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# Representations on “Cell C Change of Control”

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As invited in Notice 2216 of 2023 appearing in *Government Gazette* 49831 6<sup>th</sup> December 2022.

APPLICATIONS FOR THE TRANSFER OF CONTROL OF THE INDIVIDUAL ELECTRONIC COMMUNICATIONS NETWORK SERVICE (“I-ECNS”), INDIVIDUAL ELECTRONIC COMMUNICATIONS SERVICE (“I-ECS”) AND RADIO FREQUENCY SPECTRUM (“RFS”) LICENCES FROM CELL C LIMITED TO THE PREPAID COMPANY (PTY) LTD

**Principal Submission:** The Authority has no fundamental basis upon which to refuse the application for the change of control that is necessitated by a change in the shareholding of Cell C Limited. However Cell C Limited should be expected to make further disclosures and undertakings pertaining to its continuation as a going concern with separate and distinct legal personality to The Prepaid Company.

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# Opening Remarks

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*Those companies who enjoy the privileged position of having rights and interests in high demand spectrum, particularly that spectrum which is in the highest demand, attract and invite considerable scrutiny.*

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Within the framing of the regulations as well as media reports flowing from the gazette there is a lack of clarity as to exactly what is being proposed to be “transferred”. Cell C Limited as a company has existed a separate person with its own board and objectives for many years and will continue to do so. Cell C Limited is (or should be) a going concern, and the transaction will not change that. Less than 10% of the shareholding of Cell C Limited is changing, BUT the acquisition of additional shareholding naturally triggers consequences which flow from the fact that Cell C Limited has licences under the Electronic Communications Act. Nothing in the applications being brought will see the actual licence move outside of Cell C Limited. In essence by The Prepaid Company is moving from a significant shareholder (with a shareholding that already has consequences under other laws) to a shareholder which for the purposes of the Electronic Communications Act has control of Cell C Limited and through its control of Cell C Limited control of the licences and resources which the Authority regulates.

Whilst the Application concerns distinct transfers of control in respect of the service and network licences as well as the spectrum licences, I am for these submissions considering the matter from the perspective that its an all or nothing approval.

The submissions are made in my personal capacity as a citizen of the Republic of South Africa with considerable interest in the state of the industry.

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# Submission: Public Hearings should be held

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Whilst I am of the view that the issue for determination by ICASA is straightforward the fact that it concerns the functioning of a “spectrum player” necessitates the holding of public hearings.

## **PUBLIC HEARINGS IN SIMILAR MATTERS**

1. There have been many instances in which an individual ECNS and ECS licence have been transferred without the holding of public hearings. Recent examples include:
  - a. Gijima (9 March 2022) – a transfer of the licence from one entity to another in the group
  - b. Digital Infrastructure Holdings / Metro Fibre Networx (March 2022) – formation of an investment vehicle.
  - c. Purple Pebble Production (March 2022) – change of shareholders
2. In contrast where Vodacom sought to acquire Neotel as a going concern public hearings were held.
3. On the face of it, the present application (in which there is not a change of the licence holder but rather approval of small change in shareholding which results in a change of control) is a smaller ask than applications which have been approved without the holding of public hearings. However I submit that the proper standard for the Authority to hold public hearings is not how significant a change is being made but rather whether the consequences of the changes give rise to a significant public interest. For this reason I submit that whenever high demand spectrum is at issue the holding of public hearings is likely to be necessary. While in the long term the importance of high demand spectrum will decline this is not the case at present.
4. I further submit that even if the consequence of the transaction which gives rise to the necessity for approval of a change of control has no immediate impact on ordinary customers of Cell C the interest arising from a sizeable customer base should not be discounted. Even if Cell C were to only have two million customers they would still have significantly more customers than 300 of the other individual licence holders.

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# Submission: The Authority may and should require that both Blue Label Telecommunications and The Prepaid Company make undertakings to preserve Cell C Limited as a going concern

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5. At point 10 of Form B<sup>1</sup> the Applicant (Cell C Limited) is asked to “specify any undertakings which the transferee is prepared to make in order to promote the objectives of the Act”. The Applicant answers N/A. While it may be correct that as there is no transferee (recipient of a transfer of the licence) and that this is reflected in the lack of a sworn signing (point 11) by a transferee, I do not see any obstacle to the Applicant who is seeking approval of a change of control furnishing undertakings which
6. To this end – and I understand that the issue moves deeply into the weeds – I submit that the form of undertaken given by BM Levy as a director of the Prepaid Company (appearing in Annexure A of Form B8<sup>2</sup>) does not prevent The Prepaid Company from obstructing Cell C Limited’s fulfilment of its licence obligations. It merely re-affirms that Cell C Limited will have the obligations.
7. The matter of the Prepaid Company and Blue Label recognizing Cell C Limited as distinct going concern is of significance in the scheme of interconnection agreements and facilities leasing, both of which are vital components in the overall scheme of telecommunications infrastructure. To view it differently: Vodacom, Telkom, Liquid, Rain and MTN are all in a state where complex agreements with Cell C Limited to collaborate and compete are inevitable. These agreements will by regulation frequently introduce obligations on the parties to those agreements – such as a non-discriminatory access obligation to competitors. It will be gravely problematic if a situation emerges in which all of the obligations arising from participation in the licensing system are carried by Cell C Limited whilst its shareholders are undertaking activities which defeat this very framework. Whilst the present circumstances in the industry may suggest that the large firms honour their obligations under the Act in the breach rather than the norm, progress in the industry can only sustainably be reached by a rules based approach. Part of that means that a controlling shareholder of a participant in the system must be as committed to that participant playing by the rules as licenced entity is.

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1 Page 18 of the Non-Confidential Application Bundle

2 Page 203 of the Non-Confidential Application Bundle

8. I draw specific attention to the Memorandum of Incorporation of The Prepaid Company (Pty) Ltd as furnished by the Applicant. This memorandum requires a special resolution in instances of “the encumbering of any assets of the Company in any manner whatsoever, other than in the ordinary course of business of the Company”<sup>3</sup>. While this clause is a perfectly sound provision for a company to have, in the present instance it has bearing. The shareholding of Cell C Limited is an asset of The Prepaid Company, when Cell C Limited does something to fulfil its obligations arising from the Electronic Communications Act it may well end up as an encumbrance of the asset which that shareholding represents.
9. I propose that a simple undertaking that The Prepaid Company will not take any steps or actions which prejudice Cell C Limited’s capacity to act as a distinct legal person and going concern able to fulfil the licence obligations and that this undertaking follows a special resolution from The Prepaid Company such that it is recognized that the directors of The Prepaid Company have no ability to act contrary to the obligations of Cell C Limited that flow from its operations as licence holder. I further propose that a similar undertaking from Blue Label Telecommunications (as the sole shareholder of The Prepaid Company) be sought.

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# Submission: The Reason for The Prepaid Company acquiring further shares and “say” are valid.

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10. I submit that the core proposition advanced – that Cell C Limited requires directed and strategic management – is fundamentally true. Further I believe that shareholders in Blue Label Telecommunications are placed in a very precarious position if Blue Label Telecommunications is not able to put in place mechanisms to properly control Cell C Limited through The Prepaid Company.
11. I admit that I have limited sympathy any shareholder of Cell C Limited who wishes to preserve a stance in which the company is without a controlling shareholder.
12. However I also submit that Blue Label Telecommunications chose to invest in what on the documentation provided for the application is clearly a Byzantium structure with full knowledge of what they were investing into. I therefore do not support any consent from the Authority to Blue Label’s investors by-passing the separation of concerns and some inevitable oddities arising from the structuring and agreements in place. In particular it must be understood that The Prepaid Company is not applying to obtain any licence.
13. I therefore submit that it is doubly unfortunate that The Prepaid Company has not furnished any information as to what its plans and intentions are. Even if The Prepaid Company has a controlling interest in Cell C Limited it must exercise that controlling interest in line with the law and the regulations of the industry.
14. In particular I submit that there will be many instances in which Blue Label Telecommunications and Cell C Limited will be obligated to operate at arms length. The vehicle of The Prepaid Company should enable this. However if The Prepaid Company were to act as if it is Cell C Limited and there is a lack of independent directors (independent of the group) many problems will arise. More significantly an erosion of the purpose of requiring approval for a change of control will be seen.
15. For these reasons I am concerned at a lack of furnishing the memorandum of incorporation and existing shareholder agreements for Cell C Limited. I will separately to these submissions request same from Cell C Limited and I believe that the documents are public but the absence raises a concern in my mind as to a lack of providing assurances of Cell C Limited as a distinct legal entity (which is the main theme of my submissions).

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# Submission: The Prepaid Company may acquire the means to act as bad faith actor in the market but will lack the incentive to do so

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16. The Applicant takes pains to address foreclosure in distribution of prepaid airtime (page 16 of the Acacia report)<sup>4</sup>. I agree with the Applicant's fundamental argument but submit that the Authority needs to take a different analysis of the issue raised.
17. The Prepaid Company as the controlling shareholder in Cell C will have continue to have the incentives of providing prepaid airtime to customers on all network offerings. The value proposition of The Prepaid Company is significantly diminished if it were to act improperly or if significant other MNOs who are serving the prepaid market are not within the same distribution system. If anything Vodacom, Telkom and MTN have leverage.
18. However the dynamic as it exists – that consumers demand that whatever channel they make purchases of prepaid services work across the industry – can pose a barrier to entry for new entrants, particularly MVNOs.
19. It is probable that adjustments in Cell C Limited's business to serve in an "MVNE" role will serve as a synergy for The Prepaid Company as a wholesaler for prepaid services.
20. My concern however is that if all players in the industry behave in their rational and lawful self-interest the respect advantages of the different firms will promote a net advantage, history shows that sometimes very large firms behave very badly simply because somebody in a position of control is allowed to act as a child (or worse a petty politician). If a large MNO (Vodacom, MTN and Telkom) decides to behave badly and in bad faith a response from The Prepaid Company could be problematic.
21. I therefore submit that it would not be improper for the Authority to engage with all MNOs and MVNOs who are serving more than a million customers and for The Prepaid Company to consciously ensure that marketplace for the distribution of prepaid services is kept open and competitive. It may well be that robust contractual agreements are in place and that the strategy of The Prepaid Company fully addresses the issues but that is not demonstrated in the application papers (at least not as is available to the public).

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# Submission: Several Confidentiality Requests should not be acceded to

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22. The documentation provided makes extensive redactions and claims of confidentiality, whilst there is inevitably commercially sensitive information which should not be disclosed to competitors and the public at large I do not believe that the sought level of non-disclosure is proper.
23. In particular I submit that the following exclusions are unjustified:
  - a. “The Prepaid Company’s Five Year Business Plan, March 2023”; While an un-redacted version may indeed prejudice The Prepaid Company, the essence of the application is for the Prepaid Company to be given the means of control by which to execute that plan. I submit that either a redacted business plan or a statement of plans of The Prepaid Company in respect of Cell C Limited for the 5 year period should be insisted upon.
  - b. The Prepaid Company’s audited financial statements for the financial years ended 2020, 2021 and 2022; While The Prepaid Company is a private company it is seeking to act as the controlling voice of a very public company (not merely public in terms of corporate structure) and it is a subsidiary of a listed company. Most importantly any qualifications in the audited statements are materially relevant.
24. I further submit that requirement in point 6 of the Form requiring a business plan specifically seeks business plan information pertaining to “in respect of the licensed service” and thus that a Cell C Limited business plan should be furnished.
25. I am particularly concerned at the prospects that various roaming agreements and similar instruments which should be disclosed are being kept within a culture of secrecy.
26. I do not believe that a decision as to whether to approve the application will turn on the documents not being included in the non-confidential version but I submit that the Authority should refuse confidentiality and the Applicant an opportunity to re-submit less redacted documents.



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# Conclusion

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27. Save for arguing that further information ought to be disclosed by Cell C Limited I do not believe that a basis to refuse the application arises in the papers of the Applicant. I do not envisage any grounded argument arising from other submissions as invited.
28. I submit that there is a proper case to insist that a resolution of the board of directors of The Prepaid Company addressing the distinct legal personality of Cell C Limited should be required prior to approval.