



Independent Communications Authority of South Africa
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REASONS FOR DECISION

APPLICATION FOR APPROVAL OF CHANGE OF CONTROL OF NEOTEL (PTY) LTD'S LICENCES FROM THE CURRENT SHAREHOLDERS OF NEOTEL (PTY) LTD TO VODACOM (PTY) LTD

TABLE OF CONTENTS

I	INTRODUCTION.....	3
II	THE PROPOSED TRANSACTION	3
III	CONSIDERATION OF THE APPLICATION	5
IV	SUMMARY OF WRITTEN REPRESENTATIONS	6
	The Applicants' Submissions.....	6
	Internet Solutions	11
	ISPA.....	17
	WAPA	19
	MTN	19
	TELKOM	21
	CRYSTAL WEB.....	24
	CELL C.....	26
V	LEGISLATIVE FRAMEWORK.....	30
VI	DETERMINATIONS REGARDING THE REPRESENTATIONS.....	33
	Applicable Regulations.....	33
	HDP Equity Ownership Implications On Change Of Control Of A Licensee	36
	Spectrum	38
	Competition.....	41
	AUTHORITY'S DECISION.....	46

I INTRODUCTION

1. On 17 June 2014 Neotel (Pty) Ltd ("**Neotel**") (together with all its current shareholders, namely, Sepco Communications (Pty) Limited ("**Sepco**"), VSNL SNOSPV Pte Limited ("**VSNL**") and Nexus Connection SA (Pty) Limited) ("**Nexus**") and Vodacom (Pty) Ltd ("**Vodacom**") (hereinafter collectively referred to as the ("**Applicants**"), submitted an application ("**the Application**") to the Independent Communications Authority of South Africa ("**the Authority**"), for the approval of transfer of control of the Individual Electronic Communications Network Service (IECNS) licences, Individual Electronic Communications Service (IECS) licences and Radio Frequency Spectrum licences of Neotel, pursuant to the proposed acquisition by Vodacom of the entire issued share capital of Neotel ("**the Proposed Transaction**").
2. The Application was made in terms of sections 13(1) and 31(2A) of the Electronic Communications Act, 36 of 2005, ("**ECA**"), as amended.

II THE PROPOSED TRANSACTION

3. The current shareholders of Neotel are Sepco, VSNL and Nexus (collectively, "**the Sellers**"). Pursuant to the Proposed Transaction, the Sellers will sell to Vodacom, who will acquire all the shares and claims held by the Sellers in Neotel. Upon implementation of Proposed Transaction, Neotel will become a wholly owned subsidiary of Vodacom. Thus Vodacom and Neotel will remain separate juristic entities and licensees in terms of the ECA.
4. The agreement for the sale of shares and claims giving effect to the Proposed Transaction was signed by Vodacom and the Sellers on or about

18 May 2014 and is subject to a number of conditions precedent including, but not limited to, competition and other regulatory approvals.

5. Vodacom and Neotel's commercial rationale for the Proposed Transaction may be summarised as follows:¹

Table 1: Pre-Transaction

NEOTEL	VODACOM
Inadequate fixed network coverage relative to its competitors	Facing capacity constraints due to increasing demand for high speed mobile data
Experiencing capital constraints which is hampering its growth	Unable to re-farm spectrum to drive long term evolution (" LTE ") deployment
Inability to invest to improve its coverage due to capital constraints	Inability to make significant inroads in the fixed line market
Unable to compete effectively and as such not able to grow its market share	

Table 2: Post-Transaction

VODACOM/NEOTEL
Neotel's fixed line business will complement Vodacom's mobile business
Increase roll-out of high-speed fibre-optic connectivity and next-generation mobile services in SA
Saving on capital expenditure (" CAPEX ") and operational expenditure (" OPEX ")
Will accelerate LTE network roll-out
Provide customers with high quality and competitive services
Introduce effective competition in the fixed-line space
Increase fixed and mobile coverage

¹ Information extracted from transcript of the Public hearings held on 15 and 16 January 2015.

III CONSIDERATION OF THE APPLICATION

6. On 15 September 2014, the Authority published the Application under **General Notice 799 of 2014** in *Government Gazette* 37998 inviting interested parties to make written representations regarding the Application, which were to be submitted within a period of twenty one (21) days from publication of the Application.
7. On or about 15 October 2014, the Authority received seven (7) written representations from interested parties, namely: Cell C Proprietary Limited ("**Cell C**"); Crystal Web Proprietary Limited ("**Crystal Web**"); Internet Service Provider's Association ("**ISPA**"); Dimension Data Middle East and Africa Proprietary Limited, through its division, Internet Solution ("**Internet Solutions**"); Mobile Telephone Networks Proprietary Limited ("**MTN**"); Telkom SA SOC Limited ("**Telkom**"); and Wireless Access Provider's Association ("**WAPA**") (hereinafter collectively referred to as "**the interested parties**").
8. On 20 October 2014, the Authority, acting in terms of section 4(4)(a) read with section 17 of the Independent Communications Authority Act ("**the ICASA Act**"), established a special committee known as the Market Consolidations Committee ("**the Committee**") to, *inter alia*, consider the Application, conduct public hearings and make recommendations to Council regarding the Application.
9. On 13 November 2014, the Authority received from the Applicants a response to the written representations referred to in paragraph 7 above.
10. The Committee held public hearings on 15 and 16 January 2015. Subsequent to the public hearings, the Authority received unsolicited supplementary written responses from Cell C, MTN and the Applicants.

The Committee accordingly invited the rest of the interested parties to submit supplementary written responses.

11. The Authority received the final set of supplementary written representations on 07 April 2015. There were also written representations received from Black IT Forum on 10 April 2015, but the Authority rejected their submission because Black IT Forum did not participate in the process before.
12. Below are the salient points raised by each of the Applicants and the interested parties in their written and oral representations.

IV SUMMARY OF WRITTEN REPRESENTATIONS

The Applicants' Submissions

Applicable Regulations

- 12.1 For purposes of the Application, and in the absence of the regulations contemplated in sections 13(2) and 31(3)(c) of the ECA, respectively, the Applicants provided information in terms of the Regulations in Respect of the Limitation of Ownership and Control of Telecommunication Services (published under Government Notice R105, Government Gazette 24288 of 16 January 2003) promulgated in terms of the now repealed Telecommunications Act, No. 103 of 1996 (**"the Ownership and Control Regulations"**).
- 12.2 The Applicants contend that pursuant to section 95(2) of the ECA, the Ownership and Control Regulations are in effect and

that they are the only regulations that have any relevance in the context of the Proposed Transaction and the Application.²

12.3 Further, the Applicants submitted that the Ownership and Control Regulations are only relevant in the context of the Proposed Transaction insofar as they prescribe the form in which applications for the Authority's approval must be prepared and submitted, which form the Applicants duly followed.³

12.4 The Applicants argue that the approval process described in Regulation 11 of the Processes and Procedures Regulations relates to the transfer of a licence from one entity to another and does not relate to the change of control of a licensee. Thus they maintain that the Processes and Procedures Regulations are not applicable in the context of applications for approval of a transfer of control submitted in terms of section 13(1) of the ECA such as the Application.⁴

12.5 The Applicants contend that the absence of the regulations contemplated in sections 13(2) and 31(3) (c) of the ECA, respectively, does not impede the Authority's competence to consider and decide the Application. The Applicants contend that the promulgation of the regulations is not peremptory but merely a power conferred upon the Authority, which it may exercise at its discretion.⁵

² The Applicants' Written Submissions, at para 17.1.

³ The Applicants' Written Submissions, at para 26.1.4.3 – 26.1.4.8.

⁴ *ibid*

⁵ Neotel Letter to the Authority, dated 17 June 2014 at paragraphs 5,6, and 7.

Control of licences

- 12.6 The Applicants contend that whilst the Proposed Transaction will result in the transfer of control of Neotel and consequently the licences held by it, however, it will not, result in transfer of any of the licences held by Neotel to Vodacom or to any other person.
- 12.7 To that end, the Applicants maintain that the Proposed Transaction contemplates merely a change of beneficial control of the licence holder – Neotel – from the Sellers to Vodacom.⁶
- 12.8 The Applicants contend further that Neotel and Vodacom will continue to be separate juristic persons and licensees. Neotel and Vodacom will continue to hold their respective ECS and ECNS licences and radio frequency spectrum licences and to operate in terms of those licences and continue to provide services to end-users and operating their respective electronic communications networks.⁷

HDP Equity Ownership

- 12.9 The Applicants argue that there is currently no threshold of ownership of existing licensees by historically disadvantaged persons ("**HDPs**") that licensees must comply with and further that there is no general requirement that individual licensees must have 30% HDP ownership. The Applicants contend that the ECA does not impose such a requirement and nor do any of the regulations published under the ECA. Nor have such requirements been imposed in any of Neotel's licences.⁸

⁶Written Responses from the Applicants on Representations submitted by Interested Persons, 13 November 2014 at paragraphs 11 and 12.

⁷ The Applicants' Written Submissions, at para 11.

⁸ The Applicants' Written Submissions, at para 20.

- 12.10 The Applicants contend that section 9 (specifically section 9(2) (b)) of the ECA does not impose an ongoing requirement that 30% of a licensed entity must be held by HDPs. The Applicants argue that section 9(2) (b) provides that the Authority must specify the level of equity ownership to be held by persons from historically disadvantaged backgrounds in an invitation to apply for an individual licence. They maintain that this requirement applies to every invitation to apply for new individual licences and has no application to existing individual licensees. In support of this view, the Applicants argue that the fact that none of the major individual licensees currently meet the 30% ownership by HDPs threshold, supports their position in this regard.⁹
- 12.11 In addition, the Applicants submit that the ICT Sector Code does not require that 30% of the ownership interests in a measured entity in the ICT sector must be held by Black people. They argue that the 30% threshold in the Sector Code is an aspirational target and not a binding requirement on the part of licensed operators and should be regarded as such.¹⁰
- 12.12 Furthermore, the Applicants argue that empowerment should not solely be viewed in an ownership context but should consider other factors including, voting rights in the hands of Black persons.¹¹
- 12.13 The Applicants contend that following the Proposed Transaction, Neotel's Broad Based Black Economic Empowerment ("**BBBEE**") score for ownership will increase

⁹ The Applicants' Written Submissions, at para 27.2.3.2.

¹⁰ The Applicants' Written Submissions, at para 27.2.3.8.

¹¹ The Applicants' Written Submissions, at para 20.2-20.3.

due to, amongst other things, the increased points that Neotel will score for net value and that Neotel's overall BBBEE score would increase.

- 12.14 The Applicants also argue that the Proposed Transaction allows Neotel's current BBBEE shareholder to divest its investment in the manner that it sees fit, which they argue, is consistent with the Government's BBBEE policy that Black shareholders should have real unrestricted rights of ownership.¹²

Competition

- 12.15 The Applicants argue that the Proposed Transaction will not have an adverse effect on competition, but that, in fact, it will promote competition and the interests of consumers. They are of the view that having regard to the recent amendments to section 4B(8)(b) of the ICASA Act, the primary authority responsible for considering the competition implications of the Proposed Transaction is the competition authority.¹³

- 12.16 The Applicants cited the competition benefits for the industry as follows:

- 12.16.1 *"facilitate investment in the communications sector, particularly strategic infrastructure investment (as provided for in section 2(d) of the ECA), given that Vodacom will, as the controlling shareholder of Neotel, be in a position to increase capital investment to maximise the efficient use of Neotel's assets;*

¹² The Applicants' Written Submissions, at para 20.4.

¹³ The Applicants' Written Submissions, at para 21.3.

12.16.2 *ensure the efficient use of the radio frequency spectrum (as provided for in section 2(e) of the ECA) given that, with increased capital investment, it is likely that there will be increased efficiency in the use by Neotel of its radio frequency assignments; and*

12.16.3 *enhance the variety of electronic communications services that are available to consumers, and promote the interests of consumers (as provided for in sections 2(m) and (n) of the ECA).¹⁴*

12.17 The Applicants also contended that by approving the Proposed Transaction the Authority will refrain from unduly interfering in the commercial activities of licensees while taking into account the electronic communications needs of the public (as provided for in section 2(y) of the ECA).

Internet Solutions

General

12.18 Internet Solutions contends that:

12.18.1 the *Proposed Transaction* is inconsistent with the objects of the ECA based on the following:

12.18.1.1 the Proposed Transaction will result in the reduction of Neotel's shareholding by HDPs;

¹⁴ The Applicants' Written Submissions, at para 23.

- 12.18.1.2 the Proposed Transaction does not promote competition within the ICT sector and will, instead, have an adverse effect on competition in the sector;
- 12.18.1.3 Vodacom, as a consequence of the Proposed Transaction, will control a significant portion of the available radio frequency spectrum, which is a scarce resource; and
- 12.18.1.4 the Proposed Transaction may result in re-emergence of Telkom SA's monopoly in respect of fixed line services.

HDP Equity Ownership

- 12.19 Internet Solutions cites the provisions of the ECA (sections 2 and 9), the ICT Charter as well as Regulation 12 of the Licensing Processes and Procedures Regulations, 2010 in support of its contention that the Authority is obliged rely on the 30% threshold in all transactions presented to it for its consideration as a benchmark, to determine whether the Proposed Transaction will promote the empowerment of historically disadvantaged persons.

- 12.20 Internet Solutions further stated that Vodacom's current shareholding by HDPs as shown in the BBBEE Certificate¹⁵ is 9.22%, whilst Neotel's black ownership amounted to 19%.
- 12.21 Internet Solutions submitted that there is no undertaking or statement anywhere in the Application that steps will be taken as part of the Proposed Transaction to maintain or improve the current levels of ownership by HDPs. Accordingly, Internet Solutions contends that it can only assume that no such steps have been contemplated by Vodacom and/or Neotel.
- 12.22 Internet Solutions further submitted that Neotel provided an undertaking in the Application to continue to satisfying its obligations in terms of the ECA and the licences issued to it. Internet Solutions submitted that if it is correct that there will be a reduction in Neotel's shareholding by HDPs, Neotel would not be abiding by the aforementioned undertaking.¹⁶

Competition

- 12.23 Internet Solutions stated that one of the objects of the ECA is the promotion of competition within the ICT sector and the Proposed Transaction "militates against competition in the ICT Sector".
- 12.24 Internet Solutions submitted that a handful of large players in the ICT Sector have sought to strengthen their position by exploring consolidation opportunities with smaller players, who have typically relied on the large players for certain

¹⁵ Broad- Based Black Economic Empowerment Verification Certificate issued to Vodacom on 23 May 2014 for the period between 23 May 2014 and 22 May 2015.

¹⁶ Para 3.2.9 of the Internet Solutions Submissions (2014) Page 6.

infrastructure and/or technological capacity. Therefore, the newly formed merged entities (controlled by the large players) may seek to look at ways to reduce the infrastructure and/or technological capacity provided to the smaller players. Internet Solutions contended that a decrease in smaller players in the sector, would increase the risk of anti-competitive foreclosure and bundling, as well as increased barriers to entry.¹⁷

12.25 Internet Solutions further contended that, following the conclusion of the Proposed Transaction, Vodacom will be able to utilise its mobile infrastructure together with Neotel's fixed infrastructure to offer a broader spectrum of services to both corporate and household customers¹⁸ and the merged entity (controlled by Vodacom), will be able to displace smaller players by foreclosing such players from using its superior infrastructure. In addition, Internet Solutions argued that Vodacom would gain access to Neotel's comprehensive fibre network and would have *"little incentive to provide access to this fibre network on a wholesale basis, and on terms that are competitive to smaller players"*.¹⁹

12.26 On the basis of the above arguments, Internet Solutions stated that it cannot be said that the Proposed Transaction will facilitate or promote competition in the ICT Sector.

12.27 Internet Solutions argues that it is common cause that the radio frequency spectrum in South Africa is a scarce resource

¹⁷ Internet Solutions Submissions (2014) Page 9.

¹⁸ Para 3.3.9 of the Internet Solutions Submissions (2014) page 9.

¹⁹ *Supra*.

and the licensing and use thereof is controlled, planned and administered by the Authority.²⁰

12.28 Internet Solutions contends that the Proposed Transaction will result in Vodacom gaining access to Neotel's spectrum, which will inevitably prejudice and be to the disadvantage of Vodacom's competitors.²¹

12.29 With reference to section 31(2A) of the ECA, which states that a radio frequency 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. Internet Solutions contends that this provision was intended to reinforce ICASA's oversight role in relation to the allocation of spectrum and "*the prevention of over-concentration of spectrum*".²²

12.30 Internet Solutions argued that the Authority has gone to great lengths to allocate substantially the same amount of radio frequency spectrum to Vodacom and Neotel's competitors so as to ensure parity among operators in respect of frequency spectrum allocation and consequently, to ensure that all parties are able to compete effectively in the market.²³

12.31 According to Internet Solutions, upon approval of the Proposed Transaction, Neotel's frequency spectrum will provide Vodacom with the execution capabilities necessary to roll-out LTE/4G technology almost immediately, thereby

²⁰ Para 3.4.1 of the Internet Solutions Submissions (2014) Page 9.

²¹ *Supra*.

²² Para 3.4.2 of the Internet Solutions Submissions (2014) page 10.

²³ *Supra*.

giving Vodacom an unfair advantage in the accelerated roll out of LTE services and the building of a national LTE network.²⁴

12.32 Further, Internet Solutions argued that it would be unfair and inequitable for Vodacom to be allowed to gain access to additional spectrum when its competitors are unable to access any additional radio frequency spectrum; and that the Proposed Transaction will result in Vodacom being able to unfairly compete with its competitors in respect of radio frequency spectrum.²⁵

12.33 Internet Solutions furthermore argued that Neotel may be required by Vodacom to no longer continue with the provision of fixed line telephone services but to focus primarily on data services. Internet Solutions contends that this scenario would be possible because the licences issued to Neotel are technology-neutral and contain no provisions that compel Neotel to provide fixed line telephone services²⁶.²⁷ It contends that Neotel is a considerable competitor to Telkom in the provision of fixed line telephone services, and ending Neotel's provision of fixed line services will have a considerable and negative impact on competition in the ICT sector with regard to fixed line telephone services.

12.34 Internet Solutions expressed the concern that Neotel (controlled by Vodacom) would be more inclined to self-deal than to continue to competitively supply other independent firms (such as Internet Solutions) with wholesale services, including infrastructure and/or technological capacity. It

²⁴24 Para 3.4.3 of the Internet Solutions Submissions (2014) page 10.

²⁵ Para 3.4.4 of the Internet Solutions Submissions (2014) page 11.

²⁶ Para 3.5.1 of the Internet Solutions Submissions (2014) page 11

²⁷

argues that the possible removal of Neotel as Telkom's competitor would negate the positive strides which have been achieved, in relation to competition, through Neotel's establishment²⁸.

Internet Service Providers Association (ISPA)

12.35 ISPA contended that the Ownership and Control Regulations are fatally outdated and it is extremely difficult to apply them to the current regulatory framework under the ECA and the market reality post the completion of the licence conversion process in 2009.²⁹ It submitted further that –

12.35.1 the *Proposed* Transaction may fall within the definition of "control interest" in terms of the Ownership and Control Regulations 2003 but those regulations are extremely difficult to apply in the current context;³⁰

12.35.2 the *procedures* for the transfer of ownership of licences have been established under the ECA and are more correct to utilise in relation to the Proposed Transaction;

12.35.3 the *provisions* of the ICASA Licensing Processes and Procedures Regulations 2010 in respect of the transfer of ownership of a service licence encompass and supersede the provisions of the Ownership and Control Regulations 2003;

²⁸ *Supra*.

²⁹ Para 7 of the ISPA Submissions (2014) Page 2.

³⁰ Para 8 of the ISPA Submissions (2014) Page 4.

- 12.35.4 the *correct* process to be followed by the Parties in seeking the prior approval of the Authority for the transfer of control should have been in terms of Regulations 11 and 12 of the ICASA Licensing Processes and Procedures 2010;
- 12.35.5 in *respect* of the radio frequency spectrum licences held by Neotel, the Applicants' reliance on the Ownership and Control Regulations 2003 is even more misplaced as section 31 of the ECA read with Regulation 10 of the Radio Frequency Spectrum Regulations 2011. The said regulations explicitly contemplate a separate regulatory process for the transfer of ownership of radio frequency spectrum licence and it is that process the Authority should apply to evaluate the Application;³¹
- 12.35.6 the *Applicants* 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;³² and
- 12.35.7 the net *effect* of the Proposed Transaction is that there will be a reduction in ownership by HDPs persons in respect of both the service licences and the radio frequency spectrum licences.³³

³¹ Paras 16 - 18 of the ISPA Submissions (2014) Page 6.

³² Para 27 – 29 of the ISPA Submissions (2014) Page 9.

³³ *Ibid.*

WIRELESS APPLICATIONS PROVIDERS ASSOCIATION (WAPA)

WAPA's representations substantially mirror those of ISPA in all material respects. Accordingly, to avoid duplication, the contents thereof will not be repeated here.

MOBILE TELEPHONE NETWORKS (MTN)

12.36 MTN opposed the Application to the extent that the high demand frequency spectrum currently assigned to Neotel will become concentrated under Vodacom's control.

12.37 MTN contended that:

12.37.1 Neotel, due to its minimal investment in mobile infrastructure, failed to utilise the spectrum allocated to it and therefore, the South African public has not benefited from the scarce and highly valuable spectrum resource;

12.37.2 Neotel's *shareholders* should not be allowed to realise a significant windfall from the sale of the scarce public asset which "*they simply hoarded at the expense of the South African public over the last 7 years*",³⁴

12.37.3 the return of the spectrum as a condition to the application by Vodacom and Neotel being granted is a sensible way forward;³⁵

³⁴ Page 2 of the MTN Submissions (2014).

³⁵ *Ibid.*

- 12.37.4 the *acquisition* would provide the already dominant Vodacom with an additional and substantial cost, capacity and time-to-market advantage relative to its competitors, while at the same time removing a potential mobile [sic] competitor (Neotel) from the market;³⁶
- 12.37.5 the return *and* re-assignment of the Neotel spectrum on the basis of either the soon-to-be released spectrum policy and the current frequency spectrum band plan would provide a more pro-competitive outcome than allowing this spectrum to be concentrated in the sole hands of the dominant market player being Vodacom;³⁷
- 12.37.6 the *competition* between more-efficient competitors could drive prices down further than would be the case if Vodacom were the only competitor with a significant cost advantage;³⁸
- 12.37.7 the Proposed Transaction would result in Vodacom gaining control over twice the amount of prime LTE 1800 MHz spectrum as the rest of the market and, uniquely would get access to spectrum in the 800MHz band. The 800MHz band provides a significant advantage over 1800MHz in providing geographic coverage and in-building penetration;³⁹

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Page 3 of the MTN submissions (2014).

- 12.37.8 the impact would be twofold: Vodacom would be able to launch a national LTE network (without the need to refarm any of its existing spectrum away from voice) well in advance of any other competitor and Vodacom would benefit from an additional, structural cost and/or capacity advantage relative to its mobile competitors. The additional spectrum would mean that Vodacom may build significantly less radio sites in order to serve demand;⁴⁰
- 12.37.9 the *Proposed* Transaction would entrench Vodacom's dominant position in the mobile market, as the network, market and cost advantage available to Vodacom would then become unassailable; and
- 12.37.10 the *Proposed* Transaction should not be allowed to proceed unless the Neotel spectrum is returned to ICASA for downstream re-assignment.⁴¹

TELKOM

12.38 Telkom contended that:

- 12.38.1 there are no regulations governing the transfer of control of spectrum licences;⁴²
- 12.38.2 the *spectrum* that will be affected by the change in control of the Neotel spectrum licences includes

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Para 7 of the Telkom Submissions (2014) page 3.

high demand spectrum. The Authority is very detailed and meticulous in regulating spectrum, especially so with high demand spectrum. Therefore, the transfer of control of a spectrum licence is not meant to attract an informal or lighter regulatory process than the transfer of the licence itself;⁴³

12.38.3 with regard to the transfer of ownership of spectrum licences, the Spectrum Regulations provide for a detailed process to enquire into the economics of the affected spectrum, the impact on competition and the ownership by historically disadvantaged individuals ("**HDIs**");⁴⁴

12.38.4 in terms of *regulation* 10.7 of the Spectrum Regulations, the Authority is enjoined to decline an application if the transfer envisaged would limit competition or reduce the ownership of HDIs;⁴⁵

12.38.5 the transfer of control of spectrum licences should be treated with the same rigor and oversight as the transfer of ownership of a spectrum licence;⁴⁶

12.38.6 the Ownership *and* Control Regulations 2003 do not regulate the transfer of an individual licence as defined in the ECA, they regulate the transfer of licences listed in the definition of "telecommunication service category" in their

⁴³ Para 9 of the Telkom Submissions (2014) page 3.

⁴⁴ Para 10 of the Telkom Submissions (2014) page 3.

⁴⁵ Para 11 of the Telkom Submissions (2014) page 3.

⁴⁶ Para 12 of the Telkom Submissions (2014) page 3.

definitions section. It is thus difficult to conceive that the Ownership and Control Regulations 2003 may be correctly applied in this instance;⁴⁷

12.38.7 in terms of section 2(h) of the ECA, the Authority is enjoined, among other things, to promote the empowerment of historically disadvantaged persons.

12.38.8 Section 13(3) of the ECA empowers the Authority to realise the objective set out in section 2(h) of the ECA insofar as transfer of ownership or control of individual licences is concerned. The exit of Nexus (the BBBEE shareholder) at Neotel would result in the negation of section 2(h) of the ECA;⁴⁸

12.38.9 the *Authority* should “*seriously consider*” the possible adverse effects of the Proposed Transaction on ownership by HDIs, BBBEE and policy objectives which underpinned the introduction of the SNO;⁴⁹

12.38.10 the *Proposed* Transaction will significantly strengthen Vodacom’s overall capability to offer both fixed and mobile services, on either a wholesale or retail basis. Vodacom already possess an extensive network and would now have access to the additional connectivity of Neotel’s network. The impact of this may have certain effects on competition which may be difficult to identify and

⁴⁷ Para 17 of the Telkom Submissions (2014) page 4.

⁴⁸ Paras 23 and 24 of the Telkom Submissions (2014) page 5.

⁴⁹ Para 26 of the Telkom Submissions (2014) page 6.

quantify. The Authority should therefore consider what pro-competitive remedies would be necessary to ensure a level playing field;⁵⁰ and

- 12.38.11 the *Authority* must promulgate the requisite regulations to govern the transfer of control of individual licences, the transfer of control of spectrum licences, the regulations on ownership by HDIs and considerations of BEE in the transfer of ownership or control of individual licences.⁵¹

CRYSTAL WEB

12.39 Crystal Web contended that:

- 12.39.1 the Proposed Transaction falls within the parameters of regulation 4(1)(a) of the Ownership and Control Regulations;⁵²
- 12.39.2 the *acquisition* of Neotel by Vodacom would not represent a transfer of the licence as the licence is issued to Neotel, a juristic person enjoying full legal and economic agency. Therefore, the “prayer” in 3.1 of the Application cannot and should not be granted;⁵³
- 12.39.3 all that is required to be granted by the Authority is prior written approval in terms of section 4(1) of

⁵⁰ Para 28 of the Telkom Submissions (2014) page 6.

⁵¹ Para 30 of the Telkom Submissions (2014) page 6.

⁵² Para 4(e) of the Crystal Web Submissions (2014) Page 3.

⁵³ Para 4(h) of the Crystal Web Submissions (2014) Page 3.

the Ownership Regulations which is required by virtue of such regulations standing as the regulations which serve to restrict the ownership or control of an individual licence in terms of section 13(3) of the Act (ECA);⁵⁴

12.39.4 the *transfer* contemplated in terms of the Proposed Transaction would not diminish the ownership of and control of services by historically disadvantaged groups and would in fact promote competition in the ICT sector, and as such the Authority is obligated to grant the approval under the Ownership Regulations;⁵⁵

12.39.5 Neotel *depends* on a lack of regulations in respect of section 31(2A) of the Act to invoke the same procedures as are applicable for section 13(3), this approach is correct in the circumstances but needs to be considered in line with the difference in wording between section 13(1) and section 31(2A);⁵⁶

12.39.6 it is not possible for the Authority to transfer spectrum allocation from one licensee to another without the spectrum in question re-entering a general pool for re-allotment;⁵⁷

⁵⁴ Para 4(i) of the Crystal Web Submissions (2014) Page 3.

⁵⁵ Para 4(j) of the Crystal Web Submissions (2014) Page 4.

⁵⁶ Paras 7 and 8 of the Crystal Web Submissions (2014) Page 5.

⁵⁷ Para 9 of the Crystal Web Submissions (2014) Page 6.

- 12.39.7 a *change* in the ownership structure of Neotel does not modify its contractual obligations to its existing clients;⁵⁸
- 12.39.8 Neotel *under* Vodacom's aegis would be publicly beneficial. There is inevitable consolidation and convergence in the industry and this transaction is unlikely to be the last such consolidation;⁵⁹
- 12.39.9 the *Authority* should grant the Application and there is no rational basis for the Authority to oppose the Application.⁶⁰

CELL C

12.40 Cell C contended that:

- 12.40.1 the nature of an individual licence is such that the Authority may only accept and consider applications for these licences in terms of a policy direction issued by the Minister in terms of section 3 of the ECA;
- 12.40.2 Licences the Authority may issue are very special licences and their shareholding and the identity of the person to whom they are awarded (juristic or natural), it is a crucial aspect of the award and continued validity (and even renewal) of each such licence. A change in shareholding such as that

⁵⁸ Para 14 of the Crystal Web Submissions (2014) Page 7.

⁵⁹ Para 15 of the Crystal Web Submissions (2014) Page 7.

⁶⁰ Para 17 of the Crystal Web Submissions (2014) Page 7.

described by Neotel has far-reaching consequences. It is not the mere change in beneficial control that results but a significant change in the identity of the licence holder, their equity ownership credentials, their business proposition, financial status and service proposition that will fundamentally change;⁶¹

12.40.3 the *Authority* is obliged to take account of the objectives of section 2 of the ECA. The objects of the ECA specifically require the Authority to promote competition in the ICT sector;⁶²

12.40.4 the *larger* the scale of an operator, the more investment that operator can attract and the larger the economies of scale in building network infrastructure and providing services. The increase in scale that will result for Vodacom from this transaction is likely to result in the sort of anti-competitive behaviour that Cell C has already complained about in relation to Vodacom;

12.40.5 Vodacom's competitive position will be further unfairly improved by its control over spectrum that should, if not being used by Neotel, be returned to the national plan for allocation as part of a co-ordinated allocation of high demand spectrum to all applicants in a fair and equitable manner;

⁶¹ Para 1 of the Cell C Submissions (2014) Page 2.

⁶² Para 2 of the Cell C Submissions (2014) Page 2.

- 12.40.6 Spectrum is a scarce resource that confers a clear competitive advantage on the holder. It is clear that the fundamental purpose of the Proposed Transaction is to permit Vodacom to access and use Neotel's spectrum and that Neotel will, for all intents and purposes, cease to exist despite representing that it will continue to operate as a separate company and separate licensee;⁶³
- 12.40.7 the *effective* transfer of Neotel's shareholding to Vodacom will remove the ownership and control by black-empowered persons in Neotel, replacing this level of control by Vodacom's shareholding, which is not as empowered as that of Neotel;
- 12.40.8 Vodacom's acquisition of the fibre presently owned and leased by Neotel to other operators including Cell C will likely have the effect of foreclosing the use of that fibre to Cell C and other parties that are dependent on it for redundancy or primary leased lines, links or backhaul because Vodacom is likely to retain that fibre for its own exclusive use;
- 12.40.9 The Authority has historically failed or refused to enforce or investigate compliance with the Facilities Leasing Regulations, 2010, so the likelihood of access being granted to this fibre and associated facilities by Vodacom to any third parties on non-discriminatory terms and at a reasonable price, is very low. In any event, any regulatory process such as the referral of a dispute

⁶³ Para 4 of the Cell C Submissions (2014) Page 3.

in this regard would take an inordinate amount of time which would have the result of frustrating licensees dependent on that fibre;⁶⁴

12.40.10 Vodacom claims to want to use Neotel's spectrum and fibre to enhance its competitive position in the market, while it already holds more than 50% of the service revenue in the mobile market. Vodacom's revenue compared to the revenue of Telkom is also significantly greater as indicated in the parties' most recent financial statements. For their financial years ended 31 March 2014, Telkom reported a group operating revenue of R32.5 billion, while Vodacom reported total revenues for South Africa of R61.8 billion and R75.7 billion at group level;⁶⁵

12.40.11 the *transfer* of shares to Vodacom will, along with the transfer of fibre and spectrum and the existing Neotel enterprise and corporate customer base, create Vodacom as a super-dominant operator. Vodacom will be able to leverage its increased scale across both fixed and mobile markets;

12.40.12 In all probability, Vodacom will have the effect of reducing Cell C's ability to compete and to increase scale and market share in the foreseeable future. No new entrant will be able to compete against a super-dominant operator.⁶⁶

⁶⁴ Para 6 of the Cell C Submissions (2014) Page 3.

⁶⁵ Para 7 of the Cell C Submissions (2014) Page 3.

⁶⁶ Para 8 of the Cell C Submissions (2014) Page 3.

V LEGISLATIVE FRAMEWORK

13. The Authority is a juristic person established in terms of section 3(1) of the ICASA Act.
14. The Authority's primary objects and functions as set out in terms of section 2 of the ICASA Act include *inter alia* to:
 - 14.1 regulate electronic communications in the public interest; and
 - 14.2 achieve the objects contemplated in the *underlying statutes* as defined in section 1 of the ICASA Act.
15. The underlying statutes, as defined, includes the ECA, which assigns to the Authority additional responsibilities and obligations specifically pertaining to the regulation of electronic communications within the Republic of South Africa and in the public interest.
16. The Authority considered the Application in terms of the relevant provisions in the ICASA Act and ECA, including those set out below.
17. Section 13 of the ECA stipulates:
 - (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.*
 - (2) *An application for permission to let, sub-let, assign, cede or in any way transfer an individual licence, or assign, cede or transfer control of an individual licence may be made to the Authority in the prescribed manner.*

(3) *The Authority may by regulation, set a limit on, or re-strict, 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.*

(4) *The Authority may, subject to Chapter 9, by regulation, set a limit on, or restrict, the ownership or control of an individual licence for broadcasting services in order to promote a diversity of views and opinions.*

(5) *Regulations contemplated in subsection (3) and (4) must be made-*

(a) *with due regard to 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".*

(6) *The provisions of section 9(2) to (6) apply, with the necessary changes, to this section.*

18. Section 9 (2) of the ECA states:

"The Authority must give notice of the application in the Gazette and –

- (a) *Invite interested persons to apply and submit written representations in relation to the application within the period mentioned in the notice;*
- (b) *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;*
- (c) *Set out the proposed licence conditions that will apply to the licence; and*
- (d) *Give interested persons an opportunity to submit written responses to any representations submitted in terms of paragraph (a);*
- (e) *May conduct a public hearing in relation to any application for an individual licence."*

19. Section 31 (3) of the ECA stipulates that:

"The Authority may, taking into account the objects of the Act, prescribe procedures and criteria for-

- (a);
- (b) *the amendment, transfer, transfer of control, renewal, suspension, cancellation and withdrawal of radio frequency spectrum licenses..."*

VI DETERMINATIONS REGARDING THE REPRESENTATIONS

20. The Authority has considered all the written and oral representations made by the Applicants and interested parties. Largely, the general tenor of the representations seem to focus in the main, on the following:

20.1 The applicable regulations;

20.2 HDPs equity ownership;

20.3 Spectrum; and

20.4 Competition.

21. The Authority will provide below, how it came to its determinations in respect of each of the four key considerations in paragraph 20 above.

Applicable Regulations

21.1 The Authority has not promulgated any Regulations as contemplated in Sections 13(2) and 31(3) (c)⁶⁷ of the ECA. The Processes and Procedures Regulations, 2010 only venture into transfer of licences; they do not regulate change of control of licences.⁶⁸ Similarly, the Radio Frequency Spectrum Regulations, 2011 are also limited to regulation of transfer of radio frequency spectrum licences, but not the control thereof.⁶⁹

⁶⁷ Electronic Communications Amendment Act, No. 1 of 2014.

⁶⁸ Regulation 12, Processes and Procedures Regulations 2010

⁶⁹ Regulation 10, Radio Frequency Spectrum Regulations 2011

- 21.2 The Authority is however of the view that the absence of regulations as contemplated in sections 13(2) and 31(3)(c) of the ECA is not fatal – it does not render the provisions that direct the approval of change of control of licences (both individual and radio frequency spectrum licences) inoperative. Those provisions are not peremptory, they merely confer powers upon the Authority to make regulations.
- 21.3 In terms of Section 95 of the ECA, the Authority may, if it considers it necessary, repeal or amend the regulations made under, *inter alia*, the Telecommunications Act, 1996 ("**Telecommunications Act**"), which were in force immediately prior to commencement of the ECA.⁷⁰ Otherwise, the regulations published in terms of the Telecommunications Act remain of force and effect.⁷¹
- 21.4 The Ownership and Control Regulations were published in terms of Section 52 of the Telecommunications Act on 16 January 2003.⁷² These Regulations have not been repealed or amended to date. Accordingly, despite the repeal of the Telecommunications Act in its entirety, the Ownership and Control Regulations remain in force and effect.
- 21.5 Regulation 5 thereof sets out in detail the process that should be followed in the event of transfer of an ownership interest or control interest that requires the approval of the Authority. This process remains substantially relevant.

⁷⁰ Section 95(1)(b), ECA.

⁷¹ Section 95(2), ECA

⁷² published in Government Gazette no. 24288 of 16 January 2003

- 21.6 In any event, to the extent that the procedure set out in Regulation 5 of the 2003 Regulations is inadequate, sections 9(2) to (6) provide an adequate framework that the Authority may follow. Accordingly, the Authority decided that the Application will be considered in accordance with the provisions of sections 9(2) to (6) of the ECA, read with Regulation 5 of the Ownership and Control Regulations.
- 21.7 As part of the process, the Authority considered the submission by WAPA/ISPA that it is problematic that Neotel did not rely upon the Standard Terms and Conditions for Individual Licences, 2010. The Authority holds the view that these regulations do not regulate transfer of control of licences.
- 21.8 The same applies to the Processes and Procedures Regulations, 2010. These regulations provide for among others, the process to effect transfer of licences and the applicants whoever they may be, to give notice to the Authority of any changes to the shareholding of any licensee. The Regulations do not regulate change of control of a licence.
- 21.9 Further, the Authority also considered whether the 2011 Radio Frequency Spectrum Regulations would apply. The Authority came to the conclusion that they too would apply only to transfer of spectrum licences but not the control thereof - as was the case in the Proposed Transaction.
- 21.10 Furthermore, although the 2015 Radio Frequency Spectrum Regulations make provision for the transfer of control of radio frequency spectrum licences, these were only effective from 1 April 2015 and therefore the Authority is satisfied that they could not be applied retrospectively.

- 21.11 In light of the above, the Authority concluded that it was empowered to consider the Application despite the absence of the regulations contemplated in section 13(3) and 31(3)(c) of the ECA. There was no need for the Authority to halt the process pending publication of the regulations. The Authority was satisfied that it could consider the Application in terms of sections 13 and 31(2A), respectively, read with the objects of the ECA.

HDP Equity Ownership Implications on change of control of a Licensee

- 21.12 In terms of section 2(h) of the ECA, one of the primary objectives of the ECA is to *"promote broad-based black economic empowerment, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities."*
- 21.13 Section 13(3) (a) further provides that the Authority may by regulation set a limit 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 broad-based black economic empowerment."* The Authority recognizes that these regulations are yet to be published. That however does not hinder the Authority's power to give effect to this objective.
- 21.14 Section 13(6) of the ECA imports the provisions of section 9(2) to (6) of the same Act to apply to an application for the transfer of a licence or transfer of control thereof, obviously

with necessary changes to distinguish the provisions of section 9(2) to (6) from the instance of new applications for licences.

- 21.15 Section 9(2)(b) of the ECA provides that ICASA must, upon receipt of an application for a licence, when giving notice in the Gazette inviting written representations from interested parties in respect of an application, *"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."*
- 21.16 Section 4(3) (k) of the ICASA Act provides that ICASA *"may make regulations on empowerment requirements to promote broad-based black economic empowerment."* The Authority is yet to make such regulations. Nonetheless, the provisions of section 4(3)(k) are permissive and not peremptory. Therefore the absence of these regulations does not in the Authority's view impact the applicability or operation of the minimum 30% HDP requirement contemplated in section 9(2)(b).
- 21.17 The Authority is of the view that, by importing the provisions of section 9(2)(b) in to section 13, the legislature sought to ensure that after the promulgation of the ECA transferees of licences or the licences that are subject to change of control, conform with the same requirement as new applicants for licenses regarding equity ownership by HDPs. In other words, that the equity ownership of the licence that is the subject of the transfer (or transfer of the control thereof) should, following the transfer, not be less than 30%.

- 21.18 Accordingly, the Authority is satisfied that section 9(2) (b) applies to the Application. However, the Authority is aware that it cannot lower the stipulated percentage threshold; it has no discretion in that regard but to direct compliance with the 30% HDI equity ownership on transfer of individual licences or control thereof.
- 21.19 Nonetheless, the Authority is of the view that it has a discretion to direct compliance therewith by a certain future date. Therefore, the Authority decided that it will conduct a public consultation process into the reasonable period to allow the Applicants to comply with the HDPs ownership requirement.

Spectrum

- 21.20 The Application for transfer of control of the radio frequency spectrum licence was submitted in terms of section 31(2A) of the ECA. Although at the time of the Application, the 2015 Radio Frequency Spectrum Regulations were not in place, the Authority was nevertheless competent to consider the application in the absence of those regulations. The Authority took into consideration the objects of the ECA, in particular section 2(e) which provides for the efficient use of the radio frequency spectrum.
- 21.21 The Authority received submissions from MTN and Cell C that the spectrum be withdrawn first if the Application is to be considered. However, upon due consideration of these submissions, the Authority could not find a sound legal basis to withdraw or cede Neotel's spectrum. To this end the ECA is clear that when dealing with a withdrawal of a radio frequency

spectrum license, the Authority must act in terms of section 31(8); (9); and (10) of the ECA.

21.22 Internet Solutions submitted that, Vodacom and Neotel each currently hold a significant amount of 900MHz and 1800MHz radio frequency spectrum, which is considered to be a scarce resource in South Africa.

21.23 Internet Solutions is of the view that the giving of control of Neotel's radio frequency spectrum to Vodacom will result in the concentration of spectrum (see scenario illustrated in pre-transaction and post transaction tables below), circumvention of section 31(2A) and the inevitable prejudice of Vodacom's competitors, as the spectrum would give Vodacom an unfair advantage in the building of a national LTE network.

Pre-Transaction

Band (MHz)	800	900	1800	2100	2300	2600	3500
Cell C		22*	24	30			
MTN		22**	24	30			
Neotel	10		24				56
Telkom			24	30	60		28
Amatole							28
Vodacom		22**	24	30			
WBS			24			15	

Source: ICASA

Post-Transaction

Band (MHz)	800	900	1800	2100	2300	2600	3500
Vodacom+Neotel	10	22	48	30	0	0	56

21.24 Vodacom submitted that it will access Neotel's assigned spectrum through commercial arrangements which are yet to be disclosed to the Authority. Nevertheless, Vodacom

submitted to the Authority various scenarios on how it will access Neotel's assigned spectrum.

21.25 Vodacom and Neotel submitted that the Proposed Transaction is in the best interest of South Africans, as it will contribute to the increase in broadband penetration in South Africa, which is currently very low, when compared to global standards and will assist in achieving South Africa's broadband objectives outlined in SA Connect and Vision 20/20, as well as the National Development Plan.

21.26 SA Connect envisages that 50% of the South African population should have access to broadband with an average speed of 5Mbps by 2016.

21.27 Taking into account the spectrum which the Applicants will have post transaction and the current market share of Vodacom (regarding mobile services), the Authority decided that it is appropriate that Neotel should be required to roll-out broadband in at least 25% of rural areas and under serviced areas⁷³ (as defined in the Under Serviced Area Regulations, 2011). However, the Authority decided to subject this condition to a public consultation process, prior to finalizing the exact extent of the roll-out, as it believes it is fair and necessary to do so.

21.28 The Authority did not find any reason to conclude that the Proposed Transaction will lead to inefficient use of the radio

⁷³ Dr Kenneth Kaunda in North West; Gert Sibande in Mpumalanga; O.R. Tambo in the Eastern Cape; Pixley ka Seme in the Northern Cape; Thabo Mofutsanyane in the Free State; Umgungundlovu and Umzinyathi in KwaZulu-Natal; and Vhembe in Limpopo.

frequency spectrum nor did the Authority find any reason to consider withdrawal of the spectrum from Neotel. Therefore, the Authority concluded that there are no sound technical and regulatory grounds to not approve the Application for the transfer of control of Neotel's radio frequency spectrum licences to Vodacom.

Competition

- 21.29 According to Cell C, the Proposed Transaction should not be approved because of the detrimental impact it might have on competition. This impact, according to Cell C would be primarily due to Vodacom's competitive position being unfairly improved due to its control over Neotel's spectrum and ability to leverage its increased scale across both fixed and mobile markets.
- 21.30 The Proposed Transaction would create a super dominant operator through access to fibre, spectrum, enterprise and corporate customer base and that no existing or new operator would be able to compete against Vodacom. Cell C also believes that there is a possibility that Neotel will post the Proposed Transaction, cease to exist as a fixed line competitor to Telkom.
- 21.31 According to Cell C, Vodacom's acquisition of Neotel's fibre will foreclose Cell C and other parties dependent on Neotel's fibre and further that the Facilities Leasing Regulations/Dispute Resolution processes have not been effective in the past, to ensure access to facilities on non-discriminatory terms and reasonable pricing.

- 21.32 Internet Solutions submitted that the Proposed Transaction is not consistent with the objects of the ECA as set out in section 2(f) and (h) (i.e. to promote competition and promote broad-based black economic empowerment) and therefore should not be approved.
- 21.33 While conceding that there may be benefits in terms of the convergence of technologies, Internet Solutions holds a firm view that the authorities must weigh this against the potential harm to smaller players that relied on the dominant players for particular infrastructure/technological capacity.
- 21.34 The concern they raised is that there might be a risk of anticompetitive foreclosure and bundling where merged entities will limit or reduce the infrastructure capacity previously provided to smaller players.
- 21.35 MTN raised a concern that high demand frequency spectrum will be concentrated under Vodacom's control and provide the already dominant mobile player with an advantage relative to its competitors, while at the same time removing a potential mobile competitor from the market (Neotel).
- 21.36 While MTN conceded that consumers will likely benefit from the earlier and wider availability of LTE through this process. It cautioned that the Authority must be concerned about the competitive impact of providing an already dominant player with a larger structural and timing advantage over its competitors thus giving it the opportunity to entrench its dominance even further.

- 21.37 Telkom submitted that this Application should be evaluated in the context of the increased merger activity in the sector and the consequent impact of such merger activity on competition and future regulation of the sector.
- 21.38 Telkom submitted further that the Proposed Transaction, if approved, will significantly strengthen Vodacom's overall capability to offer both fixed and mobile services, on a wholesale or retail basis. Further, that the Proposed Transaction, if approved, is likely to result in the creation of a dominant firm or association of firms with the ability and incentive to operate independently of competition.
- 21.39 Therefore, Telkom proposed that the Authority ought to investigate the impact and where possible, impose pro-competitive conditions such as behavioral remedies, to maintain a level playing field.
- 21.40 The Applicants emphasised that the Proposed Transaction would have positive competition effects as it will allow Neotel the ability to compete with Telkom and that there will also be an increased availability and improved offering of FTTH⁷⁴ and FTTB⁷⁵ services.
- 21.41 The Applicants highlighted that interested parties gave no proper basis that there will be a possible decrease in competition nor did they submit any evidence leading to possible anti-competitive effects. The Applicants believe that the assessment of competition is essentially the reason behind the filing of the "merger" with the Competition Commission

⁷⁴ Fibre To The Home.

⁷⁵ Fibre To The Business.

and that it is important to also file with the Authority as it is mandated to promote competition in the ICT sector. In the same breath, the Applicants believe that the assessment on competition by the Authority should not be as concentrated as the assessment would be expected from the Competition Commission.

21.42 After receipt of the Application the Authority commissioned Acacia Economics ("**Acacia**") to develop a position paper for the Authority on the following:

- (a) potential benefits that may accrue to social welfare if the market consolidations agreements are to be approved;
- (b) potential negative consequences if these agreements were to be approved; and
- (c) implications for one deal being approved and one deal not being approved.

21.43 Following a consultation process that was conducted by Acacia with various major licensees the Authority received a report from Acacia which indicated that the Proposed Transaction may raise a number of potential anti-competitive effects and recommended various possible remedies that could be undertaken by the Authority.

21.44 The Authority considered sections 2(f), and 13(3)(b) read together with section 67(4) of the ECA in relation to assessment of competition implications of the Proposed Transaction.

21.45 The Authority was of the view that the Competition Commission was best placed to adequately assess and

regulate the potential effects on competition arising from the Proposed Transaction. Accordingly, the Authority consulted with the Competition Commission in line with the provisions of sections 67(11) and 67(12) of the ECA and the Memorandum of Understanding of 2002. The Authority submitted the Acacia report to the Competition Commission for consideration by it as the primary authority responsible to regulate competition effects of mergers in line with section 4B(8)(b) of the ICASA Act.

21.46 It is also noteworthy that the Applicants initially submitted to the Authority a report by Frontier Economics on the analysis of the competitive impact of the Proposed Transaction on 04 November 2014. However, the Authority could not consider the content of that report as the Applicants withdrew the entire report after the Authority declined their request for confidentiality on certain sections of the report in terms of section 4D of the ICASA Act. Nonetheless, having taken the decision to defer to the Competition Commission on competition matters, the Authority did not pursue the matter any further.

21.47 In particular, the Authority was of the view that it may be premature to embark on a competition enquiry in terms of section 67(4) of the ECA. The Authority however, recognizes that it has the power to hold an enquiry terms of section 67 at any time in the future, should the Authority deem it necessary to do so.

AUTHORITY'S DECISION

21.48 Accordingly, the Authority on 11 June 2015 approved the Application as it viewed the Proposed Transaction to be in the best interest of the industry and the public but subject to the following:

21.48.1 First, the Applicants must comply with the requirement for 30% (thirty percent) equity ownership of the individual licence that is the subject of the transfer of control application being held by persons from historically disadvantaged groups ("**the HDP Requirement**"), as contemplated in section 13(6) read with section 9(2)(b) of the EC Act. The Authority, however, recognizes that it may not be practicable for Applicants to comply with the HDI Requirement from the onset. Therefore the Authority would like to determine the reasonable period within which the Applicants should ensure compliance with the HDP Requirement; and

21.48.2 Second, the Authority acknowledges that the implementation of the Proposed Transaction will result in the consolidation of spectrum. The Authority recognizes that broadband access across the country remains a challenge that must be addressed with due speed. In addition, the Authority views universal service and access to broadband services by all South Africans as an integral part of the implementation of transactions such as the current, with priority being given to rural and under serviced areas (as defined in the

Under Serviced Area Regulations, 2011). Therefore, in accordance with the provisions of section 13(6) read with section 9(2)(c) of the EC Act, and in order to ensure the utilisation of spectrum (which is a scarce resource) to achieve the developmental goals of the Republic of South Africa in relation to broadband, the Authority is considering the imposition of the condition that at least 25% (twenty five percent) of any broadband roll out to be undertaken by Neotel following the implementation of the Proposed Transaction (with the specification of a minimum of 5Mbps), be undertaken in under serviced areas (hereinafter **"the USA Roll - Out Condition"**).

21.49 The Authority notes that imposing the HDP Requirement and the USA Roll - Out Condition may necessitate the amendment of the individual licences of Neotel. The Authority is of the view that the licence amendment process may be undertaken in terms of section 10(f) and (2) of the EC Act.

21.50 The Authority will consult the Applicants and interested persons regarding the HDP Requirement and the USA Roll - Out Condition.


Nomvuyiso Batyi
Acting Chairperson

Date: 13 Aug 2015