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Date: 30th October 2015

**Submissions on prospective
spectrum auctions as invited by GN 914 of 2014 “INFORMATION
MEMORANDUM FOR RADIO FREQUENCY SPECTRUM PROSPECTIVE
LICENCE TO PROVIDE MOBILE BROADBAND WIRELESS ACCESS
SERVICES FOR URBAN AND RURAL AREAS USING THE
COMPLIMENTARY BANDS, 700MHZ, 800MHZ AND 2.6GHZ”**

Mr Dikgale

1. Crystal Web hereby submits for consideration by the Independent Communications Authority of South Africa (the Authority or ICASA) representations as invited by Notice 914 of 2015 published in the Government Gazette 39203 of the 11th of September 2015 (the invitation) as extended on the 16th October by Notice 1000 of 2015.
2. It is clear that the prospective spectrum rights falls within high demand ranges and that this auction is a process of embarking on an “Extended Application Procedure” under the 2015 Radio Frequency Spectrum Regulations appearing in Government Gazette 38641 of the 30th March 2015 as Notice 279 of 2015.
3. The process proposed in the Information Memorandum is I submit largely in line with the direction which the Authority should adopt in order to enable the expansion of broadband connectivity in South Africa. We however have three major lines of concern in regard to this matter:
 - a. The dangers of embarking on this process prior to the conclusion of the acquisition of Neotel (or the cancellation of same acquisition);
 - b. The prescriptive ownership and control provisions of the Radio Frequency Spectrum Regulations cannot be satisfied by any individual operator with sufficient scope;
 - c. Lack of guidance on the proper introduction of a MORAN infrastructure environment;
 - d. Lack of regional development opportunities in the process.



Dangers of embarking on the process prior to the finalization of suit

4. The Authority is currently a respondent in four applications seeking to set aside the approval by the Authority of the acquisition of Neotel by Vodacom. This acquisition has a major impact on the sector of the industry which the proposed auction relates to. Anticipated participants in the auction are in the main respondents (and applicants) in those suits and the outcome of the acquisition would directly determine whether Vodacom and Neotel both participate (or only one or the other) in each class¹. Moreover – and more importantly – the entire structure upon which the auction must take place is predicated on the validity of the 2015 Radio Frequency Regulations.
5. It is being specifically argued before the North Gauteng High Court that the 2015 Radio Regulations are applicable to the acquisition of Neotel by Vodacom. This argument is made by all four applicants before the Honourable Court, notwithstanding the authority of *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman of the National Transport Commission and Others*, *Transnet Ltd (Autonet Division) v Chairman of the National Transport Commission and Others*². I submit that in the event that the Honourable Court does hold the 2015 regulations apply in that case that both Vodacom and Neotel will have reason and energy to challenge the validity of those regulations and that such a challenge could gravely complicate matters.
6. Moreover the approach of the authority in relaxing aspects of ownership requirements found in statute or regulation is in question in same suit. If it is held that the Authority cannot relax such requirements (which I submit is indeed the case³), then any measure in the planned auction that presumes the eligibility of various parties is simply untenable. As set out later, the fact that the exclusionary criteria of regulation 6(3)(d) could make the entire process a disaster.
7. I therefore submit that the Authority cannot reasonably proceed with finalizing this process until the conclusion of litigation relating to the Neotel Acquisition by the North Gauteng High Court.

Prescriptive provisions of Regulation 6(3)(d)

8. Regulation 6(3)(d) is prescriptive that an applicant is excluded from acquiring the licence if their ownership structure does not include a 30% equity ownership.

¹ Neotel being acquired by Vodacom would preclude both from participating by virtue of Regulation 6(3)(a); it would be most improper if due to obscure delays Vodacom and Neotel are both able to obtain the high demand spectrum in question and thereafter are in the same stable.

² [1999] ZASCA 40; [1999] 3 All SA 365 (A)

³ It is my argument that the 30% equity ownership position does not apply to the transaction and that if it did it would not be eligible for relaxation by the Authority.



9. The Information Memorandum moves further than the Level 4 BBBEE requirement and embraces a target of Level 2 status within 24 months. There is a further prescription of increasing the ownership equity by 3% within 24 months.
10. It appears that the Authority is intent on suspending the application of Regulation 6(3)(d) in order not to exclude all of the prospective applicants with deep pockets. I submit however that this is simply untenable. Instead the process embarked upon will require applicants will require 30% to embark on the auction and thereafter to acquire a further improvement of 3% over 24 months. This would mean that 24 months after the close of the auction successful parties will need to have 33% historically disadvantaged ownership. The alternative would be a situation in which only certain entities who have the benefit of an individual licence but are not heavily (and I submit sufficiently invested to warrant an individual licence) invested in the industry to align themselves to the equity requirements and in the process through regulatory windfall acquire a monopoly over an incredibly valuable public asset for their major benefit.
11. I submit that, absent the Minister and Authority embarking on a process to invite additional applicants to seek individual ECN and ECS licences to enter the space as wireless network operators and service providers, there simply will not be proper interest from qualified parties to auction for the spectrum. Such new entrants can be required to hold 30% or such higher percentage of equity ownership by historically disadvantaged individuals.
12. Alternatively the Authority could embark on a process to commence an auction process for applicants that are conditional upon post-conclusion qualification under the regulations. This would entail both the holding of the requisite individual licences and equity ownership criteria.

MORAN Ecosystem

13. There is a general failure by the Authority to drive the implementation of a culture of facilities sharing – best captured by the fact that the Authority has failed absolutely to ensure that Local Loop Unbundling takes place.
14. This lack of a culture of embracing facilities leasing and the development of a rich environment where infrastructure is shared through appropriate commercial arrangements needs to be tackled. There is a need for infrastructure which is built on a Multiple Operator Radio Operator Network (MORAN) basis to be embraced. The information document simply does not contain any indications of embracing such business models – beyond the fact that Lot A wholesale provisions have effect.
15. If the Authority (and Minister) embrace the opportunity to see new entrants that will aide in restructuring the South African economy in line with the Constitution, the opportunity to see a low capital barrier to entry must be embraced. New firms



that acquire via auction the spectrum rights an lease from existing network operators (who have rolled out the infrastructure) on a proper commercial basis the infrastructure to provide LTE services on either a wholesale or retail basis. This approach will enable existing firms who have made considerable capital investments and must ensure a return on that capital to mitigate their risk through leasing out their infrastructure.

Lack of regional scope

16. The auction proposal operates with national lots rather than regional lots. If a proper division between the infrastructure leasing company (existing operators) and new entrants is recognized as an opportunity to unlock many opportunity, then a rational extension of recognizing that high demand spectrum on a regionalized level is possible.

Conclusion

17. In the event that the Authority convenes public hearings on this process 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.
18. For the reasons set out above, we submit that:
 - a. The proposed auction can only take place after the conclusion of litigation relating to the Neotel acquisition and that further invitation needs to be issued for comment at that point;
 - b. The Authority should consult with the minister as to the prospects of embarking on a process to invite new entrants;
19. Crystal Web would welcome any opportunity to participate in the envisaged spectrum auction.

Yours Truly

Paul Hjul