MOBILE TELEPHONE NETWORKS PROPRIETARY LIMITED

SUBMISSION TO THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

ON THE GENERAL NOTICE RELATING TO THE 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 (AS PUBLISHED IN GOVERNMENT GAZETTE NO 49831, ON 6 DECEMBER 2023, UNDER NOTICE 2216 OF 2023)

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1. INTRODUCTION

1.1 Mobile Telephone Networks Proprietary Limited ("**MTN**") is a holder of an individual electronic communications services licence and an individual electronic communications network services licence, as well as a number of radio frequency spectrum licences (the "**MTN Licences**"), issued to it by the Independent Communications Authority of South Africa ("**ICASA**") in terms of the Electronic Communications Act, 2005 (the "**ECA**").

1.2 MTN makes these submissions in response to the general notice relating to the applications (collectively, the "**Applications**") for the transfer of control of the Individual Electronic Communications Network Service, Individual Electronic Communications Service and Radio Frequency Spectrum Licences from Cell C Limited ("**Cell C**") to the Prepaid Company (Pty) Ltd ("**TPC**") (as published In Government Gazette No 49831, on 6 December 2023, under Notice 2216 of 2023) (the "**Notice**").

1.3 In the Notice, ICASA invited interested parties to lodge written representations concerning the Applications. MTN is an interested party as:

1.3.1 it holds the MTN Licences issued to it by ICASA;

1.3.2 it provides electronic communications services and electronic communications services in the same geographic region as Cell C;

1.3.3 it has concluded a national roaming agreement with Cell C, which has been disclosed by Cell C to ICASA in the Applications, in terms of which certain Cell C customers roam on MTN’s network (and vice versa);

1.3.4 Cell C has an extensive customer base, and roaming and sharing arrangements with other MNOs. Should ICASA make a decision that results in a change to the manner in which Cell C services its customers, this could impact other mobile network operators, including MTN; and

1.3.5 TPC is one of the largest airtime distributors in South Africa. TPC is a key distributor of MTN, and TPC's acquisition of control over an MTN competitor in this context may have a significant impact upon MTN (as well as any other mobile network operator that distributes airtime through TPC).

1.4 MTN has made significant financial investments in its own network to ensure that Cell C's customers are able to roam seamlessly on MTN's network. For this reason, MTN has a significant interest in the long-term financial stability of Cell C, as well as any change in the strategic management and/or direction of Cell C which may impact:

1.4.1 Cell C's ongoing contractual and commercial relationship with MTN; and

1.4.2 the experience of customers on Cell C's network, given that certain of these customers are roaming on MTN's network.

1.5 MTN wishes to make the written submissions to ICASA in respect of the Applications.

1.6 Interested parties were asked in the Notice to state whether they require an opportunity to make oral representations should ICASA elect to hold public hearings on the Applications. MTN hopes that ICASA will proceed to hold a public hearing in relation to the Applications so as to enable all interested parties to properly ventilate their issues and to engage ICASA on the submissions made in relation to the Applications. It is MTN’s belief that the Applications warrant a public hearing as the matters to be dealt with in this submission, and presumably in other submissions lodged by other interested parties, cannot be adequately dealt with by ICASA in the absence of a public hearing. MTN requests that it be given an opportunity to make oral representations at these public hearings.

2. RELEVANT REQUIREMENTS OF THE ECA AND ITS REGULATIONS

2.1 MTN notes that the Applications must comply with the requirements of the ECA, including the following requirements promulgated thereunder:

2.1.1 the Individual Licence Process and Procedure Regulations (in the case of the individual service licences held by Cell C;[1] and

2.1.2 the Radio Frequency Spectrum Regulations[2] (in the case of the radio frequency spectrum licences held by Cell C).[3]

2.2 MTN notes the following provisions of the Individual Licence Process and Procedure Regulations and the Radio Frequency Spectrum Regulations:

2.2.1 ICASA will not consider any application for the transfer of control over a licence if the applicant is in arrears with respect to any fees due and payable to ICASA[4];

2.2.2 ICASA will not approve the transfer of a radio frequency spectrum licence if such transfer will not promote competition;[5]

2.2.3 a transfer of control application will be evaluated on the basis of the following criteria:

2.2.3.1 promotion of competition in the ICT sector;

2.2.3.2 interests of consumers; and

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1 The '*Licensing Processes and Procedures Regulations for Individual Licences, 2010, for applications, renewals, surrender and transfer of Individual Licences and matters pertaining thereto; and applications for special temporary authorisations*' published under Government Notice R522 in Government Gazette 33293 of 14 June 2010 (as amended)

2 The 'Radio Frequency Spectrum Regulations, 2015', published under General Notice 38641 of 30 March 2013 (as amended)

3 ECA, section 13 (read with section 9)

4 Individual Licence Process and Procedure Regulations, regulation 3(a) and regulation 12(1)(a

5 Radio Frequency Spectrum Regulations, regulation 12(9)(b)

2.2.3.3 equity ownership by historically disadvantaged groups; [6] and

2.2.4 ICASA will not consider any application if the applicant is found to be non-compliant by the Complaints and Compliance Committee ("**CCC**") with regards to the applicable regulations and/or the provisions of the ECA and has failed to remedy the non-compliance.[7]

2.3 In the context of the above provisions of the ECA and its regulations, MTN respectfully submits that ICASA should consider the following comments by MTN when considering both the Applications.

3. PROMOTION OF COMPETITION IN THE ICT SECTOR

<u>The telecommunications value chain</u>

3.1 The South African telecommunications value chain comprises the following three broad levels:

3.1.1 The upstream level consists of network infrastructure, such as mobile sites, ducts, poles, and dark fibre. It also includes active and passive elements of radio access network ("**RAN**") and radio frequency spectrum allocated for mobile telephony use.

3.1.2 The wholesale level involves the wholesale of network infrastructure, in terms of which mobile network operators ("**MNOs**") provide access to their RAN (which may include both spectrum capacity or sites and network infrastructure) to downstream service providers such as virtual network operators ("**MVNOs**") who do not own their own RAN or have limited capabilities at the upstream level. Vodacom Group Limited ("**Vodacom**"), MTN, Cell C and Telkom SOC Limited ("**Telkom**") provide network connectivity services to MVNOs (either directly or through a mobile virtual network enabler). MTN understands that Cell C currently provides services to most MVNOs in South Africa. Internet service providers, fixed network operators, banks and retailers typically use these services. In this context, we note that MNOs who obtained radio frequency spectrum in the IMT3500

6 Individual Licence Process and Procedure Regulations, regulation 11(4)

7 Individual Licence Process and Procedure Regulations, regulation 11(3)(b)

band following the auction conducted by ICASA in 2022 are required to provide open access to MVNOs that meet certain criteria.

3.1.3 The wholesale level also involves roaming or facilities arrangements and managed network services, where one MNO has limited capacity on its RAN or network and uses that of another MNO for coverage or capacity purposes. This may include traditional roaming (e.g. 2G, where this is the only option available) and Multi-operator Core Network (MOCN) enablement, allowing traffic routing directly to the third-party core network. Technology evolution has allowed parties such as Cell C and Telkom to maintain their core networks while allowing their subscribers to use RAN capacity and coverage services on both the MTN and Vodacom networks seamlessly to the end user.

3.1.4 The downstream level involves retail communication services to end-users or consumers (i.e., individuals or businesses) that use mobile and related services. Retail communication services include mobile voice (calls), sold on a prepaid or postpaid basis using a GSM network, and mobile data, sold on a prepaid or postpaid basis. At this level, MNOs also offer value-added products and services that are ancillary to mobile voice and mobile data, such as devices, accessories, SIM cards, security services, cloud services, hosting, insurance, itemised billing, device management, content such as voice mail, call barring, and call back. These products and services are distributed online or through physical retail outlets (either owned by an MNO, MVNO, or independent retail outlets).

3.2 When mobile telecommunication technology was introduced in South Africa, Telkom was the sole provider of telecommunication services. In 1993, MTN and Vodacom were granted licenses to operate as MNOs. Cell C subsequently obtained its MNO license in 2001. Telkom, MTN, Vodacom and Cell C remain the primary MNO players in South Africa.

3.3 In recent years, Cell C's role as an MNO has diminished. It was widely reported in 2019 that Cell C is in severe debt and unable to meet its debt obligations. As a result, Cell C commenced a turnaround strategy that involved recapitalisation to improve liquidity and ensure that Cell C stays afloat. The recapitalisation saw Cell C reduce operational expenditure by switching off its RAN and migrating its network through various roaming and managed network services agreements with MTN and Vodacom.

3.4 Accordingly, Cell C seems to be operating as an MVNO as it procures wholesale access to mobile networks and then makes that access available to its customers at the wholesale and retail levels. However, Cell C still has some features of an MNO given its access to spectrum, where many of its customers remain MVNOs, and it accesses its virtual RAN hosted and enabled through MTN-owned sites and network infrastructure.

3.5 Notwithstanding the changes in Cell C's business model, there is public commentary and uncertainty regarding its financial position and whether it can manage its debts, given the roaming and managed network services arrangements with both MTN and Vodacom. Indeed, in the cover letter to the Applications, Cell C states that it is "*burdened with unsustainable debt and technical insolvency.*"

Blue Label Telecoms Limited ("**BLT**") and TPC

3.6 BLT is the sole shareholder of TPC and is the largest distributor of prepaid airtime and data in South Africa and is a significant contributor to MTN's (and other MNO's) prepaid airtime and data sales.

3.7 MTN and TPC concluded a commercial distribution agreement in 2010 in terms of which MTN supplies prepaid airtime and data to TPC, and TPC, in turn, sells the prepaid airtime and data to downstream distributors (e.g., direct agents, Fast Moving Consumer Goods (FMCG) suppliers, retailers, spaza shops, and wholesalers).

3.8 BLT operates Blue Label Distribution ("**BLD**"), a services aggregator that on-sells value-added services to customers. This includes prepaid electricity and prepaid airtime. BLD is integrated with municipalities nationally for the sale of prepaid electricity.

3.9 Other than the distribution of airtime, data and electricity, BLT's value-added service offering includes bill payments, ticketing and the distribution of lotto games, such as Lotto, Lotto Plus, Powerball and Quickpick.

3.10 BLT has developed a large distribution network with exclusive relationships with various counterparties and a significant footprint of point of sale (POS) terminals/devices integrating the major mobile networks, MVNOs and others.

<u>The impact upon competition in the ICT Sector if the Applications are granted</u>

3.11 Cell C's current shareholding raises multiple questions. However, at the centre seems to be BLT with a number of tentacles across the entire telecommunications value chain:

3.12 As indicated in BLT's Group Financial Annual Statements for the financial year ended 31 May 2023, as part of Cell C's recapitalisation, BLT created several special purpose vehicles to take over Cell C's debt obligations to various lenders and, in return, hold shares in Cell C. As a result, BLT, through TPC, holds 49.53% of the voting rights in Cell C and additional "interests" amounting to 13.66% in Cell C. One of the special purpose vehicles is linked to a debt to Dark Fibre Africa Proprietary Limited, which is a subsidiary of Community Investment Ventures Holdings Limited. This special purpose vehicle holds at least 10% of the shares in Cell C.

3.13 BLT distributes prepaid airtime, data, value-added services and other mobile network services or products for Cell C, MTN, Telkom and Vodacom. BLT is the largest distributor of prepaid airtime and data in South Africa.

3.14 Cell C has outsourced the operation of its post-paid base to Vodacom and has a roaming agreement with Vodacom.

3.15 Given the above, BLT's acquisition of control of Cell C will likely affect the relationship between BLT/TPC, on the one hand, and the other MNOs in South Africa (including Vodacom, MTN, Telkom and Rain). The proposed transaction will give BLT/TPC the ability and incentive to prefer Cell C above other MNOs in South Africa (and it would have a clear incentive to do so, given Cell C's significant indebtedness).

3.16 MTN believes that the analysis of the potential vertical aspects resulting from the combination of Cell C (a mobile network operator) and TPC (a distributor, in particular of prepaid airtime) in the Competition Assessment prepared by Acacia Economics ("**Acacia**") is incomplete. This is because Acacia only looks at potential *total* foreclosure and does not assess potential *partial* foreclosure. Total foreclosure refers to a complete refusal to deal with other market participants, whereas partial foreclosure refers to a worsening of the terms on which to (continue to) deal with other market participants. Partial foreclosure is often more attractive to parties than total foreclosure. For this reason, it is not possible to rule out foreclosure concerns by looking at total foreclosure only.

3.17 A vertical merger may negatively impact competition if it creates the *ability and incentive* for the merged entity to engage in input or customer foreclosure, on either a total or partial basis.

Input foreclosure

3.18 Input foreclosure arises when the merged entity leverages its strong market position upstream to control the inputs supplied to its downstream rivals, with the aim of reducing those rivals' competitiveness or forcing them out of the market. Total input foreclosure involves the upstream division of a vertically integrated firm refusing to supply an input to rivals of its downstream division. Partial input foreclosure involves the upstream division of an integrated firm continuing to supply the input to its downstream rivals, but on 'worse terms' (for example, charging higher prices or supplying lower quality input for the same price) compared to the pre-merger scenario.

Customer foreclosure

3.19 Customer foreclosure occurs when a vertically integrated firm is able to leverage its market power as a downstream customer to negatively impact its competitors at the upstream level. Total customer foreclosure involves the vertically integrated firm completely stopping to purchase inputs from rival upstream suppliers. Partial customer foreclosure involves the vertically integrated firm continuing to purchase inputs from an upstream rival, but at a lower price (i.e., it reduces the upstream rival's revenues) or on worse terms (e.g., limiting the quantities or increasing the price at which it sells the upstream rival's products to final consumers).

3.20 In its assessment of input foreclosure, Acacia finds that total foreclosure is unlikely, on the basis that Cell C is too small a player in the upstream MNO market to leverage any market power, and that distributors/wholesalers rely more on MTN and Vodacom for business than Cell C. In the case of customer foreclosure, Acacia concludes that it is "inconceivable" that the merged entity would have the ability or incentive to foreclose competing MNOs, on the basis that these MNOs have the option of accessing the market through 13 other distributors.

3.21 However, for both input and customer foreclosure, Acacia only considers total foreclosure theories of harm and does not consider whether partially foreclosing either competing distributors/wholesalers or competing MNOs may be profitable for the merged entity. Total foreclosure is an extreme strategy, whereas partial foreclosure is a much more "gradual" practice. For example, in the case of the proposed transaction, partial customer foreclosure might occur by way of the merged firm supplying fewer rival MNO products to the market, or increasing the margin charged on distributing rival MNOs' products. Even if there is no incentive to engage in total foreclosure, there may be an incentive for the merged entity to engage in partial foreclosure. It can be more profitable for a merged firm to engage in partial foreclosure, and as such, it may be viewed as being more likely to occur than total foreclosure.

3.22 Given the above, MTN respectfully submits that ICASA should consider the impact on the entire telecommunications value chain (as we have described it above) should a single entity, BLT, ultimately control:

3.22.1 one of the primary MNOs in South Africa (which has roaming, facilities or managed network services arrangements with Vodacom and MTN, and which hosts most of the MVNOs in South Africa on its network);

3.22.2 one of the largest prepaid airtime and data distribution networks in South Africa, which distributes these products on behalf of all MNOs in South Africa; and

3.22.3 a SIM card and entry-level mobile device distribution network.[8]

3.23 ICASA (and the South African Competition Commission) should consider whether the merged entity would have the incentive to worsen the terms of TPC's commercial distribution agreements with rival MNOs, so as to partially foreclose upstream competitors from BLT/TPC as a customer/distributor of their products.

[8] In this regard, please refer to paragraph 12 of the Competition Assessment annexed to the Service Licence Application, which notes that BLT (and its affiliates) distribute SIM cards and entry-level mobile devices

Further, in assessing potential partial foreclosure, the following factors must be considered:

3.23.1 quantifying the importance of BLT to rival MNOs as a customer and distributor of prepaid products and SIM cards (e.g., by considering the proportion of MNOs' sales which are attributed to BLT and its subsidiaries);

3.23.2 determining whether BLT has control of particular segments of the market for the supply of prepaid products (in particular local options for consumers to purchase prepaid top up bundles) and SIM cards and the extent to which the proposed transaction can enhance BLT's influence on competition in other segments of the market. For example, given BLT's wide distribution network and significant footprint of POS devices across various retail outlets (with whom we understand BLT tends to have exclusive relationships), could the proposed transaction result in BLT exerting an additional level of influence on the choice of counterparties that can engage in the distribution and sales of various services (airtime, data, electricity) of MNOs, MVNOs, and others?" To the extent that different distributors serve different market segments, it may be possible to profitably engage in partial foreclosure despite the presence of alternative distributors; and

3.23.3 quantifying the importance of Cell C to rival distributors/wholesalers of prepaid products and SIM cards (e.g., by considering the volume and value of distributors' sales which are attributed to Cell C's products).

3.24 Lastly, we note that Cell C states that it has not yet turned a profit after more than 20 years in the market, with cumulative losses of approximately R45 billion[9] and that the transaction will put TPC "*in a better position to focus its efforts on Cell C's financial stability*".[10] It is not clear from the Applications whether BLT might have a different strategic approach to operating Cell C and, as such, how the proposed transfer of control of Cell C will alter Cell C's financial position, more especially that the parties acquiring control (TPC, and indirectly BLT) are suppliers of Cell C and are reliant upon Cell C for certain revenues (for example, the sale of postpaid

[9] See paragraph 3 of Appendix 10.1 to the Service Licence Application

[10] See paragraph 85 of the Competition Assessment annexed to the Service Licence Application

Cell C contracts[11] and the sale of Cell C devices[12]) either directly or through tier affiliates. MTN believes that ICASA should consider whether the proposed transfer of control benefits Cell C, or if it instead serves to benefit suppliers of Cell C – TPC and BLT (and their affiliates), what these benefits are, how they will be achieved and what impact they will have on competition in the ICT sector in South Africa.

4. INTERESTS OF CONSUMERS

4.1 MTN notes that, in the Applications, Cell C's consumer interest report states that "*BLT doesn't anticipate making major changes to Cell C's underlying business*".[13] MTN respectfully submits that this statement is inconsistent with the stated purpose of the Applications, which is to introduce "strategic shareholder direction"[14] and to "better enable Cell C to compete effectively".[15]

4.2 Self-evidently, if there is no change to Cell C's current business model, there is no reason to believe that the change in control will achieve its stated purpose – the commercial success of Cell C. Rather, MTN respectfully submits that ICASA should consider the impact that this change will have in the relationship between consumers and Cell C, given the control that BLT will acquire. Unless Cell C takes ICASA into its confidence as to what these changes will be, on the face of the Applications, it is not possible to discern the impact of these changes.

4.3 MTN also notes that the Consumer Interest Report provided by Cell C refers to engagements with Cell C's 'business customers', including two distributors of airtime, SIM cards and/or handsets and one MVNO (the identity of these customers was not disclosed). We note that the Consumer Interest Report notes a concern raised by a 'distribution customer' of Cell C, with the report stating that the distribution customer "*was worried about the transaction since they compete more broadly with BLT, and the transaction might put them at a competitive disadvantage*". While the Consumer Report goes on to note[16] that "on balance"

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11 See paragraph 23.2 of the Competition Assessment annexed to the Service Licence Application

12 See paragraph 23.3 of the Competition Assessment annexed to the Service Licence Application

13 Please refer to paragraph 9 of the Consumer Interest Report annexed to the Service Licence Application

14 See, for example, paragraphs 5, 13 and 14 of the cover letter to the Service Licence Application

15 Please refer to paragraph 11 of the Consumer Interest Report annexed to the Service Licence Application

16 See paragraph 13.3 of the Consumer Interest Report annexed to the Service Licence Application

the transaction is "necessary", it is unclear on what basis the distribution customer's concerns relating to competition with BLT will be addressed or resolved.

4.4 MTN also notes that Cell C does not elaborate on how the Applications will achieve their stated objective – namely, that Cell C will become a more competitive MNO. The Consumer Interest Report[17] provided by Cell C notes that the transaction has "*the potential to strengthen Cell C's weak position relative to other MNOs and ensure the continued presence of Cell C as a competitor in the country*", but it does not elaborate upon how this will be achieved. In the absence of clarity from Cell C as to how it will achieve a viable business model, it is not possible to accurately assess the impact that the proposed transfer of control will have on consumers in South Africa.

4.5 Moreover, as noted, the analysis of the potential vertical aspects resulting from the transaction is incomplete. This is because this only considers total foreclosure and does not also examine partial foreclosure. As is the case with total foreclosure, partial foreclosure strategies can harm consumers. For example, in the case of the proposed transaction, partial customer foreclosure might occur by way of the merged entity supplying fewer rival MNO products (or even MVNO products) to the market, or increasing the margin charged on distributing rival MNO products (or MVNO products). This could, in turn, reduce the available choices and/or increase the prices faced by the end consumers of rival MNOs' products (or MVNO products).

5. EQUITY OWNERSHIP OF DISADVANTAGED PERSONS

5.1 MTN notes that, should the application be granted, the transfer of control in Cell C will result in a reduction of black ownership of Cell C by 1.80%. Specifically, on conclusion of the transaction, the ownership of Cell C by historically disadvantaged persons will be 34.41% (as opposed to the 36.21% currently owned by historically disadvantaged persons).

5.2 As we have noted in paragraph 4, the Applications do not clearly set out how the proposed transfer of control will result in the purported objective of the Applications being achieved – being the sustained commercial viability of Cell C.

[17] See paragraph 16 of the Consumer Interest Report annexed to the Service Licence Application

5.3 If the *reason d'etre* of the transfer of control of Cell C is to achieve a commercially viable MNO, then the strategies to achieve this stability should be clear (or at least discernible) from the Applications. MTN respectfully submits that ICASA should consider whether the Applications clearly set out how the proposed transfer of control will achieve these objectives. In the the Competition Assessment annexed to the Service Licence Application, it is stated that a decline of ownership in Cell C by historically disadvantaged persons "*of just 1.8*" is "*an immaterial change which does not warrant further consideration*". MTN submits that in order to assess whether a decrease in ownership by historically disadvantaged persons is material or "*immaterial*", one must be able to understand the benefits that arise from that reduction. We respectfully submit that ICASA should consider whether the Applications set out a clear benefit, which is meaningfully substantiated by Cell C, for a decrease in ownership by historically disadvantaged persons in Cell C.

6. OUTSTANDING AMOUNTS PAYABLE BY CELL C TO ICASA

6.1 MTN notes that ICASA will "*not consider any application for the transfer of control of a licence where the applicant is in arrears with respect to any fees due and payable to*" ICASA.[18]

6.2 MTN understands that:

6.2.1 Cell C acquired 10MHz of radio frequency spectrum in the IMT3500 band pursuant to the auction conducted by ICASA in 2022 (the "**New Spectrum**");

6.2.2 Cell C may have failed to pay ICASA in respect of the New Spectrum (in an amount of approximately R288 million) on the basis of certain public media reports.

6.3 While MTN is not able to confirm whether Cell C has settled all amounts owing to ICASA, we note that ICASA is precluded by the regulation 11(3)(a) of the Individual Licence Process and Procedure Regulations from considering the Applications should Cell C be in arrears with any fees due and payable to ICASA (including, for example, the fees payable by Cell C in respect of the New Spectrum).

[18] The Individual Licence Process and Procedure Regulations, regulation 11(3)(a)

7. **COMPLIANCE BY CELL C WITH ITS UNIVERSAL SERVICE OBLIGATIONS**

7.1 Cell C is required, in terms of its Radio Frequency Spectrum Licences, to fulfil certain universal service obligations, including those set out in Annexure A to its 2100MHz Radio Frequency Spectrum Licence (the "**Universal Service Obligations**").

7.2 Given the challenges currently faced by Cell C, MTN respectfully submits that it would be prudent for ICASA to consider:

7.2.1 whether Cell C has fulfilled its Universal Service Obligations in the manner required under the ECA, its regulations and Cell C's licences; and

7.2.2 if Cell C has failed to fulfil its Universal Service Obligations, whether it would be appropriate for ICASA to require Cell C to rectify any failure as a condition of ICASA's approval of any transfer of control or to refer the matter to the CCC.

8. MTN appreciates the opportunity to make a written submission on the Applications and looks forward to making oral presentations at public hearings, should these be conducted by ICASA.