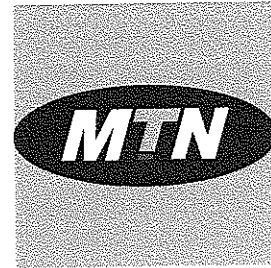


MOBILE TELEPHONE NETWORKS (PTY) LTD
Head Office: 216 Fourteenth Ave Fairland 2195
Private Bag 9955 Cresta 2118 South Africa
Tel +2711 912 3000 Fax +2711 912 3001 <http://www.mtn.co.za>



29 October 2007

The Project Manager
Telecommunications Policy
Department of Communications
Private Bag X860
Pretoria
0001

Facsimile: 012 427 8059
Email: ecaamendment@doc.gov.za

Dear Madam/Sir,

RE: DRAFT REGULATION IN TERMS OF THE ELECTRONIC COMMUNICATIONS ACT AMENDMENT BILL

MTN welcomes the opportunity to comment on the above draft regulations as published in the Government Gazette Notice no. 1200 of 2007

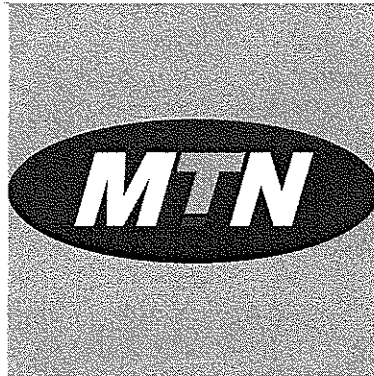
We sincerely thank you for the opportunity to submit our comments and confirm our participation in the public hearing scheduled for 31 October 2007

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Graham de Vries', written in a cursive style.

GRAHAM DE VRIES
GENERAL MANAGER: REGULATORY AFFAIRS
MTN SA

Directors PL Heinemann (Chairman) TP Lowry Managing Director Z Bulbulia**
ZNA Cindi PF Nhleko SL Botha RS Dabengwa RD Nisbet PD Norman R Gasant N Molope I Mkhize AJTaylor
*Company Secretary SB Mtshali * Executive*
Reg Number: 1993/001436/07
Vat Reg. No. 4630140434



**MTN (PTY) LTD'S SUBMISSION ON THE
ECA AMENDMENT BILL, [B38-2007]
PUBLISHED ON 17 SEPTEMBER 2007 BY THE
DEPARTMENT OF COMMUNICATIONS**

1. INTRODUCTION

MTN would like to take this opportunity to express its gratitude to the Parliamentary Committee on Communications and to the Department of Communications ("the DOC") for affording us an opportunity to make comments on the Electronic Communications Act 36 of 2005 ("the ECA") Amendment Bill ("the Bill") as published in Government Gazette 30307 of 17 September 2007.

MTN would appreciate an opportunity to make an oral presentation at the public hearings of the Communications Portfolio Committee to be held on 31 October 2007.

2. THE OBJECTIVE OF THE ECA

MTN appreciates the need for Government to provide reliable, affordable and ubiquitous telecommunications infrastructure with a view to further promote the objects of the ECA which include the following, amongst others:

- *to promote the universal provision of electronic communications networks and electronic communications services and connectivity for all – section 2(c);*
- *to encourage investment and innovation in the communications sector - section 2 (d);*
- *to promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services - section 2 (g);*
- *to ensure the provision of a variety of quality electronic communications services at reasonable prices - section 2 (m).*

However, there are some issues in this regard which we wish to raise. The Bill is clearly a continuation of the process of establishing a state owned enterprise ("the Infraco") in terms of the Broadband Infraco Bill ("the Infraco Bill"). It therefore seems to be a vehicle that Government wishes to use for the purpose of licensing the Infraco. However, by the use of a broadly stated purpose and undefined reference in the object of the Bill, which states: "*for Government to make strategic interventions on infrastructure investments whenever it deems necessary*", the Bill therefore goes beyond merely providing a licensing solution that is specific to the Infraco as originally envisaged by the Infraco Bill.

3. THE ADEQUACY OF THE LICENSING PROVISIONS OF THE ECA

MTN submits that it does not seem possible to grant a licence in the area of telecommunications other than via the process already identified in the ECA. This process is captured within sections 3 and 5 of the ECA.

MINISTERIAL POWERS

The role of the Minister in terms of issuing policy directives is clearly stated in the ECA. Section 3 (1) states that the *Minister may make policies on matters of national policy applicable to the ICT sector, consistent with the objects of this Act and of the related legislation in relation to, among others.*

In terms of section 3(2): *"The Minister may, subject to subsections (3) and (5) issue to the Authority policy directions consistent with the objects of this Act and of the related legislation in relation to—*

- (a) ...;
- (b) *the determination of priorities for the development of electronic communications networks and electronic communications services or any other service contemplated in Chapter 3;*
- (c) *the consideration of any matter within the Authority's jurisdiction reasonably placed before it by the Minister for urgent consideration.*

It is however clear from Section 3(3) that: *"No policy made by the Minister in terms of subsection (1) or policy direction issued by the Minister in terms of subsection (2) may be made or issued regarding the granting, amendment, transfer, renewal, suspension or revocation of a licence, except as permitted in terms of this Act.*

MTN submits that the Bill seeks to legitimize the Infraco licence by amending the incorrect section of the ECA. It is not section 5 of the ECA that requires amendment but rather section 3 thereof. This is because such licensing process will in fact be based on a licence grant by the Minister.

EQUALITY IN THE APPLICATION OF THE BILL

The provisions of the Bill will grant the Infraco rights and privileges in excess and different to those held by other licensees in terms of the ECA. Therefore Infraco will not be subject to the same conditions applicable to other licence holders. It is therefore submitted that such preferential treatment may be seen to be unconstitutional as the other licence holders and prospective licence holders will not to be treated equally to Infraco.

In its submissions of 11 June 2007 and 31 July 2007, MTN raised certain legal concerns relating to the licensing or deemed licensing of Infraco within the context of the new licensing regime enunciated by the ECA. Accordingly MTN submits that such licensing will not *promote an environment of open, fair and non-discriminatory access* for licensing in terms of the ECA.

However, taking into account the Governments arguments for the necessity of the Infraco licence and the requisite urgency for the Infraco to establish technological infrastructure for the country, MTN submits that it would be probably unlawful to grant a licence in the area of telecommunications other than via the process already identified in the ECA. Bearing this in mind it is not appropriate that such licencing process be captured within the ambit of section 5 of the ECA.

4. CONCLUSION

We reiterate that MTN supports government's policy to promote access to ubiquitous, affordable and reliable ICT infrastructure of very high quality. MTN understands and agrees with government's stated policy of bridging the digital divide by ensuring that services are extended to underserved areas without sacrificing advances made in business to ensure that South Africa remains technologically relevant in the global economy.

MTN recommends that the DoC reconsider the decision to amend the ECA since the ECA already provides adequate provisions to effect the objects of the Act, including the licensing of public entities. In this regard specific attention is once more drawn to the objects of the ECA and particularly to sections 3 (1), 3 (2), 5 (1) and 5 (2).

MTN is of the view that whilst the ECA empowers the Minister to issue any policy directive to advance the objects of the ECA, the broad wording of the Bill negates the spirit of the ECA and the process of liberalisation. However, should it be absolutely necessary to amend the Act, then such amendment should relate to section 3 and not section 5 thereof. It is therefore our recommendation that the INFRACO be specifically mentioned by name and described in section 3 of the ECA, being the most appropriate provision to affect such special licence.