Representations on Second Information Memorandum on Licensing Spectrum in the IMT700, IMT800, IMT2600 and IMT3500 bands

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Principal Submission: The Authority is wasting the public's time and abusing the public's trust by continuously acting in flagrant and intentional disregard of its legal obligations in ensuring that high demand spectrum is available on a competitive basis in accordance with a just and reasonable process. The outcome and effect of an Authority that continues to disregard the statutory and regulatory framework within which it is required to operate is that the cost to communicate is maintained at artificially high levels.

Opening Remarks

Authentic public participation makes for better processes. Inauthentic efforts simply produce a big mess. The auctioning of spectrum by ICASA is a big mess and will only stop being a mess when ICASA starts valuing authentic public participation and embraces the values and principles of the legal and regulatory framework for the industry.

Fully canvassing the multitude of defects evident from the published two successive Information Memoranda is a futile exercise. ICASA insists on taking irrelevant considerations into account while failing to remedy fatal flaws identified and raised with ICASA. It is inevitable that at a certain point a telco or broadcaster will be forced to litigate on the matter again thereby perpetuating this Sisyphean like punishment imposed on ICASA and the telcos.

Fundamental problems within the Information Memoranda include:

- The Authority has not set out the applicable caps for various bands as envisaged by the Radio Frequency Spectrum Regulations 2015 (as amended, the Regulations)

- Having amended the Regulations (Regulation 7(3)) to modify (and frankly circumvent judicial outcomes) the HDI/BBBEE requirements for applicants seeking spectrum to be awarded in a profoundly illogical manner, the draft ITA ignores the amendment (or at least the wording of the amendment).

- The Authority is seeking to shift the responsibility for undermining the interests and rights of the Broadcasters onto the Minister while making an administrative decision which compels such an undermining.

Each of these problems is fatal to any hope of a successful holding of a spectrum auction as envisaged. The unfortunate reality is that rather than ICASA remedying the situation and working towards achieving a just and equitable licensing of high demand spectrum in an expedited manner, what ICASA insists on doing is rushing while on the wrong track. The outcome is predictable and it is a bad one for South Africa.

Having considered the submissions which we made by other parties and the futility of cataloguing concerns with the fatally flawed current path this submission set instead focuses on the argument from Telkom that whether to hold an auction needs to be rationally considered.

Other than the passing of time little has changed since December 2020 or June 2016 for that matter. Until the Authority experiences a Damascus moment South Africa's ambitions at near universal broadband connectivity will be frustrated.

Submission: The Information Memorandum is wholly insufficient as a means by which to conduct an administrative decision making process

1. Section 3(2)(iii) of PAJA requires that in a "clear statement of the administrative action" be furnished when such action is proposed. The First Information Memorandum simply did not meet that that requirement. Comment on the administrative action proposed has therefore been limited to two weeks rather than a calendar month. Moreover, no public hearing has been convened to consider the administrative decision proposed to be made. This therefore gravely prejudices the rights and interests of broadcasters. The Authority appears to have realized that a comment and hearing process is required under the circumstances, but rather than embracing such a process sought to fudge the exercise with a stupid ruse – namely holding a workshop on incomplete information and as a formalistic step on a checklist.
2. By issuing the draft language of the proposed ITA on 16th of November ICASA has afforded insufficient opportunity to scrutinise and comment by the 30th November. This is particularly deleterious, and irrational, because ICASA has wasted approximately 45 days during which time there was no reason why the proposed ITA draft language could not be known and subjected to scrutiny by affected and interested parties.
3. Based on experience there is no rational basis to presume that the Authority will remedy any discovered problems with the specific language in the ITA which it proposes to put out. This prior experience includes correspondence to ICASA on 16th October 2020 wherein the logical flaw in the approach to defining Tier-1 and Tier-2 operators was pointed out. This experience also includes the failure of the Authority to address the problem in Regulation 7(3) of the Radio Frequency Spectrum Regulations resulting from a rushed amendment which was designed to facilitate incumbent operators being eligible for additional high demand spectrum.
4. The Authority in its reason's document has misconstrued the problem it has created in the timetable it is working with. As pointed out by Telkom the effect of the timeline presented is such that interested parties have had no time to consider the ITA itself and that this is irrational.
5. I do not know whether Telkom would argue that it would have been possible to have crafted a process that would complete at the time envisaged. In my submission and view, had the Authority acted with good faith and conducted a workshop a week earlier and had presented

the proposed draft ITA in full with the first Information Memorandum it would have been possible to have reached an awarding stage on time. However, it will no longer be possible to do so. Subsequently ICASA can and should properly reconsider the matter with a possible awarding in the final quarter of 2022. The alternative of running the course and the matter being back at court in mid-2022 will only see a further reconsideration in 2023.

6. I submit that the Authority is wrongfully seeking to short-circuit the outcome of the judicial proceedings surrounding the 2020 ITA. The interpretation advanced by the Authority of the order as only reversing the publication of the document is irrational and absurd.
7. If Telkom's approach of requiring that the matter in its entirety is correct then the Authority has not even begun in earnest with a process by which to avoid further litigation, further delays and a further waste of public funds. I submit that Telkom's contention that the effect of the High Court order is to require the Authority to submit the entire matter – including the decision as to which approach to use for the awarding – is correct. I however hasten to add that the Authority is not precluded and is in fact required to consider the 2020 ITA and its preparatory steps when undertaking the re-consideration. There is another proviso of having to restrain to relevant considerations. Therefore, while the effect of the order is to send ICASA back to the drawing board and requiring a reconsideration of the matter in its entirety the Authority is not sitting with a clean slate at the drawing board.
8. To reiterate, it is not the case that failing to properly consider parties comments or submissions **may** be a violation of PAJA. My submission is that the failure represents an outright violation of PAJA. The only "may" in the equation is that the court may yet again set aside the proceedings and ITA.
9. To this end I submit that ICASA is obligated to consider submissions and inputs properly received in respect the earlier processes as a failure to do so will result in adversely affected parties being deprived of being heard through never being advised of the need to re-submit. I submit that the effect of the High Court Order is to find the process to tainted but not a nullity and therefore that steps, particularly steps taken by third parties need to be viewed within context.[1] This is because "there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights"[2]
10. Thus, rather than providing interested parties and organizations whose rights are adversely affected by the administrative decision to be made by ICASA an opportunity to be heard, what the process has been designed to do is to "workshop to death" any objection to what ICASA has pre-determined it wishes to do. This is bad faith from the administrator and should result in the decision being set aside with a possible adverse costs order.
11. The assertion that formulating the ITA represents the first regulatory step taken by the Authority (Reasons p.14 ad para 4.17) is peculiar and there is an inconsistency between this assertion and the explanation set forth in para 4.18. This inconsistency reveals problems in the Authority's reasoning. The publication of the ITA captures the entire matter and is the administrative decision upon which consequences arise. I submit that a party will be hard pressed to institute a PAJA based challenge until the publication of an ITA. In the present

1 Consider the dicussion of the Constitution Court in *Magnificent Mile Trading 30 (Pty) Limited v Charmaine Celliers N.O. and Others* [2019] ZACC 36 para 35 citing *Smith v East Elloe Rural* [1956] UKHL 2, which was further cited with approval in *Oudekraal*.

2 *MEC for Health, Eastern Cape and Another v Kirland Investments* [2014] ZACC 6 Para 82

matter the Authority has taken a regulatory step in the form of determining to hold a workshop as the means by which to afford hearing to affected parties. The Authority took the regulatory step of deciding which methodology of awarding spectrum to follow. It has taken the step of conducting a flawed competition analysis. Under PAJA these preparatory and inconclusive regulatory steps are not easily open to challenge as there is not a “direct, external legal effect” but they are regulatory steps.

Submission: ICASA is harbouring an erroneous approach towards roaming agreements

12. While I submit that Telkom's suggestion of viewing the spectrum arrangements as a de facto trade of spectrum is erroneous, it is impossible to ignore the fact that in proposing the ITA ICASA have been negligent in failing to consider the nature of the market due to various commercial arrangements involving spectrum.
13. The simple truth is that entities which hold spectrum rights are going to enter into commercial arrangements with other entities in order to generate value from those spectrum rights. These arrangements will vary greatly and can produce a greater or less competitive dynamic in the market. These arrangements must (by law) adhere to the regulatory and statutory obligations on the parties and depending on the specifics may be required to be filed with ICASA. The devil is quite simply in the detail. Some arrangements are commercial agreements that are perfectly licit and some arrangements will either fall foul or will raise concerns.
14. An agreement proposed between Telkom and MTN was prohibited by the Competition Commission in 2015. On the publicly available information it is difficult to not conclude that the arrangements between Vodacom and Rain have not been considered by the Authority at all, and it is reasonable to anticipate that proceedings involving the Competition Commission and initiated by Telkom will result in an adverse outcome (to what degree is an entirely different question) for one or both of the firms. This is a deleterious state of affairs.
15. It makes little difference how CellC is labelled (again I submit Telkom's categorizing of the firm is uncharitable, while CellC will inevitable characterize itself very differently) as the simple reality is that CellC is transitioning into a very different user of spectrum assets and this transition makes the assumptions about wholesale national operators incorrect. The commercial arrangements by which CellC transitions is a relevant consideration if consideration is given to the nature of the market.
16. I submit that in failing to consider the implications of the agreements between incumbent network operators the Authority has presented a wholly flawed assessment of the competition landscape and is therefore operating with irrelevant considerations while ignoring relevant considerations.
17. Properly considering the implications of market forces and technological developments renders a considerable amount of discourse around the awarding of high demand spectrum to incumbents outdated. With GSM technologies it was not possible for a firm to roll out the

network without spectrum, today an operator – as is demonstrated by Rain – can have a considerably larger network footprint without purchasing the infrastructure.

18. It is probable that the arrangements between firms involving roaming entail both facilities leasing and interconnecting both of which necessitate a degree of scrutiny from the Authority with there being regulations on these matters. I am not aware of any technological means of achieving carrier aggregation such that no interconnection agreement between the parties would be required. Therefore it is beyond comprehension that the Authority has not had ample opportunity to consider the agreements.
19. I submit that while the regulatory framework precludes competition impairing practices and exclusivity in which a "tier 1 operator" can supplement the spectrum resources available to it through roaming agreements with small operators holding national spectrum resources but a small infrastructure footprint. However, a small national operator having commercial arrangements with both "tier 1 operators" and there being competitive forces around infrastructure is not only permitted but envisaged in the regulatory framework.
20. The Authority presupposes that it is practicable for same to "level the playing field". While some parties may submit that the Authority can and should level the playing field but that it is misunderstanding the field, I submit that the field is far to complicated to be levelled.
21. The historic malfeasance of anticompetitive practice in the broadband space from Telkom was addressed not by ICASA but rather through proceedings in the Competition Tribunal. It appears that this pattern will repeat itself in respect of the use of roaming agreement which is most deleterious for the industry as it represents a post-injury remedial outcome rather than pro-active competition and growth producing approach.

Conclusion

22. I do not see how ICASA can hope to conclude the auction with the current litany of missteps made by ICASA most of which are wholly inexcusable. It is unfortunate because the mishandling of its responsibilities produces costs not born by those who are acting irresponsibly but by society at large.
23. The failure to remedy the amendment to Regulation 7 prior to issuing a new ITA in particular demonstrates the total disregard for the regulations and other relevant considerations.
24. It is too late to adjust course while still meeting the deadlines ICASA has set for itself, but failing to adjust course and remedy all of the problems will simply lead to further costly delays for all concerned.