SUBMISSION BY MWEB CONNECT (PTY) LTD ("MWEB") ON THE DRAFT BITSTREAM ACCESS AND SHARED/FULL LOOP ACCESS REGULATIONS

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1. INTRODUCTION

1.1 MWEB thanks the Independent Communications Authority of South Africa ("the Authority") for providing us the opportunity to submit our comments on the draft Bitstream Access and Shared/Full Loop Access Regulations ("the draft Regulations").

1.2 Although we applaud that the Authority has finally issued draft Regulations, we submit that these draft Regulations omit essential detail and is largely derived from the existing Electronic Communications Facilities Leasing Regulations, 2010 ("Facilities Leasing Regulations") and for that reason causes confusion and does not properly cover issues specifically related to the unbundling of the local loop.

1.3 MWEB, like many other Internet Service Providers ("ISPs"), has been engaging relentlessly for the unbundling of the local loop as we strongly believe that this will lead to better competition, service and service delivery, ultimately benefitting the end user. We believe that the unbundling of the local loop is essential and therefore any Regulation drafted to provision that should be explicit about the extent to which the local loop is unbundled and the provisions should be sound so as to prevent dominant players from abusing the provisions and rendering the Regulations ineffective.

1.4 We submit that for there to be sound Regulations, there needs to be extensive consultation by the Authority with experts, who, through their experience, more likely in other jurisdictions that offer Bitstream or Shared/Full Loop Access, will be able to guide us in addressing the essentials and alert us of stumbling blocks that we may encounter. When unbundling Telecom New Zealand's infrastructure and telecommunications services, according to Telecom New Zealand, "The Commerce Commission alone spent more than a year on the active investigation, which involved submissions, conferences and consulting experts from around the world."[1]

1.5 MWEB believes there are currently certain key problems associated with the Broadband industry in South Africa. We believe LLU goes some way in addressing these problems, however, if we want to successfully achieve the goals set out above, short term solutions have to be found. For context the following key problems associated with the Broadband industry have been highlighted:

1.5.1 Pricing of Telkom's IPC solution

Telkom's IPC offering is currently the only way ISPs can in some way connect to the last mile on the Telkom infrastructure. The cost of this offering is however prohibitive and stifles growth in the industry. Currently the cost of national IPC bandwidth is four times more expensive than connecting to Europe on undersea cable systems. It should further be noted that in addition to the high IPC cost that the ISP pays to Telkom, the end user (consumer) also has to pay Telkom a line rental fee for the same connection in order for the end user to reach the ISP. There is therefore effectively a double charge for the same infrastructure, which also supports Naked ADSL (which we discuss below).

[1] http://www.telecom.co.nz/content/0,8748,204206-203337,00.html

Increased line speeds result in ISPs having to purchase more IPC. Therefore, the volume of IPC purchased is steadily and fast growing as Telkom line speeds increase, which lends further credit to the argument that IPC costs should be reduced.

1.5.2 Quality of the IPC network

ISPs have no insight into the Telkom network and often the capacity ISPs purchase from Telkom is not delivered to the end users as a result of serious network congestion on the backhaul from the end user to the Telkom core. Even if ISPs buy additional IPC capacity the backhaul cannot cater for the demand and the bandwidth does not reach the end user. This despite the significant high prices the ISP pays for the IPC capacity.

ISPs also do not have any insight into the Telkom network to ensure that the ISPs' traffic has the same priority on the Telkom network as Telkom's own traffic to its end users. There is clearly a need to regulate this and for specific service level agreements to be attached to IPC or similar Bitstream services.

1.5.3 Naked ADSL

ADSL is increasingly competing against mobile Broadband solutions. As Telkom does not allow for the ADSL line portion to be subscribed to as a stand-alone, it makes for an uncompetitive offering. It also increases Telkom's ability to bundle voice minutes with the ADSL line portion which weakens competitor offerings. This in turn holds back job creation by ISPs as their own growth is impacted.

1.5.4 Wholesale pricing on the mobile networks

(a) The prices the wireless operators offer ISPs are much higher than the retail offering available in the market, ensuring no ISP can compete in the open market with the wireless/mobile operators. There are wholesale offerings from the mobile operators, but on very inflated pricing to ensure that independent operators or ISPs cannot compete effectively. The prices the mobile operators offer ISPs are much higher than the retail offering available in the market, ensuring no ISP can compete in the open market with the mobile operators.

(b) Mobile operators should be regulated to offer true wholesale prices so that ISPs can offer these services to their customers and increase competition.

1.5.5 Increased investment in the last mile

For Broadband to really achieve its potential and for the internet access industry to grow and create jobs, it should be considered that subsidies should be awarded to companies that invest in last mile infrastructure. Because such investment in infrastructure will benefit the entire country, MWEB believes that such subsidies can fall within the ambit of the Universal Service and Access Fund. However, such subsidies should be made subject to the condition that infrastructure built with subsidies are open to all licensees and subject to proper pricing principles, allowing for a level playing field for all.

1.6 We also refer the Authority to our previous submission on LLU dated 22 June 2011 (attached hereto marked Annexure 1), and urge the Authority to also consider the comments and recommendations made therein, which are still relevant today.

1.7 Having made the point that there should be further consultation and research done before issuing draft Regulations, we will nonetheless comment briefly on the draft Regulations.

2. COMMENTS ON DRAFT REGULATIONS

2.1 MWEB submits that full loop unbundling may not be the most beneficial solution, specifically for ISPs. Full loop unbundling will prove to be a very costly investment, especially for entrants as they will need to invest in their own DSLAMs, etc.) and this will inevitably lead to poor uptake. As a result of the extensive research done in New Zealand, the Commerce Commission decided to implement Unbundled Bitstream Access Services and pointed out that there was evidence to suggest that Bitstream Access uptake is faster than full unbundling in many countries[2].

2.2 Before any Bitstream or Local Loop Unbundling occurs, there must be effective restructure of the Facilities Providers, e.g. Telkom. There must be a clear distinction between Telkom as the network/Facilities Provider and Telkom as a Facilities Seeker. There must be oversight by the Authority or auditors of this restructure to ensure that this restructure is correctly carried out.

2.3 The Regulations should be clear to indicate that a licensee/Facilities Seeker has a choice of the model type they may select; i.e. a Facilities Seeker may either enter into an agreement for Bitstream, Shared Loop or Full Loop Access and is not compelled to seek two or all three models.

2.4 A Facilities Provider must be prevented from pricing existing facilities, such as IPC, more favourably in an attempt to prevent licensees from seeking Bitstream, Shared Loop or Full Loop Access. The Facilities Provider must demonstrate the costs for the various models and must be able to justify these costs.

2.5 Both “Aggregation Point” and “Bitstream and Shared/Full Loop Access Master Lease Agreement” are defined, however neither of these terms is used within the draft Regulations. Reference is made throughout the document to “electronic communications facilities leasing agreements” which may be confused with the Facilities Leasing Agreements under the Facilities Leasing Regulations.

2.6 “Section 4 refers to “Requests for interconnection…”, however the remainder of the section does not relate to interconnection. We therefore do not understand why interconnection would be relevant where there would be a Shared/Full Loop lease agreement.

[2] Commerce Commission Report on access to the unbundled elements of Telecom’s local loop network and access to the unbundled elements of and interconnection with Telecom’s fixed Public Data Network under section 64 and Schedule 3 of the Telecommunications Act 2001 (2003)

2.7 Although in 4(a) there are time frames for responding to a request for leasing facilities and for finalising the agreement, there isn't a timeframe for commissioning implementation. A timeframe for commissioning implementation is necessary to prevent unwarranted delays by Facilities Providers.

2.8 MWEB applauds the Authority for stating that "…a request is financially feasible where an I-ECNS licensee provides the same or similar service to itself or entities under its control.", however MWEB submits that this should be widened to include the Facilities Providers "affiliates" and not just "entities under its control".

2.9 There is reference to "I-ECNS" licensees in certain sections and in other parts "ECNS" licensees. Use of ECNS licensees implies that this would include both I-ECNS and C-ECNS licensees. The Authority must provide clarity as to the type of licensees these Regulations would apply to.

2.10 With regard to 7(a) Pricing, we submit that the pricing should be regulated and regularly reviewed. The price the Facilities Provider charges itself, its affiliates or entities under its control should be filed with the Authority with the public having access to this upon request.

2.11 While 7(a)(i) states "An ECNS licensee may only apply a fee to the Facilities Seeker similar to that charged to itself or entities under its control", MWEB submits that the **pricing must be the same** and the Regulations should not use the term "similar" but "same". There should be no distinction between the pricing to the ECNS licensee itself, its affiliates or entities under its control and unrelated Facilities Seekers. Further this provision must include reference to the ECNS licensee's affiliates.

2.12 7(a)(ii) states that "The ECNS licensee requesting access to the local loop is obliged to pay for any once-off capital equipment…". This provision is very wide and leaves this open to abuse by the Facilities Provider. The Facilities Provider could abuse this provision by requiring the Facilities Seeker to pay exorbitant prices for the equipment. Further, the Facilities Provider may also restrict the use of only certain equipment with knowledge that the equipment is exorbitantly priced, whereas other, reasonably priced equipment could be efficiently used to provide the service.

2.13 The Facilities Provider should provide a standard API interface to their billing systems. Development and integration costs will be for the Facilities Seekers' account. This model is most efficient. Provisions should not be wide so as to allow for abuse by the Facilities Providers, as this will frustrate and delay the process and render the Regulations ineffective.

2.14 These Regulations should not state that the provisions of other Regulations would apply and in this regard we submit that 7(b) should directly deal with Equal treatment of request for access to facilities and it should not refer to the Facilities Leasing Regulations.

2.15 We submit that 7(c)(i) should read "An ECNS licensee who owns a local loop must offer the same **[or similar]** technical and service level quality of service it provides for

itself, **its affiliates** or entities under its control." If there is to be "Non-discriminatory access to the local loop" there should be no difference in price or Quality of Service ("QoS") offered by the Facilities Provider to unrelated Facilities Seekers and itself, its affiliates or entities under its control.

2.16 The Regulations must be clear with regard to QoS. There must be defined SLAs. The Facilities Provider should not be able to claim a "best effort service" as is currently the case with IPC. There must be minimum service levels which will compel the Facilities Provider to upgrade the network when necessary ensuring that the QoS does not deteriorate. Facilities Seekers do not have insight into the Facilities Providers network and will be at the mercy of the Facilities Providers. The Regulations have to regulate the QoS and set minimum SLAs for the Regulations as was done in New Zealand.

2.17 S9(b) is incorrectly numbered while 9(c)(i) does not make sense as it reads "any material changes to the electronic communications facilities leasing agreements that may affect the electronic communications facilities leasing agreements; and".

2.18 MWEB submits that the following must be thoroughly considered and dealt with in detail in the Regulations:

a) Co-location

i) Proximity to the Main Distribution Frame ("MDF")

ii) Reservation of space

iii) Installation and security of equipment

iv) Access to staff

v) Pricing

vi) Dealing with multiple requests

b) Minimum SLAs

i) Services must be properly defined so as to set minimum SLAs

ii) Performance targets/availability

iii) Start and end points must be capable of being audited and established

iv) Handling of orders (multiple orders, etc.)

v) Fault reporting

vi) Fault repair

vii) Penalties for non-performance

c) Number portability

   i) Migration between products / service providers

d) Transparency

   i) Should include detail on technical specifications

   ii) Availability of information with regard MDF exchanges on publicly available site

   iii) Pricing must be the same as offered to itself, affiliates or entities under its control

e) Non-discrimination

   i) Well defined QoS - should not be solely a best effort service

f) Accounting

   i) Accounting must be separate from other services offered by the Facilities Provider

g) Pricing

   i) Must be regulated

   ii) LRIC pricing

   iii) Non-discrimination

h) Technical specifications and operating systems

   i) Imperative that service and how it must work is properly described

   ii) Maintenance

2.19 Many of the above topics are regulated by the Commerce Commission[3] in New Zealand, as this promotes fairness and efficiency. These regulations are very detailed and cover, for example, the format of the bill/invoice, the time limit for invoicing and how the bill must be accessed by the Facilities Seeker. The regulations also describe how the different types of outages must be dealt with, with the regulations going as far as outlining the time frame for service disruption in a planned outage. Pricing is regulated and any adjustment to the pricing must be approved by the Commerce Commission. Any proposed change to these regulations must be approved by the Commerce

[3] Standard Terms Determination for Chorus' Unbundled Bitstream Access Service: Schedule 1 UBA Service Description; Schedule 2 UBA Price List; Schedule 3 UBA Service Level Terms; Schedule 4 UBA Operations Manual

Commission. We have attached copies of these regulations hereto for the Authority's ease of reference as Annexures 2 to 6.

2.20 Without proper regulation we fear that no type of LLU will be successful.

3. CONCLUSION

3.1 MWEB is confident that further research and consultation on this vital development in South Africa will result in efficient and valuable Regulations that will ultimately benefit the industry as a whole.

3.2 We are eager to be a part of any related consultative process.

3.3 For any further information please contact Wilmari Hannie at whanni@mweb.com.