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Dear Mr. Makgotlho

**COMMENTS REGARDING THE DRAFT RADIO FREQUENCY REGULATIONS,  
GOVERNMENT GAZETTE No. 33590, NOTICE 925 OF 2010**

Kawuleza Connect (Pty) Ltd (“**Kawuleza**”) wishes to congratulate the Independent Communications Authority of South Africa (the “**Authority**”) on comprehensive and progressive looking draft radio frequency spectrum regulations contained in the above referred to government gazette notice (the “**Draft Regulations**”).

We should like to submit that recognition of radio spectrum as a national asset and liberation of such radio spectrum as is referred to in Part VII of the reasons document, notice 926 of 2010 titled “Draft Radio Frequency Spectrum Regulations Explanatory Document” (the “**Reasons Document**”) should lead to growth in this sector, with resulting positive effects for society as a whole including improved telecommunications and job creation. Certainly such similar growth was experienced in 2004 when the state separated mineral rights from title deeds, and became the curator of all mineral rights, allowing anyone with sufficient financial and technical ability to apply for and develop undeveloped resources.

However it is Kawuleza’s view that the Authority needs to decide whether spectrum should be allowed to have inherent commercial value and hence be subject to an auction process and the other proposed rules for the purchase and sale of spectrum, or alternately that spectrum remains the property of the state, and subject to the proposed uncertainty of tenure referred to in Part VII of the Reasons Document and hence of no calculable commercial value. Given the large capital expenditures on potential spectrum auctions, and even greater capital expenditure on equipment to utilize spectrum, it is felt that



holders of spectrum should have a security of tenure commensurate with the expenditure on acquisition and development of such spectrum.

It is further Kawuleza's view that the current position where there are a number of licences with allocated but undeveloped spectrum should be separated from future allocations to licences through auction or other justifiable means. Similarly to the changes in the minerals act, if the regulator should like to tackle the problem of undeveloped spectrum, it is suggested the Authority pass legislation to become the curator of spectrum, and allow current holders of spectrum first right of refusal to apply for new licences based on the mechanisms detailed in the Draft Regulations. In this way the current issue of underutilised spectrum can be addressed, holders of spectrum can be made to comply with the requirements of their spectrum licence in accordance with the proposals of the Draft Regulations, and the Draft Regulations could be amended to provide greater security of tenure for holders of new spectrum licences.

Specific comments to the Draft Regulations follow, and the above concerns around the mismatch of commercial value of spectrum attributable to holders against the potential lack of security of tenure of such spectrum against large capital expenditures is highlighted.

1. In order to effect efficient planning by both operators and the Authority, it is suggested pursuant to part II of the Draft Regulations, the Authority be required to draw up and maintain a comprehensive existing band plan for all radio spectrum together with details of all licences to radio spectrum. This will promote access to information, and improve efficiencies for both operators and the Authority for operators applying for access to spectrum.
2. With respect to section 5, it is not certain whether it is necessary for operators to wait for a band plan before applying for unallocated or unplanned frequencies where there is no Radio Frequency Spectrum Band Plan or Radio Frequency Spectrum Assignment Plan. If it should be necessary to wait for a band plan, does the Authority envisage a process where operators can request such Radio Frequency Spectrum Band Plans and Radio Frequency Spectrum Assignment Plans?
3. Section 6 (3) (i) seems to imply that an auction may be the only way spectrum licences can be awarded where it is deemed there is insufficient spectrum to accommodate demand. In order to encourage new entrants to the market against the incumbents who can always justify large auction fees for spectrum, could the Authority not give cognisance that spectrum might be able



to be allocated through a beauty contest and / or public-private partnership as has been done very successfully in other countries?

4. Section 9 (1) further affirms the lack of tenure referred to in Part VII of the Reasons Document. It is felt that such a lack of tenure will detract from investment in the development of spectrum, since incalculable risks are imposed on the holders of spectrum where their spectrum might be revised or revoked at any point during the value delivered to operators using spectrum they hold. Further discussion on this point is detailed in point 9 below.
5. It should be noted in section 11 that the withdrawal of a Radio Frequency Spectrum Licence will be subject to the procedures for withdrawal detailed in section 18. Further discussions on the procedures for withdrawal are detailed in point 9 below.
6. It is unclear in section 12 (3) what price will be attached to spectrum that has already been awarded to operators, possibly at nominal value, and where such spectrum falls in a band designated as being in high demand. Should a Radio Frequency Spectrum Licence be granted by auction in the same band designated as being in high demand as existing spectrum awarded previously at nominal value, this could lead to artificial mispricing of the value of spectrum within the same high demand frequency band.
7. Section 13 (2) again confirms the lack of tenure referred to in Part VII of the Reasons Document, in that the Authority may initiate an amendment of a Radio Frequency Spectrum Licence. Similarly again it is felt that such a lack of tenure will detract from investment in the development of spectrum, since incalculable risks are imposed on the holders of spectrum where their spectrum might be revised or revoked at any point during the value delivered to operators using spectrum they hold. Further discussion on this point is detailed in point 9 below.
8. Similarly to point 6 above, it is unclear what monies to be paid by a lessee or third party for the leasing or third party authorisation of a Radio Frequency Spectrum Licence Assignment (the “**Spectrum Rental Fee**”) specified in section 14 (2) (f), should be paid to operators holding spectrum in a high demand band, but where the spectrum was previously awarded at nominal value. It is once again felt that such a possible diversity of Spectrum Rental Fees could lead to artificial mispricing of the value of Spectrum Rental Fees within the same high demand frequency band.



9. While Kawuleza understands that it is in the public good in certain circumstances to take spectrum away from existing users as detailed in the Reasons Document, it is felt that the procedures detailed in section 18 should at least contain the recourse to appeal a decision by the Regulator, possibly to the Minister of Communications, given that access to spectrum is such a critical element of the business of an operator using spectrum they hold. Beyond the argument that such uncertainty of tenure of spectrum is likely to detract from investment in the sector, further it is felt that where a withdrawal is enacted not through any fault of the holder of the Radio Frequency Spectrum Licence, the operator should be compensated for the original cost of the Radio Frequency Spectrum Licence and / or any auction price paid by the original licence holder. Even with this compensation for the acquisition of the Radio Frequency Spectrum Licence, this would still not compensate an operator for the investment the operator will have made in developing spectrum, such as through capital expenditure on radio equipment to utilize spectrum they hold.
10. The word “final” should be added in before the word “notice” in section 18 (5). This is necessary to eliminate misunderstandings that could arise between the licensee and the Authority, since the licensee might be under the impression that the suspension or cancellation is still under discussion, whereas the Authority might have already reached a final decision.
11. There should be a specific time frame within which the Authority shall publish notice of suspension or cancellation in the Government Gazette according to section 18 (6), in order to formalise the decision made by the Authority.
12. It is unclear whether spectrum that was allocated before being subject to an extended procedure for application, but which falls within a band requiring or which required an extended procedure for application by nature of an Invitation to Apply being issued, would require an extended procedure for application for transfer as detailed in section 20 (2). It would seem sensible that such spectrum should be subject to an extended procedure for application in order to confer similar rights and obligations on holders of spectrum within similar bands.
13. Kawuleza feels it would be unduly onerous to expect all amendments to a Radio Frequency Spectrum Licence to be subject to all of the subsections of section 21. Minor changes such as the name of a Radio Frequency Spectrum Licence holder or a change of directors of a company holding a Radio Frequency Spectrum Licence should not need to be subject to an extended procedure for application or to a public consultation, but rather changes that materially affect the original conditions under which a licence was awarded pursuant to an Invitation to Apply (such



as a change in the spectrum held by the operator or a material change in the empowerment credentials of an operator) should be subject to all of the subsections of section 21.

14. There should be specific timeframes within which the Authority shall give notice of the application for Surrender, Amendment or Transfer in the Government Gazette as per section 22 (1) (a) in order to avoid delays.
15. Section 23 (2) implies that where a Radio Frequency Spectrum Licence had been awarded to an operator, the Authority may at a later stage require the operator to share the spectrum covered by the Radio Frequency Spectrum Licence with another operator, which could adversely affect the value of such a Radio Frequency Spectrum Licence through the operator not being able to access customers that would have been accessed by the Radio Frequency Spectrum Licence due to it being utilised by another operator. This further affirms the lack of tenure referred to in Part VII of the Reasons Document with the commensurate concerns listed earlier in this document.
16. Once again Kawuleza understands the reasoning behind the requirement to enable the Authority to undertake the withdrawal of rights to radio frequency spectrum detailed in section 26 (1), however Kawuleza feels that section 26 should state that the withdrawal of rights to radio frequency spectrum should be subject to section 18, and furthermore to the suggestions listed in point 9 above.
17. In order to afford some rights to operators holding a Radio Frequency Spectrum Licence that is subject to the procedures for withdrawal to the rights to spectrum detailed in section 27, Kawuleza should like to suggest that where such spectrum becomes available again, even if subject to a new Radio Frequency Spectrum Band Plan or Radio Frequency Spectrum Assignment Plan, the original operator which held such spectrum could be given first right of refusal access to the spectrum according to its new Radio Frequency Spectrum Band Plan, new Radio Frequency Spectrum Assignment Plan, and / or subject to requirements such as an extended procedure for application and public consultation by nature of the spectrum being intended to form part of an Invitation to Apply.

In the spirit of the Reasons Document which Kawuleza feels, when correctly applied, should lead to growth in this sector, it is further suggested that the Draft Regulations should place specific timeframes on the Authority and other parties within which each of the processes detailed in the Draft Regulations should be completed. Given the fast pace of global telecommunications development, Kawuleza feels it should be necessary for processes conducted within the Authority and other parties to match the



speed of development of this sector, and as such it is felt slow processes or a lack of timeframes within which the Authority and other parties should be compelled to act will lead to South Africa lagging the rest of the world with regards telecommunications development, and will not do justice to the spirit of the Reasons Document.

An example of such timeframes could be a specific timeframe within which the Authority must prepare a Radio Frequency Spectrum Assignment Plan, if one is envisaged, and pursuant to that, a specific timeframe within which the Authority must publish an Invitation to Apply for Radio Frequency Spectrum Licences within the Radio Frequency Spectrum Assignment Plan if envisaged, and timeframes within which interested parties shall respond to an Invitation to Apply for a Radio Frequency Spectrum Licence.

It is thus suggested the Authority review each process within the Draft Regulations in order to effect specific timeframes under which all parties referred to in the Draft Regulations must comply.

In summary Kawuleza Connect should again like to congratulate the Authority on comprehensive and progressive looking Draft Regulations. As mentioned earlier it is Kawuleza's view that the Authority needs to decide whether spectrum should be allowed to have inherent commercial value and hence be subject to an auction process and the other proposed rules for the purchase and sale of spectrum, or alternately that spectrum remains the property of the state, and subject to the proposed uncertainty of tenure referred to in Part VII of the Reasons Document and hence of no calculable commercial value. Given the large capital expenditures on potential auctions, and even greater capital expenditure on equipment, it is felt that holders of spectrum should have a security of tenure commensurate with the expenditure on acquisition and development of such spectrum. Should the Authority like to tackle the problem of undeveloped spectrum, it is suggested the Authority pass legislation to become the curator of spectrum, and allow current holders of spectrum first right of refusal to apply for new licences based on the mechanisms detailed in the Draft Regulations, rather than to place the uncertainty of tenure onto those holders of spectrum that are actively spending large capital expenditures to develop their spectrum.

We will appreciate the opportunity to make oral representation of approximately 30 minutes at any hearings that might be held by the Authority on the Draft Regulations after the closing date for written representations or enquiries related to General Notice No 925.

We thank the Authority for the opportunity to comment on the Draft Regulations and wish to assure you of our continued full support and cooperation at all times.



Yours Faithfully

Marthie Armstrong  
KAWULEZA CONNECT (PTY) LTD  
Director