



**APPCHAT REPRESENTATIONS ON THE 800 MHZ AND 2,6GHz SPECTRUM
ASSIGNMENT PLAN PUBLISHED IN THE GOVERNMENT GAZETTE NUMBER 34872
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1 INTRODUCTION

- 1.1 We welcome the opportunity to make representations on the Authority's draft 800 MHz and 2,6GHz Spectrum Assignment Plan and Licensing Framework.
- 1.2 Altivex 295 (trading as AppChat) is holds ECS and ECNS licences. It has recently undergone a change of ownership and control and will very shortly be launching ECS and ECNS services in the South African market with a focus on mobile applications.
- 1.3 We believe that the document is an improvement on previous efforts to implement robust telecoms regulation, in that it clearly identifies that the structure of vertically aligned monopolies is the root cause of regulatory failure in the telecommunications industry in South Africa.
- 1.4 This is a refreshing change when, in the past, the perceived need for compromise often trumped the need for decisive action. A good example would be the Authority's failure to recommend a cost based pricing model in its recent mandate to reduce termination rates.
- 1.5 In this document we, firstly, outline out Primary Concerns with the Authority's Draft Spectrum Assignment Plan, secondly we suggest Framework Principles that could be applied to the spectrum Assignment Plan and licensing framework.
- 1.6 Whilst we welcome the opportunity to make these representations, we also note the Minister of Communications has yet to finalize her consultations on her Policy on the "*Electronic Communications Services in High Demand Spectrum and on Exploiting the Digital Dividend*". It seems to us that it is possible that draft Assignment Plan and ITA may yet be scrapped and ICASA sent back to the drawing board if the Minister's final Policy is at odds with what is contained in the Draft Spectrum Assignment Plan.

- 1.7 AppChat would appreciate the opportunity to participate in any oral hearings held regarding the Draft Spectrum Assignment Plan.

2 **PRIMARY CONCERNS**

- 2.1 The telecommunications industry is characterised by monopoly or at least dominance in upstream markets. The economies of scale prevalent in the upstream market i.e. implementation and maintenance of a national network does not generally allow for development of competition to the extent necessary to challenge the dominant firms' position in that part of the market.
- 2.2 In South Africa MTN, Vodacom and Telkom are vertically-integrated monopolies with SMP. Telkom is obligated to provide a basic level of wholesale access to service providers on a non-discrimination basis. However, MTN and Vodacom despite being vertically integrated monopolies with SMP are not required to do so, and show little or no sign of vertical separation being undertaken voluntarily.
- 2.3 As competition is generally considered to lead to better consumer outcomes than monopolies, ICASA is seeking with its draft 800 MHz and 2,6GHz Spectrum Assignment Plan to introduce a licensing philosophy and framework that encourages open access and thus competition and ICASA should be applauded for that. In South Africa mobile calls and data are among the most expensive in the world. A pro-competitive measure requiring mobile operators' implement an Open Access Model will have a profound impact on the competitiveness of the market.
- 2.4 There are a number of open access models that can be implemented in telecommunications markets to correct the anti-competitive effects of vertically aligned monopolies. We outline the four models below,

together with their associated *ex ante* remedies imposed on the monopoly upstream or wholesale entity. The four structures are:

- 2.4.1 **Model 1.** A vertically-integrated monopoly with no obligation to supply to rival downstream businesses.
- 2.4.2 **Model 2.** A vertically-integrated firm with SMP upstream that is required to provide access to essential facilities to rival downstream firms under a non-discrimination obligation. Accounting Separation is used to provide transparency.
- 2.4.3 **Model 3.** A vertically-integrated firm that is required to provide access to downstream operators under an equivalence remedy. Functional separation is used to provide transparency.
- 2.4.4 **Model 4.** A structurally-separated industry where the upstream monopoly has no incentive to discriminate.
- 2.5 In the Spectrum Assignment Plan and Licensing Framework, it appears that Cell C, MTN, Vodacom and Telkom will be precluded from applying for spectrum in the following packages or blocks:
 - 2.5.1 Package 2 (individual ECNS license holder that has no spectrum licenses in any of the designated IMT bands);
 - 2.5.2 Package 3 (individual ECNS license holder that has no spectrum licenses in any of the designated IMT bands)
 - 2.5.3 Package 4 (assigned to Sentech),
 - 2.5.4 Package 5 (reserved for a future managed Spectrum Park), Package 6 (assigned to WBS); and
 - 2.5.5 Package 7 (assigned to Neotel).

- 2.6 This leaves a single package or block available, namely Package 1, for ECNS license holders with existing mobile networks and spectrum in the designated bands i.e. CellC, MTN, Vodacom and Telkom (Heita) to potentially bid for. The successful bidder or (consortium of bidders) for Package 1 shall also be required to implement a Model 4 type open access model i.e. ECNS wholesale transport provider with vertically integrated ECS based retail services structure prohibited. Please see extract from Spectrum Assignment Plan and Licensing Framework below:-

Licensing Philosophy

Wholesale Open Access model refers to a sharing model where a licensed entity allows other entities to offer services using its network. The Authority defines open access in terms of "no locking", "no blocking" and "no retail". Open access is a special case of Managed Spectrum Park model.

"No retail" means that the licensee will not offer any retail services to end users but will provide basic transport capacity to unaffiliated retail service providers on a non discriminatory basis. The disassociation of transport from retail services will promote competition and benefit consumers."

- 2.7 The effect is that should CellC, MTN, Vodacom and Telkom bid for package 1 and be successful, they would be required to split their existing operations into separate wholesale and retail companies. In the case of CellC, MTN, Vodacom and Telkom that could potentially entail having to divest the business or businesses that control access infrastructure, through a de-merger or stock-market floatation, with the resultant retail bits left to fight for their own commercial survival.

- 2.8 In view of the nature of the draconian restructuring requirements, we believe that it is unlikely that CellC, MTN, Vodacom and Telkom will submit bids for the 800 MHz and 2,6GHz spectrum in package 1. Given that they are also prohibited from bidding for other spectrum packages or blocks, this could mean that CellC, MTN, Vodacom and Telkom would be excluded from the 800 MHz and 2,6GHz spectrum bidding process and forced to lease 800 MHz and 2,6GHz spectrum from a successful bidder should they want to deploy 4th generation mobile services such as LTE.
- 2.9 We think that the above scenario is unworkable and impractical and do not believe that there is a sufficient case yet, for moving to a structurally separate business model, without exploring alternative approaches. In particular, we think that the Authority should attempt to impose a **model 3** type open access solution with an equivalence remedy and full functional separation first. If equivalence and functional separation does not appear to be a workable solution, then and only then, would we support a model 4 type structurally-separated industry.
- 2.10 Our primary concern is that excluding CellC, MTN, Vodacom and Telkom from the bidding process at the wholesale level, will severely undermine the rollout of 800 MHz and 2,6GHz spectrum and the availability of 4th generation services such as LTE at the retail level. CellC, MTN, Vodacom and Telkom have existing physical networks in place, the financial capability, technical know how and experience required to roll-out the 800 MHz and 2,6GHz spectrum on a national basis in a relative short space of time. Vodacom are currently 3G enabling 600 3G base stations a quarter, at that pace with KPI's mandated by the Authority, Vodacom, MTN and CellC could quite comfortably roll out LTE to 100% of their base stations in 3 to 4 years or even less.
- 2.11 We more than most understand that vertically integrated operators controlling key upstream services have strong incentives to deny

access to competitors. MTN and Vodacom are no different to any other company controlling a bottleneck resource. Their commercial imperative is to drive shareholder value by controlling retail markets and eliminating competitors, while regulation requires them to undertake activities that are necessary to enable competition.

- 2.12 They, like any other incumbent telecoms operator around the world, adopt a rational and legal strategy of complying with the formal requirements for access, while testing the limits of the regulatory regime and opposing any new access requirements. As the former CEO of ECN I experienced this on a daily basis when trying to negotiate termination agreements with MTN and Vodacom.
- 2.13 The end result has been that specifically MTN and Vodacom, like any other dominant company, has sought to minimize the impact of change in the market, specifically by ensuring that competition does not upset the telecoms order that has them at the apex of the 'food-chain'. Their own attempts to manage these tensions have been almost non-existent and they have roundly ignored the loud calls by the PPC, the Authority and other licensees to pass on interconnect rate reductions and implement a more equitable wholesale model.
- 2.14 We believe that the allocation of the 800 MHz and 2,6GHz spectrum, together with the Authority's recommended licensing philosophy has the ability to transform the mobile telecommunications landscape in South Africa. However, we are concerned that the Authority's Spectrum Assignment Plan and Licensing Framework is too radical and could have led to negative outcomes and unintended consequences including but not limited to lengthy court processes, lack of investment and slow rollout of services.
- 2.15 Given MTN and Vodacom's track record and behavior on competition matters we fully understand the reasons why the Authority has recommended the course of action that it has. However, we believe

that the Authority's statutory mandate is to further the interests of competition and consumers in having markets that work effectively. Therefore we believe that the long-term interests of consumers will be better served by implementing solutions that harness the strengths and capabilities of all roll players including CellC, MTN, Vodacom and Telkom.

3 FRAMEWORK PRINCIPLES

- 3.1 As a licensee who will be purchasing wholesale network services, it is our view that CellC, MTN, Vodacom and Telkom with existing networks in place will be in the better position to rapidly and reliably deliver wholesale network services. We believe that without their participation at the wholesale level, we will not bridge the digital divide nor reap the benefits of powerful 4th generation services such as LTE at the retail level.
- 3.2 We therefore recommend the Authority Implement a Wholesale Open Access model that is based on **Model 3** i.e. vertically-integrated licensees are required to provide access to downstream licensees under an equivalence remedy with functional separation used to provide transparency. The model would also incorporate no locking, no blocking but would allow successful bidders to offer retail services to end users.
- 3.3 "Equivalence of Inputs" or "EOI" means that successful bidders sign an undertaking to provide Wholesale Open Access services not just on new services but on all legacy products and services as well, including but not limited to 3G, the same products or services to all ECS and ECNS licensees (including the retail arm of the successful bidders) on the same timescales, terms and conditions (including price and service levels) by means of the same systems and processes and includes the provision to all ECS and ECNS licensees (including the retail arm of the

successful bidders) of the same Commercial Information about such products, services, systems and processes.

3.4 Functional transparency means:-

- **a separate Access Services business unit** with a separate brand name e.g such as BT Openreach. This should be a new business unit separated from the rest of the successful bidder with responsibility for providing the majority of the input equivalent wholesale products. The purpose being to develop a different culture focused on treating all of its customers in an equivalent manner. This will ensure that there is a “clean” interface with all the ECS and ECNS competing in the downstream markets and greater transparency for monitoring compliance with the undertakings.
- **a Code of Practice for employees:** it is obviously essential that the detailed set of commitments made in the successful bidders undertakings are understood clearly by the employees affected and so a simple code of practice is needed, backed up by training and support services for employees.
- **an Equality of Access Board (EAB):** this body provided an independent means to monitor the implementation and administration of the successful bidders undertakings, to ensure that successful bidders remains compliant with its commitments.

3.5 We further propose that packages or blocks defined be apportioned on the following basis:-

- a. **Package 1** to an individual ECNS license holder on the Wholesale Open Access model described in 3.2, 3.3 and 3.4 of this document.

- b. **Package 2** is licensed to CellC. CellC have already implemented a wholesale model and embrace many of the open access principles discussed in this document. They have also rolled out a high capacity HSPA+ national data network in a very short space of time and would no doubt be able to do the same with 4th generation LTE services.
- c. **Package 3** to an individual ECNS license holder that has no spectrum license in any of the designated IMT bands.

3.6 We agree with the authority that applicants for **Package 1** should consider forming a consortium that would be jointly responsible for implementing and maintaining network services delivered using the 800 MHz and 2,6GHz spectrum. The wholesale upstream entity or entities providing these services should run a separate Access Services business unit with a separate brand name such as BT Openreach in the UK. This should be a new business unit separated from the retail divisions of the successful bidder or bidders.

4 **CONCLUSION – THE NEXT 5 YEARS**

- 4.1 We are entering a period of immense change in the industry as many of license holders make significant investment to upgrade their networks to 3G, 3.5G and beyond. If successfully implemented the Authority's draft 800 MHz and 2,6GHz Spectrum Assignment Plan and Licensing Framework Strategic presents a genuine opportunity for the telecoms landscape to improve and grow within the next 5 year. Conversely, the wrong solution to the problem could perpetuate the problems of the past and result in another period of slow product development and regulatory uncertainty ultimately failing competition and letting down customers. We hope it won't come to that.
- 4.2 We agree with Authority's view that structure of vertically aligned monopolies is the root cause of regulatory failure in the Telco industry

in South Africa. As we outlined in the document, we think that competition and consumers would be better served by allowing a vertically-integrated licensee or group of licensees to provide access to downstream operators under an equivalence remedy with functional separation used to provide transparency. Rather than excluding ECNS license holders who have spectrum in any of the designated IMT bands from the wholesale bidding process.

- 4.3 However we think it's imperative that everyone – by which we mean all licensees, the Authority, industry, government and other stakeholders – has a clear view of what success looks like and that everyone understands the basis on how it is to be achieved.
- 4.4 Another key aspect of a successful settlement is a solid implementation plan, transparent to all stakeholders. We look forward to working closely with the Authority over the coming months to develop this. And we recognise that there is a lot of work to do.
- 4.5 Despite these encouraging draft regulations, unless there is real change as a result, the lasting impact of the Authority's bold recommendations on Wholesale Open Access will be negligible. We urge the Authority to take the ideas outlined in this document as the basis for clear and decisive action to bring regulatory change and certainty to the industry and break market power of the vertically integrated monopolies that dominate the industry.