

## Regulatory Affairs and Government Relations

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08 November 2018

Mr T Ngobeni  
The Director General  
Department of Telecommunications and Postal Services  
iParioli Office Park  
1166 Park Street  
**HATFIELD**  
Pretoria, 0002

Via email: [woan@dtps.gov.za](mailto:woan@dtps.gov.za)

Dear Mr Ngobeni

**RE: TELKOM'S WRITTEN SUBMISSION ON THE PROPOSED POLICY AND POLICY DIRECTIONS TO THE AUTHORITY ON THE LICENSING OF UNASSIGNED HIGH DEMAND SPECTRUM**

Telkom SA SOC Ltd ("Telkom") welcomes the opportunity to provide written comments pertaining to the proposed Policy and Policy Directions to the Authority on licensing of unassigned high demand spectrum ("draft policy and policy directions"), as published in Government Gazette No. 41935 on 27 September 2018.

Please find herewith Telkom's written comments on the draft policy and policy directions.

Yours sincerely



**Siyabonga Mahlangu**  
Group Executive: Regulatory Affairs and Government Relations

Submission to the Department of Telecommunications and Postal Services

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Draft Policy and Policy Directions to the Authority on licensing of unassigned high demand spectrum

Government Gazette No. 41935 (Notice 1003 of 2018) dated 27 September 2018

## **1 Executive summary**

The proposals espoused through the draft policy and policy directions, if implemented as proposed, will have far-reaching implications for the ICT sector in general and for competition, broadband access and the cost to communicate specifically. Telkom is of the view that the proposals will not address the concentration and consequent dominance of Vodacom and MTN in the mobile market, but will rather further entrench their dominance. This will negatively impact any initiatives to increase competition and reduce cost to communicate.

The national ICT policy is premised on earlier findings by the Department of Telecommunications and Postal Services (DTPS) that the mobile sector of the market is highly concentrated and duopolistic. It is for this reason that the policy proposes that all the currently unassigned spectrum be assigned to a Wireless Open Access Network (WOAN).

Although the policy direction states that the licensing of spectrum should be sensitive to competition, it does not state how its proposed hybrid model, which includes a watered-down WOAN and assignment of spectrum to the sector, will address the high level of concentration in the mobile market. It is Telkom's contention that the hybrid approach of assigning some spectrum to the WOAN and some to the market, will not address the competition concerns. Instead, the hybrid model is likely to entrench the duopoly.

Telkom proposes that the licensing of high demand spectrum be preceded by a comprehensive market inquiry into the mobile sector. ICASA is already gearing up to conduct such an inquiry.

The policy direction attempts to change the substance of national policy on ICT. The ECA does not empower the Minister to make policy directions in respect of the licensing of spectrum. It is Telkom's submission that the detail of the policy exceeds the Minister's statutory mandate in respect of the licensing of spectrum. Further, Telkom contends that the ECA does not authorise the Minister to make policy directions in respect of electronic communications network service (ECNS) licences, other than those owned or controlled by the State. The proposal that ICASA should allow unlicensed persons to bid for the unassigned high demand spectrum is therefore incapable of lawful implementation.

The objects and purport of the Minister's policy directions in respect of the licensing of spectrum, the licensing of the WOAN and the competence of unlicensed entities to bid for spectrum require substantive legislative amendments.

The CSIR study is limited in scope and does not consider the economic aspects or market effects of its proposals. Further still, the CSIR study crucially does not employ a long-term market forecast in its inputs. Technically we find the CSIR study to be deeply flawed, and hence an unreliable basis to inform policy decisions.

## 2 Competition in the mobile sector

Mobile telephony in South Africa is now over 25 years old. At inception, the two early mobile operators enjoyed supportive legislative, policy and regulatory interventions. For instance, the wholesale voice termination rates were skewed in their favour. It is estimated that Telkom subsidized Vodacom and MTN by over R70bn through this asymmetric regulatory environment which favoured these two entities as new entrants. A combination of the favourable regulatory environment and the early mover advantage contributed to the current duopolistic structure of the mobile market.

Today, more than 75% of mobile subscribers in South Africa are subscribed to MTN and Vodacom. Over 85% of the gross revenues are also shared between these two operators. Each of them has over 10 000 base stations across the country compared to the 4 000 that Telkom currently has. Telkom as the legacy telecommunications services provider is still saddled with a high and stubborn cost structure. For instance, Telkom had obligations to roll out its copper network to unprofitable areas. The costs of maintaining this network remain. Telkom has over 18 000 employees, which is higher than the total employee complement of MTN and Vodacom combined.

Despite the introduction of new players such as Cell C, Liquid (formerly Neotel) and Rain (formerly WBS), there has been no significant impact on the market structure nor its dynamics. In 2013, the South Africa Connect Policy identified the need to promote competition in the mobile sector.<sup>1</sup> It is part of its object to *create a fair and competitive environment, particularly enabling service-based competition through the enforcement of the wholesale access regulations to dominant market players' network and mandatory open access to infrastructure rolled out through public investment.*

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<sup>1</sup> SA Connect Policy (Government Gazette No. 37119 dated 6 December 2013)

One of the goals of national policy is to ensure that everyone, regardless of who they are, where they live or their social or economic standing, can benefit from the opportunities offered by ICTs either on an individual or shared basis. Achieving this will require both competitive private sector investment and appropriate relevant targeted public intervention to address any market failures as evidenced by the true access gap and smart subsidy zones. To ensure competition, national policy proposes an open access dispensation which shifts focus to service-based competition. The policy promotes competition and encourages market reviews to ensure that regulatory decisions are evidence-based.

Telkom engaged with the proposal of a WOAN within the context of national policy. We supported the WOAN as a strategic policy intervention to address access to mobile wholesale infrastructure. In our view, the WOAN can only meet the objectives of national policy if it has access to all the unassigned high demand spectrum.

When the Minister published a draft Electronic Communications Amendment Bill for comment, we made written submissions on the technical feasibility of the WOAN and advanced reasons why the WOAN would only be able to meet its policy mandate if it was assigned all the unassigned spectrum. Copies of our written submission on the technical feasibility of the WOAN and a report prepared by Econex on the economic implications of having a WOAN and licensing all unassigned spectrum to it are attached hereto.

We reiterate that it will not be economically, commercially nor technically possible for the WOAN to deliver on its policy mandate to increase competition if all the unassigned spectrum is not licensed to it.

We are cognisant of the Department's shift in policy to licence part of the spectrum to the market and part to the WOAN. In our view, any shift in policy must be informed by the economic and competition realities in the sector. High demand spectrum plays a vital role in improving the ability of an operator to compete in the provision of mobile broadband services. Today, the predominant means of accessing broadband is through

mobile devices. We have requested Econex to consider and advise on the economic implications of the licensing of spectrum in the hybrid model proposed in the policy direction. The Econex report is attached.

In a nutshell, Econex has advised that the Draft Policy Directions and accompanying CSIR Report provide little comfort that the proposed assignment of spectrum to the WOAN will enable it to become a viable player in the market. They have highlighted various technical shortcomings in the CSIR's analysis which suggest that the amount of spectrum that will need to be assigned to the WOAN for it to be viable is likely to be under- or overestimated if the results of the CSIR study are used as the basis for such assignment. Furthermore, they point out that the policy implication is that if too little high demand spectrum is assigned to the WOAN, it will be unviable and exit the market. In contrast, if too much spectrum is assigned to the WOAN, this will unnecessarily limit the fiscal revenue that could be received. They also argue that if the spectrum is auctioned, the current duopoly is likely to obtain the preferred lots. This will enable it to entrench its position in the market. In the event that the WOAN is not assigned the necessary amount of spectrum and becomes unviable, the relative position of the incumbents in the market will be even stronger and competition in the sector will be undermined.

We welcome the proposal in the policy direction that the assignment of high demand spectrum be subject to chapters 8 and 10 of the ECA. Chapter 10 mandates ICASA to conduct market inquiries to establish the nature and extent of competition. ICASA has recently completed an inquiry into priority markets. One of its findings is that the mobile sector is a priority market earmarked for a further market enquiry. Telkom recommends that, to safeguard and promote competition in the mobile sector, the Minister must direct ICASA to license high demand spectrum in a manner that promotes competition. Particularly, that ICASA be directed to conduct a market inquiry into the effect of assigning spectrum before spectrum is licensed.

### **3 The relationship between national policy and the policy directions**

Section 3 of the ECA distinguishes between two types of policy-making: the issuing of national policy under section 3(1) and the issuing of policy directions under section 3(2). Policy developed under section 3(1) is intended to provide general guidance for the ICT sector, such as the guidance provided in the White Paper. By contrast, policy directions under section 3(2) are directed specifically at ICASA or the Universal Service Agency. In our view, the proposed policy directions are in violation of section 3(2) of the ECA to the extent that they are inconsistent with national policy. The purpose of policy directions under section 3(2) is to give more specific guidance to ICASA than is provided in high-level national policy. As a result, policy directions may expand and elaborate on national policy and some consistency with national policy is required

National policy is emphatic that all remaining and available high demand spectrum (HDS) must be licensed to the WOAN.<sup>2</sup> There is nothing in the White Paper which suggests that this position is open to revision or subject to further investigation. Arguably, the Minister would exceed his powers under section 3(2) if he attempts to use policy directions to amend national policy or to introduce new policy.<sup>3</sup>

The notice published in the Government Gazette is clear that the Minister is only relying on his section 3(2) powers to issue policy directions. There is no suggestion in the notice that the Minister intends to amend the national policy or to issue new policy. However, in

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<sup>2</sup> See para 9 of the policy.

<sup>3</sup> *e.tv (Pty) Ltd and Others v Minister of Communications and Others* 2016 (6) SA 356 (SCA).

substance, the policy directions contained in the accompanying schedule make it clear that the Minister is attempting to introduce new policy or to amend national policy:

- The schedule is prominently headed “Proposed Policy and Policy Direction”.
- The schedule contains further indications of a shift in national policy:
  - The Schedule opens by summarising the White Paper (paras 1.1 – 1.4) and acknowledges that the White Paper called for all unassigned HDS to be licenced to the WOAN (paragraph 1.5).
  - The Schedule then indicates that the Minister has embarked on further consultations on the White Paper (para 1.5) and commissioned the CSIR to reconsider whether all HDS should be licenced to the WOAN (para 1.6).
  - It then records that Cabinet has decided to depart from the White Paper (para 1.7).
  - The policy directions clearly purport to give effect to this Cabinet decision.

This attempt to use section 3(2) to introduce new policy or to amend existing policy arguably falls foul of the principle in *Harris v Minister of Education*.<sup>4</sup> The Harris principle requires that where a decision-maker has the statutory power to do something, he or she must rely on the statutory provision that confers that power. It is unlawful to exercise that power by relying on a different, unrelated statutory provision.

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<sup>4</sup> *Minister of Education v Harris* 2001 (4) SA 1297 (CC).

It may be argued that the Minister's proposed policy directions are also in violation of the principles of openness and transparency, as reflected in sections 1(d) and 195(1)(g) of the Constitution.<sup>5</sup> These principles require that any proposed policy or proposed amendments to policy must be announced openly and explicitly. They cannot be brought in under the guise of a mere policy direction to ICASA.

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<sup>5</sup> Section 1(d) of the Constitution requires openness, accountability and transparency in government affairs. Section 195(1)(g) of the Constitution further requires that “[t]ransparency must be fostered by providing the public with timely, accessible and accurate information”.

#### 4 Policy directions and the licensing of spectrum

Section 3(3) generally prohibits policy directions addressing radio frequency spectrum licensing. Alternatively, even if there is no general prohibition, in this specific case, section 3(3) prohibits the type of detailed prescriptions for the licensing of radio frequency spectrum to a WOAN and to other licensees, in the absence of any amendments to the ECA.

In *Altech Autopage Cellular v Chairperson of ICASA*,<sup>6</sup> the High Court interpreted the section 3(3) prohibition in broad terms as prohibiting any policy directions that purport to address licensing, unless there is specific statutory authority for those policy directions under the Act. In that case, the Minister published policy directions seeking to guide ICASA on the conversion of old-order licences under the Telecommunications Act to ECNS licences under the ECA. The High Court held that the ECA did not empower the Minister to make policy directions governing the conversion of licences. Accordingly, the High Court held that the policy directions were unlawful and invalid.<sup>7</sup>

A contrary interpretation of section 3(3) was suggested in *Minister of Telecommunications and Postal Services v ICASA*.<sup>8</sup> There, Sutherland J favoured a narrower interpretation of section 3(3), albeit without deciding the issue. Sutherland J suggested that section 3(3) may only prohibit the Minister from meddling with specific licensing decisions, without establishing a general bar to policy that deals with licensing.

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<sup>6</sup> *Altech Autopage Cellular (Pty) Ltd v Chairperson of the Council of the Independent Communications Authority of South Africa and Others* [2008] ZAGPHC 268 (29 August 2008).

<sup>7</sup> *Ibid* at para 18.

<sup>8</sup> *Minister of Telecommunications and Postal Services v Acting Chair, Independent Communications Authority of South Africa and Others; Cell C (Pty) Ltd v Acting Chair, Independent Communications Authority of South Africa and Others and Others* [2016] ZAGPPHC 883 (30 September 2016). <sup>26</sup> *Ibid* at para 22.

“Does this section relate to a given specific licence or does it apply generically? In other words, is this simply a safeguard against a bill of attainder, or a restriction on the general powers of MOT, in effect cautioning MOT to keep a distance. Perhaps the point is to restrict MOT's section 3 power to formulate policy within the ambit of the statute? If so, why say something so obvious? Alternatively, it is argued the use of 'a' points to the aim being to eliminate the risk of victimisation. I am inclined to agree with the latter construction, although, in my view, it is unnecessary to decide that point definitively for the purposes of this case, because on either view, MOT is constrained in the use of section 3 powers.”<sup>26</sup>

In our view, even if Sutherland J's narrower interpretation of section 3(3) were adopted, the policy directions in this case would be subject to the section 3(3) prohibition, unless expressly permitted by the Act. This is because the policy directions seek to guide the minutiae of ICASA's role in issuing licences to a WOAN and other parties. In particular:

- Paragraphs 1.9 – 1.13 prescribe detailed requirements that must be satisfied by a prospective WOAN and specify conditions that must be attached to the WOAN's ECNS and radio frequency spectrum licences.
- Paragraph 2.2 further specifies detailed conditions that must be attached to the radio frequency spectrum licences to be issued to industry participants.
- Paragraphs 1.12(b)(iv) and paragraph 2.2(b) seek to prescribe that all licensees that receive currently unassigned HDS must be compelled to procure a minimum of 30% of their network capacity from the WOAN.

These directions cross the threshold from general guidance on the licensing function to specific directions on specific licences.

## 5 The CSIR study

The CSIR study has its own technical limitations and is of limited scope. The study does not consider the economic and competition implications of adopting a hybrid model. Telkom's analysis of the study has revealed that certain aspects of the methodology and specific input parameters and assumptions lead to either an underestimation or overestimation of the WOAN spectrum requirement, thereby leading to unreliable results.

There is a clear disjoint between the CSIR's study results and their recommendations regarding the WOAN spectrum requirement. The CSIR study concludes that the WOAN requires 33.5 MHz of spectrum, which is later rounded to 40 MHz. The CSIR study then recommends that the WOAN be assigned 115 MHz (2x25 @ 800 + 2x20 @ 2600 + 25 @ 2600) - the deviation from the initial study conclusion is not clear.

Telkom was assisted by Detecon to conduct a technical assessment of the CSIR modelling methodology/approach and parameter selection. A copy of the Detecon report is attached.

Telkom submits that the limitations of the CSIR study justify the Minister directing ICASA to assess the spectrum requirements for the WOAN comprehensively, having due regard to its policy mandate, the desired levels of competition in the mobile sector, the competition implications of adopting a hybrid model and its technical feasibility and sustainability.

## 6 Summary of recommendations

A summary of Telkom's recommendations is provided below:

- National policy cannot be amended through a policy direction but needs to follow a formal consultative process;
- Given that the Minister's proposed policy directions may be in violation of the principles of openness and transparency, any proposed policy or proposed amendments to policy must be announced openly and explicitly. They cannot be brought in under the guise of a mere policy direction to ICASA;
- To safeguard and promote competition in the mobile sector, the Minister must direct ICASA to license high demand spectrum in a manner that promotes competition.
- ICASA must be directed to conduct a market inquiry into the effect of assigning spectrum before spectrum is licensed.
- The assignment of high demand spectrum be subject to chapters 8 and 10 of the ECA; and

The limitations of the CSIR study justify that the Minister direct ICASA to assess the spectrum requirements for the WOAN comprehensively having due regard to its policy mandate, the desired levels of competition in the mobile sector, the competition implications of adopting a hybrid model and its technical feasibility and sustainability.

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