



15 October 2014

**Independent Communications Authority of South Africa**

**Attention: Mr Godfree Maulana**

Per email: [EcsEcns.Compliance@icasa.org.za](mailto:EcsEcns.Compliance@icasa.org.za)

**CC: Neotel (Pty) Ltd**

**Attention: Dr Tracy Cohen**

Per email: [tracy.cohen@neotel.co.za](mailto:tracy.cohen@neotel.co.za)

Dear Godfree,

**WAPA SUBMISSION IN RESPECT OF THE APPLICATION FOR APPROVAL OF THE ACQUISITION OF NEOTEL (PTY) LTD BY VODACOM (PTY) LTD**

**Introduction**

1. WAPA refers to the notice in terms of section 13(6) read with section 9(2)(a) of the Electronic Communications Act 36 of 2005, as amended (“the ECA”) published as General Notice 799 in Government Gazette 37998 of 15 September 2014, regarding the application by Neotel (Pty) Ltd (“Neotel”) for the prior written approval in respect of the acquisition by Vodacom (Pty) Ltd (“Vodacom”) of 100% of the issued share capital of Neotel as well as all of the Neotel shareholders’ loan claims against Neotel (“the proposed transaction”), which application was submitted to the Authority on 17 June 2014 (“the Application”).
2. WAPA has noted the content of the notice and reviewed the Application and sets out its submissions below.

**Legal Framework for the Application**

3. As set out therein, the Application is made in terms of ECA, specifically:
  - 3.1. Section 13(1) of the ECA<sup>1</sup> – for the prior written permission of the Authority for the transfer of control over Neotel’s individual electronic communications network service (IECNS) and individual electronic communications service (IECS) licences (together “the service licences”) from the Neotel shareholders (“the Sellers”) to Vodacom; and

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<sup>1</sup> 13(1) 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.

- 3.2. Section 31(2A) of the ECA<sup>2</sup> – for the prior written permission of the Authority for the transfer of control over Neotel’s radio frequency spectrum licences as set out in the Application (“the radio frequency spectrum licences”) from the Sellers to Vodacom.
4. Paragraph 5 of the Application further indicates that the Sellers and Vodacom (together “the Parties”) have affected these applications for transfer of control through the provision of information required under the Regulations in Respect of the Limitation of Ownership and Control of Telecommunications Services (“the Ownership and Control Regulations 2003”)<sup>3</sup> published in January 2003 under the now-repealed Telecommunications Act 103 of 1996 (“the Telecommunications Act”).
5. Paragraphs 5 and 6 of the Application read as follows:
5. *For the purpose of the applications described in paragraphs 3.1 and 3.2 above, the parties have provided the information required under the Regulations in Respect of the Limitation of Ownership and Control of Telecommunications Services (published under Government Notice R105, Government Gazette 24288 of 16 January 2003) published in terms of the Telecommunications Act 103 of 1996 (“the Ownership and Control Regulations”) which remain in effect under the ECA. These Ownership and Control Regulations prescribe the process to be followed in respect of an application for the transfer of control of an individual licence as provided in section 13(2) of the ECA.*
6. *For the purpose of the application described in paragraph 3.3 above, the parties have provided the same information as must be provided in terms of the Ownership and Control Regulations. This is on the basis that, as yet, no regulations have been prescribed in terms of section 31(3)(c) of the ECA. The fact that no regulations have been prescribed for the purposes of section 31(3)(c) of the ECA, does not impede the Authority’s ability to consider and decide on the Parties’ application given that, while the Authority has the power to make such regulations, there is no obligation placed on the Authority to do so.*
6. WAPA notes the difference in approach as regards the service licences as opposed to the radio frequency spectrum licences, specifically
- 6.1. In respect of the transfer of control over the service licences, the Parties assert that the Ownership and Control Regulations 2003 are of direct application and prescribe the process to be followed.
- 6.2. In respect of the transfer of control over the radio frequency spectrum licences, the Parties indicate that they have provided the information set out in Regulation 5 of the Ownership and Control Regulations 2003 in the absence of any directly applicable regulations, and that the Authority should use this information to evaluate the application.

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<sup>2</sup> 31(2A) 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.

<sup>3</sup> Published as Government Notice R105 in Government Gazette 24288 on 16 January 2003

### **The Control and Ownership Regulations 2003**

7. WAPA's position is that the Ownership and Control Regulations 2003 are outdated and that it is extremely difficult to apply the provisions thereof having due consideration to the current regulatory framework under the ECA as well as the market reality post the completion of the licence conversion process that commenced in 2009.
  - 7.1. This is WAPA's position particularly due to the fact that the concept of a "concentrated market" is no longer applicable given the state of the market following the licence conversion process that took place in 2009, and that the concept of a "telecommunication service category" is also no longer applicable given the horizontal licensing framework introduced by the ECA. Regulation 2 is no longer of any practical application for these reasons.
  - 7.2. Regulation 3 has been effectively repealed by the provisions in the Compliance Manual Regulations 2011<sup>4</sup> relating to the obligation on all service licensees to submit ownership and control information in the prescribed format on an annual basis, as well as the requirement in terms of the Standard Terms and Conditions for Individual Licences Regulations 2010<sup>5</sup> read with the the ICASA Individual Licensing Processes and Procedures Regulations 2010<sup>6</sup> to notify ICASA of any changes to shareholding (including changes to controlling interest) or contact details within the prescribed timeframe and in the prescribed format.
  - 7.3. The substantive requirement to obtain prior written approval set out in Regulation 4 is no longer of any practical application due to sub-regulation 4(2)(b), which states that this requirement shall not apply where the market is not a concentrated market.
  - 7.4. Regulation 5 sets out the procedure for transfers and the information required from the parties thereto, but it is explicitly subject to sub-regulation 4(1), which – as has been demonstrated above – is no longer of any practical application.
  - 7.5. Regulation 7, which sets out, *inter alia*, the criteria to be used by the Authority in evaluating a transfer application, is likewise no longer of any practical application as it is reliant on sub-regulation 5(1), which refers to the requirement to obtain prior written approval as set out in Regulation 4.
8. While WAPA agrees that the proposed transaction falls within the meaning of the transfer of a "control interest" as defined in the Ownership and Control Regulations 2003, WAPA is of the opinion that these Regulations are extremely difficult to apply in the current context for the reasons set out above.
9. WAPA submits that there are procedures for the transfer of ownership of licences in terms of the ECA which are more correct to utilise in the circumstances. The nature of these procedures is different as regards the service licences as opposed to the radio frequency spectrum licences, thus each will be considered separately below. With this in mind, WAPA is uncertain

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<sup>4</sup> Published as General Notice 902 in Government Gazette 34863 of 15 December 2011

<sup>5</sup> Published as General Notice 523 in Government Gazette 33294 of 14 June 2010

<sup>6</sup> Published as Government Notice R522 in Government Gazette 33293 of 14 June 2010

as to the Parties' reasoning for not utilising the procedures set out in the ECA and the ICASA Individual Licensing Processes and Procedures Regulations 2010 with regard to the service licences, and the Radio Regulations with regard to the radio frequency spectrum licences.

### **The Service Licences**

10. Applications to the Authority for the transfer of ownership of service licences are to be made in terms of Regulations 11 and 12 of the ICASA Licensing Processes and Procedures Regulations 2010 and utilising Form G as contained in the schedule to these Regulations.
11. While WAPA understands that this process applies to transfer of ownership of service licences, and that the ECA draws a distinction between the transfer of ownership of a service licence and the transfer of control over a service licence, WAPA submits that the two types of transaction are closely related having due regard to the legal and practical effect flowing from both types of transaction, specifically that both types of transaction lead to the acquiring party obtaining the ability to control the activities associated with the licences in question.
12. Paragraph 5 of the Application indicates that the Ownership and Control Regulations 2003 are to be applied, as it prescribes the process to be followed in respect of an application for the transfer of control of an Individual licence as required in section 13(2) of the ECA. While WAPA understands the reasoning behind this statement, WAPA disagrees with it for various reasons:
  - 12.1. As set out above, the Ownership and Control Regulations 2003 have restricted practical application and dubious legal relevance. There is currently no prescribed manner in which the Authority should evaluate an application for the transfer of control of an Individual licence, nor any clarity on the criteria to be employed. WAPA also submits that the information provided by the Parties in the Application in terms of the Control and Ownership Regulations 2003 is insufficient for any meaningful evaluation by the Authority or any interested parties of the desirability of the proposed transfer of control in the service licences.
  - 12.2. The ICASA Individual Licensing Processes and Procedures Regulations 2010 had been finalised within the current legislative and regulatory framework, taking into account the service licensing reality post-2009. The requirements in these Regulations relating to the transfer of ownership of an Individual licence encompass and supersede all of the requirements laid out in the Ownership and Control Regulations 2003, and as such, any application should at the least provide the information required in these Regulations.
  - 12.3. WAPA also notes that the Application does not set out the result of the proposed transaction on the ownership in the service licences as held by historically disadvantaged groups. While the Ownership and Control Regulations 2003 does not require the Parties to set out such information, the ICASA Individual Licensing Processes and Procedures Regulations 2010 requires the submission of detailed information in this regard. WAPA submits that the approach in the ICASA Individual Licensing Processes and Procedures Regulations 2010 is in line with the current focus on

transformation of licensees under the ECA, and is an important point for consideration by the Authority when evaluating the Application.

- 12.4. Regulation 12 of the ICASA Licensing Processes and Procedures Regulations 2010 sets out the criteria to be employed by the Authority in evaluating an application of this nature.
13. WAPA accordingly submits that the correct process to be followed by the Parties in seeking the prior written approval of the Authority for the transfer of control of the service licences, as required by section 13(1) of the ECA, is – in the absence of a prescribed manner for such applications as mentioned in section 13(2) of the ECA – as set out in Regulations 11 and 12 of the ICASA Licensing Processes and Procedures Regulations 2010.
14. Alternatively, WAPA submits that it is incumbent upon the Authority to seek appropriate legal advice to provide it with guidance on the correct process to be followed by the notifying Parties.

#### **The Radio Frequency Spectrum Licences**

15. WAPA submits that the same logic as set out above applies in respect of the radio frequency spectrum licences currently held by Neotel, and over which Vodacom would have effective control post-transaction.
16. The reliance by the Parties on the provisions of the Ownership and Control Regulations 2003 is even more misplaced, particularly as these Regulations were never intended to govern a transfer of ownership or a transfer of control of radio frequency spectrum licence. In addition, there is no clear set of criteria in these Regulations which would guide the Authority as to the manner in which an application in this regard should be evaluated.
17. WAPA submits that the transfer of radio frequency spectrum licences is not an automatic incidence of the transfer of service licences in terms of which the radio frequency spectrum licence is held. WAPA also submits that an application submitted in terms of section 13 of the ECA for the transfer of control of service licences does not cover an application for transfer of control of a related radio frequency spectrum licence in terms of section 31(2A).
18. WAPA notes that there is a procedure set out in section 31 of the ECA read with Regulation 10 of the Radio Frequency Spectrum Regulations 2011<sup>7</sup>, which explicitly contemplates a separate regulatory process for the transfer of ownership or control of radio frequency spectrum licences, and submits that it is this process which the Authority should utilise in evaluating the Application insofar as it pertains to the proposed transfer of control of Neotel's radio frequency spectrum licences.
19. The Authority has exercised the power accorded by section 31(3)(b) of the ECA, and has set out in the Radio Frequency Spectrum Regulations 2011 the procedures and criteria for the

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<sup>7</sup> Published as General Notice 184 in Government Gazette 34172 of 31 March 2011

transfer of a radio frequency spectrum licence. These Regulations were finalised under the ECA, which takes into account the current legislative and regulatory framework and market realities.

20. As noted above, applications for the transfer of a radio frequency spectrum licence are governed by regulation 10 of the Radio Frequency Spectrum Regulations 2011.
21. WAPA notes that Regulation 10 refers to “transfers” without referencing “transfers of control”, for which the Authority’s prior written permission is required in terms of section 31 of the ECA following the recent amendment to the ECA. WAPA notes in this regard that the Authority has – in respect of transfers of control of individual service licences – adopted the practical approach of utilising the existing procedures, criteria and forms for transfers of individual service licences where an application for transfer of control has been received. There is no reason why the same approach should not be adopted in respect of applications for the transfer of control of radio frequency spectrum licences, so that Regulation 10 of the Radio Frequency Spectrum Regulations 2011 will apply to transfers of control of radio frequency spectrum licences as it does to transfers of ownership of such licences.
22. While WAPA understands that this process applies to transfer of ownership of radio frequency spectrum licences, and that the ECA draws a distinction between the transfer of ownership of a radio frequency spectrum licence and the transfer of control over a radio frequency spectrum licence, WAPA submits that the two types of transaction are closely related having due regard to the legal and practical effect flowing from both types of transaction, specifically that both types of transaction lead to the acquiring party obtaining the ability to control the activities associated with the licences in question.
23. Further – as noted by the Parties in paragraph 6 of the Application – the “fact that no regulations have been prescribed for the purposes of section 31(3)(c) of the ECA, does not impede the Authority’s ability to consider and decide on the Parties’ application given that, while the Authority has the power to make such regulations, there is no obligation placed on the Authority to do so”. WAPA submits that the proper basis for use in considering and deciding on an application for the transfer of control in the radio frequency spectrum licences is that set out in the Radio Frequency Spectrum Regulations 2011.
24. WAPA accordingly submits that the correct process to be followed by the Parties in seeking the prior written approval of the Authority for the transfer of control of the radio frequency spectrum licences is that set out in Regulation 10 of the Radio Frequency Spectrum Regulations 2011.
25. Alternatively, WAPA submits that it is incumbent upon the Authority to seek appropriate legal advice to provide it with guidance on the correct process to be followed by the notifying Parties.

### **Reduction in ownership by historically disadvantaged persons**

26. The Application does not set out any information regarding the impact of the proposed transaction on the percentage ownership or control by historically disadvantaged persons over the service licences and the radio frequency spectrum licences respectively.
27. It is WAPA's understanding that the net effect of the proposed transaction is that there will be a reduction in ownership by historically disadvantaged persons in respect of both the service licences and the radio frequency spectrum licences.
28. It appears that the Parties – by electing to utilise the processes set out in the Ownership and Control Regulations 2003 – are seeking to avoid the application of the provisions of Sub-Regulation 12(c) of the ICASA Licensing Processes and Procedures Regulations 2010 and Sub-Regulation 10(7)(c) of the Radio Frequency Spectrum Regulations 2011 to the Application.

### **Conclusion**

29. It is WAPA's conclusion that discerning the applicable legal framework for the transfer of control of service licences and radio frequency spectrum licences is fraught with difficulty. WAPA submits that it is incumbent upon the Authority to obtain clear and unequivocal legal advice on the correct procedure to be followed by the Parties to the proposed transaction.
30. The current Application merely sets out licence and shareholder information, without reference to any criteria for approving such a transfer which may be applicable. This does not afford any basis for industry to react to such criteria.
31. WAPA reserves its rights in respect of its ability to make submissions regarding the Application as it has been notified to the Authority.
32. WAPA requests that the Authority afford it the opportunity to make oral presentations at any public hearings which it may elect to conduct in connection with this Application and process.

Regards,  
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