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22 January 2024

Acting Chairperson
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Per email: licensing@icasa.org.za

CC: chairperson@icasa.org.za
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Dear Ms Kedama,

RE: APPLICATIONS FOR THE TRANSFER OF CONTROL OF CELL C'S INDIVIDUAL I-ECS AND I-ECNS AND RADIO FREQUENCY SPECTRUM LICENCES TO THE PREPAID COMPANY

On 6 December 2023, the Independent Communications Authority of South Africa ("**the Authority**") gave notice that it had received applications ("**the applications**") from Cell C Limited ("**Cell C**") for the transfer of control of its Individual Electronic Communication Service, Individual Electronic Communication Network Service Licence and Radio Frequency Spectrum licences to The Prepaid Company (Pty) Ltd ("**the Notice**"). The Notice was published in Government Gazette 49831 under Notice 2216 of 2023.

In the Notice, the Authority requested interested parties to lodge written representations on the applications within fourteen working days from the date of publication of the Notice. On 14 December 2023, the Authority extended the due date for written representations to 22 January 2024. The full applications were made available on the Authority's website on or around 12 December 2023.

Telkom SA SOC Ltd welcomes the opportunity to provide written representations on the applications. Telkom would like the opportunity to participate in a public hearing process, if the Authority determines that this is needed.

As required by the Authority, and as indicated above, the relevant Cell C representatives have been copied in this correspondence.

Please find herewith Telkom's written representation.

Yours Sincerely

A handwritten signature in black ink, appearing to be 'Nozipho Mngomezulu', written in a cursive style.

Nozipho Mngomezulu
Group Executive: Regulatory and Legal Affairs

Telkom Submission

Application for the transfer of control of Cell C's licences to The Prepaid Company

A. INTRODUCTION

1. On 21 September 2023, Cell C applied to the Authority to transfer control of its Individual Electronic Communication Service (“I-ECS”) and Individual Electronic Communication Network Service (“I-ECNS”) Licences, as well as two radio frequency spectrum (i.e. 900 MHz & 1800 MHz and 2100 MHz) (“RFS”) licences (“the Application”).
2. Telkom’s comments are limited to the application for transfer of the RFS licences.

B. GENERAL COMMENTS PERTAINING TO THE TRANSFER OF CONTROL OF CELL C’S SPECTRUM LICENCES

3. The Authority is aware of several spectrum arrangements, or deals, between Vodacom and MTN on the one hand and the smaller licensees on the other, namely Rain, Cell C and Liquid. Telkom has in previous submissions submitted to the Authority (e.g. Telkom’s written submissions on the two Information Memorandums (“IMs”) leading up to the spectrum auction held in 2022) raised its concerns regarding these arrangements. Telkom is not privy to all the details pertaining to these spectrum arrangements, including the arrangements between Cell C and MTN. However, based on media reports and Telkom’s views on the use of Cell C’s spectrum by MTN, Telkom is of the view that that these spectrum arrangements may amount to *de facto* spectrum trading, leasing, sharing, sub-letting, and/or the effective transfer of control of the spectrum licences. To simply assume that these spectrum arrangements amount to “roaming” agreements should not be accepted at face value and should be investigated fully by the Authority. Telkom remains of the view that these spectrum arrangements have a huge impact on, amongst others, competition, markets, and spectrum licensing.
4. It is evident from numerous media articles that Cell C no longer has its own radio access network (“RAN”) and that its customers roam on the networks of Vodacom or MTN. In this regard, Cell C itself has indicated that it is roaming on Vodacom and MTN’s networks.¹ It is further common knowledge that Cell C’s pre-paid and MVNO customers are roaming on MTN’s network; whereas their post-paid customers are roaming on Vodacom (see article referenced at footnote 1).
5. It is Telkom’s understanding that the Cell C spectrum is effectively managed or controlled by MTN, with part of the spectrum being used to provide services to Cell C’s pre-paid customers through a virtual network. Since all of Cell C’s post-paid customers are roaming on Vodacom’s network, it remains unclear to Telkom as to how the remainder of Cell C’s spectrum is used. Telkom is of the view that part of Cell C’s spectrum is used by MTN in providing services to its customers including its roaming customers.
6. It is therefore plausible that Cell C has, through commercial agreements, effectively already transferred control of its RFS licences to MTN, without the requisite investigation by ICASA in terms of Regulation 15 of the Radio Frequency Spectrum Regulations (“RFSR”). It is our submission that the application by Cell C to transfer control of its RFS licences to TPC must be fully investigated and understood by the Authority and must include the consideration of the existing commercial agreements between Cell C and MTN as well as other matters which have a bearing on the Application. A report by the Authority in this regard should also be made available for public comment.

¹ <https://mybroadband.co.za/news/cellular/497185-cell-c-finishes-switching-off-its-towers.html>

7. As part of assessing the Application, the information required under Annexure E of the RFSR must therefore be provided and thoroughly considered by the Authority. It is noted that Cell C argued in its application that this information is not necessary and therefore such has not been provided. Telkom does not agree with the views expressed by Cell C in this regard and is of the opinion that the Application cannot be properly considered if the information requested in Annexure E is not provided, as discussed further below.

C. SPECIFIC COMMENTS PERTAINING TO THE TRANSFER OF CONTROL OF SPECTRUM LICENCES

8. In terms of the Notice, the application for transfer of control of the RFS licences is made in terms of s.31(2A) of the Electronic Communication Act ("the ECA"), read together with, inter alia, Regulation 15 of the Radio Frequency Spectrum Regulations, 2015 as amended. In terms of both these provisions, written permission from the Authority is required to transfer control of Cell C's spectrum licences (i.e. 900 MHz & 1800 MHz and 2100 MHz) to TPC.
9. In section 2.9 of the Notice, relating to the application for transfer of control of the RFS licences, the Authority refers to section 9(2)(a) of the ECA stating that the Authority must give notice of the application and invite interested persons to make written representations. However, section 9(2)(a) of the ECA relates to "*Applications for and granting of individual licences*", which does not relate to spectrum matters. This reference is therefore incorrect. In terms of section 31(3)(b) of the ECA, the Authority may prescribe procedures and criteria for, amongst others, the application for transfer of control of a RFS licence, as contained in Regulation 15 of the RFSR. Sub-regulation 15(4) of the RFSR states that: "*The Authority will take the following steps with regard to an application for assignment, ceding or transfer of control of a radio frequency spectrum licence that was or would have been subject to an extended application procedure.*" The process provided by the Authority for the transfer of control of the RFS licences (e.g. inviting written representation, oral hearings, the right of the applicant to respond, consideration of competition, etc) fully aligns with the process prescribed in sub-regulation 15(4). This process is applicable to frequency spectrum licences that are subject to the extended application procedure. Telkom agrees that the extended application procedure is applicable to this Application.
10. In paragraph 2.10 of the Notice, the Authority states that the application will be assessed in accordance with regulation 15, sub-regulation 6 of the RFSR. Sub-regulation 6 refers to an application for transfer of control of a radio frequency spectrum licence, in relation to licenses to which the standard application procedure applies. Telkom does not agree that Cell C's application to transfer control of its RFS licences can be considered under the standard application procedure. Based on the RFSR and the list of categories (list of spectrum and radio uses) applicable to the standard application procedures (as prescribed in Annexure C of the RFSR), the RFS licences in question fall under the extended application procedure. Also, the RFS bands involved in Cell C's application are all identified in the National Table of Frequency Allocations for International Mobile Telecommunication (IMT) applications and must therefore be classified as high demand spectrum, to which the extended application procedure applies.
11. Accordingly, it is Telkom's submission that this application must be assessed in accordance with sub-regulation 5, which relates to applications where the extended application procedure applies. Based on the process proposed by the Authority, as discussed above, it appears as if the Authority erroneously referred to sub-regulation 6 of regulation 15 when it should have referred to sub-regulation 5. The relevant provisions that apply to the Application must therefore be confirmed.

12. In terms of paragraph 15 of the Application, the application is for the transfer of control of Cell C's RFS licences (and I-ECS, I-ECNS licences) to TPC. However, in footnote 3 to paragraph 15, Cell C refers to Regulation 12 of the RFSR. This Regulation provides for the "*Procedure to Transfer a Radio Frequency Spectrum Licence*" (own emphasis) which, in Telkom's understanding, is not the intention of the application. The procedure dealing with the transfer of control is stipulated in, as indicated in the Notice, Regulation 15 of the RFSR ("*Permission to Assign, Cede or Transfer of Control of a Radio Frequency Spectrum Licence*"). The Authority and Cell C must confirm that the reference to Regulation 15 in the footnote was made in error.
13. Cell C submitted Form B of Annexure A of the RFSR as part of their application, and as required in terms of Regulation 15 of the RFSR. In terms of sub-regulation 15(3), "*The applicant for the assignment, ceding or transfer of control of a radio frequency spectrum licence that was or would have been subject to an extended application procedure in terms of Annexure E, must provide information as set out Annexure E*". Since the frequency bands applicable to this application would have been subjected to an extended application procedure (as discussed above), Annexure E does apply, and such information must be submitted. This is also confirmed in the header of Form B, which was submitted by Cell C: "*Annexure E MUST be completed and submitted with this Form B, unless written agreement is received from the Authority not to submit Annexure E, and attached herewith*" (emphasis of "MUST" in capital letters as per the RFSR).
14. Telkom therefore does not agree with the views expressed by Cell C in their application letter (paragraphs 19 and 20) that Annexure E information is not required. The reasons are as follows:
 - a. Sub-regulation 15(3) of the RFSR, and well as Form B, as indicated above, is explicit that Annexure E information must be provided.
 - b. The arguments provided by Cell C, in paragraphs 19 and 20 of the Application, that Annexure E is not necessary or appropriate or that providing such information will "unduly burden" Cell C and the Authority, are not sufficient. This information is critical for a thorough assessment of an application to transfer of control of a spectrum licence, as further elaborated below.
 - c. Stating that the RFS licences will not be transferred, but only the control thereof, is also not relevant, noting that Regulation 15 deals specifically with applications for the control of spectrum licences, which is the intention of this Application.
 - d. Annexure E information was required in the recently concluded spectrum auction for IMT frequency bands, notwithstanding the fact that this was "extensive information".
 - e. Annexure E requires information that in Telkom's view is very important for consideration of this Application also in the context of the existing commercial spectrum agreements between MTN and Cell C, as discussed above. For example:
 - i. Part III of Annexure E requires information pertaining to the construction of the network. In the context of Cell C having no physical radio access network, which network is provided virtually by MTN, the use of these IMT frequency bands by the Transferee and the Transferor are both relevant.

- ii. The information required under Part V² ("Technical Information (Radio System Design)") is also very pertinent for assessment by the Authority of the Application. For example, specific information to be provided in terms of this section includes, amongst others, approach to network development and expansion; upgrade of the network to accommodate new standards and technology developments; details of radio planning including methods to reserve frequency; diagrams or sketches of proposed operations; details of fixed network planning; network management, fault detection, service and maintenance mechanisms, etc. All these issues speak to the control of spectrum. This information is important considering that Cell C depends on MTN to provide radio access services, which includes the use and control of its spectrum.
 - iii. Calculating critical efficiency factors (technical, functional, and economic) as per sub-section 20 of Part V of Annexure E, is also critical. As per sub-regulation 15(7)(f), the transferee must have a score not less than that of the transferor. This is understood to be in the context of a score of efficiency, as discussed above.
15. Based on the above, Telkom is of the view that the application is incomplete if the information as required under Annexure E is not provided and can therefore not be properly assessed. Providing this information is necessary as it will allow the Authority to properly assess the transfer of control of spectrum in the context of Cell C's current business and operating model in the context of the existing spectrum arrangements and the transfer of control of the RFS licences to TPC. Not participating in the infrastructure market, but rather fully relying on MTN to provide a virtual mobile network, raises serious questions about the actual control of the spectrum licensed to Cell C, which spectrum control will now be transferred to TPC. By simply stating that Cell C will continue to provide the licensed services and to discharge its licence obligation when TPC is taking control of these valuable assets, are not sufficient.
16. In summary, as discussed above, Telkom requests the Authority to:
- a. Confirm the relevant provisions of the ECA and RFSR that apply to the Application.
 - b. Confirm that the Application for transfer of control of Cell C's RFS licences will be considered as per the provisions that apply to the extended application procedure.
 - c. Confirm that the information in Annexure E must be supplied by Cell C and request such information to be provided as part of the Application.
 - d. Include consideration of the existing spectrum agreements between Cell C and MTN in assessing the Application.

THE END

² Although this Part is indicated as Part IV, in terms of sequential numbering this should be Part V.