



30 October 2015

**Mr Joseph Dikgale
Independent Communications Authority of South Africa
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E-mail: JDikgale@icasa.org.za

“PER EMAIL”

Delivered via email to: - JDikgale@icasa.org.za

Dear Mr Dikgale,

RE: SUBMISSION ON THE INFORMATION MEMORANDUM FOR RADIO FREQUENCY SPECTRUM PROSPECTIVE LICENCE TO PROVIDE MOBILE BROADBAND WIRELESS ACCESS SERVICES FOR URBAN AND RURAL AREAS USING THE COMPLIMENTARY BANDS, 700MHz, 800MHz AND 2.6GHz

1. Smile Communications (Pty) Ltd (“Smile”) hereby submits its inputs on the Independent Communications Authority of South Africa (“ICASA” or “the Authority”) Draft Information Memorandum, published for public comments in Government Gazette 39203, General Notice 914 of 11 September 2015.
2. Smile looks forward to further engagements towards the proposed process and hereby indicates its interest to participate in any further consultative processes the Authority may have.
3. Smile thanks the Authority for the opportunity to comment and trusts that this is in order. Kindly acknowledge receipt of this correspondence.

Kind Regards,

Valencia Risaba
General Manager: Legal



SMILE'S SUBMISSION

ON THE INFORMATION MEMORANDUM

FOR RADIO FREQUENCY SPECTRUM PROSPECTIVE LICENCE

TO PROVIDE MOBILE BROADBAND WIRELESS ACCESS SERVICES FOR URBAN AND RURAL AREAS USING THE COMPLIMENTARY BANDS, 700MHz, 800MHz AND 2.6GHz.

GOVERNMENT GAZETTE 39203, GENERAL NOTICE 914 OF 11 SEPTEMBER 2015

SUBMISSION DATE: 30 October 2015



1. INTRODUCTION

- 1.1. Smile Communications (Pty) Ltd (“Smile”) welcomes the opportunity to comment on the Draft Information Memorandum, published in Government Gazette 39203, General Notice 914 of 11 September 2015.
- 1.2. Broadband is an important contributor to socio-economic development and has been described by some as the “fourth utility”, alongside water, heating and electricity. It is able to generate social and economic impact through, for example, job creation, increased Gross Domestic Product (“GDP”) growth and extended reach of education and health tools. Smile is of the opinion that the licensing process for high demand spectrum presents the Independent Communications Authority of South Africa (“ICASA” or “the Authority”) with the opportunity to maximise the social and economic impact of the spectrum.
- 1.3. The long-awaited assignment of new spectrum for high speed, mobile broadband is therefore welcomed. However, Smile is concerned that the manner in which the terms of reference have been crafted will inhibit the social and economic impact of ubiquitous broadband. Furthermore the approach taken does not seem to be aligned with ICASA’s mandate and South Africa’s broader national objectives.
- 1.4. In general, Smile’s submission addresses:
 - The **legal status of the Information Memorandum and where ICASA’s proposed process fits vis-a-vis the broader policy and related processes**, especially the pending Spectrum Policy and ICT White paper;
 - **Smile’s preference for a competitive bidding / hybrid process** which would be best suited to the South African environment ;
 - The need to **design the licensing process such that it does not inherently favour incumbents** through the assumption that spectrum will be issued to augment existing networks; rather spectrum should be used (and therefore reserved) to facilitate new entrants and diverse players and in so doing meet

national objectives of increasing competition, and participation of Black people and women;

- The need for **better structured and fairer / non-discriminatory obligations** designed to meet the targets set out in SA Connect; where possible, such as in the case of BBEE, such obligations should be required up front; and
- The need to provide **more detail on the open access regime and obligations** before the wholesale open access network assignment is made.

Each issue is discussed in turn in the remainder of the submission.

2. CONTEXT AND GENERAL COMMENTS

- 2.1.** The publication of the Information Memorandum takes place in the context of previous attempts by the Ministry and the Authority to allocate high demand spectrum. The Information Memorandum acknowledges these developments including but not limited to: The draft Invitation to Apply (“ITA”) on the combined licensing of 800 MHz and 2.6 GHz bands for broadband wireless access services published on 15 December 2011;¹The International Mobile Telecommunications (IMT) Roadmap published in the 14th November 2014;² and the Final Radio Frequency Spectrum Assignment Plan for the specific IMT frequency bands published on 30th of March 2015.³
- 2.2.** Given the far reaching impacts for both operators and end users, it is critical that this process aligns to related process such as the National ICT Policy White Paper and accommodates impact that the later processes might have on the Authorities decision to proceed with the proposed licensing processes.⁴

¹ Government Gazette No. 34872 (Notices 911 and 912 of 2011 respectively.

² Government Gazette No. 39203 (Notice 914) of 11 September 2015

³ Government Gazette Number 38641 (Notice Number 279 of 2015) of 30 March 2015

⁴ For example, ICASA’s proposed plan was postponed in March 2012 pending a policy directive from the Department of Communications. Subsequently the draft policy directive was issued, however this was not finalised. Furthermore the then The Department of Communications (“DoC”) released a media statement on the 23rd of May 2014 shedding some light on the future of spectrum allocation. The DoC indicated that it wanted to adopt holistic approach to ensure the optimum efficiency in the use of the spectrum.

2.3. The Authority indicates that the main aim of licensing 700MHz, 800MHz and 2600MHz is to ensure nationwide broadband access for all citizens by 2020. This will be achieved by:

- Increasing universal service and access by ensuring rural connectivity
- Giving consumers more choice,
- Introducing a wholesale open access network,
- Promoting Investment in the sector and economic growth
- Ensuring quality of service and experience
- Ensuring affordability of services

2.4. In agreement with the Authorities stated objectives, Smile notes that this process presents an opportunity to influence and shape the South African ICT market structure. Amongst others, in addition to what is stated in the Information Memorandum, the outcomes of this process will also:

- increase competition,
- introduce new players (and thus provide choice to consumers),
- facilitate participation of Black people and women,
- address universal service and access (both urban and rural), and
- generate revenue for the fiscus for re-investment in the ICT sector.

2.5. While Smile welcomes the Authority's efforts to leverage this process to assign the long-awaited assignment of new spectrum for high speed, mobile broadband, we are also of the opinion that in its current form the proposed auction would not achieve the intended objectives discussed in paragraphs 2.3 and 2.4 and in many instances is not compatible with ICASA's mandate and South Africa's broader policy objectives.

3. LEGAL FRAMEWORK

3.1. The Authority indicates that the Information Memorandum is guided broadly by the provisions set out in the Independent Communications Authority of South Africa Act 13 of 2000 (ICASA Act), Electronic Communications Act, Act 36 of 2005 (ECA), National Radio Frequency Plan 2013 (NRFP), the Radio Frequency Spectrum Regulations¹⁰ 2015 (RFSR), as well as the broader policy objectives of South Africa as set out in

amongst other documents, the National Development Plan and South Africa Connect (National Broadband Policy), Broadcasting Digital Migration Policy 2008 (as amended) Radio Frequency Spectrum Policy 2010”.

- 3.2. Smile notes the Authority’s position, however further clarity is sought on the legal status of the Information Memorandum and how it impacts the subsequent processes undertaken by the Authority in implementing the licensing process, vis-a-vis the broader policy and related processes mentioned in section 2.1 and 2.2 above. In specific, we would like an understanding both of the legal context and the anticipated timing of each of the processes that will follow the issuing of the Information Memorandum and culminate in the issuing of the licenses.

4. THE AWARD PROCESS – PROCESS DESIGN

- 4.1. Smile is concerned with the proposed design of the licensing process. In section 7 of the Information Memorandum, the Authority provides an overview of the award process, including an indicative timetable for the completion of the auction. Accordingly, the award will consist of three stages which will include (1) Qualification, (2) Auction and (3) Licensing Stages.
- 4.2. Smile seeks the Authority’s clarification on the purpose of the qualification stage, as in its current form it appears to only confirm eligibility of bidders. Contrary to previous processes, this stage does not factor in competitive bidding, which in the previous processes was also used to ensure that BBBEE, participation by women and previously disadvantaged communities and universal access and coverage are the primary licensing criteria. Without these an applicant could not proceed to the auction. As it is currently drafted, despite the qualification phase, the process amounts to a pure auction, which is problematic.
- 4.3. Smile believes a competitive bidding / hybrid process would be best suited to the South African environment where the government is not just interested in raising the most money possible but rather interested in reaping the greatest economic IMPACT from the use of the spectrum. The competitive bidding approach is well documented and is

understood in South Africa as it is the process that has been used historically for both telecoms and broadcasting licensing processes.

- 4.4.** Smile notes that the auction vs competitive bidding debate has been ongoing in the South African market for over five years. The arguments in favour of a competitive bidding process, which is better suited to meeting the needs of a developmental state and developing country context are well known. However, Smile proposes that if ICASA decides to abandon the competitive bidding approach and an auction is held, as is currently proposed – at the very least the auction should be designed to meet the country’s objectives and in so doing should facilitate the entry of players who do not currently have access to spectrum and new entrants; it should not assume that high demand spectrum is an "add on" to spectrum assigned to existing players (who incidentally have not closed the universal service and access gaps or met national socio-economic objectives). It should rather be viewed as an opportunity to introduce competition in the market, extend universal access and services, and facilitate participation of previously disadvantaged communities and women as well as to promote BBBEE in the ICT sector. These objectives should therefore be central to the design of this licensing process.

5. SPECTRUM AVAILABLE FOR AWARD – RESERVATION FOR NEW ENTRANTS

- 5.1.** Section 5 of the draft Information Memorandum indicates the following spectrum as available for assignment in this process:

- 2 x 30MHz in the 700MHz band (703MHz-733MHz/758-788MHz)
- 2 x 29.305MHz in the 800MHz band (791-821MHz/832.695-862MHz)
- 2 x 70MHz and 1 x 25MHz in the 2.6GHz band (2500-2570MHz/2620-2690MHz and 2595 - 2615MHz)

The memo further provides for the spectrum to be “awarded on a national basis covering the entire territory of South Africa.” In terms of packaging, “the is packaged into two (2) Lot Categories and six (6) Lots”, and “applicants are eligible to bid only on one of the proposed Lot Categories except for Lot A which is to be dealt with through a separate Licensing process.”

As explained earlier, Smile is of the opinion that the proposed packaging does not augur well for facilitating participation of smaller and new entrants into the ICT market. Smile

proposes that one lot of 800 MHz spectrum should be reserved for new entrants / players who do not have access to broadband spectrum. Importantly “new entrants” does not mean “no experience”; all applicants should be required to demonstrate the ability to roll out a digital network – a requirement which is currently absent from ICASA’s terms of reference.

5.2. New entrants are as capable of deploying networks and successfully providing broadband services as existing players. The requirements would need to be designed such that new entrants would need to demonstrate a track record in ICT infrastructure deployment, show evidence of adequate funding and prove that they have the skilled personnel to effectively utilise the license.

5.3. A spectrum reservation for new entrants in the 800 MHz band would reduce the impact of the 'deep pockets' of existing players, and ensure that the government addresses its commitment to introduce new players and diversify the sector. Importantly, a spectrum reservation for new entrants will furthermore be aligned with the National Integrated ICT Policy Review Report which recommends:

Spectrum auctions can give government the best revenue but could favour stakeholders with substantial resources and therefore not necessarily result in the greatest value. Auctions should thus be considered with discretion.

This implies reservation of some spectrum for smaller or new players and the setting of spectrum caps for others.⁵

6. OBLIGATIONS

Section 6 of the draft Information Memorandum indicates the following obligations as forming part of the license conditions of the Radio Frequency Spectrum License to be issued:

6.1. Coverage obligation

⁵ R49 National Integrated ICT Policy Review report

6.1.1. The Authority considered approaches used internationally to incentivise network deployment. It indicates that it is particularly impressed by the success of the model adopted in Germany, where for operators that acquired 800MHz spectrum were required to provide coverage in less populated areas before they were able to utilise the spectrum in more populated regions. It maintains that this approach resulted in Long-Term Evolution (“LTE”) services being deployed across the whole of Germany in a period of less than two years.

Based on this, the Authority intends to apply a coverage obligation following similar principles on the holders of Lots B, C, D and E (i.e. the winners of packages which contain low-frequency spectrum). The Authority will identify areas which should be covered by the holders of Lot B, C, D and E. Licensees will be required to rollout 70% of the broadband network in the identified areas before rolling out in the cities. Therefore, licensees will be required to provide sufficient quality of network coverage to provide data services in the areas with an average downlink user throughput of 30Mbit/s in the period from 07:00 to 20:00 (time in the local region). This time period has been chosen to cover the vast majority of mobile data usage in the public area.

Accordingly, the holders of Lots B, C, D and E will each have a maximum of three years from the date that the 700MHz/800MHz spectrum becomes available to provide services to all identified underserved areas. If the holder fails to meet this obligation, this will be regarded as a serious breach of the licence conditions.

6.1.2. While Smile agrees with the need to design an appropriate framework to meet broadband universal service and access objectives as set out in South Africa Connect, the German benchmark applied by the Authority, is for various reasons an inappropriate frame of reference for the proposed auction process. There are marked differences between Germany and South Africa, by way of demographics and infrastructure development, among other things. For example, Germany’s GDP per capita is eight times that of South Africa’s, the population is larger and six times denser, while the levels of urbanization vary by only 10%. This indicates that Germany’s better educated, wealthier rural population represents a substantially larger potential revenue pool that can be accessed at much lower cost as opposed to South Africa’s.



Furthermore, given the initial investment and limited returns, the proposed license requirement for a 70% roll out in rural areas before the main cities can be covered, which is based on the German experience, assumes that the licensee will be an incumbent which already has some level of coverage. The proposed obligations are weighted in favour of incumbent players, in the sense that established operators already have unregulated urban coverage and can use returns from urban areas cross subsidise rural coverage.

6.1.3. Obligations should be better structured and more targeted to meet the targets set out in SA Connect with respect to school, hospital and public facility connectivity. In addition, the uptake of individuals will address universal service and access needs to the extent that the services provided are affordable, high quality and reliable. Prohibitive license fees that arise from auction processes will compromise the winning bidders ability to meet these goals of affordability and high quality.

6.2. BBEE Obligations

6.2.1. In Section 6.4 the Authority indicates that “A licensee must achieve BBEE level 2 status within twenty four (24) months from date of issue of the Radio Frequency Spectrum Licence. Alternatively a licensee must increase equity ownership by Historically Disadvantaged Persons (HDP) by three percent (3%) within twenty four (24) months from date of issue of the Radio Frequency Spectrum Licence”

6.2.2. Smile does not believe that BBEE compliance and HDP compliance should be alternatives. This process presents an opportunity to increase Black participation in the sector as well as HDP participation, especially the participation of women. Furthermore we believe that BBEE compliance and HDI participation should be prerequisites for participation in the licensing process – currently they will become compliance requirements after the license has already been issued. History shows that compliance with BBEEE requirements in the sector has been deficient.

6.3. Wholesale open a wireless wholesale open access obligation

6.3.1. In section 6.2 the Authority outlines the rationale for applying open access obligations to the 700 MHz spectrum. It states that this is mainly “to stimulate competition in the provision of broadband services while ensuring innovative, affordable and universally accessible at acceptable quality levels.” In this regard the Authority indicates the following;

- The auction of the 700MHz spectrum is important for the future of broadband services in South Africa.
- The 700MHz spectrum has much better propagation characteristics, which enables better coverage at relatively lower cost of network deployment suitable for sparsely populated areas.
- The 700MHz spectrum is important in shaping the future and role of the ICT industry in ensuring that South Africa meet broadband targets set out in the SA Connect Broadband Policy.
- An important provision contained in the broadband policy is the vision of the creation of a wholesale wireless broadband network. Although a detailed roadmap regarding its development has not been finalised, it is expected to address structural constraints in the market and enhance service- based competition.
- The wireless wholesale open access network is becoming even more relevant now given the recent wave of market consolidation in the ICT industry, which might reverse competition gains introduced in the market since the implementation of the ECA.
- The wireless wholesale open access network operator would be expected to deploy wholesale Radio Access Network (RAN) for mobile broadband.
- The Authority is of the view that the proposed 2 x 20MHz band would be sufficient to deploy wholesale RAN nationally.
- The wireless open access network shall be given 3 years of obligation holiday from paying radio frequency spectrum license fees with regard to the 700MHz spectrum license.

6.3.2. Smile supports the notion of spectrum in the 700 MHz band being reserved for wholesale/open access. However the details of the form of open access regime and obligations need to be specified before the assignment is made.

6.3.3. The Authority further indicates that basis on which the winner of Lot A must provide wholesale open access services, including non-discriminatory access; transparency; fair and reasonable pricing; and cost oriented with reasonable rate of return. Whilst Smile is in agreement with costs orientation, the rate of return and methodology used to define it are not specified. Overall, our opinion is that more detail is needed on the regulatory and anticipated operational approaches to the open access regime before the license can be issued.

7. CONCLUSION

In summary, Smile believes that:

- Further clarity is needed on the legal status of the Information Memorandum and how it would impact on the subsequent processes undertaken by the Authority in implementing the licensing process, vis-a-vis the broader policy and related processes, especially the pending Spectrum Policy and ICT White paper
- A competitive bidding / hybrid process would be best suited to the South African environment where the government is not just interested in raising the most money possible but rather interested in reaping the greatest economic IMPACT from the use of the spectrum.
- If ICASA decides to abandon the competitive bidding approach and an auction is held, as is currently proposed – at the very least the auction should be designed to meet the country's objectives and in so doing should facilitate the entry of players who do not currently have access to spectrum and new entrants. A spectrum reservation for new entrants in the 800 MHz band would reduce the impact of the 'deep pockets' of existing players, and ensure that the government addresses its commitment to introduce new players and diversify the sector.
- Obligations should be better structured and more targeted to meet the targets set out in SA Connect with respect to school, hospital and public facility connectivity.



- BBBEE compliance and HDI participation should be prerequisites for participation in the licensing process – currently they will become compliance requirements after the license has already been issued. History shows that compliance with BBBEE requirements in the sector has been deficient.
- Smile supports the notion of spectrum in the 700 MHz band being reserved for wholesale/open access. However the details of the form of open access regime and obligations need to be specified before the wholesale/open access network assignment is made.

Smile looks forward to the speedy finalisation of the licensing process. Once Smile again thanks the Authority for the opportunity to comment on the Draft Information Memorandum and avails ourselves for further participation, including public hearings.