

Independent Communications Authority of South AfricaPinmill Farm
Block B
164 Katherine Street,
Sandton, 2146Attention: **Ms Refiloe Motsoeneng**
The Project ManagerBy email: transformation@icasa.org.za

30 June 2017

Dear Ms Motsoeneng

Submission in respect of the Discussion Document: equity ownership by historically Disadvantaged Groups and the Application of the ICT sector Code in the ICT Sector in terms of S4B of the ICASA Act 2000, as amended

We refer to the above which was published in the Government Gazette No 40759, on 31 March 2017.

The written response of Liquid Telecommunications South Africa Proprietary Limited (formerly known as Neotel) to the above is attached to this letter.

We confirm our availability and indeed request that you include us, to participate in public hearings in regard to this consultation, should the Authority elect to hold same following the receipt of the written responses.

Kindly acknowledge receipt of this submission.

Yours sincerely

**LIQUID TELECOMMUNICATIONS SOUTH AFRICA PROPRIETARY LIMITED**Per: Mike Silber
General Counsel

Submission to The Independent Communications Authority of South Africa ("ICASA")**by****Liquid Telecommunications South Africa Proprietary Limited****on****The Discussion Document: Equity ownership by historically Disadvantaged Groups and the Application of the ICT sector Code in the ICT Sector in terms of S4B of the ICASA Act 2000, as amended****INTRODUCTION**

1. Liquid Telecommunications South Africa ("**Liquid**") extends its appreciation to the Independent Communications Authority of South Africa ("**the Authority**" / "**ICASA**") for the opportunity to comment on the Discussion Document: Equity ownership by historically Disadvantaged Groups and the Application of the ICT sector Code in the ICT Sector in terms of S4B of the ICASA Act 2000, as amended ("**Discussion Document**") published on 31 March 2017 in Gazette 40759.
2. ICASA invited interested persons to submit written comments on the Discussion Document, which comments follow.
3. We also wish to express our appreciation to the Authority for the extension of the closing date for written submissions from 8 June 2017 to 30 June 2017. We submit that this consultation is a critical one which has the ability to provide much needed clarity in the sector in regard to its subject matter and as such, value the opportunity to have had additional time to comment on its contents.
4. Part A of this submission will offer a number of general comments, followed by specific comments and responses in Part B to the questions posed in the Discussion Document. We do not address every question that ICASA has raised in the Discussion Document in every section, but we do offer a submission on each of the broad sections under which questions are posed.

PART A: GENERAL COMMENTS

5. Liquid understands the purpose of the Discussion Document and the consultation is to determine:
- 5.1. How the Authority should approach the implementation the ICT Sector Code in light of the existing Historically Disadvantaged Groups/Individuals ('**HDG/I**') ownership requirements; and
 - 5.2. How the Authority can promote Broad-Based Economic Empowerment ("**BBBEE**"), and equity ownership of HDG's as required in terms of sections 9 and 13 of the *Electronic Communications Act*, No 26 of 2005 ("**ECA**"), as amended. This includes the needs of women, opportunities for youth and challenges for persons with disabilities.¹
6. Before offering our views below, we wish to note that this submission is made as Liquid as an entity which has recent experience of the Authority's change of control process. This follows the approval of a transaction by the Authority and the Competition Commission in 2016 in terms of which Royal Bafokeng Holdings and the Liquid Telecom Group acquired control in the Neotel licences, the change of name of Neotel to Liquid and the formal re-branding on 28 June 2017 of Neotel's enterprise business under the Liquid brand. This re-brand reaffirms the group's commitment to upgrading and expanding its network across South Africa, which will result in greater access to high-speed connectivity for more customers. Liquid Telecom's retail business, including its fixed-line broadband service, will continue to operate under the Neotel name. This point is important because the transactions underpinning this potential growth and what is in effect, an expression of many of the objects of the ECA have taken place in the context of the subject matter of this Discussion Document.
7. As such, it is also noteworthy that this submission to ICASA is the first one we do as a joint entity formed as a result of the transaction mentioned above. We make this point again, as the context of this discussion document on equity ownership was a key feature, both in our successful transaction and also very much so in the failed proposed transaction with Vodacom Proprietary Limited which preceded the conclusion of ours. Indeed, the conditions proposed by ICASA in the proposed Vodacom transaction became the subject matter of litigation in the High Court and even following an appeal, is left largely unresolved from the perspective of enabling commercial efficiency in the Information and Communication Technology ("**ICT**") sector.

¹ In terms of sections 4(3) (j) and (k) of the ICASA Act no 13 of 2000 and section 2 (h) of the ECA.

8. This consultation and the Discussion Document on which it is premised, is important for the ability it holds to clarify some of the is lingering definitional issues that have arisen with respect to equity ownership, Black Economic Empowerment ("BEE"), Historically Disadvantaged Groups / Individuals ("HDG / HDI") and ownership and control in licences, that have existed in the sector for many years.
9. We accordingly encourage ICASA to utilise this opportunity, to the fullest extent possible to clarify as many issues pertaining to the above as possible within its mandate and remit to facilitate the realisation of section 2 of the Electronic Communications Act no 26 of 2005 ("ECA"), specifically, those in section 2(a), (c), (d), (f), (h), (k), (n), (o), (p) and (z).

PART B: SPECIFIC COMMENTS

Re Application of HDG Equity Requirement

10. The Discussion Document correctly notes that the ECA adopts a prescriptive approach for Individual licensees, where equity held by HDGs is mandatory whilst it is silent with respect to Class licences. Liquid is of the view that the ECA adopted this approach for a reason, namely that the class licensing regime should be one to which much less regulatory rigour applies, both in respect of obtaining and complying with these licences. They are by their nature "softer" licences, available to anyone who qualifies to registers one and to which less obligation must by definition, apply less onerously than Individual licences. This does not preclude class licences being part of overall transformation as businesses in the ICT sector and indeed, they are subject to compliance with the overall BEE framework in the country.
11. To this end, Liquid is of the view that:
 - 11.1. No specific, mandatory equity requirement under the ECA should apply to class licences, though it may be worthwhile to develop an incentive system for class licensees to comply by affording those that do, with reductions on other compliance requirements, such as for example, contribution to the universal service and access fund. That is, create a system of incentives to comply thus rewarding those that do, but not penalising those that do not, given the nature of the class licence. As such, Liquid does not believe that the Authority should consider income levels and size of the entity as criteria for differentiation in the imposition of the HDG requirement. The licensing framework in the ECA developed criteria for individual and class licences, not for a stratification thereof, within the latter.

12. Liquid submits that the minimum legislated requirement should remain at 30% to create certainty and predictability within the ICT sector. In the current SA investment grading situation, we are of the view that a sector as critical as ICT and one which requires foreign and local investment, no further changes should be implemented.
13. In respect of whether the Authority should provide imprimatur to a transaction in which the change in shareholding reduces overall equity ownership by HDG's below 30%, Liquid is of the view that the crisp issue rather, is for the Authority to use these (or other relevant regulations) to define "equity ownership". The term is not defined in the ECA or the regulations and its relevance arises in the context of section 13(1) and 9(2)(b) (application for a granting of, and transfer of control). Does equity ownership mean voting rights, beneficial ownership in assets, direct or indirect shareholding? In other words, how is the 30% actually measured by ICASA and in the context of a change of control, how is control measured by ICASA?
14. Liquid is of the view that while this remains poorly defined, the discussion must rather centre on defining it for compliance purposes, rather than specifying a level under which a percentage cannot drop, without detailing how it is comprised and measured. This remains a lacuna that needs to be addressed to ensure certainty, reduce regulatory gaming and facilitate commercial transactions that result in growth and competition in the sector. Please see further comments below relevant to this issue at paragraph 22 onwards.
15. Liquid is of the view that the HDG equity ownership requirement cannot effectively be applied to publicly traded entities and efforts should not be directed at doing so, save for where an individual licence is being applied for, transferred, renewed or amended, or the control of the licence, (we propose this should be defined as 51%) is being transferred. Our comments in this regard pertain to further questions raised in the Discussion Document in respect of publicly traded entities.

Re verification of compliance with the HDG requirement

16. The Authority should adopt the approach under the Broad-based Black Economic Empowerment Act, 53 of 2003 ("**BEE Act**") in respect of verification, for the reason that transformation and empowerment is far more than just equity held at a particular point in time. We elaborate on this point further below at paragraph 19.
17. However, while one can understand the Authority's concern with "continuing consequences" as a possible means to frustrate its efforts to transform the sector, the fact remains that the ECA has a trigger for ensuring the 30% minimum threshold.

18. That trigger, as the Authority itself points out in the Discussion Document, is in respect of:
- 18.1. Applications for a new licence;
 - 18.2. Transfer of a licence;
 - 18.3. The transfer of control in a licence, or change of ownership of a licence;
 - 18.4. Renewal of a licence, and
 - 18.5. Amendment of a licence.
19. This trigger then serves as a means for ICASA to consider and approve any of the above applications in the context of the 30% threshold. Accordingly, there is no need for ICASA to attempt to develop a mechanism to try and ensure that verification is constant and perennial as opposed to static, but annual. Simply put, a rational organisation / entity seeking to comply with the BEE framework, generally orders its affairs to try and meet as many of the scorecard elements under the BEE framework as possible. It is called a "balanced" scorecard for this reason – so that one element alone is not capable of rendering these efforts fruitful or a failure. It is the combination thereof that will determine the outcome.
20. Similarly, in meeting that outcome, through management control, employment equity, procurement practices, contributions to enterprise development etc., that entity contributes in a more holistic way to transformation than simply equity ownership, which itself carries the risk of being concentrated and not as broad-based as the BEE Act or policy envisages. As such, verification as per the scorecard, notwithstanding the challenges specified in the Discussion Document viz. Black People and HDG's, should suffice for ICASA's purposes. It further does not matter that verification certificates are valid for one year: while ICASA has the triggers for 30% necessary for any of the above events listed in 18.1 - 18.5 above, it should not concern itself with the scoring of an organisation at any other time.
21. Our submission above applies equally to questions posed later in the Discussion Document as to what minimum level of BBBEE certification should be required by ICASA and whether the Authority should require BBBEE certificates to be submitted as part of licensees' annual compliance requirements. The threshold triggers exist in the ECA and the Authority should not seek to go beyond the consideration of those given the objectives, if correctly

defined and uniformly implemented, they will achieve. To go beyond that, may result on over-regulation of licensees and risk having a stifling effect on the sector.

Re Ownership vs Control

22. The Authority validly points out that the term "Ownership" is not defined in the ECA (nor is "equity ownership") and the lack thereof has created uncertainty. We draw your attention to our previous comment at paragraph 13. Similarly, the term "control" appears to have only reached some certainty in the context of broadcasting services, where, as per section 66 (5) of the ECA, control is defined as a "20% shareholding" in a commercial broadcasting service licence.
23. As ICASA notes in its Discussion Document, the BEE Act requires the application of by an organ of state or public entity of relevant Code of Good Practice in the qualification (and transfer, assignment, renewal, amendment) criteria for licensing. We do not wish to make any further submission on this point and the 30% threshold requirement as whether correctly, or incorrectly, it has been interpreted by our courts as a minimum, immediate threshold and until amended through legislation or further case law, it stands.
24. We do however, submit that the Authority should use this opportunity to properly define the issue of "control" in the application of section 13(1) and 31((2)(a) and section 9(2)(b) of the ECA.
 - 24.1. Essentially, section 13(1) prohibits a transfer (of an individual licence or control of an individual licence) without the prior written permission of ICASA.² Section 31(2A) prohibits this in respect of the control of a radio frequency spectrum licence.³ ICASA is required to apply the requirements of section 9(2)(b) below with the necessary changes to a section 13(1) application.
 - 24.2. Section 9(2)(b) requires ICASA to include in the notice for an application for an individual licence, the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act.

² Section 13(1) states that "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 Section 31(2)(A) provides that "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." Regulation 15 of the Radio Frequency Spectrum Regulations, 2015 sets out the procedure to be followed for such application and the basis on which ICASA will evaluate and approve such an application.

25. As the Authority is aware, the concept of control is not defined anywhere in the ECA or in the regulations: while the regulations however, do provide a procedural framework within which to apply, they offer no guidance in any other respect in regard to "control" in a licence. As a result, when an application for prior written approval for a transfer of control of a licence must be made, has been interpreted fairly widely by different operators within the sector.⁴ This definitional issue needs to be addressed.
26. While reference is made to the Regulations in respect of the Limitation of Ownership and Control of Telecommunication Services, 2003, which offer a definition of both an "ownership interest" (5%) and a "control interest" (25%), Liquid is of the view that these regulations no longer have any application and have in fact been repealed through the promulgation of other regulations made pursuant to the promulgation of the ECA, such as the Radio Frequency Spectrum Regulations of 2015 and the Processes and Procedures Regulations, as amended in 2016 (notwithstanding the saving provisions section 95(2) of the ECA).⁵
27. Accordingly, Liquid agrees that the sector requires clarity on what constitutes transfer of ownership and what constitutes a transfer of control. We submit that the provisions of the Competition Act no 89 of 1998 (section 12(2)) and the Companies Act no 71 of 2008, are suitable for the purpose of defining control.
28. The focus on an ownership interest should be limited to instances where 100% of the share capital is transferred, in which case a section 13(1) application is triggered. We are further of the view that the question in respect of whether a transfer of 100% share capital in a licensee amounts to transfer of control or transfer of ownership is irrelevant for the purposes of section 13(1) which caters for both. Other aspects of such transactions receive attention where applicable under the Competition Act and it is not necessary for ICASA to define this further?

Re Application of the ICT Sector Codes

29. At a general level, the provisions in the ECA relating to ownership by HDGs need to be clarified in the context of the provisions on the application of broad-based black economic empowerment ("BEE") and the ICT Sector Code, so as to give the ICT Sector certainty on how BEE will be applied in relation to licence applications, licence transfers, and changes in control of licence holders.

⁴ For example, 20% as per the broadcasting licence threshold, 25% issued share capital, voting or veto rights, etc. See KZN Talk Radio (Pty) Ltd v ICASA and Another, case number 41672/12, Gauteng High Court. 5 August 2014 (unreported) judgement.

⁵ See also *Telkom SA (SOC) Limited v Mncube NO & Others*, [2016] ZAGPPHC 93 (26 February 2016).

30. When the ECA was amended in 2014 it introduced various changes relating to BEE, including the following –
- 30.1. it defined "broad-based black economic empowerment" as having the meaning assigned to it in the BEE Act. The BEE Act contains a wide definition of broad-based black economic empowerment, but which encompasses the viable economic empowerment of all black people, including women, youth, people living in rural areas and people with disabilities. The BEE Act defines black people very specifically with reference to African, Indian and Coloured citizens of South Africa. The BEE Act does not seek to benefit HDGs nor does it make any reference to such term;
 - 30.2. it further defined the "ICT Sector Charter" as a sector code on broad-based black economic empowerment issued in terms of the BEE Act, The ICT Sector Code was gazetted in terms of section 9(1) of the BEE Act on 7 November 2016. The term ICT Sector Charter in the ECA would therefore refer to such ICT Sector Codes;
 - 30.3. section 2(h) was amended to provide that one of the objectives of the ECA is to promote broad-based black economic empowerment and it deleted the reference to promoting the "empowerment of historically disadvantaged persons, including Black People";
 - 30.4. section 5(9)(b) was amended to state that ICASA must, in granting a licence, promote broad-based black economic empowerment, including the empowerment of women and the youth and persons with disabilities, in accordance with the requirements of the ICT Charter. It resulted in the deletion of the reference to promoting the "empowerment of historically disadvantaged persons";
 - 30.5. section 9(2)(b) was amended to provide that ICASA may "include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under Section 4(3)(k) of the ICASA Act"; and
 - 30.6. section 13(3)(a) was amended to provide that ICASA may restrict ownership or control of an individual licence in order to promote the ownership and control of electronic communication services by historically disadvantaged groups, and to promote broad-based black economic empowerment.
31. The reference to HDG remains in section 9(2)(b) and section 13(3)(a). However, such provisions have the potential to be confusing when considered alongside the provisions that refer to BEE and the ICT Charter. It appears that the 2014 amendments to the ECA were made to align the ECA with the principles of BEE set out in the BEE Act.

32. In this regard we refer to the Memorandum on the Object of the of the Electronic Communications Amendment Bill accompanying the ECA Amendment Bill in 2013, which *inter alia* states, that the objects of the Bill are to amend the Electronic Communications Act, 2005, so as to *align the Act with broad-based black economic empowerment initiatives*; and in relation to the amendments to section 9(2)(b) that the focus of the Act has been changed from the empowerment of "historically disadvantaged individuals" to broad-based black economic empowerment.
33. In addition, section 10(1)(a) of the BEE Act provides that every organ of state and every public entity must apply any relevant code of good practice issued in terms of the BEE Act in, amongst other things, determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law.
34. ICASA is an organ of state as contemplated in section 10(1)(a) of the BEE Act. The ICT Sector Code was gazetted in terms of section 9(1) of the BEE Act on 7 November 2016. The ICT Sector Code provides that it applies to all participants in the ICT sector, including ICASA. When section 10(1)(a) of the BEE Act is read together with the application provisions of the ICT Sector Codes, it is clear that ICASA has an obligation to apply the ICT Sector Code when determining the qualification criteria for licences. Since the BEE Act and the ICT Sector Code seek to benefit black people, we submit that the term HDG no longer has any relevance and should be replaced with the concept of black people.
35. In addition, we submit that empowerment generally and black ownership specifically of the ICT sector should be measured in terms of the measurement principles set out in the ICT Sector Codes. ICASA is bound in terms of the BEE Act to do so. This will eliminate the considerable degree of confusion and complication that currently surrounds empowerment in the ICT sector.
36. We are of the view that the Authority should not however seek to apply the Codes to every aspect of regulation. In this regard, see our comments above at paragraph 10 in respect of class licences, which pertain equally to operational regulatory matters such as type-approval and numbering applications.
37. The issue of high-demand spectrum and qualification criteria is a separate debate, one embroiled in a multiple complications and High Court litigation and one that cannot be resolved here. At a high-level, the Authority could possibly consider the same BEE criteria for the issue / award of new high-demand spectrum assignments only as it

would for an individual licence application. To apply the criteria to general spectrum and links necessary for continued service operation, may result in severe and deleterious, unintended outcomes to current operations.

38. Our comments above have equal application to the question posed by the Authority as to whether the Authority should apply either HDG ownership requirements or the Codes, to all applications and processes.
39. Similarly, as a regulatory imperative, HDG requirements should only be made mandatory for the triggers that are set out in paragraphs 18.1 - 18.5. It is unclear to Liquid what the Authority means by applying such requirements to "application of some other regulatory process"?
40. Finally, Liquid agrees with the frustration of the Authority in its statement that two decades into the South African democratic dispensation, there is a lack of full and meaningful transformation of ownership and operations of licensees in the sector. This is of concern and certainly a policy issue that requires attention. The proposed Integrated ICT White Paper process would be an appropriate vehicle when it progresses to a Bill for comment, to raise possible amendments in this regard.⁶
41. One tool for this would be the imposition of a timeframes for compliance by all of its licensees for requirements for empowerment. This is a useful mechanism but must allow for a reasonable 24-36 month period to ensure the legal due diligences, commercial agreements and negotiations that would inevitably flow from such a requirement to do so in an orderly fashion. A rushed requirement timeframe might not only suffer a review based on irrationality but too, could yield unintended outcomes for the sake of reflecting "ownership" without meaningful participation.

CONCLUSION

42. Liquid re-iterates its appreciation to ICASA for the consultative way in which it is approaching these important issues. Liquid supports the process to review and hopefully implement regulations to clarify this important aspect of commercial engagement and policy vision. Our high-level recommendations in addition to our detailed comments above are as follows:

- 42.1. Fix definitions and areas that lack clarity;
- 42.2. Clarify the definition of "control" and "equity ownership";

⁶ Government Gazette No 40325, GN 1212, 3 October 2016.

- 42.3. Promulgate regulations that align with the implementation of the ICT Sector Codes to avoid ambiguity and ensure certainty in the sector.
43. Ultimately, the output of such a consultation must be a significant positive impact on transformation and in transformation of the ICT sector as a whole. The comments which have been made serve to note a few potential areas of refinement and Liquid welcomes the opportunity to participate and contribute further. We remain available to assist the Authority in any way required.