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29 JUNE 2017

Ref No. 201706/05/04

Ms Refiloe Motsoneng

Project Manager

Independent Communications Authority of South Africa (ICASA)

Blok B, Pinmill Farm

164 Katherine Street

Sandton, 2146

Via email: transformation@icasa.org.za

Dear Sirs,

**RE: MTN'S SUBMISSIONS REGARDING 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 Government Gazette Notice No.40759 dated 31 March 2017 issued by the Authority inviting written submissions from interested persons.

MTN hereby make its submission in accordance with the above-mentioned invitation. In addition to making these written submissions, MTN would like an opportunity to make oral submission at the hearings the Authority may need to convene.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Moses Mashisane', written over a horizontal line.

Moses Mashisane
General Manager: Regulatory Affairs
Mobile Telephone Networks (Pty) Ltd

*Directors: MJ Harper (Chairman), MJ Bosman, SA Fakie, GB Makhaya, GN Motsa, CWN Molope, PD Norman, PF Nhleko,
M Nyali, SS Ntsele, LW Phalatse*
Company Secretary: SB Mtshali
Reg. No. 1993/001436/07



MTN's Submission regarding Equity Ownership by Historically Disadvantaged Groups

and the Application of ICT Sector Code in the ICT Sector

Government Gazette No. 40759 Dated 31 March 2017

29 June 2017

ANNEXURE A**MTN'S SUBMISSIONS ON EQUITY OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUP AND ICT SECTOR CODE APPLICATION DISCUSSION DOCUMENT****1. INTRODUCTION**

- 1.1 In this document, the following words shall bear the corresponding meanings:
- 1.1.1 **"Authority"** means the Independent Communications Authority of South Africa;
 - 1.1.2 **"BBBEE"** means broad-based black economic empowerment;
 - 1.1.3 **"BBBEE Act"** means the Broad-Based Black Economic Empowerment Act No 53 of 2003;
 - 1.1.4 **"ECA"** means the Electronic Communications Act No. 36 of 2005;
 - 1.1.5 **"ICASA Act"** means the Independent Communications Authority of South Africa Act No 13 of 2000;
 - 1.1.6 **"ICT Sector Codes"** means the ICT Sector Codes published in terms of section 9(1) of the BBBEE Act under General Notice 1387 in *Government Gazette* 40407 of 07 November 2016; and
 - 1.1.7 Terms defined in the B-BBEE Act or the ICT Sector Codes bear the same meaning when used in this document.

2. Background and MTN's Motivation

- 2.1 This document sets out MTN's submissions in response to the discussion document published under General Notice Number 274 of *Government Gazette* Number 40759,

("Discussion Document") in terms of which the Authority gives notice of its intention to conduct an inquiry to determine:

- 2.1.1 how the Authority should approach the implementation of the ICT Sector Codes in the context of the existing ownership requirements in the ECA relating to historically disadvantaged groups ("HDG's"); and
 - 2.1.2 how the Authority can promote BBBEE and equity ownership by HDGs, as required in terms of the ECA.
- 2.2 In addition to making these written submissions, MTN would appreciate an opportunity to make oral submissions at the hearing the Authority may need to convene.
- 2.3 According to the 13 September 2016 B-BBEE verification certificate, MTN's Black ownership stood at 46.22%, and 8.19% for Black Women. A copy of the verification certificate is attached marked "MTN1". We hope this demonstrates to the Authority that MTN is not motivated by self interest in making these submissions. The submissions are made in the interests of rational, transparent, lawful and certain regulation for the entire ICT sector.
- 2.4 Large-scale ICT investment will play a crucial role in fuelling the growth of South Africa's GDP through increased economic activity, innovation and productivity. This is especially needed now, in the face of the economic crunch caused by, amongst other things, the downgrade of South Africa's rating to junk status.
- 2.5 Regulatory certainty is required in order to attract investment. Our government recognises this. When Minister of Telecommunications and Postal Services, Dr Siyabonga Cwele announced the new B-BBEE ICT sector code at the launch of a B-BBEE ICT sector council in Midrand on Tuesday, 8 November 2016 he said *"the advantage of a sector-specific code is that it brings regulatory certainty and enables the sector to maximise its transformative impact by focusing on opening up participation in the sector for designated groups that include women, youth and people with disabilities."*

¹ <http://www.fin24.com/tech/news/new-bee-code-for-sas-ict-sector-20161109>

- 2.6 MTN believes that ICT investment could assist in fuelling economic growth and aide in the elimination of unemployment, poverty and inequality. MTN is committed to economic transformation, which it believes can be achieved through pragmatism and, most importantly, policy and regulatory certainty.
- 2.7 MTN's submissions are made with that spirit in mind.
- 2.8 Our submissions are structured as follows:
- 2.8.1 We first analyse the relationship between the B-BBEE Act, the ICASA Act and the ECA;
- 2.8.2 We then make submissions on what we understand the Authority to be empowered to regulate and how we believe it should go about doing so;
- 2.8.3 We then address the Authority's 30% equity ownership regulation as per the Authority's Notice published in Government Gazette No. 38087 on 10 October 2014 ("the Authority's Equity Regulation"); and
- 2.8.4 Lastly, we address the specific questions raised in the Discussion Document.

3. RELATIONSHIP BETWEEN THE B-BBEE ACT, THE ICASA ACT AND THE ECA

- 3.1 The B-BBEE Act sets out the objectives of government's intervention to promote empowerment of Black People, and, at section 9, delegates to the Minister of Trade and Industry the power to prescribe codes of good practice. The codes of good practice may specify:
- 3.1.1 B-BBEE targets aimed at achieving the objectives of the B-BBEE Act;² and
- 3.1.2 The period within which those targets must be achieved.³

² B-BBEE Act section 9(3)(a)

³ B-BBEE Act section 9(3)(b)

- 3.2 Once the codes of good practice are issued, every organ of state and public entity (including the Authority) is obliged to apply it until it is amended, replaced or repealed.⁴
- 3.3 The Minister may, if requested to do so, permit a public entity (including the Authority) to specify qualification criteria for procurement and other economic activities which exceed those set by the Minister in the codes of good practice. Where no such permission has been sought or granted, no organ of state or public entity may impose criteria different from that imposed by the B-BBEE Act and the relevant codes of good practice.

The ICASA Act

- 3.4 Section 4(3)(k) of the ICASA Act permits, but does not oblige, the Authority to make regulations on empowerment requirements to promote B-BBEE.
- 3.5 In the event of a conflict between the ICASA Act and any other law: –
- 3.5.1 relating to the regulation of broadcasting, electronic communications and postal services - the ICASA Act prevails;⁵ and
- 3.5.2 relating to B-BBEE - the B-BBEE Act prevails.⁶

The ECA

- 3.6 Section 2(h) of the ECA requires the Authority to promote B-BBEE, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities.
- 3.7 The Authority is required to promote B-BBEE when granting a licence.⁷

⁴ B-BBEE Act section 10

⁵ ICASA Act section 24

⁶ B-BBEE Act section 10(1) read together with ICASA Act section 24

⁷ ECA section 5(9)(b)

- 3.8 The Authority is empowered to “set a limit on, or restrict, the ownership or control of an individual licence, in order to promote the ownership and control of electronic communications services by historically disadvantaged groups and to promote B-BBEE.”⁸
- 3.9 The Authority is required to impose minimum HDG equity ownership, not below 30%, in its notices inviting applications for individual licences.⁹
- 3.10 The Authority has interpreted the power conferred under section 9(2)(b) of the ECA as including the converse, and has extended its power to require at least 30% HDG equity ownership to the transfer of individual licences under section 13(1) of the ECA.¹⁰
- 3.11 In the event of a conflict between the ECA and any other law –
- 3.11.1 relating to the regulation of broadcasting or electronic communications – the ECA prevails;¹¹ and
- 3.11.2 relating to B-BBEE – the B-BBEE Act prevails.¹²

4. AUTHORITY'S B-BBEE REGULATORY POWER

- 4.1 The Authority is required to apply the ICT Sector Code, and may not impose requirements that exceed or fall short of those in the ICT Sector Code,¹³ unless it has been granted special approval by the Minister of Trade and Industry.¹⁴
- 4.2 It is therefore safe to interpret section 4(3)(k) of the ICASA Act as relating only to instances where the Authority wishes to impose B-BBEE requirements that exceed the ICT Sector Code. To hold otherwise will result in an absurdity that could not have been intended - that the Authority, may issue B-BBEE regulations separate from and in parallel

⁸ ECA section 13(3)(a)

⁹ ECA section 9(2)(b)

¹⁰ Notice 881 of 2014 GG No. 38087 10 October 2014

¹¹ ECA section 94

¹² B-BBEE Act section 10(1) read together with ECA section 94

¹³ B-BBEE Act section 10(1) read with 10(3)

¹⁴ B-BBEE Act section 9(6)

with the ICT Sector Code, and which regulations will be unenforceable¹⁵ and trumped by the ICT Sector Code in any event.¹⁶

4.3 However, even in that case – where the Authority wishes to impose B-BBEE requirements that exceed the ICT Sector Code – the Authority is constrained. It must first seek the approval of the Minister of Trade and Industry before such regulations can be put into effect.¹⁷ We are respectfully of the view that the exercise by the Minister of Trade and Industry of the powers under section 9(6) of the B-BBEE Act is not a mere formality. An imposition of requirements exceeding those in the applicable sector code is in effect an amendment of the applicable sector code, in which case the Minister must first hear affected and interested parties.¹⁸

4.4 The ECA does not confer on the Authority any powers to regulate B-BBEE beyond what the Authority is empowered to do under section 4(3)(k) of the ICASA Act. In fact, the ECA confers no powers to regulate B-BBEE at all, but imposes an obligation to promote B-BBEE. This is clear from the wording of sections 2(h), 5(9)(b) and 13(3)(a) of the ECA as follows:

4.4.1 Under section 2(h) the primary purpose is the regulation of electronic communications in the public interest, and (secondary purpose) to promote B-BBEE, “with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities.” Our reading of this section is that it is electronic communications that the Authority is empowered to regulate and that it must do so in the public interest, while at the same time promoting (but not regulating) B-BBEE.

4.4.2 section 5(9)(b) is much clearer, as it imposes an obligation on the Authority to promote B-BBEE when granting a licence, and makes it clear that the Authority must do so (promote B-BBEE) “in accordance with the requirements of the ICT Charter.”

4.4.3 Under section 13(3)(a) what the Authority is empowered to do by regulation is to set a limit or restriction on the ownership or control of an individual licence. The Authority is empowered to do so in order to, *inter alia*, promote the ownership

¹⁵ If the regulations covered the same field as that covered by the ICT Sector Code they will be superfluous.

¹⁶ ICASA Act section 24 read with B-BBEE Act section 10(1) and (3)

¹⁷ B-BBEE Act section 9(6)

¹⁸ B-BBEE Act section 9(5)

and control of electronic communications services by historically disadvantaged groups and to promote B-BBEE. There is no separate power under section 13(3)(a) for the Authority to regulate B-BBEE. As an aside observation, the language of section 13(3)(a) is potentially confusing. The reference to “historically disadvantaged groups” is rather dated.¹⁹ In the empowerment parlance the term has been replaced by “black people” as defined in the B-BBEE Act. Therefore, the term should be read to mean “black people”, and we would encourage the Authority to use “black people” in all its official documents in order to avoid confusion. This is because “black people” will be a more accurate reference as there is legislation and a detailed regulatory framework that sets out how the ownership of “black people” is to be measured for the purposes of B-BBEE.

4.4.4 Section 9(2)(b) presents a problem. It introduces a power to stipulate a percentage ownership of not less than 30% in a notice inviting parties to apply for an individual licence. This notwithstanding, we submit that this power – assuming it is lawful for a moment – is not a broad power to regulate, but limited to instances when the Authority invites applications for individual licences.

4.4.4.1 The first challenge is that the provision flies in the face of the B-BBEE Act by purporting to allow the Authority to exceed the requirements of the ICT Sector Code without going through the process under section 9(6) of the B-BBEE Act, which is impermissible.

4.4.4.2 The second difficulty is that it is inconsistent with section 5 of the ECA. An individual licence is a licence granted in terms of section 5(2). Section 5(9)(b) requires the Authority to promote B-BBEE “in accordance with the requirements of the ICT Charter” when granting a licence, it does not empower or require the Authority to exceed the requirements of the ICT Charter.

4.4.4.3 Thirdly, the requirements seem to apply to the granting of individual licences only. Unless there is a sound explanation for singling out the

¹⁹ The term “Historically Disadvantage Individual” (HDI) predates the B-BBEE Act and it used to refer to a South African citizen (a) who, due to the apartheid policy, had no voting rights in the national elections prior to the introduction of the 1983 Constitution (Act No. 100 of 1983) or the Interim Constitution (Act No. 200 of 1993), and/or (b) who is a woman, and/or (c) who has a disability, provided that such person obtained citizenship before the Interim Constitution Came into effect. The term “Historically Disadvantaged Group” referred to a grouping of HDIs. (See National Treasury 2001 Preferential Procurement Regulations)

granting of individual licences and imposing different requirements for it, the provision may be irrational and therefore liable to be set aside.²⁰

4.4.4.4 Fourthly, the requirement is vague and unmeasurable to the extent that it requires the ownership to be by “historically disadvantaged groups”. If the historical definition of “historically disadvantaged groups” is adopted it will include white women, among others, who are not included in the definition of black people in the B-BBEE Act. If the historical definition of “historically disadvantaged groups” is not adopted, then the concept is not defined anywhere in the ECA making it impossible to measure. Either way, the B-BBEE Act and the codes of good practice regulate the measurement of ownership by black people – and will therefore be of no assistance in measuring ownership by “historically disadvantaged groups”. Therefore, if ownership by “historically disadvantaged groups” is to be verified in the same manner as is required by the B-BBEE Act and the ICT Charter in respect of black people, a parallel verification process akin to that under the B-BBEE Act will have to be developed, at a significant cost to the industry.

4.4.4.5 To the extent that the provision is contrary to the B-BBEE Act, the B-BBEE Act trumps it,²¹ and is therefore unenforceable.

5. AUTHORITY'S 30% OWNERSHIP REGULATION AND MTN'S RECOMMENDATIONS

5.1 The Authority's supposed power to impose black people²² ownership requirement of more than 30% seems to be sourced from section 9(2)(b) of the ECA. As is set out above, we submit that there is no other source.

5.2 In terms of the ICT Charter the measurable ownership targets applicable are set out in the below table:

²⁰ Constitution sections 1(c), 2, and 36

²¹ B-BBEE Act section 10(1) and (3) read together with ECA section 94

²² We use black people deliberately, but that does not suggest that we accept that “historically disadvantaged groups” is the same as “black people as defined in the B-BBEE Act.

Category	Ownership Indicator		Weighting Points	Compliance Target
2.1	Voting rights			
	2.1.1	Exercisable Voting Rights in the Entity in the hands of Black People	4	30%
	2.1.2	Exercisable Voting Rights in the Entity in the hands of Black Women	2	10%
2.2	Economic Interest			
	2.2.1	Economic Interest in the Entity to which Black People are entitled	4	30%
	2.2.2	Economic Interest in the Entity to which Black Women are entitled	2	10%
	2.2.3	Economic Interest of any of the following Black natural persons in the Measured Entity. NOTE: The maximum points that can be achieved by any of the following is limited to 3		
	2.2.3.1	Black Designated Groups	3	3%
	2.2.3.2	Black Participants in Employee Share Ownership Programmes		
	2.2.3.3	Black People of Broad Based Ownership Schemes		
	2.2.3.4	Black Participants in Co-operatives		
	2.2.4	New Entrants	2	2%
2.3	Realisation Points			
	2.3.1	Net Value	8	Measured as per Annexure 100(E)

- 5.3 As can be seen from the table above, the economic interest of Black People in an enterprise (ownership) target is 30%. MTN's Black ownership stands at 46.22%, and 8.19% for Black Women as can be seen from annexure "MTN1".
- 5.4 The table above reflects the nuance that goes into ownership regulation under the ICT Sector Codes, and demonstrates that a one line requirement of 30% or more ownership by historically disadvantaged groups, if it were permissible, is woefully inadequate and does not do justice to the ECA injunction to pay "particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities."
- 5.5 More importantly, the 30% ownership in the ICT Sector Codes is a target to be achieved over time, as opposed to an immediate requirement that must be met to be granted a licence like the ECA seeks to impose. The scheme of the B-BBEE Act is to ensure progressive realization of transformation by setting targets for the industry to achieve over time.

- 5.6 Furthermore, the Preferential Procurement Regulations, 2017 issued by the National Treasury in terms of the Preferential Procurement Policy Framework Act, 2000 ("the PPPFA"), the Public Finance Management Act, 1999 ("PFMA")²³ and the Constitution,²⁴ bind the Authority. The Preferential Procurement Regulations also envisage a different regulatory philosophy to that envisaged by section 9(2)(b) of the ECA. The Preferential Procurement Regulations require the Authority to set a minimum B-BBEE threshold below which it will not entertain applicants for a licence. We submit that it would be irrational to make such minimum threshold the ultimate target to be achieved over time in terms of the ICT Sector Codes. An applicant for a licence who meets that minimum threshold will then be considered compliant for the purposes of evaluation. Once compliant, the normal functionality evaluation, followed by price and B-BBEE will then have to apply.
- 5.7 In the case of licensees or transferees of licences we submit it will be better and in line with the B-BBEE Act for the Authority to set B-BBEE ownership levels to be achieved over time aligned with the ICT Sector Codes, rather than applying a once off or guillotine approach. By way of example:
- 5.7.1 The Authority may stipulate that it will not issue a licence to any person who does not have Black ownership of XX%;
- 5.7.2 When evaluating applications for a licence the Authority will have to evaluate the total package offered including B-BBEE;
- 5.7.3 As a condition of licence, the Authority may set a target of black ownership to be achieved by the licensee over the duration of the licence (the overall target);
- 5.7.4 The Authority is furthermore perfectly entitled to set short term targets that must be achieved towards achieving the overall target. These can be annual, bi-annual or longer. If they are not met the Authority may impose a penalty, which penalty will have to be communicated by the Authority upfront.
- 5.8 Such a regulatory approach, we submit, will be in line with the B-BBEE Act, the ICT Sector Codes, and the Preferential Procurement Regulations. We wish to emphasise our

²³ Section 76(4)(c)

²⁴ Section 217

submission that it will be best for the Authority and the industry if the Authority applied the ICT Sector Codes instead of creating a parallel and irreconcilable regulatory scheme.

6. We now turn to address the specific questions raised in the Discussion Document.

QUESTIONS AND RESPONSES

1. *The ECA is explicit in its requirement for empowerment, and equity to be held in respect of individual licences. There is no similar explicit requirement for class licensees. However, the Authority is of the view that it should not exclude a broad sector of licensees from being part of the transformation agenda and through its regulation making powers, and in accordance with the objects of the ECA may impose HDG equity requirements on all licensees including class licences. It is also empowered to increase the requirement target beyond 30%.*

1.1 Firstly, MTN submits that there is no rational basis to distinguish between individual licensees and class licensees. Accordingly, the comments which follow should apply to both class and individual licensees.

1.2 We repeat our submission set out above that the Authority has no authority to create a parallel Black ownership regulation scheme for the ICT sector outside of the B-BBEE Act and the ICT Sector Codes. To the extent that the ICASA Act and/or the ECA oblige or empower the Authority to do so, they are unlawful. The Authority should apply the requirements as set out in the ICT Sector Codes.

1.3 All references to HDGs in the ECA should be read to mean black people as defined in the B-BBEE Act.

2. *Should class licensees have HDG equity requirements similar to those of Individual licensees?*

Explain the rationale for the position proposed. In your opinion, how should the equity requirement be imposed on class licensees?

Please refer to our response to the Question posed in paragraph 1 above.

3. *Should the Authority consider income levels and size of the entity as criteria for differentiation in the imposition of the HDG requirement?*

3.1 No. There is no need, nor is it legal for the Authority to create a parallel regulatory scheme for any aspect of empowerment regulated under the B-BBEE Act and the ICT Sector Codes. Please refer to our response to the Question posed in paragraph 1 above.

- 3.2 If the Authority accepts our submission that the Authority should do no more than is stipulated in the BBBEE Act and the ICT Sector Codes, then there would be no need to consider income levels and size of the entity as a criteria to differentiate on the imposition of any requirements. This is so because the ICT Sector Codes already distinguish between different sizes of entities in assessing their compliance with the BBBEE targets set out in the ICT Sector Codes.
- 3.3 For example, entities with an annual turnover of R10 million or less are regarded as EMEs and automatically qualify as level 4 BBBEE contributors. If they are at least 51% Black-owned they are deemed level 2 BBBEE contributors and if they are 100% Black-owned they are deemed level 1 BBBEE contributors.
- 3.4 Furthermore, in terms of the ICT Sector Codes a QSE is an entity with an annual turnover of between R10 million and R35 million. QSEs which are at least 51% Black-owned are deemed level 2 BBBEE contributors and if they are 100% Black-owned they are deemed level 1 BBBEE contributors.

4. *Should the minimum legislated requirement remain at 30% or should it be increased? If so, what targets do you propose and why?*

- 4.1 We respectfully submit that there should be no ownership target set in any legislation other than the B-BBEE Act and the ICT Sector Codes. Please refer to our response to the Question posed in paragraph 1 above.

5. *Should the Authority require licensees to seek prior approval in instances where:*

- *a change in shareholding results in reduction of equity ownership by HDG's below 30%; and*
- *where the licensee does not meet the 30% minimum requirement, and change in shareholding that affects the percentage of equity ownership by HDG's.*

- 5.1 Please refer to our response to the Question posed in paragraph 1 above. A B-BBEE certificate is valid for a period of 12 months, regardless of any changes that might occur, including in relation to Black ownership, during that period. If the Authority falls in line with the regulatory regime under the B-BBEE Act its regulatory work will be simplified. It will not have to try and monitor fluctuations in Black ownership levels except at the

measurement periods. The Authority will be well within its rights to stipulate, as licence conditions, penalties that will be applicable if a licensee falls below a stipulated B-BBEE contributor level or the Black ownership dips below a set minimum threshold.

6. How should the HDG equity ownership requirement be applied to publicly traded entities, without discouraging HDG's from participating in share schemes?

- 6.1 Please refer to our response to the Question posed in paragraph 1 above. The HDG equity ownership requirement could, and should, be applied to publicly traded entities in exactly the way the ICT Sector Codes applies the measurement of the black ownership target to publicly traded entities.
- 6.2 In terms of the measurement principles applicable to determining the extent of black ownership in a publicly traded scheme, the ICT Sector Codes applies the following calculation methodologies:²⁵
- 6.2.1 When determining Ownership in a Measured Entity, rights of Ownership of Mandated Investments may be excluded.
- 6.2.2 "*Mandated Investments*" means "*any investments made by or through any third party regulated by legislation on behalf of the actual owner of the funds, pursuant to a mandate given by the owner to a third party, which mandate is governed by that legislation*"²⁶. This generally pertains to shareholding in publicly traded companies held by institutional shareholders such as, for example, banks, insurance companies and pension funds.
- 6.2.3 The maximum percentage of the Ownership of any Measured Entity that may be so excluded is 40%.
- 6.2.4 A Measured Entity electing not to exclude Mandated Investments when it is entitled to do so, may either treat all of that Ownership as non-Black or obtain a competent person's report estimating the extent of Black rights of Ownership measurable in the Measured Entity and originating from that Mandated Investments.

²⁵ Paragraph 3.7 of Mended Code Series 100, Statement 100

²⁶ Schedule 1, Part 2 of the ICT Sector Codes

- 6.2.5 A Measured Entity cannot selectively include or exclude Mandated Investments and therefore an election to exclude one Mandated Investment is an election to exclude all Mandated Investments and *visa versa*.

7. *How should Compliance with the HDG requirement be verified?*

Please refer to our response to the Question posed in paragraph 1 above. MTN submits that the Authority should rely on the institutional capability and capacity that has been established through the B-BBEE legislative regime, and should essentially rely on the B-BBEE verification certificates issued by accredited verification agencies.

- 7.1 ***Recognising the difference between HDGs and Black people, the Authority has consistently faced challenges in respect of the evidence of HDG equity ownership that applicants are required to submit in support of applications before it. Applicants typically submit BBBEE verification certificates as proof of claimed levels of equity held by Black people. This presents the following challenges:***

7.1.1 ***BBBEE provides for continuing consequences, and as a result recognises for a period, equity held by Black people who have already exited. The ECA does not adopt a similar approach. It only recognises equity currently held.***

7.1.2 ***BBBEE certificates are valid for a period of one year, and do not indicate the equity held on the date of application. The ECA requires that an applicant must hold 30% equity at the point of submission of an application. The Authority accordingly assesses the HDG requirement based on the most appropriate information it is able to obtain in each instance.***

7.1.3 ***The difference in terminology between HDG and Black people poses a challenge despite the fact the Black people are a subset of HDGs. This is the case as applicants of various processes submit B-BBEE certificates as proof of ownership. These certificates reflect the status in terms of Black People and not HDG which creates a gap in the provision of proof of equity ownership.***

7.2 Please refer to our response to the Question posed in paragraph 1 above. The Authority must apply the ICT Sector Codes and not create a parallel regulatory regime for ownership of the ICT sector. The B-BBEE Act prevails in the event of a conflict with the ECA.

7.3 ***What proof should the Authority consider appropriate to confirm compliance with the HDG requirements?***

Please refer to our response to the Question posed in paragraph 1 above. The accepted proof should be a B-BBEE verification certificate.

7.4 ***What proof would in your view be appropriate to confirm the compliance of publicly traded entities provide with the HDG equity/ownership requirement?***

Please refer to our response to the Question posed in paragraph 1 above. The accepted proof should be a B-BBEE verification certificate.

8. *What constitutes Ownership and what constitutes Control?*

8.1 Please refer to our response to the Question posed in paragraph 1 above. There is no need to invent new measurements, accepted proof should be a B-BBEE verification certificate.

9. *Application of the ICT Sector Codes*

9.1 ***The ECA requires the Authority to promote BBBEE and the BBBEE Act compels all organs of state and public entities to apply the applicable sector codes. How should the Authority go about doing this? Explain the rationale that underpins your view.***

Please refer to our response to the Question posed in paragraph 1 above.

9.2 ***Should the Authority require BBBEE certificates to be submitted as part of licensees' annual compliance requirements?***

Yes, to enable the Authority to monitor compliance with the minimum BBBEE contributor status level requirement, licensees should be required to submit a valid and updated B-BBEE certificate on an annual basis once that verification has been issued.

9.3 *Should HDG requirements or the application of the Codes be made mandatory and not be triggered only by an application of some other regulatory process?*

Yes. Please refer to our response to the Question posed in paragraph 1 above. B-BBEE is an ongoing commitment, and the ongoing compliance is proved with a B-BBEE verification certificate. The B-BBEE verification certificate is valid for 12 months, and therefore “reverification” can be done annually in line with each entity's B-BBEE measurement period.

The Authority will be well within its rights to require progressive achievement of certain targets up to that which is required in the ICT Sector Codes as an ongoing licence condition.

9.4 *The Authority proposes that with individual licence applications, both HDG ownership requirements as well as the Codes should be applied. Please provide your view whether this proposed approach should apply? Provide reasons for your position.*

Please refer to our response to the Question posed in paragraph 1 above. Such a regulatory scheme would be unworkable and unlawful. The Authority should only apply the ICT Sector Codes.

****END****