



Chief: Regulatory and Corporate Affairs

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**01 March 2013**

Mr A Hermans  
National Parliament of The Republic of South Africa  
Portfolio Committee on Trade and Industry  
Parliament Street  
Cape Town

Attention: Mr A Hermans  
Telephone: 021 403 3776  
Email: [ahermans@parliament.gov.za](mailto:ahermans@parliament.gov.za)

Dear Sir,

**Re: Telkom Submission – To the Department of Trade and Industry (dti) in Response to the Broad-Based Black Economic Empowerment Amendment Bill [B42-2012] (“B-BBEE Bill, 2012”) as published in Government Gazette no. 35907 of 23 November 2012**

The above matter refers.

Telkom would like to thank the Department of Trade and Industry (dti) for the opportunity to take part in the public process on the above B-BBEE Amendment Bill. The company trusts that the attached comments will assist with the process going forward.

Telkom would like to take part in any public hearings and / or oral presentations that may be called by the dti on this subject.

Telkom’s comments will be submitted by both facsimile transmissions as well as via e-mail to the relevant numbers and addresses provided in the Gazette.

Yours sincerely

A handwritten signature in black ink, appearing to read "Ouma Rasethaba", written over a horizontal line.

**Adv Ouma Rasethaba**  
Chief of Regulatory and Corporate Affairs



## Telkom's comments on the Broad-Based Black Economic Empowerment Amendment Bill

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**Submission by Telkom SA SOC Limited ("Telkom") on the Broad-Based Black Economic Empowerment Amendment Bill [B42-2012] ("B-BBEE Bill, 2012") as published in Government Gazette no. 35907 of 23 November 2012**

### INTRODUCTION

In November 2012 the Department of Trade and Industry released the Broad-Based Black Economic Empowerment (B-BBEE) Amendment Bill for public comment and input by 01 March 2013.

The Amendment Bill seeks to align the B-BBEE Act with other legislation and the codes of good practice, establish the B-BBEE Commission, deal with non-compliance and circumvention by introducing offences and penalties and to promote transformation in State Owned Entities.

Telkom appreciates the opportunity to provide its written comments on the proposed Broad-Based Black Economic Empowerment Amendment Bill [B42-2012] ("B-BBEE Bill, 2012") as introduced in the National Assembly of the Parliament of the Republic of South Africa in terms of section 75 of the Constitution of the Republic of South Africa. The explanatory summary of the B-BBEE Bill, 2012 has been published in Government Gazette No. 35907 of 23 November 2012.

Telkom trusts that its submission will prove useful to the Department of Trade and Industry's ("the dti") proposed amendment of the Broad-Based Black Economic Empowerment Act, 53 of 2003 ("B-BBEE Act").

Telkom requests an opportunity to make an oral presentation on its written comments and representations contained its submission during the public hearings scheduled for 3, 8, 13, 15 and 20 March 2013 in Parliament.

### GENERAL COMMENTS

In general, Telkom welcomes the dti's amendment of the B-BBEE Act in particular in so far as the amendment, among others, seeks to align B-BBEE Act with other legislation that impacts on the B-BBEE and with the codes of good practice. Such alignment once achieved, will help to ensure that there is a degree of certainty on various critical concepts in this area thus leading to the attainment of the desired objectives behind the enactment of the B-BBEE Act.

Whilst Telkom welcomes this amendment of the B-BBEE Act, Telkom would urge the dti to ensure that the concepts and definitions embodied in the amendment are properly explained and uniformly aligned with those that exist elsewhere in other legislation so that no wheel is reinvented as that can lead to uncertainty.



Lastly, Telkom appreciates the establishment of the Broad-Based Black Economic Empowerment Commission through this amendment. However, its status seems vague even though its proposed functions seem fairly fine and consistent with most attributes of a regulatory entity. There is a need to elaborate on the status of the Commission proposed to be established.

## TELKOM'S SPECIFIC COMMENTS ON THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT AMENDMENT BILL

*[Note: The bold italicised highlighted text below is the exact text of the Regulation. Telkom's comments are not highlighted]*

***1b. by the substitution for the definition of "black people" of the following definition: " 'black people' [is a generic term which] means Africans, Coloureds, and Indians— (a) who are citizens of the Republic of South Africa by birth or descent; or (b) who became citizens of the Republic of South Africa by naturalisation— (i) before 27 April 1994; or (ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but were precluded from doing so by Apartheid policies;'***

### Telkom feedback:

There is no clarity on how are these individuals identified and what form of documentation would prove qualification for naturalisation and subsequent naturalisation.

***1c. by the substitution for the definition of "broad based black economic empowerment" of the following definition: "broad based black economic empowerment" means the viable economic empowerment of all black people, [including] in particular women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies..***

### Telkom feedback:

Provide a definition of workers as defined in the ambit of the Bill? Clarify which areas are defined as a rural area e.g. townships such as Soweto or villages such as Mathibestad or farm areas. The definition should refer to viable and sustainable economic empowerment of all black people.

***1c (d) achieving equitable representation in all occupational categories and levels in the workforce***

### Telkom feedback:

It should be clear whether there will be specific measurements that address this or will this be a mere principle that aims to align B-BBEE with the Employment Equity Act





**1e by the insertion after the definition of "Council " of the following definitions:  
"Department' means the Department of Trade and Industry;**

**'fronting practice' means a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act, including but**

Telkom feedback:

It is suggested that the word 'authentic' be inserted before the word "achievement" in the second sentence on the definition of the term 'fronting practice'.

**1e (a). In terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise**

Telkom feedback:

Clarify how will these be measured and investigated.

**Amendment of section 2 of Act 53 of 2003**

**2b (g) promoting access to finance for black [economic empowerment] start-ups, micro and medium enterprises and black entrepreneurs, including in the informal business sector**

Telkom feedback:

Clarify if this is limited to effective black owned and managed or all black owned and managed companies.

This limits the support only to financial independence and not operational independence. Please clarify whether operational independence is a priority and will be offered as support to black start-ups, micro and medium enterprise and black entrepreneurs.

**2c (h) increasing effective black owned and managed enterprises, including SMMEs, and their access to financial and non-financial support**

Telkom feedback:

Government should provide case studies on how the implementation can be done by other organisations

Information on existing programmes that the private sector can collaborate with government on should be communicated.



**Amendment of section 9 of Act 53 of 2003**

**5 (b) by the insertion in subsection (1) after paragraph (e) of the following paragraph:**

***“(eA) the interpretation and definition of, and indicators to measure, local production and content; and”;***

Telkom feedback:

It is not clear why the proposed insertion is not made **“f”** and the old “f” of B-BBEE Act simple made “G”.

**Amendment of section 10 of Act 53 of 2003**

**10 (1) every organ of state and public entity must take into account as far as is reasonably possible and apply any relevant code of good practice issued in terms of this Act**

Telkom feedback:

Specify the exemption of the private sector from this clause and its voluntary or mandatory participation.

**10 (1e) determining criteria for the awarding of incentives, grants, and investment schemes in support of broad-based black economic empowerment**

Telkom feedback:

Please clarify if this speaks specifically to enterprise development

**(3) Enterprises operating in a sector in respect of which the Minister has issued a sector code of good practice in terms of section 9, must report annually on their compliance with broad-based black economic empowerment to the sector council which may have been established for that sector.”**

Telkom feedback:

Clarity is sought on whether it is mandatory to submit a report if there is no sector council in place and if so, clarity on the reporting body.

**Amendment of section 11 of Act 53 of 2003**

**7 (2a) a strategy in terms of this section must -**

***Provide for an integrated, co-ordinated and uniform approach to black economic empowerment by all organs of state, public entities, the private sector, non-governmental organisations, local communities and other stakeholders***



Telkom feedback:

Please indicated the applicability of the strategy to entities i.e. public and/or private

**7 (2b) develop a plan for financing broad-based black economic empowerment, including the creation of incentive schemes to support effective black owned and managed enterprises**

Telkom feedback:

Telkom acknowledges this notion as it promotes transformation as opposed to compliance

**Insertion of sections 13A, 13B, 13C, 13D, 13E, 13F, 13G, 13H, 13I, 13J, 13K, 13L, 13M, 13N, 13O and 13P in Act 53 of 2003**

**Cancellation of contract or authorisation -**

**13A. Any contract or authorisation awarded on account of false information by or on behalf of an enterprise in respect of its B-BBEE status may be cancelled at the sole discretion of the organ of state or public entity without prejudice to any remedies that the organ of state or public entity may have**

Telkom feedback:

Specify the applicability of this clause to private sector companies for use in policies and strategies on B-BBEE for any breach of contract of the same nature.

**13B Establishment and status of Broad-Based Black Economic Empowerment Commission**

**(1) The Broad-Based Black Economic Empowerment Commission is hereby established as a trading entity within the administration of the Department.**

Telkom feedback:

It is not clear why the proposed Broad-Based Black Economic Empowerment Commission is sought to be established as a trading entity. Also, there is no definition of what trading entity means in the context of the proposed Commission.

Telkom's understanding, especially taking into account the proposed functions of the Commission at 13F, is that the proposed Commission should ideally be a government or a state agency that is essentially charged to investigate and monitor compliance with the B-BBEE legislation and meting out prescribed penalties whenever instances of established transgression of the law occur.

Telkom urges the dti to revisit the status it wishes to accord upon the proposed Commission.





**(2) The Commission**

**(3b) The Commission - must be impartial and perform its functions without fear, favour, or prejudice**

Telkom feedback:

Explain how impartiality will be determined. Will impartiality be achieved through the composition of the council?

**(4) The Minister may issue directives of a general nature, which are consistent with this Act, to the Commission concerning the performance of its functions and the Commission must comply with any such directive.**

Telkom feedback:

Telkom holds the view that this clause could cause possible unnecessary tension between the proposed Commission and the Ministry.

It is advised that it should be reviewed.

Ideally, the Minister can consult and ask the proposed Commission to carry out any work falling under the B-BBEE legislation as contemplated under the B-BBEE Acts.

One form of affirming or giving teeth to this arrangement could be giving an option of issuing regulations to the Minister for this purpose.

**(5) each organ of state must assist the Commission to exercise its authority and perform its functions effectively**

Telkom feedback:

This proposed clause is drafted in a manner that could easily be unattainable and can result in some entities not being able to comply with it.

It is suggested that it should be re-drafted thus:

"Each organ of state is under a duty to, as far as reasonable possible, to assist the Commission to...."

**13C Appointment of Commissioner**

**(2) The Minister may re-appoint a person as Commissioner at the expiry of that person's term of office**

Telkom feedback:

It is suggested that the re-appointment should be limited only to one more term and not beyond that except in exceptional circumstances where a suitable candidate cannot be found.



### **13D Appointment of Deputy Commissioner and staff of Commission**

**(1) The Commissioner, in consultation with the Minister, must appoint a person with suitable qualifications and experience to be the Deputy Commissioner for a term of five years.**

Telkom feedback:

Should the Deputy Commissioner not have the same term as the Commissioner i.e. not more than 5 years?

The issue of the term of re-appointment of the Deputy Commissioner is not provided for here. It is suggested that it should be provided for along the similar suggestions made in respect of re-appointment of the Commissioner above, namely re-appointment but for one more term and no longer except if no suitable candidate is found.

**(4) The Commissioner may—**

Telkom feedback:

Rephrase the statement to read "The Deputy Commissioner may—"

### **13E Finances of Commission**

**(b) money received from any other source.**

Telkom feedback:

The "other sources" may pose a conflict of interest and jeopardise the impartiality of the Commission.

It is suggested that this clause should be revised to read:

"money received from any other legitimate source disclosure of which should be made when so required."

Further, in relation to 13E as a whole, it may be good to provide for the channels of reporting the proposed Commission. It may not be superfluous to add that the proposed Commission would report and be accountable to parliament as regards its finances and to the minister as regards its operations, if that is what is envisaged.

### **13F Functions of B-BBEE Commission**

**(1a) the functions of the commission are -  
To oversee, supervise and promote adherence with this Act in the interest of the public**

Telkom feedback:

Provide clarity on what measures will be taken and how this will be implemented and achieved

**(1e) the commission must promote advocacy, access to opportunities and educational programmes and initiatives of B-BBEE**





Telkom feedback:

Elaborate on the channels in which these opportunities will be made accessible i.e. through government or the private sector. Explain how this will be achieved and indicate who they will be directed at i.e. companies or the general public.

***(f) to maintain a registry of major B-BBEE transactions, above a threshold determined by the minister***

Telkom feedback:

This information should be made available to the public. The database should be updated with progress on the transactions. Indicates what the basis of the thresholds will be.

The Department of Trade and Industry should consider working in collaboration with the Department of Labour to integrate reporting requirements to minimise the reporting requirements for small businesses.

***(g) To receive and analyse reports as prescribed concerning B-BBEE compliance from organs of state, public entities and private sector enterprises***

Telkom feedback:

Will the commission publish reports similar to the CEE report on employment equity which reports on progress on transformation to the general public?

***(h) to promote good governance and accountability by creating an effective and efficient environment for the promotion and implementation of B-BBEE***

Telkom feedback:

Indicate how this will be achieved

***(ii) Issuing non-binding opinions on the interpretation of any provision of this Act; or***

Telkom feedback:

All interpretations should be considered for released through the Department.

### **13G Reporting**

Telkom feedback:

A national report on the status and progress on B-BBEE should be published similar to that published by the Commission for Employment Equity.

***(2) All public companies listed on the Johannesburg Stock Exchange must provide to the Commission—***

***(a) in such manner as may be prescribed, a report on their compliance with broad-based black economic empowerment; and***



Telkom feedback:

The prescribed manner of reporting should not be vastly different from the scorecard requirements of the generic or sector codes.

**13I Specialist committees**

**5 (b) have appropriate expertise or experience; and**

Telkom feedback:

Relevant qualification should also be part of the criteria for the specialist committee member.

**(8) A member of a specialist committee who has any personal or financial interest in any matter on which the committee gives advice, must disclose that interest and withdraw from the proceedings of the specialist committee when that matter is discussed.**

Telkom feedback:

Specialist committee members should not be allowed to be party to any deals that may constitute a conflict of interest after they have been appointed as members.

Further, in relation to 13E as a whole, it would be helpful to have an indication of when the Minister can invoke the provisions of this proposed clause.

**13J Investigation by Commission**

**(1) Subject to the provisions of this Act, the Commission has the power, on its own initiative or on receipt of a complaint in the prescribed form, to investigate any B-BBEE transaction which exceeds a value determined from time to time by the Minister**

Telkom feedback:

Clarity on how the value of B-BBEE transactions will be determined i.e. Rand value or percentages.

Indicate the purpose of the investigation and what measures will follow the investigation and the intended use of the information.

**(7) The Commission may publish any finding or recommendation it has made in respect of any investigation which it had conducted in such manner as it may deem fit.**

Telkom feedback:

What media will be used to publish the results of the investigation? Will the organisation being investigated be given reasonable notification prior to publishing the results? What level of detail will be published on the investigated matter?

Telkom SA SOC Limited: Reg no 1991/005476/30

Directors: JA Mabuza (Chairman), NT Moholi (Group Chief Executive Officer), JH Schindehütte (Chief Financial Officer), S Botha, B du Plessis, Dr. CA Fynn, N Kapila\*, I Kgaboesele, K Kweyama, L Maasdorp, J Molobela, K Mzondeki, F Petersen, LL Von Zeuner.

Act: Company Secretary: A Dille

\*India



### **13K Summonses**

***(b) may retain any such book, document or other object for examination for a period not exceeding two months or such longer period as the court on good cause shown, may allow.***

Telkom feedback:

The statement should read “may retain a copy of any such book, document or other object for examination for a period not exceeding two months or such longer period as the court on good cause shown, may allow.”

### **13O Other offences and penalties**

***(1c) any person is guilty of an offence is that person knowingly - Provides false information or misrepresents information relevant to assessing the B-BBEE status of an enterprise to any organ of state or public entity***

Telkom feedback:

Clarify where the accountability lies i.e. with the company or individual or both.

***(3a) any person convicted of an offence in terms of this Act, is liable - In case of a contravention of a sub-section (1), to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and imprisonment or, if the convicted person is not a natural person to a fine not exceeding 10 per cent of its annual turnover; or***

Telkom feedback:

Indicate the turnover that will be used as a base for a fine i.e. latest audited turnover or at a point in time.

## **CONCLUDING REMARKS**

Telkom SA SOC Limited acknowledges the proposed amendments to the B-BBEE Act and notes the intentions set to introduce a commission which will be responsible for monitoring and evaluating the status of B-BBEE in South Africa as this will assist with the monitoring of progress. Telkom also acknowledges the alignment of the B-BBEE Act with the B-BBEE Amended Codes and other relevant legislation and the introduction of penalties for offences that seek to undermine the principles and objectives of the Act. Telkom SA SOC Limited supports this amendment and urges the dti to consider the status it seeks to accord to the proposed Commission.

Telkom SA SOC Limited supports the national transformation agenda and is committed to assisting the government to achieve its transformation objectives and targets where possible.

## **END OF SUBMISSION**

Telkom SA SOC Limited: Reg no 1991/005476/30

Directors: JA Mabuza (Chairman), NT Moholi (Group Chief Executive Officer), JH Schindehütte (Chief Financial Officer), S Botha, B du Plessis, Dr. CA Fynn, N Kapila\*, I Kgaboesele, K Kweyama, L Maasdorp, J Molobela, K Mzondeki, F Petersen, LL Von Zeuner.

Act: Company Secretary: A Ditle

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