



By email

The Independent Communications Authority of South Africa

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Attention: Mr Davis Kgosimolao Moshweunyane
Email: Covid19regulations@icasa.org.za

7 May 2021

Dear Mr Moshweunyane

SUBMISSION ON THE ICT COVID-19 NATIONAL DISASTER REGULATIONS

1. Introduction

- 1.1 We are grateful for the opportunity to present our submission on the issues that the Independent Communications Authority of South Africa (**the Authority**) should take into account in the context of the ICT Covid-19 National Disaster Regulations (the **Regulations**), as amended and published under the Electronic Communications Act 36 of 2005 (the **ECA**). As the Authority knows, Rain Proprietary Limited (**Rain**) is a smaller market player which operates in both the retail and wholesale telecommunications markets. Despite being a smaller market player, Rain, like any other mobile network operator (**MNO**), has an interest in ensuring that its network infrastructure and service offering grows and that it has access to sufficient and appropriate high-demand spectrum in this regard.
- 1.2 Our submission is set out as follows:
- 1.2.1 an overview of our position on the Regulations and any further extension of temporary high-demand spectrum;
- 1.2.2 background to the temporary assignments as applicable to Rain specifically;
- 1.2.3 the likely impact on competition and consumers in the event that the Authority further extends the temporary spectrum beyond 31 May 2021; and
- 1.2.4 Rain's alternative proposals if the Authority ultimately decides that the temporary spectrum must be further extended.

2. Overview of Rain's position

- 2.1 The initial need for the assignment of temporary emergency high-demand spectrum to MNOs in light of the COVID-19 lockdowns and the resulting increased demand for network capacity and data services cannot be disputed. In fact, Rain understands that this was, and to some extent still is, the basis on which temporary spectrum was assigned to MNOs in the first place, pending the IMT spectrum auction.
- 2.2 Rain's position is that the Authority **should not** extend the current assignments of temporary spectrum beyond 31 May 2021 without a revaluation of the utilisation consideration to its original intent.

- 2.3 If the temporary spectrum is to be extended beyond 31 May 2021, it is **imperative** the Authority must look again at the temporary assignments, and assign spectrum that MNOs actually need (and only as much spectrum as they actually need and can utilise effectively) to alleviate current spectrum constraints.
- 2.4 The danger of continuing with status quo is three-fold.
- 2.4.1 First, that MNOs are simply engaging in spectrum squatting so that operators who could actually use the spectrum cannot use it.
- 2.4.2 Second, that MNOs are using the temporary spectrum assignments to roll out new and faster services and entrench their respective positions in the market, rather than on a temporary basis for a specific short-term need related to the pandemic. Even though the MNOs will have to stop using the temporary assignments at some stage and when the IMT spectrum auction happens, the effects on competition (from a market-share and subscriber-base perspective) are not temporary even if the current assignments are.
- 2.4.3 Third, those operators that are benefitting in some way from the temporary assignments (because they are spectrum squatting or because their temporary spectrum allows them to roll out new or faster services or networks or to spend less on their networks) may not be incentivised to resolve the current litigation around the spectrum auction expeditiously.
3. **Background to Rain's application for temporary spectrum**
- 3.1 Rain had initially applied for temporary spectrum in the IMT2600 and 3700 MHz frequency bands in response to the Authority's invitation. In the 2600 MHz band, Rain applied for 20 MHz in the 2575-2615 portion so that Rain could use this spectrum for its 4G sites, as this part of the band is compatible with the equipment deployed by Rain and its infrastructure partners and service providers.
- 3.2 The Authority assigned to Rain 5 MHz in the 2595-2600 portion, and 25 MHz in the 2550-2575 portion, i.e. a total of 30 MHz. The Authority indicated in its media statement dated 17 April 2020,¹ that Rain's temporary spectrum assignment was issued to complement Rain's existing spectrum assignment in the 2600MHz band. The Authority refused Rain's application for temporary spectrum in the 3700 MHz frequency spectrum band on the basis that this was not in line with the Regulations. The temporary spectrum that was assigned to Rain in the 2600 MHz band was not the primary spectrum that Rain requested. As the Authority is aware, Rain is currently not able to efficiently utilise the 25 MHz assigned to it in the 2550-2575 portion of the 2600 MHz band.
- 3.3 Rain was at pains to apply only for temporary spectrum that it was actually in a position to deploy at the time (i.e. that was compatible with its network equipment). Rain did not ask for spectrum that it was not able to use immediately simply in order to stop other MNOs from obtaining temporary access to the spectrum or with the intention of deploying equipment on the temporary spectrum at a later stage. Other operators received far more spectrum including in bands where they, at the time, were not, as far as Rain understands it, able to provide services using their existing equipment.
- 3.4 The part of the 2600 MHz band that Rain had applied for was ultimately assigned to Telkom SA SOC Limited (**Telkom**) on a temporary basis. As far as Rain understands, Telkom was not able to deploy the spectrum in question that it was assigned to at the time as it was not compatible with Telkom's existing radio access network equipment. Rain, accordingly, entered into discussions

¹ See [here](#).

with Telkom, and made formal requests to the Authority, in an attempt to resolve the issue but Telkom was not amenable to any changes or substitution of the temporary spectrum assigned to it. The reasons for this are not clear.

4. Likely impact of a further extension on competition and consumers

- 4.1 Telkom, Vodacom and MTN have all been assigned temporary emergency high-demand spectrum in the 700/800 MHz, 2600MHz and 3500MHz bands. While MTN and Vodacom have larger networks than Rain and arguably need access to more spectrum to maintain their network performance in light of increased demand, we note that Telkom is not using the temporary spectrum assigned to it in the 3500 MHz band, while Vodacom and MTN have been using the temporary spectrum assigned to them on a commercial basis to expand their network infrastructure and service offerings in the ordinary course (such as developing their 5G networks) rather than on an emergency basis to deal with increased demand from consumers.
- 4.2 *Telkom's non-use of the temporary spectrum assigned to it in the 3500 MHz band*
- 4.3 Given that the temporary emergency spectrum was assigned with the view that MNOs need more spectrum to cope with increased strain on their networks, and given that Telkom has more spectrum assigned to it, on a permanent basis, than any other MNO, Rain submits that this is not an efficient use of the temporary spectrum assigned to Telkom. Smaller market players like Rain, on the other hand, could certainly make use of this spectrum, even if on a temporary basis, given the current capacity constraints they face. We set out our proposals on this below.
- 4.4 *Vodacom and MTN's commercialisation of the temporary emergency spectrum*
- 4.5 Vodacom and MTN have been using the temporary emergency spectrum assigned to them to great effect. For example, Vodacom publicly announced, that as a result of the temporary high-demand spectrum assigned to it, it was able to fast-track the launch of its 5G network.² This is despite the fact that the temporary spectrum assignments were not intended to be used on a commercial basis but as a means to help MNOs cope with increased strain on their respective networks. In this regard, regulation 6(1) of the Regulations provides that “...any licensee may apply to the authority...for the licensing of...spectrum, including high demand spectrum, in order to enable it to deal with the anticipated rise in demand for network capacity or data services” (underlined emphasis added).
- 4.6 As a result of their temporary spectrum assignments, Vodacom and MTN, the two largest market players by market share and number of subscribers, have been able to grow their network infrastructure, and capacity, offer better quality services to consumers and, therefore, increase their already large market shares and customer bases. It is no surprise that Vodacom and MTN are the only two MNOs who requested a further extension of the temporary spectrum assignments beyond 31 March 2021, as the Authority has indicated in its section 18(2) application in the spectrum litigation that is currently underway and to which Rain is also party.
- 4.7 Rain is concerned that this is affecting and will continue to affect competition in the market in a negative way such that the current duopoly in the market will only be further entrenched and smaller market players will not be able to compete effectively, even if the current use of high-demand spectrum is temporary. This position is as envisaged by the Competition Commission's findings in its Data Services Market Inquiry report, dated 2 December 2019, and as echoed by Judge Baqwa in the written judgment handed down in Part B of the application brought by

² See [here](#).

Telkom against the Authority, that a larger assignment of spectrum to Vodacom and MTN would result in the further entrenchment of the duopoly and an asymmetric assignment to smaller market players would lock the market shares of larger MNOs like Vodacom and MTN, both of which would entrench a currently uncompetitive market structure. The uncompetitive nature of the market will continue to negatively affect consumers who bear the price of high operating costs.

5. **Proposed ways for the Authority to mitigate effects on competition (and consumers) if a further extension is absolutely necessary**

- 5.1 In light of the current interdict against the Authority, and given that the spectrum litigation will be ongoing for some time to come, if it is absolutely necessary for the Authority to further extend the temporary spectrum beyond 31 May 2021, Rain proposes that the Authority should not simply extend the current temporary assignments. Instead, Rain thinks that the Authority should look again at the spectrum that is assigned to qualifying MNOs and possibly assign different bands to the MNOs.
- 5.2 Rain suggests that the Authority interrogate how the current temporary assignments have been used in practice and obtain additional details from qualifying MNOs about how they will use any temporary spectrum that is assigned to them. The licensees should only be given spectrum that they can actually use from the outset and that will give them additional capacity on their networks. They should not be allowed to expand services in the ordinary course. For example, MNOs should not be allowed to use their temporary spectrum assignments to develop their 5G networks.
- 5.3 By assessing the way that the current temporary spectrum assignments are being used, the Authority will be able to detect where spectrum is not being used at all (and is being hoarded), is being used to a limited extent and the reasons as to why this might be the case (for example, incompatibility with an MNO's network), or is being used for purposes and needs that extend beyond the reason that the temporary assignments were made in the first place.
- 5.4 Temporary assignments should be "switched-up" such that MNOs who currently have access to certain bands should give these bands back to the Authority for rational reassignment to other MNOs who have not had access to these bands and who need access to these bands (even if this need will only be fulfilled on a temporary basis). If this happens, Rain will likely re-apply for the spectrum it had initially applied for in the 2600 MHz band (which spectrum is currently temporarily assigned to Telkom as explained above) and possibly for spectrum in the 3500 MHz band.

6. **Conclusion**

Rain thanks the Authority for the opportunity to make submissions on the Regulations and submits that the temporary spectrum assignments in terms of the Regulations should not be extended beyond 31 May 2021 or, if the Authority ultimately determines that it should be extended beyond 31 May 2021, the Authority should reconsider and redraw the current temporary assignments for the reasons set out above.

Yours faithfully

Rain Proprietary Limited



Mlindi J Kgamed, Chief Regulatory Officer