

## 15. Concluding Questionnaire: US/UA Model related issues.

This section covers the list of questions raised in section 15 of the Discussion Document. The responses are premised on the rationale for the model that Telkom prefers, Model 4 (Pay or Play). The responses are also based on the applicable legislative and regulatory framework as at the date of publication of the Discussion Document.

### 15.1 Legislative and Regulatory Issues

#### 15.1.1 *Must licensees continue to carry USAOs?*

- **NO**, licensees should not continue to carry USAOs in their current form. Telkom would like to urge the Authority to approach and revise existing USAO's in the following manner:
  - All obligations, existing and new, should be based on a USAO regulatory framework that is guided by the views and principles as articulated in Section 5 of this document, as well as the suggested "Gaps Model" as substantiated in Section 6 of this document.
  - Obligations that have already been fulfilled should be reviewed on a case by case basis and be aligned with the new USAO regulatory framework;
  - Outstanding obligations that have not been fulfilled, where a licensee have already enjoyed the benefits associated with such obligations, should also be reviewed on a case by case basis and be aligned with the new USAO regulatory framework.
- Broadcasters should also carry USAOs, provided these are relevant and applicable to the scopes of their licenses.

#### 15.1.2 *If so:-*

##### 15.1.2.1 *Which factors/considerations must be taken into account in determining whether a particular licensee or category of licence must carry USAOs or not?*

- Telkom recommends that rollout USAOs should only be imposed in Zone 3, and principally be carried by ECNS/ECS Spectrum Licensees;
- Implemented USAOs that a licensee may still be maintaining should be taken into account,
- The type and the scope of the license should be considered;
- USAOs should be proportional to the targeted licensee's network coverage and size of business;
- The cost-benefit analysis of the impact that such USAOs will have on the licensee's business.

15.1.2.2 Which licensees (electronic communications network service ("ECNS"), electronic communications service ("ECS") and / or Broadcasting licensees (NBS") must carry the USAOs, taking into account the answer to 12.2.2.2)?

- All licensees (ECNS, ECS, and Broadcasters) should carry USAOs, in line with the considerations articulated under 15.1.1 above.
- In Zone 2 of the Access Gap (Sustainability Frontier), where Smart Subsidies should be employed, broadened tendering processes should accommodate Class/Emerging ECS/ECNS licensees (notwithstanding possible partnership with well established licensees where such a need arises),
- In Zone 3 of the Access Gap (Universal Service Frontier), where ongoing subsidies will be required, USAOs should principally be imposed on ECNS/ECS Spectrum Licensees (notwithstanding additional subsidies from USAAF, or even from government, where such a need arises, and not ruling out possible partnership with Class/Emerging ECS/ECNS licensees where such opportunities exist),

15.1.2.3 Should all licensees or some continue to carry USAOs (ECNS, ECS and BS) or which, if not all, must carry USAOs? Please indicate what the role of licensees no longer carrying USAOs) should be towards the goal of achieving US/UA.

- All licensees should continue to carry USAOs. However, obligations that have already been fulfilled should be reviewed on a case by case basis (type and extent of obligation per licensee) and be aligned to the contemplated regulatory framework for USAOs;
- Outstanding obligations that have not been fulfilled, where a licensee has already enjoyed the benefits associated with such obligations (e.g. 1800Mhz Spectrum obligations for MCO's), should also be reviewed on a case by case basis and be aligned to the contemplated regulatory framework for USAOs);
- Those licensees who will longer carry outstanding USAOs should be made to trade such obligations with commensurable contributions towards the USAAF (provided such obligations were not unduly burdensome to the licensee and all things being equal, such obligations should have been fulfilled). Again each case should be reviewed on its merits.

15.1.2.4 *Do you submit that licensees falling within the same category of a licence must carry the same obligations, including similarity in terms of nature and quantity?*

- **Not necessarily.** All ECS and ECNS licensees falling within the same category should not necessarily carry the same obligations (in terms of scope and quantity) as instead obligations should be proportional to the size of the licensee's business i.e. revenues.
- Obligations should also be proportional to the commercial value of the scarce resources allocated /assigned to licensees i.e. the more valuable the spectrum the more the obligations. It is however envisaged that those spectrum licensees within the same band; will per MHz have the same effective obligations.

15.1.3 *What approach should be carried in respect of USAOs obligations imposed under the Telecommunications Act which were not carried over into the converted licences issued under the ECA?*

All obligations imposed under the Telecommunications Act and not carried over into the converted licences issued under the ECA should remain outstanding. However, as per paragraph 15.1.2.3:

- Outstanding obligations that have not been fulfilled, where a licensee has already enjoyed the benefits associated with such obligations (e.g. 1800Mhz Spectrum obligations for MCO's), should also be reviewed on a case by case basis and aligned to the contemplated regulatory framework for USAOs).
- Those licensees who will longer carry outstanding USAOs should be made to trade such obligations with commensurable contributions towards the USAAF (provided such obligations were not unduly burdensome to the licensee and all things being equal, such obligations should have been fulfilled). Again each case should be reviewed on its merits.

15.1.4 *What kind of obligations must be imposed on the licensees that you submit need to carry USAOs?*

- Obligations imposed on licensees must be based on a comprehensive "needs analysis" study for ICT services (voice, broadband internet, etc) in the targeted underserved areas and such obligations should be in line with the type and scope of their respective licenses, proportional to the size of the licensee's business and the licensee's network coverage.

15.1.5 *Would you submit that there is currently a clear or sufficient link between USAOs and the processes undertaken by USAASA and the MDDA in terms of the ECA?*

- Sections 82, 87, 88, 89 and 90 from Chapter 14 of the ECA provides for a clear link between USAOs and the processes undertaken by USAASA (and the MDDA),

notwithstanding the provision that it is the Authority that should define what constitutes under-serviced areas [section 88(2)] and thus enable the Agency, in consultation with the Authority, to identify the targeted under-serviced areas where project grants will be awarded.

- These sections of the Act are not clear (and thus not sufficient) with regard to the processes that USAASA (and the MDDA) have to undertake in order to provide assistance (subsidies and/or grants) to licensees for the fulfilment of their USAOs where such obligations are unduly burdensome to the licensee.

*15.1.5.1 If not so what would you submit has to be done to improve the harmonization of those processes towards the achievement of the goal of USAOs?*

- The Authority and the Agency should accelerate clarity on those provisions of the Act where such clarity is still outstanding – and this includes:
  - The definition for underserved areas,
  - The official list of targeted underserved areas (in line with section 90 (2) of the Act.
- Chapter 14 of the Act should be amended to specifically provide for assistance to licensees where obligations are unduly burdensome to fulfil (Zone 2 of the Gap Model) and to maintain (Zone 3 of the Gap Model). To this extent USAASA / ICASA processes should make provision for:
  - Unduly burdensome USAOs to be implemented with assistance from the USAAF (this should apply to fulfilled, outstanding and new obligations),
  - Costs of fulfilling USAOs to be offset against the licensee's contribution towards USAAF.

*15.1.6 What should happen to the obligations which were not completed or implemented at the time of the conclusion of the licence conversion or were not carried over into the converted licences and those that were carried-over into the converted licences, where applicable, and new ones which were imposed upon conversion of the licence, where applicable)?*

- Refer to 15.1.3 above.

*15.1.6.1 Would you submit that licensees should carry an obligation to maintain the obligations that have already been implemented?*

**Legally NO**, licensees should not carry an outright obligation to maintain the obligations that have already been implemented, however technically licensees may have to continue to serve customers for a defined transitional period so as not to disenfranchise customers.

- There may additionally also be a scenario where licensees consent to retain obligations if traded off against other regulatory costs
- Obligations that have already been implemented should be reviewed in line with the new regulatory framework for USAOs (where such obligations are still relevant and necessary).
- Some of these obligations were in line with the license conditions of the old licensing regime, and are now either irrelevant or unduly burdensome to some of the licensees. Telkom in particular has to write of R700m per annum to maintain the public payphones obligation in circumstances that are markedly different from those under which the obligation was imposed, a situation that cannot be sustained forever.
- Where obligations that have already been implemented have to be maintained and where such obligations are unduly burdensome for the licensees, then appropriate subsidies should be arranged from the USAAF. Alternatively, related costs should be offset against the contributions to the USAAF.

#### *15.1.7 Must licensees continue to make a contribution into the USAAF*

**YES**, licensees should continue to make contributions to the USAAF, notwithstanding administrative challenges posed by legislation, to the extent that all levies are paid into the fund and transferred to the national revenue fund, thus requiring parliamentary approval for disbursement (section 87.2 of the ECA). Particular care should be taken that Broadcasters effectively contribute to the USAAF

#### *15.1.8*

*15.1.8.1 if so taking into account your answers above on whether licensees should carry or not carry USAOs, would you submit that the existing amount of contribution is or would be sufficient?*

Taking into account the new technology neutral licensing regime, the February 2010 Ministerial Determinations on Universal Service and Access, the current market forces, etc – it is Telkom’s view that without a proper Quantification Study, based on adequately defined and targeted underserved areas, it cannot be submitted as to whether the existing amount of contribution (0.2% of annual turnover) is or would be sufficient.

*15.1.8.2 If not so from which sources do you think the USAAF should be funded?*

Notwithstanding the view that a proper Quantification Study is imperative, Telkom is of the view that government subsidies should be considered to combat the “Full Market Access Gap”. Alternatively, effective pricing schemes that will incentivise uptake and also ensure sustainment of services should be explored (social discounting, price discrimination and de-averaged pricing are typical examples).

15.1.8.3 *If you submit licensees should not continue to carry USAOs, what would you submit the role of licensees should be towards contribution to the goal of US/UA?*

Not Applicable.

15.1.8.4 *If you submit that licensees should continue to carry USAOs, would you submit that such obligations must be adjusted up in view of the relief from contribution into the USAAF?*

**NO**, obligations should not be adjusted without a proper Quantification Study.

15.1.9 *Which concepts or terms used in the ECA that have a bearing on USAOs and/or the USAAF must be defined or amended? You are requested to refer to difficulties encountered in implementing or interpreting such terms and/or concepts, if any.*

- See response to question 15.1.5 above.
- In addition Telkom is cognisant of the fact that there are no mechanisms in the EC Act which allow:
  - USF funds to be used in sustaining existing USO's which are unduly burdensome e.g. payphones
  - USF funds to supplement existing USO's where operators only cover a portion of the service fee e.g. e-rate
  - Subsidies where operators approach USAASA with a proposal to service an under serviced area

To these ends the provisions of Section 88 would require amendment.

Telkom notes that Section 89 does not allow for fees to be paid to the USAAF to be offset against any other fees or obligations. Telkom has hitherto expressed that this should be the case and hence proposes that Section 89 be amended accordingly.

15.1.10 *Which method has to be used in defining or amending such terms and/or concepts, including whether in the ECA itself, by ICASA, USAASA or any other relevant body?*

See response to question 15.1.5 and 15.1.9 above.

## 15.2 Implementation Issues

15.2.1 *Would you submit that the current USAOs' implementation system needs to be maintained (in the absence of a move towards a new model).*

**NO**, the current system cannot be maintained.

- The current implementation system has been overtaken by market forces (convergence, competition, technology neutral licensing regime, new set of socio-economic considerations, etc.) and thus cannot be maintained;
- The initial processes for the coordination and actual roll out of USAOs were lacking in a number of areas, including the targeting of duly defined underserved areas, the disbursement of the USF, as well as the proper monitoring and evaluation mechanisms.

15.2.2 *If so are there any areas that need improvement in the:*

15.2.2.1 *determination of USAOs?*

The determination of USAOs needs to be informed by:

- A clear, discernible policy on Universal Service and Universal Access,
- A strategic / tactical approach to address the Market Access Gap,
- A scientific quantification study that determines the extent of the Market Access Gap (demand), the capacity and disposable resources to address the gap (supply), as well as the costs for the implementation of contemplated USAOs.
- Current market forces, taking into account the new licensing regime, as well as the mobile and broadband internet revolution.

15.2.2.2 *coordination of USAOs?*

Chapter 14 of the ECA fairly speaks to the current institutional arrangements and the role of USAASA in coordinating USAOs, going forward legislative and regulatory frameworks needs to address:

- The lack of overarching ownership for the coordination of USAOs, (currently USAASA does its bit, then the ministry, then the Authority – and failure to deliver, by any of the institutions, stalls the entire process. A case in point is the lack of determination of underserved areas).
- The need for a much closer working relationship between the Authority and the Agency, more so given the proposed Model 4 (and the approach of tendering processes for Zone 2 of the Market Access Gap and imposed USAOs for Zone 3 for of the Market Access Gap).

- The coordination of USAOs (between the Ministry and the Agency), with other departments of government, who are targeted beneficiaries of such obligations, can be a lot better – notwithstanding the unforeseen challenges that operators are expected to tackle in the process of fulfilling these obligations (in the case of e-rate for example, challenges include incorrect details of schools, lack of electricity at schools, lack of computers at schools targeted for e-rate, schools not affording to pay the remaining 50% of their e-rate bill, etc). Other operators, whose obligations include hospitals and clinics, are also experiencing similar challenges)

#### 15.2.2.3 *monitoring and evaluation of USAOs?*

A clear and explicit legislative and regulatory framework to ensure the monitoring and evaluation of USAOs will require:

- A clear, discernible policy on Universal Service and Universal Access;
- A scientific quantification study to address the Market Access Gap;
- A clear regulatory framework for the monitoring and evaluation of USAOs;
- Overarching, one stop ownership for the coordination, monitoring and evaluation of USAOs.

#### 15.2.3 *If not so please identify the shortcomings and/or problems associated with the current system.*

See response to question 15.2.2 above.

#### 15.2.4 *As stated in the ECA, should only the ECNS licensees be eligible for the competitive tendering process for US and UA projects?*

**NO**, both ECNS and ECS licensees should be eligible.

15.2.4.1 *If yes, state why* – Not applicable.

15.2.4.2 *If no:-*

*(a) should any other licensees who carry USAOs also be considered?*

All ECNS and ECS licensees should be considered, for as long as they contribute to the USAAF and they are in good standing with their contributions.

*(b) should this be broadened to include other non-licensed qualified contenders as a way of opening up the market further?*

The Altech case resulted in more than 400 ECNS and ECS licensees being granted in January 2009. Furthermore, aspiring licensees can still file their applications with the Authority. Therefore there is no need to include non-licensed contenders in the tendering processes (for the construction, operation and maintenance of USAOs as outlined in Section 9 (1) of the ECA).

### 15.3 Policy Issues

15.3.1 *As regards the recommended model, can it be implemented under the existing provisions of the ECA?*

**NO**, Model 4 cannot be implemented under the existing provisions.

15.3.1.1 *If so, please provide full details – Not Applicable.*

15.3.1.2 *If not so, please indicate whether a legislative amendment would be required and identify provisions of the ECA that need to be amended and/or new provisions that need to be introduced*

Notwithstanding the provisions of Sections 8 (2) (g) and (4), as well as Section 10 (g) of the ECA with regard to Universal Service and Universal Access, the following amendments will be required for the implementation of Model 4:

- Section 88 of the ECA may need to be amended to allow the Agency to dispense funds in a broader manner. This would include:
  - i. Catering for licensees to approach USAASA with proposals, as per Section 3(1)(e) of the ECA towards the construction of services and networks in under serviced areas
  - ii. Catering for licensees where licensees continue to provide services in under serviced areas, presuming such obligations are unduly burdensome. This would include cases where licences have an obligation, as well as cases where licensees do not have an obligation however in agreement with USAASA and ICASA continue to provide such services in an economically efficient manner
  - iii. Catering for licensees who provide the minimum prescribed set of basic voice and broadband service in specialised cases such as the Astronomy Advantage Areas (a.k.a. “black-out zones”) as defined in the Astronomy Geographic Advantage Act.
  - iv. Catering for the subsidization of other special government telecommunications projects as declared by the President of the Republic as considered to be in the national interest e.g. presidential hotline, square kilometre array telecommunications infrastructure, business process outsourcing

v. Catering for the SABC for the Digitization and electronic archiving of Educational & Training content in the national interest

- Section 89 of the ECA may need to be amended to allow licensees to have the costs incurred to fulfil USAOs imposed by the Authority to be set off against their prescribed annual contribution to the USAAF.
- Section 90 of the ECA may need to be amended to allow licensees other than ECNS licensees to participate in competitive tenders for USAO projects.

*15.3.2 What should be the focus areas of USAOs in terms of infrastructure and services?*

Primarily, USAOs should be targeted at the roll out of integrated voice and broadband infrastructure, as well as the provisioning of related services, in Zone 3 of the Access Gap (Universal Service Frontier), whilst Smart Subsidies mainly targeted at Zone 2 of the Access Gap (Sustainability Frontier).

#### **15.4 GENERAL**

The review process underway will require considerable amount of time and space. Be that as it may, some licensees are stuck with USAOs that are unduly burdensome and can no longer be sustained. This situation calls for urgent attention, with the view of putting interim measures in place, so as to ensure a swift, win-win transition into the envisaged regulatory framework.