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INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

GENERAL NOTICE 669 OF 2021

REASONS DOCUMENT FOR THE SECOND INFORMATION MEMORANDUM

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1. On 02 October 2020, the Independent Communications Authority of South Africa ("the Authority") published the Invitation to Apply on the licensing process for International Mobile Telecommunications ("IMT") in respect of the provision of the mobile broadband wireless access services for urban and rural areas using complimentary bands IMT700, IMT800, IMT2600 and IMT3500 published in the Government Gazette 43768 ("ITA").

2. On 28 December 2020, the Authority received six (06) applications responding to the ITA. Whilst in the process of considering the applications received, on 08 March 2021, the Authority was interdicted by Telkom and e.tv from proceeding with the spectrum auction process.

3. On 22 December 2020, Telkom instituted litigation proceedings against ICASA and 12 others in which it sought substituted service (Part A), an order to interdict ICASA from assessing or adjudicating any applications received by it pursuant to the Invitation to Apply (Part B) and an order to review and set-aside ICASA's decision to publish the ITAs (Part C) ("Telkom Litigation").

4. On 09 March 2021, MTN filed the court application against the Authority's ITA. In the main, MTN's submission is that certain aspects of the Auction ITA are legally flawed, inter alia, the provisions relating to the classification of Tier 1 and Tier 2 operators and the inclusion of an Opt-In Scheme ("MTN Application").

5. Subsequently, on 23 March 2021, Vodacom submitted its counter application to have the Court confirm the correct interpretation of the Opt-In Scheme. Vodacom also submitted that it would abide in the relief sought by MTN on the Operator Categorization.

6. Pursuant to settlement negotiations amongst the litigants in the Telkom Application, on 15 September 2021, the Court granted an order, amongst other things, reviewing and setting aside the ITA and referring the matter

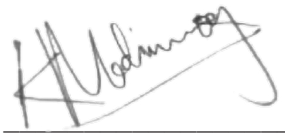
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back to ICASA for consideration. This led to the withdrawal of the application filed by MTN.

7. In light of the Court Order, the Authority published the first Information Memorandum ("IM") on 01 October 2021 in Government Gazette No. 45255 for public comment by interested parties. The closing date for written inputs was 1 November 2021 at 12h00 and was subsequently changed to 2 November 2021 at 12h00 by publication in a Government Gazette of the said notice.

8. The Authority has received ten (10) written submissions within the deadline of the closing date and time. The Authority has analysed the submissions and formulated the second IM which is informed by this reasons document.



DR KEABETSWE MODIMOENG
CHAIRPERSON
DATE: 15/11/2021

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1 ACRONYMS

ECA	Electronic Communications Act, 2005 (Act No. 36 of 2005)
ICASA	The Independent Communications Authority of South Africa
ECNS	Electronic Communication Network Services
WOAN	Wireless Open Access Network
MBSI	Mobile Broadband Services Inquiry
PAJA	Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)

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2 INTRODUCTION

2.1. Pursuant to settlement negotiations amongst the litigants, on 15 September 2021, the Court granted an order, amongst others, reviewing and setting aside the ITA and referring the matter back to ICASA for consideration. In light of the Court Order, the Authority published the second IM for public consultation which included, amongst others, matters related to competition aspects, IMT700 and IMT800 bands, with the deadline of 1 November 2021 for providing public representations.

2.2. The submission deadline was subsequently changed to 2 November 2021 at 12 midday due to a proclamation by the President of South Africa that 1 November 2021 would be a public holiday for the municipal elections.

2.3. On 2 November 2021, the Authority received 10 written representations by 12 midday from:

2.3.1. Telkom

2.3.2. Vodacom

2.3.3. MTN

2.3.4. RAIN

2.3.5. Community Investment Ventures Holdings

2.3.6. South African Communication Forum

2.3.7. South African Radio Astronomy Observatory

2.3.8. Paul Hjul

2.3.9. Competition Commission South Africa

2.3.10. Association of Progressive Communications

2.4. The Authority has considered the above written representations and provides an analysis and preliminary views under various themes provided for below.

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3. OBJECTIVES

Trade-off between objectives

3.1. Vodacom submitted that there may be tensions between the objectives that the Authority has identified and aims to achieve as described in the 2020 ITA. For example, attempting to promote competition by assigning spectrum to many players may:

3.1.1. Result in excessive spectrum fragmentation, which could undermine the efficient use of spectrum (objective 3.1.9);

3.1.2. Make it difficult for operators to offer high quality services or the universal provision of mobile services (objective 3.1.2);

3.1.3. Reduce the amount of efficient investment (objective 3.1.5); and/or deprive operators of economies of scale, which in turn would prevent consumers from benefitting from the lowest possible traffic costs (objective 3.1.3).

3.1.4. Vodacom submitted that spectrum fragmentation is more pronounced in South Africa than in comparison to developed mobile markets, with larger operators being disadvantaged and constrained by having to accommodate many more customers but without any additional spectrum relative to smaller operators, this is further compounded by the overall lack of spectrum assigned and the fragmentated nature of the spectrum already assigned. Vodacom submitted that the spectrum auction presents an opportunity to address these challenges.

3.2. Telkom has identified five key factors that should underpin the licensing of spectrum to achieve the desired objectives: The need for effective competition and the desired market structure; the impact of the spectrum arrangements on competition; the need to address past imbalances; giving effect to national policy; and the relevance of 5G.

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The objective to promote competition

3.3. Vodacom contends that there is no competition problem in the mobile markets as stated by ICASA in the ITA Reasons Document. Vodacom, however, agreed with ICASA's approach to avoid worsening competition concerns. This is consistent with the legal framework of the ECA, namely, the objective to "promote competition within the ICT sector" which requires taking into account competition effects of any regulatory action, avoiding anti-competitive conduct and seeking to foster pro-competitive outcomes to the extent possible. As such Vodacom's view is that although ICASA ought not to worsen competition, it is not at liberty to use the spectrum auction process to address existing competition issues. To this effect, Vodacom noted with concern ICASA's inclination to address competition issues as denoted in the Competition Assessment. Vodacom submitted that ICASA's analysis of the spectrum required for an operator to be "credible" may in fact go beyond purely assessing credibility, to prescriptively considering how it can shape the competitive landscape in the market, and the relative respective positions of the competitors within it, possibly disregarding different dimensions of competition and potentially to the detriment of other objectives.

3.4. Vodacom agreed with ICASA's position, that in the promotion of competition it ought to protect the competitive process rather than individual competitors, adopt proportionate minimum measures in the promotion of competition and consider the interaction of the different measures such as the opt-in round and the spectrum caps.

3.5. Vodacom submitted that the MBSI and its regulations must not in any way try to address competition concerns through the ITA process.

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PRELIMINARY POSITION AND REASONS:

The trade-offs between the objectives

3.6. It is important that the Authority balances various objectives in the ECA. The Authority believes that the allocation of IMT spectrum must be done in a manner that does not create an unbalanced competitive landscape insofar as spectrum assignment is concerned. The Authority has discounted the reserve prices so as to attract many licensees as possible to participate in this licensing process but not set a trivial level in order to discourage frivolous bidding. This is to ensure that the successful bidders who are to be assigned spectrum will use it efficiently.

The objective to promote competition

3.7. The Authority's findings confirm that there are competition issues as provided in the MBSI published in the Government Gazette No. 44337 published on the 26 March 2021 and, in particular, found Vodacom and MTN to be dominant in three markets, namely Retail Market, Wholesale Infrastructure Access Market and Wholesale National Roaming Service Market.

3.8. The Authority is empowered to promote competition within the ICT sector in executing its mandate. This would include addressing existing competition issues as well as ensuring that any regulatory action does not have the effect of worsening competition. It is well established that an operator spectrum holding has a direct impact on their competitive edge. The Authority is therefore obliged to ensure that any assignment does not have the effect of worsening competition. The Authority has determined measures to promote competition, amongst others it is implementing the minimum spectrum portfolios to support the small players to be credible in the market. This is a necessary intervention to level the playing-field and ensure that the auction does not serve to entrench the dominance of existing market player.

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4. LEGAL FRAMEWORK

Legal status of the ITA (published as Government Notice 535 of 2020 in Government Gazette No. 43768 of 2 *October* 2020) and the reasons document

4.1. Various stakeholders raised concerns around how the Authority has interpreted the order of the High Court dated 15 September 2021 which states "ICASA's decision to publish the invitation to apply for the licensing process for International Mobile Telecommunications in respect of mobile broadband wireless access services for urban and rural areas using complementary bands IMT700, IMT800, IMT2600 and IMT3500 spectrum frequency through an auction published as Government Notice 535 of 2020 in Government Gazette No. 43768 of 2 October 2020 ("the Auction ITA") is reviewed and set aside and the matter is referred back to ICASA for reconsideration."

4.2. Telkom stated that the ITAs remitted to ICASA the "matter", and not only the ITAs, for reconsideration. ICASA is therefore required to reconsider the entire matter (which is the high-demand spectrum licencing process) and not just the formulation of the ITAs.

4.3. According to Telkom and the South African Communications Forum (SACF), it is not legally competent for ICASA to simply amend the ITAs as there are currently no ITAs for it to amend. ICASA is thus required to formulate new ITAs.

4.4. Telkom and SACF's view is that it is unclear as to how ICASA was able to publish Annexures to a document that was set aside and effectively therefore no longer exists. Further, Telkom notes that the processes that preceded the publishing of the now invalid ITAs untainted, such as the Reasons Document that informed the formulation of the ITAs. Telkom concludes that the Reasons Document is therefore irrelevant to the formulation of the new ITAs, and any reliance on the Reasons Document in the 2021 IM is irrational. Further, according to Telkom, when taking new decisions to publish new ITAs, ICASA has to provide reasons for the new decisions.

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4.5. MTN states that there is confusion as to whether the Authority will publish an entirely new ITA given the fact that the one published in 2020 has been set aside. MTN further asks whether the previous ITA will only be modified or refined to consider the results of this IM process.

Publication of a Draft ITA

4.6. According to MTN, it is not clear why the Authority intends to conduct two consultation processes on the IM (on the 2nd of November 2021 and then again by the 29th of November 2021) but has chosen not to publish a draft IMT ITA for public consultation.

4.7. SACF argues that, while there is no mandatory legal requirement to do so, nothing precludes ICASA from publishing a draft ITA for comment. SACF further argues that the ECA does not provide for the publication of an Information Memorandum, yet ICASA published an IM in the three most recent processes including this one.

4.8. Telkom however, argues that ICASA has a statutory obligation to publish a draft ITA as the ITA is an administrative action that contains process and criteria for the licensing of HDS and impacts on the public in general. Telkom is of the view that section 4(3) of PAJA requires the Authority to communicate the administrative action that it intends to take and to call for comments on it. A draft ITA is the clearest form and substance of the administrative action intended by the Authority. The second reason is that section 31(3)(a) of the ECA empowers ICASA to prescribe regulations in respect of procedures and criteria for the licensing of high demand spectrum and in the RSFR of 2015, the Authority states that the procedures and criteria for licensing shall be contained in the ITA. Telkom contends that a publication of the ITA as a regulation is consistent with Section 31(3)(a) of the ECA and will promote openness and transparency.

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Auction as the chosen licensing method

4.9. Telkom argues that ICASA has failed to provide reasons to support the decision it has opted for the auction process as contemplated in the 2021 IM. Telkom states that ICASA should provide these reasons as this will enable interested parties to determine whether the decision to use the auction process is rational and reasonable. According to Telkom, through consideration of the regulatory framework for licensing spectrum, such as the ECA, the Radio Frequency Spectrum Regulations 2015, and the relevant Radio Frequency Spectrum Assignment Plans ("RFSAPs") do not prescribe to ICASA the method of licensing that it must follow. Telkom is thus of the view that for the frequency bands of 700 MHz, 800 MHz, 2600 MHz, and 3500 MHz, the Authority is only required to publish an ITA and it need not be an ITA for an auction.

Categorisation of Tier 1 and Tier 2 operators

4.10. The IM currently fails to address key issues in the MTN High Court Application during the litigation process, which to a large extent demonstrated the shortcomings of the 2020 ITA. For example, the Authority continues to use Tier 1 and Tier 2 operator concept, based on market shares in an arbitrary number of geographies. There is no indication in the IM that this will change in the final ITA. MTN says that the Authority should expect legal challenges that might emerge unless these concerns are cured (MTN).

Competition assessment, the MBSI and DSMI findings

4.11. Telkom states that in terms of the ECA, ICASA is obliged to evaluate competition in the mobile sector before publishing ITAs and ICASA failed to conduct such competition assessment before it published the old ITAs**.**

4.12. According to the Competition Commission South Africa (CCSA), the Authority does not reference the MBSI and DSMI to influence the approach of the spectrum assignment process. The CCSA also states that both the MBSMI and the DSMI recognised that there are significant

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competition concerns in the market and the Authority's main concern in licensing the spectrum should be to enhance competition and to promote affordability otherwise the Authority will only achieve universal access but not universally affordable access. The CCSA proposes that robust regulatory interventions are needed to address the robustness of the positions of Vodacom and MTN.

Inclusion of the IMT 700 & IMT 800 in the ITA

4.13. Telkom states that if the Authority is going to remove the 700 MHz and 800 MHz from the auction, it should at least, supplement any competition assessment that was conducted before the revision was proposed as the removal of the 700 MHz and 800 MHz is a material consideration that ICASA has to take into account before publishing the new ITAs. Telkom also suggests that further competition assessment must be conducted and the findings published for public consultation.

Timetable for consultation

4.14. Telkom states that the Authority's timetable for comment does not comply with section 3 of PAJA that requires that procedure chosen in taking administrative action must ensure that adequate notice of the intended administrative action is given to members of the public and that they are given an adequate opportunity to be heard. There is not sufficient time afforded to allow interested parties to make cogent, substantive and meaningful submissions, and for ICASA to properly apply its mind to and consider the parties' submissions. According to Telkom and Paul Hjul, failing to properly consider the parties comments or submissions may be a violation of section 4(3)(b) of PAJA and may render the process procedurally irrational because the purpose sought to be achieved by a particular exercise of public power or process may not be achieved because relevant considerations are not taken into account.

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PRELIMINARY POSITION AND REASONS:

Legal Status of the ITA and Reasons Document

4.15. ICASA as the regulatory Authority is empowered by the ECA and Radio Frequency Spectrum Regulations to licence spectrum in line with the prescribed legislative framework.

4.16. Regulation 7(1) of the Radio Frequency Spectrum Regulations provides, *inter alia*, that the Authority must publish an ITA where a radio frequency spectrum licence will be awarded / granted on a competitive basis and where it determines that there is insufficient spectrum available to accommodate demand in terms of that Section 31(3)(a) of the ECA and further prescribes the content of the ITA.

4.17. The formulation of the ITA is thus the first regulatory step that the Authority takes when licencing radio frequency spectrum as the document itself outlines the decisions that have been taken by the Authority on how spectrum will be licenced. The ITA's capture the administrative decision which has been taken by the authority. In other words, the ITA's capture "the entire matter which is the high-demand spectrum licencing process"[1]

4.18. The formulation and approval/decision making process related to spectrum licencing is thus done prior to publication of the ITA and consist of various decisions and considerations made by the Authority which include but are not limited to:

4.18.1. The subject of the ITA;
4.18.2. The place for the submission of the application;
4.18.3. The application fee,
4.18.4. Any qualification criteria that are applicable;

[1] Telkom submission terminology used.

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4.18.5. The terms and conditions relating to the application;

4.18.6. The proposed licence terms and conditions;

4.18.7. The procedures for submission of the application;

4.18.8. The deadline for the submission of the application;

4.18.9. Conditions and procedures for the amendment of an application;

4.18.10. Conditions and procedures for the submission of supplementary information;

4.18.11. Conditions for the disqualification of an applicant from the application process;

4.18.12. The selection process;

4.18.13. The evaluation criteria;

4.18.14. The licensing method the Authority will use, including any of the following:

4.18.14.1. Auction rules;

4.18.14.2. Beauty contest rules; or

4.18.15. Any other licensing mechanism deemed appropriate by the Authority.

4.18.16. Any other information or requirements as the Authority may deem necessary.

4.19. The ITA's once formulated are approved by the ICASA council and consist of the decisions taken in licencing spectrum.

4.20. The publication of the ITA's are thus the procedural step taken by the Authority after formulation and approving an ITA. In compliance with regulation 7(1) of Radio Frequency Spectrum Regulations which now formally informs and invites licensees to apply for spectrum licences.

4.21. The court order dated 15 September 2021 did not make any pronouncements on the validity of the decisions taken by the Authority in licencing spectrum. The ITA's being the documents that contain these decisions. The court merely declared the publication of the document invalid and remitted the licencing process back to ICASA.

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4.22. The Authority is thus currently in the process of licencing spectrum which process was rightfully remitted to them by the court. It is in the process of reconsidering its decisions captured in the ITA's currently approved by their council and shall publish their decision in line with regulation 7(1) of Radio Frequency Spectrum Regulations once the consultation process has been completed.

4.23. The Authority thus considers the discussion related to the validity of the ITA's currently approved by the Authority council as well as the discussion related to how to refer to ITA's which will be published on the 10th of December 2021 as premature.

Publication of the Draft ITA:

4.24. There is no legislative or regulatory obligation on the Authority to publish a draft ITA for public comment. However, the Authority is publishing the second Information Memorandum to give stakeholders a final opportunity to make inputs on the preliminary provisions that will be contained in the ITA.

4.25. An Information Memorandum communicates the administrative action which ICASA wishes to take when licencing the radio frequency spectrum and calls for comments in line with section 4(3) of PAJA.

4.26. The ITA is the document that captures the final administrative action which has been taken and approved by the ICASA council after consultation and can therefore not be consulted upon.

Auction as the chosen licensing method:

4.27. The Radio Frequency Spectrum Plans, 2015 for IMT700, IMT800, IMT2600 and IMT3500 dictate that these bands must be licensed through an issuance of the ITA, whereas Regulation 7 of the Radio Frequency Spectrum Regulations, 2015 provides the procedure that the Authority must apply when licensing the spectrum that is insufficient to meet demand or where an invitation to Apply is published. Regulation

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(7)(2)(n) outlines the method that the Authority can use in licensing the spectrum. The three methods proposed include the Auction rules, Beauty Contest and any other licensing mechanism deemed appropriate by the Authority. The Authority has opted to use the Auction as means of licensing process because:

4.27.1. The demand for this spectrum is high – both in terms of the possible number of licensees that may compete for the spectrum and the increased number of bandwidths required by each licensee.

4.27.2. The Auction discovers the market value of spectrum and ensures that the spectrum will be assigned to the licensee that most values it thus committing resources to use spectrum efficiently. The Auction is the best practice of licensing spectrum in a fair without a doubt of biasness and in a more transparent manner.

Categorisation of Tier 1 and Tier 2:

4.28. The Authority has considered and revised the definitions of Tier 1 and Tier 2 in accordance with the findings contained on the MBSI, as follows:

4.28.1. Tier 1: The Wholesale National Operator that has a retail market share in excess of 45% in at least one Region.

4.28.2. Tier 2: The Wholesale National Operator that is classified as Tier 1 operator.

4.28.3. Region is a rural or urban geographic retail market in each province of South Africa.

Competition assessment, the MBSI and DSMI findings:

4.29. The Authority evaluated competition in the mobile sector and has now in addition to conducting a competition assessment also considered the

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MBSI findings related to the licensing process which documents focus on competition in the mobile sector.

Inclusion of the IMT700 and IMT800 in the ITA:

4.30. The Authority notes that the Minister has committed to complete the digital migration process by 31 March 2022.[2] Assuming that this deadline is met, the Authority will include the IMT700 and IMT800 bands in the licensing process. However, should this deadline not be met, the Authority will continue to license the IMT700, IMT800, IMT2600 and IMT3500 bands but the Authority will consider the proportional payments[3] on the IMT700 and IMT800 based on the availability of these two bands.

Timelines for Consultation:

4.31. The administrative decision and procedure being considered by the Authority to licence spectrum was first published for public comment in an Information memorandum - volume 653, of the Government Gazette of 1 November 2019 number 42820, as notice 597 of 2019.

4.32. At that time all stakeholders were given until the 31st of January 2020 to submit their written representations with the licencing process only expected to commence in March 2021.

4.33. The licencing process was then interdicted by the courts until the 15th of September 2021 where a court order was agreed upon which remitted the licencing process back to the Authority therefore allow the Authority to continue with its spectrum licencing process.

[2] https://www.gov.za/speeches/minister-khumbudzo-ntshavheni-broadcast-digital-migration-and-analogue-switch-5-oct-2021

[3] Auction and Annual License Fees

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4.34. The court process itself also served as a form of further engagement between stakeholders as all papers filed in court expressed views on the spectrum licencing process which the Authority has also considered.

4.35. In addition to the above and in line with section 4(3) of the PAJA a Information Memorandum communicating ICASA's intension to licence spectrum and the process was published on 01 October 2021 allowed the public to submit their written representations within 30 working days which included the workshop that familiarised the public with the proposed processed..

4.36. An additional 15 days for consultation have also been provided for further engagement with the public on the administrative decision which the Authority wishes to take with a second Information Memorandum to be published on the 16th of November 2021 accompanied by this reasons document.

4.37. The Authority is thus of the view that it has sufficiently complied with Section 4(3) of the PAJA.

5. COMPETITION MATTERS

Incorporation of the MBSI and DSMI findings

5.1. The CCSA states that the Authority has not made reference as to how the MBSI and DSMI findings influenced the Authority approach to the spectrum assignment process;

5.2. According to Telkom, the Authority has not indicated any intention to conduct a fresh and proper competition assessment as part of this licensing process;

5.3. MTN states that the Competition Assessment or State of competition assessment that ICASA referred to in the latest IM refer to a

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Competition assessment that was not published for comment in the 2020 ITA consultation process. MTN argues that since the ITA was set aside, any document that was attached or associated with it, like competition assessment, were also set aside and so that cannot be referred to in the new process.

5.4. MTN also states that the findings and draft regulations of the MBSI were published months after the ITAs, and several competition issues that should have been assessed in the MBSI were assumed away because they were deemed to have been addressed in the ITAs.

5.5. MTN is of the view that in the new IM, ICASA must mention how ICASA is going to take into cognizance the MBSI findings published in March 2021 on the current competition dynamics as it relates to data market and current ITA.

5.6. MTN also states that ICASA's assessment of competition is fundamentally undermined as it is based on unsettled findings, and investigations that are long out of date (Competition assessment 2019). MTN submits that Telkom has long had by far the largest spectrum allocation but has not been flagged as "dominant" in any municipality.

5.7. According to Vodacom, some of the Authority's positions in its Competition Assessment differ from the MBSI Findings Document. Further Vodacom states that there are important implications for the obligations that the Authority was proposing for site access and MVNO services.

5.8. Vodacom states that any pro-competitive remedies imposed on site access should be applied as part of a market review process. Furthermore, in Vodacom's view, given that the Authority has concluded in the MBSI Findings Document that there is effective competition for MVNOs, ICASA should remove the MVNO obligation from the spectrum auction.

5.9. Vodacom does not agree with the Authority's market definition in relation to site access as contained in the MBSI Findings Document. Vodacom further expressed concern in the manner in which the

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Authority has used in order to analyses market shares, and hence to determine Significant Market Power ("SMP") in this market; and

5.10. Vodacom stated that the MBSI Findings Document still overstates the number of municipalities in which it has Significant Market Power ("SMP"). It further stated that if markets were defined properly, there would be very few municipalities where operators have SMP.

Market Developments

5.11. Vodacom stated that it does not agree with the Authority's conclusion that competition is currently not effective in South Africa's mobile market. Vodacom is of the view that there aren't any competition deficits in mobile markets.

5.12. Vodacom is of the view that the pre-auction Competition Assessment relied heavily on evidence and data from ICASA's MBSI Discussion Document, which is almost two years out-of-date (and which has since been updated by the Authority by the publication of the MBSI Findings Document). Furthermore, the market has undergone certain developments since the Authority conducted its pre-auction competition assessment. These developments according to Vodacom have implications for the Authority's auction design. The developments as listed by Vodacom include:

5.13. Vodacom further states that smaller operators have become stronger competitors, in particular:

5.13.1. Telkom has continued to grow at a remarkable rate and has been gaining subscribers from both Vodacom and MTN, this according to Vodacom is consistent with normally functioning competitive markets internationally. Consequently, Telkom Mobile has now become the second largest operator in South Africa, as measured by both service revenue and subscribers;

5.13.2. Based on this, Vodacom stated that Telkom can place an effective competitive constraint on Vodacom and MTN and reduces the risk that it could finish the auction without enough spectrum to remain a credible national wholesaler and raises the

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question whether the interventions proposed by the Authority would risk doing more harm than good to the market;

5.13.3. Cell-C has changed its business model and has recapitalised its business and implemented new wholesale agreements with Vodacom and MTN;

5.13.4. Cell-C's financial performance has shown improvement since they have been focusing more on attracting profitable subscribers rather than just maximising their total number of subscribers;

5.13.5. Based on Cell C's recent developments, Vodacom stated that there is a risk in the Authority being overly prescriptive about the minimum amount of spectrum operators should hold to be credible;

5.13.6. Vodacom stated that "ICASA risks distorting independent and diverse business strategies, whether that means a player wants to build its own network or would rather rely on wholesale access or partnering with other network players".4

5.13.7. RAIN's market position has continuously grown in relation to a rapid growth in its subscriber base and network coverage, access to significant financing, and its keen interest as reflected in RAIN's ITA application, it appears to want to expand its market position for both 4G and 5G services.

5.13.8. There have been recent significant retail price reductions in the mobile market in relation to certain tariffs and fixed LTE products which is indicative of effective competition within the retail market;

5.13.9. Mobile coverage continues to expand, with 4G population coverage reaching 96.4% in 2020 and rural population coverage for 3G basic services nearly 100% in all provinces. Lastly, "rural

[4] Vodacom IM response, paragraph 2.2, page 27.

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population coverage for 4G basic services was also above 90% in 2020 in all provinces, except for the Northern Cape".5

Spectrum constraints

5.14. MTN highlights the fact that ICASA's reason document states that Vodacom and MTN are more spectrum constrained than Cell C and Telkom, yet they will have less access to spectrum through this opt-in process.

Tier 1 and Tier 2 Operators

5.15. MTN submits that:

5.15.1. It is far smaller and less profitable than Vodacom, and that MTN competes on a more equal footing with some of its other rivals such as Telkom. MTN contends that the findings of the MBSI is yet to be contested in court and therefore ICASA can't base their competition assessment on it. Its market share dropped significantly between 2011 and 2020, from 40% to less than 30% (i.e. below the dominance threshold contained in the Competition Act). In contrast Vodacom has enjoyed a relatively steady market share of around 40% to 45% over the same period.

5.15.2. Telkom market update for the nine months ended 31 December 2020 showed that, at a group level, Telkom generated over R32 billions of turnover in this period, which is similar to the approximately R34 billions of MTN (SA).

5.15.3. There is no rational basis for selecting ten municipalities as being the relevant threshold on which anyone can decide about the competitive position or wholesale credibility of an operator."

5.15.4. The confusion and contradiction in the definition of Tier 1 and Tier 2 (on the basis of retail market share in municipalities) is prejudicial to potential bidders because they are cumbersome,

[5] Vodacom IM response, paragraph 3.2, page 31.

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time-consuming and allow the Authority to exercise its discretion and powers in ways that are arbitrary and discriminatory.

5.15.5. RAIN agrees with the Authority's classification of Vodacom and MTN as Tier 1 operators and pro-competitive mechanisms put in place by the Authority.

Roaming Agreements

5.16. The Authority received the following submissions in respect of roaming agreements from Vodacom:

5.16.1. Recent agreements demonstrate that there is effective competition for wholesale services.

5.16.2. It is evident that there exists effective competition in the markets for wholesale services, which has assisted the expansion of smaller operators. This is evidenced by smaller operators switching roaming partners. Thus, Vodacom argued that the interventions proposed by the Authority in its 2020 ITA are unlikely to be necessary;

5.16.3. The WOAN will strengthen competition for wholesale services, including national roaming and MVNO access".6

5.16.4. MTN is against "Treating capacity acquired through roaming as owned spectrum for the purpose of spectrum caps. It submits that considering roaming agreements for spectrum caps would be highly distorting and may dis-incentivise firms to conclude such arrangements".

5.16.5. Telkom indicates that the failure to have considered the impact of network sharing deals between MTN and Vodacom on the one hand, and Liquid and RAIN (and also Cell C) on other, on the viability of its proposed spectrum caps of 184 MHz per operator and on the intended purpose of the minimum spectrum portfolios

[6] Vodacom IM response, paragraph 4, page 32.

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('MSP') for what it calls Tier 2 operators in the ITA, will subject this ITA to the same failings as the previous ITA.

Five National Wholesale Operators

5.17. With regards to the Authority's 4+1 wholesale operator objective, the following submissions were received:

5.17.1. Vodacom and Telkom are of the view that the Authority's analysis does not support its 4+1 objective. They further state that the Authority did not consider how outcomes under a 3+1 scenario would compare to outcomes under a 4+1 scenario in the market.

5.17.2. Telkom states that a plan for the WOAN that is based on the flawed market structure objective mentioned above and which risks the worst of both worlds, namely that the WOAN is assigned valuable spectrum, but then fails to promote competition.

5.17.3. According to Vodacom, having five national wholesale operators in a country is high by international standards.

5.17.4. Vodacom states thar the emergence of 5G services, the global trend has been to consolidate in order to reduce the number of MNOs in markets. Further Vodacom states, "Consolidation can reduce the risk of significant spectrum resources being held by operators who make limited use of them".7

5.17.5. Vodacom is of the view that the Authority should not commit itself to five national wholesalers indefinitely if this turns out to be unsustainable. Further, Vodacom states that this could risk South African consumers not being able to benefit from the economies of scale. A 4+1 objective should be an upper-bound.

5.17.6. Cell C's ongoing move towards being, in effect, more like an MVNO on the feasibility of the "four plus WOAN" market structure

[7] Vodacom IM response, paragraph C1.1, page 36.

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that the Authority proposes, and the implication for the Authority's design of an auction and spectrum caps.

Minimum Spectrum Holding for a credible player

5.18. As regards the amount spectrum is required for an operator to be deemed credible, the following was submitted:

5.18.1. In Vodacom's opinion, the Authority has overstated the amount of spectrum that a single operator requires to render it a credible national wholesaler and hence the amount of spectrum that must be acquired by smaller operators for the Authority to meet its 4+1 objective; and

5.18.2. Vodacom is of the view that the Authority did not take into consideration the bidders' likely individual strategies and that it also understates the strength of smaller operators' and therefore take too lightly the likelihood of these smaller operators acquiring spectrum in the absence of support, the spectrum required for them to be credible.

5.18.3. The Authority's failure to properly consider the impact of persistent asymmetries in holdings of sub 1 GHz spectrum and a failure to consider ways in which this asymmetry could be resolved in a creative fashion; and broad failure in the form of an outright reliance on a foreign regulator, namely Ofcom, without considering the different and much more competitive market context in which Ofcom operates.

5.18.4. Telkom submits that, in the context of a 3-player market, effective competition means enabling a credible 3rd infrastructure player to compete equitably and effectively. This

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can be achieved through appropriate asymmetrical award of spectrum.

PRELIMINARY POSITION AND REASONS:

Incorporation of the MBSI and DSMI findings:

5.19. The Authority has prepared the second Information Memorandum based on the findings of the MBSI which took into consideration of the findings of the DSMI.

5.20. The MBSI findings provides a clear picture on the level of competition on the ICT Sector. The second information memorandum incorporates the findings of the MBSI, and accordingly proposes the following interventions that are aimed at levelling the playing field for all the licensees, which include:

5.20.1. Opt-In round: To allow at least two small players to attain the minimum spectrum portfolio to be credible in market.

5.20.2. Spectrum Caps: To ensure that the spectrum is not concentrated in hands of few players.

5.20.3. Discounted Reserve prices: To attract as many licensees as possible to participate in this licensing process but not set a trivial level in order to discourage frivolous bidding.

5.20.4. Spectrum Sharing: To promote the efficient use of the spectrum by allowing spectrum to be shared where it is not used.

5.20.5. Open Access Obligation: In the MBSI the Authority found that Vodacom and MTN are dominant in the wholesale infrastructure access market hence this obligation intends to promote access to infrastructure for Tier 2 operators.

5.20.6. MVNO Obligation: The Authority's findings in the MBSI are that there no dominant operator in the MVNO market. However, the Authority found that historically there has been ineffective competition in the market for the provision of MVNO services. There has historically been a lack of provision of services from

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the larger operators and only one supplier to the market hence the Authority proposes the MVNO obligation.

Market Developments

5.21. Despite the market developments, the Authority still finds that there are competition issues in the mobile market as provided in the MBSI where in the Authority found that Vodacom and MTN are dominant in three markets, namely Retail Market, Wholesale Infrastructure Access Market and Wholesale National Roaming Service Market. The Authority's interventions in promoting competition are aimed at addressing the MBSI findings.

Spectrum Constraints:

5.22. The Authority acknowledges that MTN and Vodacom are spectrum constrained based on the market shares of connections. However, the Opt-In Round is meant to ensure that two sub-national wholesale players become credible by acquiring the minimum spectrum portfolios without compromising the needs for Tier 1 operators.

Definitions of Tier 1 and Tier 2:

5.23. The definition of the Tier 1 and Tier 2 have been revised in accordance with the dominance findings in MBSI and are determined by the regions as outlined in paragraph 4.11 above.

Roaming Agreements:

5.24. The Authority considered the spectrum sharing arrangements in the MBSI and concluded that access to spectrum through roaming is not exclusive and does not amount to the acquisition of the spectrum through a licensing process.

5.25. Secondly, these agreements are generally structured to allow for roaming on the remaining available RAN capacity, at the capacity provider's discretion. For instance, Cell C, Rain and Liquid Telecom do

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not only use their spectrum to provide capacity for roaming but also to service their own subscribers.

5.26. According to the Authority's view in the MBSI findings report, the smaller operators are able to use their spectrum assignments as bargaining power to leverage roaming, site access and managed services arrangements. The net impact of these deals is that it increases the ability of small operators to compete at retail level, thereby providing consumers with additional choice. Therefore, these agreements potentially provide a mechanism for increasing retail competition and consumer choice.

5.27. As such, in considering spectrum caps, the Authority does not find it appropriate to consider the spectrum capacity that is available to MTN and Vodacom through the spectrum sharing agreements as an accretion in their total spectrum holdings.8

Consideration of Five National Wholesale Operators:

5.28. Although five national wholesale operators are higher than international standards that suggest a three to four national wholesale operator market, this does not preclude each economy to consider its own unique circumstances in prescribing the number of national wholesale operators.

Minimum Spectrum holdings for a Credible Operator:

5.29. The Authority has adapted Ofcom UK's 2012 broad analytical framework to assess the spectrum that a national wholesaler is likely to need to be capable of being a credible national wholesaler. Determining whether or not a particular national wholesaler is likely to be credible is ultimately an exercise of the regulatory judgement in light of the evidence. The Authority has decided to consider the two credible national wholesale operators (i.e. Vodacom and MTN) and have determined that in order to be credible, an operator have would need to have an average of 80MHz of spectrum combined for coverage and capacity. It is on this

[8] Findings Document on MBSI report (page 33)

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basis that the Authority has calculated the minimum spectrum portfolios for a credible operator.

Status of Cell C:

5.30. The Authority regards Cell C as a licensee issued with a Radio Frequency Spectrum and I-ECNS licence. Until such time that this status changes, Cell C will be regarded as a National Wholesale Operators. In the event that one of the Tier 2 operators does not participate in the licensing process, it would not compromise the objective of the Authority to achieve 5 credible national wholesale operators as there are sufficient sub-national operators that may be promoted to being a national wholesale operators through the opt-in round and the coverage obligations proposed.

6. ANALYSIS: SPECTRUM FOR THE AWARD

INCLUSION OF THE IMT700 AND IMT800

6.1. Community Investment Ventures Holdings (CIVH) and Rain support the first proposal for the Authority to auction the IMT700 and IMT800 frequency bands whilst the digital migration is in process, considering their importance in ensuring the effective cost-effective expansion of coverage for mobile broadband services (for both rural and under-served areas, as well as for the better indoor penetration in urban and suburban areas alike). SACF also supports the inclusion of IMT700 and IMT800 in the auction albeit subject to deferred payment terms until licensees can meaningfully use the spectrum.

6.2. CIVH adds that these bands have been assigned and successfully deployed without causing interference or disruption to the analogue broadcasters. CIVH further adds that the broadcasters can remain protected through effective co-ordination between the MNO's and analogue broadcasters, in accordance with the transitional arrangement during the digital migration period. Furthermore, CIVH adds that not auctioning the IMT700 and IMT800 up until such time that the migration

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process is concluded will be extremely detrimental to the licensing of the WOAN and the mobile broadband services market in general based on the following:

6.2.1. The existing 3 operators who are the only ones currently with access to sub 1 GHz spectrum, will benefit from enjoying an extension to their current, superior positions in respect of network coverage.

6.2.2. The third and fourth wholesale operator, and also the WOAN, will not have access to any sub 1 GHz spectrum to be credible competitors and not be able to meet their proposed coverage obligations.

6.2.3. The intention of the Authority to stimulate competition will therefore no longer be immediately realised.

6.3. MTN is of the view that if no sub-1GHz can be assigned during this stage, design rules rooted in the concept of wholesale credibility (e.g., MSP, Opt-In- Round) should be revisited.

6.4. Telkom is of the view that the removal of the 700 MHz and 800 MHz is a material consideration that ICASA has to take into account before publishing the new ITAs. A further competition assessment has to be completed before the new ITAs are published. Telkom is amendable to the option of only paying the auction fee for the spectrum once it is fully cleared and available nationally for mobile use. However, Telkom requires access to the spectrum, even partially, as it becomes available. Telkom recommends payment of a fee based on the prescribed spectrum fees regulations, i.e. an Administrative Incentive Pricing (AIP fee).

6.5. Not paying the auction fee until the bands are available nationally, will incentivise the Minister and ICASA to expedite the digital migration process.

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SPECTRUM SET ASIDE FOR THE WOAN

6.6. In relation to the spectrum set aside to the WOAN, CIVH submits its view that the Authority's aim to make the WOAN viable will not be achieved if the less spectrum is assigned to the WOAN in comparison to any MNO after the Auction. CIVH proposes that the WOAN spectrum be at least as much spectrum as any single national wholesale operator by considering the maximum amount of total spectrum which any single national wholesale operator will have after the auction. CIVH is of the view that the Tier 1 and Tier 2 operators may acquire double amount (Approximately 230%) of spectrum set-aside than the WOAN thus affecting its viability, also not with the Minister's Policy on High Demand Spectrum and Policy Direction on the Licensing of Wireless Open Access Network ("the Policy Direction") published in Government Gazette No. 42597 (Notice No. 1013 on 26 July 2019) (the Policy). CIVH adds that the cost of production for the WOAN will be directly related to the amount set aside for the WOAN which may be unfair.

6.7. CIVH proposes that the Opt-in round should be discarded completely in support of the proposal that the Spectrum set-aside for the WOAN should be not less that the spectrum that will be acquired from the Auction. CIVH further proposes that the spectrum caps should be revisited with consideration of Tier 1, Tier 2 and WOAN to enable the WOAN to have a sufficient spectrum to be set aside for the WOAN to be viable. Furthermore, CIVH proposes that allocating contiguous high band spectrum to prevent fragmentation particularly for the WOAN.

6.8. RAIN notes that the spectrum requirements of the WOAN was determined by an exhaustive process and with the input of many interested parties including the CSIR. Rain agrees that the spectrum earmarked for the WOAN should be set aside and not licensed through this auction process.

6.9. MTN is against the setting aside of 30MHz for WOAN in the 3500MHz because the say it is in high demand that should be reserved for

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operators. MTN further states that the WOAN should be allocated 40MHz in 2300MHz.

6.10. Telkom is of the view that If the WOAN is still maintained in the policy, the Authority should determine and set aside sufficient spectrum for it to discharge its policy mandate.

Spectrum valuation

6.11. Telkom notes that on page 132 of the Reasons Document, some outputs of the Authority's cost avoidance model are illustrated in Figure 12 therein. In relation to the cost avoidance model, Telkom states:

6.11.1. The spectrum licence duration is 20 years; however, the Authority has illustrated avoided cost modelling for years 1-10 only. Notwithstanding that the latter years have a lower time value of money this is more than compensated for by the fact that traffic is growing and is forecast to continue to grow exponentially. It would appear the Authority may have underestimated the traffic on the network in year 20, and overestimated the costs savings as a result, which would lead to the Authority having calculated a higher reserve price that it ought.

6.11.2. It is not clear what the starting spectrum holdings of the assumed operator is. To model an operator with only 1 or 2 lots is incorrect. A cost avoidance model requires a baseline and the savings are the incremental difference between that baseline and a set of scenarios.

6.11.3. By modelling only 1 or 2 lots, the Authority has lopped of a large set of permutations. Valuation is nonlinear i.e. the value of three lots is not the same as 1 lot + 2 lots. Each lot permutation needs to be individually modelled.

6.11.4. It is not evident what coverage and geo-type is being modelled. Telkom cannot confirm that obligations associated with the respective spectrum bands have actually been modelled. If not, the model is likely to overestimate costs savings, leading to inflated reserve prices.

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6.12. According to Telkom, the reserve price values contained in Table 3 of the Reasons Document (page 131), have results that look incorrect for the following reasons:

6.12.1. The value of the 700 MHz = 800 MHz and similarly 2.6 GHz = 3.5 GHz. This is incorrect because:

6.12.2. The lower 700 MHz has a greater coverage capability than 800 MHz, however, even if one presumes the same coverage, then the marked difference in practical availability of 700 MHz vis-à-vis 800 MHz is significant.

6.12.3. 2.6 GHz certainly has superior coverage and indoor propagation characteristics compared to 3.5 GHz and is more valuable as a result.

6.12.4. If one compares the ratio of 2.6 GHz compared to 800 MHz, it is approximately 1:2, which by international benchmarking is incorrect. The expected range is 1:5 to 1:7.

6.13. Telkom states that in the Reasons Document, the Authority claims that discounts have been applied to various bands, whereas in fact an arbitrary 44.4% mark-up seems to have been added. This is after the higher prices were chosen in step 1 of the valuation process.

6.14. In Telkom's view, the adjustments made to the figures have all the characteristics of an engineered desired result, particularly in the ratio between the bands, which Telkom had earlier observed appeared be an error in the first set of calculations. According to Telkom, not only are such adjustments not justified by the Authority in many instances, but this approach is not aligned with any international methodology Telkom is aware of. While Telkom admits that there should certainly be scope for some discretion in the setting of reserve prices, this should, be limited to easy to remember rounded numbers.

6.15. Telkom recommends that the Authority recalculating the reserve prices without making adjustments, so as to arrive at a more scientifically

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based reserve price. Telkom would expect the Authority to be transparent in the steps and assumptions used to derive the final answer, consulting the industry along the way.

PRELIMINARY POSITION AND REASONS:

INCLUSION OF THE IMT700 and IMT800:

6.16. The Authority notes that the Minister has committed to complete the digital migration process by 31 March 2022.[9] Assuming that this deadline is met, the Authority will include the IMT700 and IMT800 bands in the licensing process. However, should this deadline not be met, the Authority will continue to auction the IMT700, IMT800, IMT2600 and IMT3500 bands but the Authority will consider the proportional payments on the IMT700 and IMT800 based on the availability of these two bands.

SPECTRUM SET ASIDE FOR THE WOAN:

6.17. The Authority understands preferential treatment to mean setting aside the High Demand Spectrum for the WOAN, without it having to bid for the spectrum. The Authority is considering setting aside 80 MHz consisting of 2x10 MHz in the IMT700 band, and 60 MHz in the high capacity bands (1x30MHz in IMT2600 and 1x30 MHz in the IMT3500). The Authority has determined that this assignment is necessary to ensure sufficient coverage and capacity spectrum and enable the WOAN to compete effectively in the open market with other credible wholesale players.

6.18. Despite the WOAN being regarded as a 5th Credible National Wholesale Player, the Authority also aimed to ensure the efficient use of the Spectrum by not assigning the WOAN more than what it may require. Case studies show that the concept of a WOAN has not been viable in other parts of the world, and as such, there is a potential substantial

[9] https://www.gov.za/speeches/minister-khumbudzo-ntshavheni-broadcast-digital-migration-and-analogue-switch-5-oct-2021

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risk of stranded spectrum in the WOAN hence the Authority assigned an adequate portion of the IMT spectrum.

6.19. With regards to the IMT3500, 86MHz of bandwidth has been made available for the auction which excludes the 30MHz of IMT3500 set aside for the WOAN. There is accordingly enough spectrum in the IMT3500 band to ensure that all national wholesale operators can bid for it. Furthermore, the IMT2300 is not available for licensing in this process.

SPECTRUM VALUATION

6.20. In setting the reserve prices for all the Lots, the Authority has determined the reserves prices using the avoided cost model based on the Tier 2 operators and further discounted the reserve prices to ensure that they are fair and will enable more accurate price discovery of spectrum through the auction. International Benchmarking was also conducted to verify the veracity of the two models. The Authority has rounded up the reserve prices to the nearest rand.

7. OPT-IN LOTSAND SPECTRUM CAPS

OPT-IN ROUNDS

7.1. RAIN supports the Opt-In round as a pro-competitive remedy to enable smaller players to acquire the spectrum they require to become credible national wholesalers. RAIN does not support discarding the Opt-In round.

7.2. MTN says that a 42MHz sub-1GHz cap alone ensures at least 4 "credible national wholesalers" operators (+ WOAN) can emerge from the auction, and no Opt-In scheme would be necessary required to meet the stated policy objective.

7.3. The Opt-in rule will limit Tier 1 operators to bit above a certain threshold (42MHz) so that any Tier 2 operator can get a fair chance to acquire enough spectrum to compete with Tier 1 operators and also to ensure that an Tier 2 operator does not acquire much more than what will make it a credible national wholesaler e.g. one Tier 2 operator having more

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that 2MHz currently to acquire more than 40MHz of the available 60MHz that is up for auction).

7.4. Telkom is in favour of retaining the concept of opt-in lots, as such is the only pro-competitive measure currently available to non-SMP operators.

OPT-IN LOTS

7.5. Rain states that the Authority further indicates that, at its discretion, it may decide to include only certain lots of certain spectrum bands in the Opt-In round as Opt-In lots. This is creating uncertainty for prospective bidders as is not clear on what is/will influence the Authority's discretion. RAIN recommends that it may be of assistance to prospective bidders for the Authority to define these band(s) in advance.

7.6. ICASA has said that it may include the OPT-IN round, or it may not. However, it appears that this will only be known during the auction. We recommend that this is instead made known in advance to promote transparency and fairness (MTN).

7.7. It would be advisable for the Authority to be clear and also identify all bands in the Opt-in round.

7.8. Telkom is of the view that the details pertaining to the opt-in round and opt-in lots remain uncertain. Telkom recommends that these details must be provided in the invitation to apply to ensure that industry have full insights as to how this will be implemented and what will be available; without such preparation for the auction is curtailed.

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PRELIMINARY POSITION AND REASONS

Opt-in round

7.9. The only operators who presently have enough spectrum to be considered a credible player are Vodacom and MTN. The opt-in process will serve to level the playing field and ensure that all successful bidders have minimum amount of spectrum to allow them to compete effectively. To allow the auction to proceed without first remedying this situation would compromise the Authority's objectives to promote competition. The Authority is thus proposing that the opt-in rounds be included in the licensing process.

Opt-in Lots

7.10. In availing the spectrum for the opt in round, the Authority has to consider the applicants who meet the pre-qualification criteria and the total spectrum that would be necessary to assist the successful bidders to acquire the Minimum Spectrum Portfolio to establish them as credible players. The Authority has deliberately avoided predetermining these lots so to allow for flexibility in this regard. However, the Authority proposes to set aside IMT700 and IMT2600 for MSP 1. Whereas for MSP2, the Authority will set aside IMT800 and IMT2600.

8. SPECTRUM CAPS

Broadband Fixed Wireless Access Spectrum

8.1. CIVH proposes that the Broadband Fixed Wireless Access spectrum, particularly in the 3600 -3800 MHz be included for the calculating the spectrum caps because various licensees are already using the band 3600 -3800 MHz on a national basis offering 5G fixed wireless services, that the band is anticipated that it will be identified as an IMT band at the World Radiocommunication Conference 2023 and that it will assist the Authority in avoiding distorting competition in the market.

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8.2. CCSA supports the explicit spectrum caps (overall spectrum cap and sub-1GHz spectrum cap) in order to prevent spectrum being assigned to Tier 1 Operators only.

8.3. However, CCSA is concerned that the Tier 1 operators who already hold a strong position in the market may end acquiring even more spectrum over other players who may not be able to afford the auction. It further recommends that a separate spectrum cap be imposed to only Tier 1 players and imposing another spectrum cap associated with the spectrum that is going to be auctioned. CCSA support its recommendation by adding that this will protect spectrum being concentrated in the hands of Tier 1.

8.4. RAIN supports the inclusion of all IMT spectrum holdings of operators towards the spectrum cap. The intent of the auction is to license IMT spectrum to operators and it would not be appropriate to include other spectrum holdings. RAIN notes that the Authority did create lots in such a way that all the bidders have the flexibility to bid on any spectrum they require as allowed by their spectrum caps.

8.5. RAIN believes that roaming is not commercially, technically or operationally equivalent to operators holding their own spectrum licenses. As such, RAIN does not consider it as appropriate to include spectrum holdings of other operators on which an operator roams towards the roaming operator's spectrum cap.

8.6. MTN states that:

8.6.1. In light of the expected IMT conversion and the enduring nature of the proposed 184MHz cap regime in the previous ITA, MTN cannot see how ICASA can justify the exclusion of Rain's 3700 MHz spectrum from the caps, thus, it would hand over a lasting competitive advantage where Rain could uniquely hold 264MHz IMT spectrum post IMT conversion, when everyone else would be capped at 184MHz.

8.6.2. MTN has a problem with spectrum cap not applying to Rain in the 3700MHz since it already has spectrum allocated to them in this band. They argue that as soon as 2024, ITU will declare

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3700MHz an IMT spectrum. MTN further suggest an alternative which suggests that "such spectrum should be returned by current assignees for competitive assignment once its IMT status is confirmed."

8.6.3. MTN also notes the 1015MHz used as a baseline for post-ITA assignments and derive the 184MHz cap in the previous ITA includes Rain's 80MHz in the 3600-3800MHz band. It would be inconsistent to set a cap at 18% of a total that includes this the 3700MHz spectrum assignment, but then exclude the 3700MHz from the cap applicable to Rain.

PRELIMINARY POSITION AND REASONS

THE INCLUSION OF NON-IMT BANDS IN CALCULATING SPECTRUM CAPS

8.7. The 3600 – 3800 MHz is currently under study at the ITU towards WRC 2023 for allocation to the Mobile Service on a Primary basis. The Authority is of the view that there is no guarantee that this band will be allocated to the Mobile Services.

8.8. The Authority acknowledges the possibility that bands such as the 3600 – 3800 MHz band could be identified for IMT by future ITU WRCs. Should the 3600 – 3800 MHz band be allocated to the Mobile Service and identified for IMT, the Authority will undertake a process to assess the spectrum assignments in the band to ensure that the spectrum cap is not exceeded by all licensees.

8.9. The Authority will thus not consider the 3600 – 3800 MHz band in calculating the spectrum caps in this licensing process. The calculation of the Spectrum Cap (i.e., 187 MHz) includes all IMT Spectrum holdings of all the licensees plus the IMT spectrum available for licensing in this process and spectrum set-aside of the WOAN and divided by the five (5) credible national wholesale operators that the Authority intends to achieve.

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9. OBLIGATIONS

Effective date of the obligations on IMT700 and IMT800:

9.1. With regards to uplink and throughput obligations, CIVH is of the view that the uplink and throughput obligation of minimum downlink single user throughput of 5Mbps at the edge of the cell for all national wholesalers who are awarded radio frequency spectrum licences on spectrum band IMT700 within five (5) years of licence issue can only be met within the set timeline if the band is free from interference and is usable nationwide.

Exclusion of the Tier 2 Operators from the Coverage Lot:

9.2. CCSA submits that the coverage speed obligation prescribed in the ITA is reasonable. However, recommends that the obligation attached to the Coverage Lot only be applied to the Tier 1 Operators.

Preliminary Position and Reasons

Effective date of the obligations on IMT700 and IMT800:

9.3. It is reasonable to measure compliance against obligations related to the IMT700 and IMT800 spectrum bands from date the digital migration process is completed.

Exclusion of Operators from the Coverage Lot:

9.4. The Authority has discounted the reserve price for the Coverage Lot to ensure that both Tier 1 and Tier 2 operators have the opportunity to acquire the Coverage Lot but also ensure that they are able to fulfil the coverage obligation attached to it. It is thus important to afford all bidders the opportunity to compete for this Coverage lot.

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10. COVERAGE OBLIGATIONS

PRELIMINARY POSITION AND REASONS

Spectrum required to meet the Coverage and Uplink and throughput obligations:

10.1. The Authority aims for successful bidders to achieve set obligations with the spectrum assigned through this process and with any other IMT spectrum assigned prior to this process.

Coverage Obligations for Tier 1 and Tier 2 Operators:

10.2. To the extent that the Coverage obligations were unclear in respect of Tier 1 and Tier 2 operators, the Authority has amended in the IM

Discounting of Reserve Prices for Obligations:

10.3. In setting the reserve prices for all the Lots, the Authority has determined the reserves prices using the avoided cost model based on the Tier 2 operators and further discounted the reserve prices to ensure that they are fair and will enable more accurate price discovery of spectrum through the auction.

11. OPEN ACCESS OBLIGATIONS

Uptake obligations in respect of the WOAN

11.1. CIVH recommends that the 30% uptake period be for seven (7) years in alignment with the 2019 information memorandum, and further proposes that the instead of the 30% national capacity be procured from the WOAN in proportion to the overall spectrum after the auction to ensure that the viability of the WOAN is achieved.

PRELIMINARY POSITION AND REASONS

11.2. The Authority in considering the Policy decided that the period for the uptake obligation will be limited to five years.

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12. SPECTRUM SHARING

12.1. The Authority received the following submissions from Association of Progressive Communications (APC) in respect of spectrum sharing:

12.1.1. APC encourages and recommends the Authority to adopt a "use-it-or-share-it" provision for IMT Spectrum licenses that will be issued through the ITA. According to APC, the inclusion of the "use-it-or-share-it" provision will increase digital inclusion by unlocking innovation in service delivery in underserved regions by WISPs and community networks in South Africa.

12.1.2. APC adds that spectrum licenses for mobile services are typically national in scope. However, the business models of national mobile operators are naturally oriented towards investment in infrastructure in more densely populated urban areas where the customer base is larger and income levels are higher. The result is that the spectrum in many rural areas lies unused, even though assigned to an operator.

12.1.3. APC provided an example of Cell C, which has been reported that have switched off their networks in some provinces, leaving a large amount of spectrum assigned and unused. APC provided evidence where regulators in parts of the world (such as the USA, Germany, Canada, and United Kingdom) have unlocked access to spectrum in areas where operators have no strategic interest.

12.1.4. The CCSA supports the enforcement of spectrum sharing as provided in the ITA that it aligns with the recommendation of the DSMI to allow the use of the unutilised spectrum in the rural and underserved areas.

PRELIMINARY POSITION AND REASONS

Spectrum Sharing:

12.2. The Authority recognises the need for the radio frequency spectrum to be shared with ECNS licensees in areas that spectrum is not utilised to

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stimulate competition, promote SMMEs and cooperatives, and ensure that the radio frequency spectrum is used efficiently in accordance with section 2 (f), (p) and (e) of the ECA, respectively. The Authority is in alignment with the submission from APC and has accordingly included the spectrum sharing obligation in the second IM.

13. KAROO CENTRAL ASTRONOMY ADVANTAGE AREAS

13.1. South African Radio Astronomy Observatory (SARAO) further states that there are restrictions and prohibitions on spectrum use in the Karoo Central Astronomy Advantage Areas in the Northern Cape Province, they would like to bring that to the attention of aspiring licensees so that they can take that into consideration in their business development plans.

Preliminary Position and Reasons

13.2. The Authority has included the provision in the second Information Memorandum to create awareness and ensure the protection of the Karoo Central Astronomy Advantage Areas.

14. QUALIFICATION STAGE

Submission of Applications

14.1. Does the Authority expect new bidding documents to be submitted or amended bidding documents by those bidders who were part of the 2020 ITA? (MTN).

Preliminary Position and Reasons

14.2. The licensee who submitted applications received on 28 December 2020 will be given the opportunity to withdraw or amend their applications.

15. ANALYSIS: BANK GUARANTEE

15.1. Stakeholders have asked how the Authority intends to treat the R10 Million Bank Guarantee provided by the previous applicants?

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Preliminary Position and Reasons

15.2. Valid Bank Guarantee will still be applicable.

16. AUCTION STAGE

16.1. The Authority received the following enquiries in respect of the Auction stage:

16.1.1. MTN says that the IM is silent on the availability of detailed auction rules, and the timing of a round of mock an auction.

16.1.2. All spectrum in South Africa to date has been licensed administratively to date and as a result the auctioning of spectrum is a new and complex licensing method. As a result, the mock auction included in the previous licensing process which has not been included in the truncated process. The SACF is of the view that the mock auction should be included to enable a smooth auction.

Preliminary Position and Reasons

16.2. The Authority has updated the second IM to include auction rules including the details related to the mock auction. The mock auction will take place after qualified bidders have been determined through the pre-qualification stage to familiarise with auction rules.

17. ELIGIBILITY AND ACTIVITY

On eligibility and activity, the following questions were submitted (MTN):

17.1. Under the current eligibility and activity rules in the 2020 ITA once a bidder switches to Lot 9, the loss of eligibility implies that the bidder is no longer able to bid on the other Lots. This creates a material substitution risk that may result in an inefficient allocation of spectrum.

17.2. Will the Authority review its eligibility and activity rules to ensure that bidders have flexibility to switch demand back and forth between

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respective Lots in response to changing auction prices without facing substitution risk?

PRELIMINARY POSITION AND REASONS:

17.3. The eligibility and activity rules are designed in a manner that ensures that the bidders are not without spectrum demand at initial stages of the auction and subsequent auction rounds.

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