



SUBMISSION IN RESPONSE TO THE DRAFT RADIO  
FREQUENCY SPECTRUM REGULATIONS

Notice in terms of section 4(1), 4(2), 31(6), 31(3)  
read with section 4(4) of the Electronic  
Communications Act No 36 of 2005

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## 1. Introduction

- 1.1 Smile Communications (Pty) Ltd ("Smile") is pleased to submit its written comments in response to the Draft Radio Frequency Spectrum Regulations (hereinafter referred to as "draft spectrum regulations") published by the Independent Communications Authority of South Africa ("the Authority") on 29 September 2010.
- 1.2 We would appreciate the opportunity to make an oral presentation, should any public hearing ensue from this process.
- 1.3 Radio frequency spectrum is a critical component in the provision of communications services in South Africa (SA). As a national natural resource, the Authority is charged through legislation as a custodian of this scarce resource. In administering radio frequency spectrum, national policies are to be adhered to and the Authority is to ensure that assigned frequency spectrum is used gainfully to achieve the provision of universal service and access.
- 1.4 Having an efficient regulatory environment that facilitates competition is key to achieving universal service and access in SA. Key to the facilitation of competition is ensuring that the rights to and the use of radio frequency spectrum is not reserved for the exclusive domain of incumbent operators. Radio frequency spectrum is a finite resource, however the regulatory environment up until the promulgation of the ECA has allowed for a significant imbalance in the possession of spectrum. The ECA was promulgated several years ago and introduced an influx of network and service licences. Radio frequency spectrum regulations need to be cognisant of the shortage of frequency and prevent further assignments of spectrum to those who already have spectrum.



- 1.5 The Authority ought to make sure that appropriate mechanisms are in place to ensure that new entrants have access to adequate radio frequency spectrum in the relevant frequency bands in order to introduce new communications services at affordable prices to the South African consumers; and that spectrum that is assigned is used in an efficient manner.
- 1.6 We note the introduction of flexible spectrum management methods in the draft spectrum regulations, namely the transfer and leasing of spectrum and also the sharing of radio frequency spectrum. We believe that in addition to putting in mechanisms that will disallow the imbalance of possession of radio frequency spectrum, this will foster greater means for new entrants to access frequency spectrum. This is further in line with the approach followed by various jurisdictions in Europe (such as the UK) and North America where they have implemented the trading of spectrum in order to achieve spectrum efficiency and promote competition in the communications sector.
- 1.7 As a new entrant in the sector, Smile intends to provide affordable communications services to the underserved communities or people of SA. These are people who do not have access to essential communications services and earn R14 or less per day. In order to do this, Smile has engineered new and innovative means to do business to ensure that lower costs are passed on to end users.
- 1.8 Smile has successfully launched its service offering in Uganda and has commenced operational plans for rollout in Tanzania and Nigeria where it has been granted adequate spectrum in the 2.5 - 2.6 GHz band for the deployment of a low cost telecommunications network. Smile further intends to launch similar services in SA once in possession of the relevant radio frequency spectrum licence.



- 1.9 We would also like to use this platform to urge the Authority to finalise the award process for spectrum in the 2.5- 2.6 GHz band given that these draft regulations integrate the procedure and criteria for granting radio frequency spectrum licences for competing applications or instances where there is insufficient spectrum available to accommodate demand.
- 1.10 We provide below our detailed comments in response to the draft spectrum regulations.

## **2. Detailed Comments in response to the draft spectrum regulations**

### **2.1. Regulations 12 and 14 – Transfer and Lease of Radio Frequency Spectrum Licence**

2.1.1. Smile broadly supports the provisions of regulation 12 and 14 of the draft spectrum regulations which allows for the transfer and lease of spectrum licences. As stated above, we believe that putting in place different options other than a fresh acquisition of spectrum from the regulator is a means to facilitate competition in the market and allow for more efficient use of the scarce natural resource.

2.1.2. The transfer and lease of spectrum licences will also help to address the issue of spectrum hoarding by encouraging licensees in possession of available spectrum to allow access to other licensees.

2.1.3. We respect and agree for any transfer and lease of frequency spectrum to be subject to regulatory approval, but we are of the view that the amounts paid in respect of any transfer or lease will constitute a commercial transaction between the parties and the Authority ought not to set the values in respect of the transaction. Regulating the



values will also create a situation whereby operators who may be precluded from certain application procedures either through status or other requirements may use this as a back door to avoid participating in direct application processes with the regulator.

2.1.4. The Authority should also provide details regarding the basis on which it would not approve the transfer or lease of frequency spectrum by a licensee.

2.1.5. We further note that there is no timeline provided and there are no fees set out in regulation 12 or in regulation 20 in respect of the processing of applications for the transfer of radio frequency spectrum licences. We therefore suggest that the Authority establishes clear timeline for assessing and responding to applications, and fees with respect to the transfer of radio frequency spectrum licences as this will provide certainty to the industry and will assist in processing the applications.

2.1.6. The leasing of spectrum as proposed is in line with the approach followed by other jurisdiction such as the Federal Communications Commission ("FCC") in United States (US) which allows the leasing of radio frequency spectrum in several bands to a third party<sup>1</sup>.

## 2.2. **Regulation 17 - Applications for spectrum in High Demand**

2.2.1. Smile is concerned that regulation 17 of the draft spectrum regulations does not clearly state that in the instances envisaged in section 31(3) of the ECA,<sup>2</sup> the application procedures and other terms and conditions

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<sup>1</sup> See note 1

<sup>2</sup> Section 31(3) of the ECA states that "the Authority may, taking into account the objects of the Act, prescribe procedures and criteria for awarding radio frequency spectrum licences for competing applications or instances where there is insufficient spectrum available to accommodate demand".



will be specified in the relevant ITA which will also include the rules set out in the High Demand Regulations<sup>3</sup>.

2.2.2. Smile however notes that the explanatory document to the draft radio frequency spectrum regulations provides clearly that *“the procedures for applications for frequency in High Demand will be contained in a specific ITA, including the rules that were contained in the repealed High Demand Regulations”*. This should be included in the regulations for the sake of clarity.

2.2.3. In light of this, we therefore suggest that regulation 17 be amended accordingly in order to integrate the requirement that the ITA will contain the rules set out in the High Demand Regulations. The following amendment is proposed:

***“In instances envisaged in section 31(3) of the Act for licences to be awarded on a competitive basis where there is deemed to be insufficient spectrum to accommodate demand, the procedures for application and other terms and conditions will be specified in the relevant ITA, including the rules that were contained in the repealed High Demand Regulations”***

### 2.3. **Regulation 26(1)(c) – Conditions for withdrawal of the rights to Spectrum**

2.3.1. Smile notes that regulation 26(1) (c) of the draft spectrum regulations do not provide for criteria and circumstances for which the withdrawal

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<sup>3</sup> Independent Communications Authority of South Africa, “Regulations on the procedure and criteria for granting radio frequency spectrum licence for competing applications or instance there is insufficient spectrum to accommodate demand”, published in Government Gazette No 33248

of the rights to spectrum can be justified in the public interest by the Authority.

2.3.2. Smile respectfully proposes that the Authority should consider determining the criteria and circumstances for which the withdrawal of the rights to spectrum can be justified in the public interest as this will ensure certainty and transparency.

#### 2.4. **Regulation 35 – Modifications to a station**

2.4.1. Section 35 states the licensee will be obliged at its own cost to make any modifications to its radio communications system where directed by the Authority and the Authority will not be liable for any costs in this regard.

2.4.2. We submit that the provisions as stipulated are arbitrary and create uncertainty for the licensee in question. We submit that prior and sufficient notice be given to a licensee where modifications may be required. Further, sufficient consultation between the Authority and the licensee is to take place, a plan for the mitigation of costs is to be discussed extensively and issues in relation to timelines for any modification is to be agreed on.

### 3. **Conclusion**

3.1. Smile once again is thankful to the Authority for being afforded the opportunity to comment on the draft spectrum regulations and we are looking forward to further participate in the process.

3.2. Smile further stresses that the Authority must make sure that the current process related to the draft spectrum regulations does not



result in a delay in the conclusion of the 2.6 GHz band licensing process.

3.3. The following is a summary of our main points as discussed in the submission:

- We broadly support the transfer and leasing of spectrum respectively in regulation 12 and 14 as means to facilitate competition in the market and allow efficient use of spectrum. We however believe that:
  - the amount paid in respect of any transfer or lease of spectrum will constitute a commercial transaction between the Parties and the Authority ought to not set the values of such transfer;
  - the Authority has to provide details on the basis on which it will not approve the transfer or lease of spectrum;
- Smile suggests that regulation 17 be amended in order to integrate the requirement that the ITA will contain the rules set out in the High Demand Regulations.
- Smile further proposes that before the modification of a station, notice must be given to a licensee where modification may be required and further consultation between the Authority and the licensee has to take a plan for the mitigation of costs is to be discussed extensively and also issues in relation to timelines.

