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7 August 2015

Mr Peter Mailula

Independent Communications Authority of South Africa
Block C, Pinmill Farm
164 Katherine Street
Sandton

Via Email : pmailula@icasa.org.za

Dear Sir,

**RE: MTN'S SUBMISSION IN RESPECT OF THE DRAFT PROCESS AND PROCEDURE REGULATIONS
FOR INDIVIDUAL LICENSEES (GG: 38921)**

Please find enclosed MTN (Pty) Ltd submission in respect of the proposed Process and Procedure Regulation (GG: 38921) dated 26 June 2015.

Should you have any further queries please do not hesitate to contact writer hereof.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'CD', is written over the signature line.

CHERYL DINKELMANN
SENIOR MANAGER: SPECIAL REGULATIONS & CONSUMER
MTN (PTY) LTD

Directors: RS Dabengwa (Chairman), M Nyati (CEO), NWC Molope, S Fakie, S Ntsele*, S Sooklal, B Goschen.*
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**MTN'S SUBMISSION IN RESPECT OF THE DRAFT PROCESS AND PROCEDURE
REGULATIONS FOR INDIVIDUAL LICENSEES (GG: 38921)**

7 August 2015

1. Introduction

MTN would like to thank the Independent Communications Authority of South Africa ("the Authority") for the opportunity and invitation to comment on the draft Process and Procedure Regulations (GG: 38921) ("Draft Regulations").

MTN (Pty) Ltd ("MTN") submission seeks to provide the Authority with our views and proposals in respect of the Draft Regulations.

2. Specific Comments

2.1. Definition of Accounting Officer(ad item 1)

MTN submits that the term Accounting Officer, which is used extensively in the amended forms found in the Draft Regulation should be defined for the avoidance of any doubt.

Such a term has been defined in the General Licence Fees Regulation of 2012 (GG: 36323) and should therefore be replicated in the Draft Regulations. The following definition should therefore be included as follows:

"Accounting Officer" means the Chief Financial Officer (CFO) or alternatively the executive in charge of financial management of the licensee, or equivalent"

2.2. Definition of Control (ad item 1)

The Draft Regulations define Control as: *"is as contemplated in the Companies Act, Act No.71 of 2008, as amended"*.

For the avoidance of any doubt, MTN submits that this definition should be amended to include the relevant section in the Companies Act, No. 71 of 2008 ("Companies Act") where the term "control" is defined since it is also not defined in the definitions section of the Companies Act.

As a result, the proposed amendment to the definition of Control evident in the Draft Regulations should be *"as contemplated in section 2 of the Companies Act, Act no 71 of 2008, as amended."*

2.3. Amendment of regulation 12 (ad item 6.2.1) read with Form G and the amendment of regulation 11 (ad item 5.2)

The amended regulation 12 states that the Authority must refuse to transfer or transfer control of an individual licence if the licensee/transferee's ownership and control held by historically disadvantaged persons is less than 30%. For purposes of clarity, the term HDP covers 4 aspects and they are: BBBEE; the needs of woman; opportunities for youth; and challenges relating to persons with disabilities. The intention of the Authority to set a percentage for BBBEE, which forms part of the percentage calculation for HDP is simply inconsistent with BBBEE legislation for the following reasons:

1. Section 2(h) of the ECA states that the Authority must "*promote broad-based black economic empowerment, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities*". Section 2(h) is in essence HDP which is being carried forward into the draft regulations.
2. Broad-based black economic empowerment has been defined in the ECA in the 2014 amendment. The definition refers to the meaning assigned to it under the BBBEE Act 53 of 2003. Thus the architecture of the ECA when read with the Broad-based Black Economic Empowerment Act, no 53 of 2003 (" BBBEE Act") makes it clear that the BBBEE Act is the primary legislation regarding the subject matter. It is for this reason that MTN submits that the Authority does not have any arbitrary power to create its own empowerment criteria, such as measuring BBBEE on a percentage basis (as opposed to qualification criteria). It is submitted that the Authority must have regard to the BBBEE Act and relevant Codes of Good Practice when exercising its powers under section 2(h) of the ECA. As a result, a percentage attributed to BBBEE (which is included in the calculation of the 30% HDI requirement), is neither contemplated in the BBBEE Act, nor in any of its derivative legislation, codes or charters. BBBEE is measured as qualification criteria or levels, which are calculated from the points achieved for the various elements that are found in the Codes of Good Practice and not percentages as proposed by the Authority. According to section 10(1)(a) of the BBBEE Act, the Authority which is an organ of state must "*... take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act in -*

(a) determining qualification criteria for the issuing of licenses, concessions or other authorisations in terms of any law"; By measuring BBBEE as a percentage as opposed to setting a qualification criteria or level through the Draft Regulation, the Authority is acting outside of the ambit of the BBBEE Act. It is submitted that the Authority must set the criteria to authorise or refuse the renewal, transfer or transfer of control application brought before the Authority in accordance with the BBBEE Act and relevant codes of good practise.

Furthermore, the BBBEE Act will trump any other law (including the Draft Regulations) that is in conflict with the Act and which attempts to govern any BBBEE matter that should be dealt with by the Act. This includes the aspect of setting a percentage for BBBEE as opposed to setting a qualification criteria or level as prescribed in the Codes of Good Practice. This follows from section 3(b)(2) which states that: *"In the event of any conflict between this Act and any other law in force immediately prior to the date of commencement of the Broad-Based Black Economic Empowerment Amendment Act, 2013, this Act prevails if the conflict specifically relates to a matter dealt with in this Act"*. The said provision comes into effect 12 months from the end of October 2015. The risk to the Authority is that if the 30% HDP criteria is used by the Authority to refuse a renewal, transfer or transfer of control application such a decision could be challenged in light of the above-mentioned arguments.

3. Before the Authority sets a BBBEE qualification criteria or level through regulation for the purposes of making a decision to reject a transfer or transfer of control application, the Authority must consider the section that governs transfer of individual licenses or change of ownership, which is set out in section 13 of the ECA. It is submitted by MTN that the applicable provisions in this section which empower the Authority to set a limit on, or to restrict the ownership or control of an individual licence in order to promote ownership and control by historically disadvantaged individuals must be preceded by an enquiry in terms of section 4B of the ICASA Act, no 13 of 2000 (as amended). Section 13(5) of the ECA states that" *Regulations contemplated in subsection (3) and (4) must be made—*
(a) with due regard to the objectives of this Act, the related legislation and where applicable, any other relevant legislation; and

(b) after the Authority has conducted an inquiry in terms of section 4B of the ICASA Act, which may include, but is not limited to, a market study."

Subsection (3) in the above quoted provision states that "The Authority may by regulation, set a limit on, or restrict, the ownership or control of an individual licence, in order to

(a) promote the ownership and control of electronic communications services by historically disadvantaged groups and to promote broad-based black economic empowerment; or

(b) promote competition in the ICT sector."

(c)

In summary, the Draft Regulations attempts to set an HDP limit for the transfer and transfer of control of an individual licence, which is included in the scope of ownership and control of that licence without the Authority conducting the necessary enquiry in terms of section 4B of the ICASA Act. .

Secondly, the Authority, through the Draft Regulations has determined the measurement of BBBEE (which forms part of the term HDP) as a percentage, which is contrary to section 10(1)(a) of the BBBEE Act. The BBBEE Act requires that BBBEE qualification criteria or the associated levels be utilised in respect of any authorisations made in law such as the decision by the Authority to reject the renewal, transfer and transfer of control of a licence "...must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act..."

MTN submits for these two reasons, the 30% HDP criteria found in the Draft Regulations is not consistent with the ECA and the BBBEE Act. MTN therefore submits that reference to the 30% HDP criteria should be deleted from regulation 12.

MTN also submits that a sub regulation should be included in Regulation 12 that allows the Authority in a transparent manner to in detail explain the reasons for rejecting a renewal, transfer or transfer of control application brought before it. Such a sub regulation would be in line with the Promotion of Administrative Justice Act, 3 of 2000. MTN therefore proposes that the following sub regulation should be included:

"The Authority must, notify the applicant of its decision to refuse the renewal, transfer or transfer of control of a licence including the reasons for that decision and any licence conditions that are applicable"

Regulation 11 in the Draft Regulations seeks to empower the Authority to consider and evaluate a transfer of an individual licence or the transfer of control of an individual licence application on the basis of promoting competition and the interests of the consumer; and the equity ownership held by historical disadvantaged persons, which is in line with the objects of the ECA as outlined in section 2.

Following from MTN's arguments in respect of the amendments to Regulation 12, the evaluation of the equity ownership, especially as it relates to BBBEE must be done on the basis that is in line with the BBBEE Act.

MTN submits that regulation 11(4) (b) should therefore be amended as follows:

"b) equity ownership by HDP's. The equity ownership in relation to broad-based black economic empowerment will be evaluated on the basis as catered for in the Broad-Based Black Economic Empowerment Act, no 53 of 2003 (as amended)."

2.4. Amendment of Form G, which follows from Regulation 11.

Form G of the Draft Regulations and in particular clause 1.4 of same states that *"Any application for Sub-letting, Cession, Transfer or Transfer of Control with less than 30% of equity ownership held by historically disadvantaged groups will not be considered."*

For the reasons explained above, clause 1.4 is not consistent with section 10(1) (a) of the BBBEE Act and could be challenged for the reasons explain previously. As a result, MTN submits that clause 1.4 be deleted in Form G.

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