to the Independent Communications Authority of South Africa

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Response to General Notice: Application for  
approval of the acquisition of Neotel (Pty) Ltd by  
Vodacom (Pty) Ltd

[General Notice 799 of 2014]

15 October 2014

Submission by: Telkom SA SOC Limited

## EXECUTIVE SUMMARY

1. We thank the Independent Communications Authority of South Africa (“**the Authority**”) for the opportunity to respond to the **General Notice: Application for approval of the acquisition of Neotel (Pty) Ltd by Vodacom (Pty) Ltd (Government Gazette No. 37998, 15 September 2014)** hereinafter referred to as “**the general notice,**” where Neotel (Pty) Ltd and Vodacom (Pty) Ltd shall collectively be referred hereafter as “**the parties.**”
2. In light of the fact that the substantive strategic elements of the transaction are not available in the public domain, we shall focus our attention on what is publicly available, namely the written submission made to the Authority by the Parties on 17 June 2014.
3. It is our considered view that the current transaction should be evaluated in the context of the upsurge of merger activity in the sector and the consequent impact of such merger activity on competition and future regulation of the sector. The current merger activity in the sector seems to be an acknowledgement of the maturation of the sector in an economy that emphasizes greater economies of scale.
4. We submit that prior to assessing the transfer of control of the Individual Electronic Communications Network Service (“**IECNS**”), the Individual Electronic Communications Service (“**IECS**”) licences and the accompanying spectrum licences, we wish to alert the Authority that the regulatory framework upon which the proposed transaction may be evaluated and the necessary permissions granted appears to be incomplete at this point in time. Further, that the consideration of the proposed transaction in the absence of such regulatory framework would be potentially problematic. Should the Authority promulgate the necessary regulations this will ensure certainty and provide a more complete framework to regulate all transactions of this nature.

5. Subject to the Authority promulgating the necessary enabling regulatory framework, we are of the view that the Authority should have due regard to the following when assessing the application by the Parties:
- 5.1. Whether the transfer of control of the IECNS and IECS licences in the manner proposed by the Parties does not offend section 2(h) of the Electronic Communications Act, 2005 as amended (“**the ECA**”). It appears that the transaction will result in the exit of the Broad-based Black Economic Empowerment shareholders from Neotel. The effect of the transaction is that the BBBEE ownership of Neotel will be drastically reduced.
- 5.2. The proposed transfer of control of Neotel licences is likely to result in the creation of a dominant firm or association of firms with the ability and incentive to operate independently of competition. We propose that the Authority investigate this aspect and, to the extent possible, impose pro-competitive conditions including such behavioural remedies as may be permissible within the ECA, to maintain a level playing field.
6. Our submission, based on the information at our disposal, is structured as follows:
- I. Absence of regulations regulating the transfer of control of radio frequency spectrum licences;
  - II. Absence of regulations regulating the transfer of control of Individual licences;
  - III. The possible adverse impact on BBBEE;
  - IV. The effect on competition; and
  - V. Conclusion.

## I ABSENCE OF REGULATIONS FOR THE TRANSFER OF CONTROL OF RADIO FREQUENCY SPECTRUM LICENCES

7. It is common cause that there are no regulations governing the transfer of control of spectrum licences. The latter situation exists because the Authority is yet to promulgate regulations in support of the amended section 31 of the ECA which came into force on 21 May 2014.
8. The proposition by the Parties that the change in control of the spectrum licences does not need to follow a process prescribed by the Authority does not appear to be in accord with the prevailing regulatory framework.
9. The spectrum that will be affected by the change in control of the Neotel spectrum licences includes high demand spectrum. The Authority is very detailed and meticulous in regulating spectrum, especially so with high demand spectrum. For instance, the Authority recently held public hearings and received written comments on the IMT Roadmap in preparation for the appropriate channelling plan and process to award the available high demand spectrum. It is our submission 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.
10. Currently, the transfer of ownership of spectrum licences is regulated by the Radio Frequency Spectrum Regulations (Government Gazette No. 34172 dated 31 March 2011) (“**the Spectrum Regulations**”). The latter provides for a detailed process to enquire into the economics of the affected spectrum, the impact on competition and the ownership by historical disadvantaged individuals (“**HDIs**”).
11. Regulation 10 of the Spectrum Regulations contains the process and the factors that the Authority will consider before reaching its decision on a particular application. For instance, in terms of regulation 10(7) the Authority is enjoined to decline an application if the transfer envisaged would limit competition or reduce the ownership by HDIs.
12. Whereas the transfer of a spectrum licence is treated as critical and addressed through the Spectrum Regulations, we are of the view that the transfer of control of spectrum licences should be treated with the same rigor and oversight.

13. In light of the above we recommend that the Authority should consider the legal implication of the absence of the regulations envisaged in section 31(3)(c) as amended.

## II ABSENCE OF REGULATIONS GOVERNING THE TRANSFER OF CONTROL OF INDIVIDUAL LICENCES

14. Section 13(2) of the ECA provides that an application for permission to let, sublet, assign, cede or in any way transfer an individual licence, or assign, cede or transfer control of an individual licence may be made to the Authority in the prescribed manner.

15. The Authority is yet to promulgate regulations prescribing the manner in which an individual licence or its control may be transferred.

16. We understand that the Parties approached the Authority in terms of the Regulations in Respect of the Limitation of Ownership and Control of Telecommunications Services in terms of section 52 published in Government Gazette No. 24288 of 16 January 2003, promulgated in terms of the Telecommunications Act 103 of 1996 (“**the 2003 Regulations**”).

17. Although the 2003 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. The 2003 Regulations govern the transfer of licences listed in the definition of “telecommunications service category” in its definitions section. The latter does not distinguish between individual, class, network or service licences. It is thus difficult to conceive that the 2003 Regulations may be correctly applied in this instance.

18. A transfer of ownership of individual licences, as opposed to a transfer of control thereof, is governed by the regulations for licensing processes and procedures for individual licences under Government Gazette no. 33293 of 2010. These regulations predate the amendment of section 13 of the ECA. However, it is important to note that they contemplate events which trigger restrictions on the transfer of ownership, such as the reduction of BEE ownership to less than 30%. In the circumstances, it is inconceivable that the legislature contemplated a transfer of control free of restrictions or formal process.

19. We submit that the regulations governing the transfer of control of individual licences may be necessary within the meaning of section 4(1)(b) of the ECA and without which it is arguable that there would be uncertainty on the process to be followed and the factors that must be taken into account by the Authority in reaching its decision.

### III POSSIBLE ADVERSE EFFECTS ON BLACK ECONOMIC EMPOWERMENT

20. During the licensing of Neotel was licensed as the second national operator (“**the SNO**”), it was part of the policy objectives of the government at the time that the opportunity be used to increase the ownership of ICT assets by HDIs. The invitation to apply issued by the then Minister of Communications under Government Gazette no. 23460 on 24 May 2002 reserved equity of 19% for “a successful Black Economic Empowerment Applicant”.
21. The Authority conducted a detailed process to identify such successful Black Economic Empowerment Applicant.
22. The proposed acquisition of Neotel by Vodacom will result in Vodacom owning 100% of the issued shares in the share capital of Neotel. This will negate the public policy objectives that underpinned or informed the introduction of the SNO.
23. In terms of section 2(h) of the ECA, the Authority is enjoined, amongst other things, to promote the empowerment of historically disadvantaged persons, including Black people, women, youth and people with disabilities.
24. Section 13(3) of the ECA empowers the Authority to realise the objective set out in section 2(h) insofar as the transfer of ownership or control of individual licences is concerned. The exit by Nexus from Neotel negates section 2(h) read with the consistent policy objectives which informed a set aside for BEE during the licensing of the SNO.
25. Similarly, had this transaction included the direct transfer of ownership, it would have triggered regulation 10(7) of the Spectrum Regulations which forbids a transfer in the event of it resulting in a reduction of ownership HDIs.

26. We are of the view that the Authority should seriously consider the possible adverse effects of this transaction of ownership by HDIs, Broad-based Black Economic Empowerment and the policy objectives which underpinned the introduction of the SNO.
27. The Authority needs to promulgate the regulations referred to in section 13(3)(a) of the ECA to enable it to consider and decide on the BEE issues raised by the transaction.

#### **IV THE EFFECT ON COMPETITION**

28. 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. The impact of this may have certain effects on competition which may be difficult to identify and quantify. Telkom believes that the Authority should therefore consider what pro-competitive remedies would be necessary to ensure a level playing field.

#### **V CONCLUSION**

29. The consideration of the application filed by the Parties raises critical procedural issues which should inform the validity of any decision to be made by the Authority. The Authority is a creature of statute and draws its powers from the enabling statute, in the present case the ECA.
30. In order for the Authority to properly consider the application by the Parties and for it to be able to discharge its mandate, it is certainly arguable that requisite regulations must be in place. At present, even though the ECA empowers the Authority to promulgate the requisite regulations, there are in fact no regulations governing the transfer of control of individual licences, the transfer of control of spectrum licences, the regulations on ownership by HDIs and considerations of BEE in the transfer of ownership or control of individual licences.

31. The subject matter dealt with by the aforementioned regulations is such that their existence could certainly be a precondition for the proper exercise of the powers conferred by sections 13 and 31 of the ECA when considering applications of this nature.
32. In the event that the Authority promulgates the requisite suite of regulations and the current application is to be considered under such a regulatory framework, we would need to make further submissions in light thereof. To illustrate the importance of this, we can only indicate by way of example that we would need to make submissions dealing with critical issues such as:
- 32.1. That the Authority should pay particular attention to the effect of the transfer of control of the spectrum licences on competition and the structure of the market. Where necessary, we would request the Authority to consider the imposition of appropriate licence conditions to maintain a level playing field; and
- 32.2. That the Authority should consider whether this transaction does not negate the objects of the ECA in relation to BEE. If so, we would request the Authority to make an appropriate determination and/or impose appropriate licence conditions.
33. We trust that the comments provided above will assist the Authority in effectively evaluating the proposed transaction and in identifying possible and relevant remedies that will result in an even playing field where all operators are competing on an equal footing.
34. We would like an opportunity to make an oral presentation should the Authority conduct public hearings on this application.
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