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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF TELECOMMUNICATIONS AND POSTAL SERVICES

NO. 1013 **26 JULY 2019**

ELECTRONIC COMMUNICATIONS ACT, 2005 (ACT NO. 36 OF 2005)

POLICY ON HIGH DEMAND SPECTRUM AND POLICY DIRECTION ON THE LICENSING OF A WIRELESS OPEN ACCESS NETWORK

I, Stella Ndabeni-Abrahams, Minister of Communications, hereby issue the Policy and Policy Directions in the Schedule in terms of sections 3(1), 3(2) and 5(6) of the Electronic Communications Act, 2005 (Act No. 36 of 2005).



Ms Stella Ndabeni-Abrahams, MP
Minister of Communications

SCHEDULE

POLICY ON HIGH DEMAND SPECTRUM AND POLICY DIRECTION ON THE LICENSING OF A WIRELESS OPEN ACCESS NETWORK

1. BACKGROUND

1.1 Chapter nine (9) of the National Integrated ICT Policy White Paper, 2016 (the White Paper) sets out the open access policy, spectrum policy and a policy framework to address the assignment of spectrum where there is insufficient spectrum to accommodate demand (hereinafter referred to as high demand spectrum) to a wireless open access network.

1.2 Mindful of the fact that the Electronic Communications Act, 2005 (Act No. 36 of 2005) (the ECA) does not have a license type for a wireless open access network, but that the Minister may direct the Authority to accept and consider applications for individual electronic communications network service licences, an electronic communications network service licensee that provides wholesale electronic communications network services (hereinafter referred to as the wireless open access network or WOAN), is contemplated (the term WOAN is used for descriptive purposes since the term is generally known).

1.3 The White Paper places emphasis on the value of sharing and collaboration between licensees through a WOAN that will result in the more effective use of scarce resources such as spectrum and a reduction of the duplication of infrastructure while facilitating service-based competition.

1.4 The White Paper provides that all currently unassigned high demand spectrum will be set aside for assignment to the WOAN. The Minister performed significant consultation with stakeholders on the best approach to implement this policy provision.

1.5 As agreed with stakeholders, the Minister commissioned the Council for Scientific and Industrial Research (CSIR) to conduct a study to determine the spectrum requirements for the WOAN to ensure its viability, which study was published in the *Gazette* (Government Notice 1003, Government *Gazette* No. 41935, 27 September 2018). The study focused on the Capacity and Quality of Services (QoS) determination with respect to the current high demand spectrum bands namely; the network coverage spectrum (i.e. 700 MHz and 800 MHz) and the network capacity spectrum (i.e. 2600 MHz). The study provided recommendations on the high demand spectrum required by the WOAN to ensure its viability and sustainability on the basis of 20% market share; and excess high demand spectrum for other electronic communications network service licensees. The study concluded that the following spectrum combinations should be considered as the minimum for the WOAN:

- 2 x 25 MHz of 800 MHz band (Band 20);
- 2 x 20 MHz of 2600 MHz FDD band (Band 7); and
- 25 MHz of 2600 MHz TDD band (Band 38).

1.6 The Minister consulted the Authority and interested persons as required by section 3(5) of the ECA. The Minister duly considered and reviewed the Authority's views, representations received from interested persons and objects of the ECA. When reviewing the above, the Minister considered the public interest and policy objectives that include to -

(a) ensure the WOAN's sustainability and future capability including incentivising it;

(b) promote the universal provision of electronic communications networks and electronic communications services and connectivity for all, to ensure broadband coverage in rural and under-served areas;

(c) encourage investment, including strategic infrastructure investment, with predictability and certainty for investors and users of the spectrum resource and innovation in the communications sector;

(d) maximise the efficient use of the radio frequency spectrum, including technical considerations such as carrier aggregation; ecosystems, availability of user devices etc.;

(e) promote competition within the ICT sector with the emphasis on service-based competition through the WOAN;

(f) promote an environment of open, fair and non-discriminatory access to electronic communications networks and to electronic communications services;

(g) promote the empowerment of historically disadvantaged individuals, in particular women, youth and persons with disabilities;

(h) ensure that electronic communications services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in the Republic;

(i) promote the interests of consumers with regard to the price, quality and the variety of electronic communications services; and

(j) develop and promote SMMEs and cooperatives.

1.7 Following the review of representations as described in paragraph 1.6 above, the following policy and policy directions are issued.

2. POLICY ON HIGH DEMAND SPECTRUM

2.1 The following policy is made in terms of section 3(1) of the ECA:

2.1.1 The Minister recognises that there are over four hundred players that hold electronic communications network service licenses but cannot access spectrum, due to its scarcity. This has an adverse effect competition, contributes to the high costs to communicate and serves as a barrier to entry for new entrants and SMMEs. Government is committed to maximising the socio-economic benefits derived from the use of the spectrum and recognises that a shared approach to spectrum use is necessary. The deployment of a WOAN will encourage licensees to work together as far as it is practicable. The value of sharing and collaboration between licensees is that it will result in the more effective use of spectrum. Government fully supports a WOAN as a means to

meet the public policy objectives.

2.1.2 High demand spectrum may be assigned to a WOAN and the remaining high demand spectrum may be assigned to other electronic communications network service licensees, which spectrum assignment processes must commence simultaneously.

2.1.3 Noting that some incumbent operators have already been assigned high demand spectrum and considering the wholesale open access obligations imposed on the WOAN, the Authority must consider the assignment of spectrum within the following principles:

(a) On 700 MHz, to ensure preferential treatment of the WOAN;

(b) On 800 MHz, to ensure preferential treatment of the WOAN; and

(c) On 2600 MHz, to ensure preferential treatment of the WOAN.

2.1.4 The assignment of high demand spectrum not reserved for assignment to the WOAN must ensure that the following policy objectives are achieved:

(a) leasing of electronic communications networks and electronic communications facilities and provision of wholesale capacity to other licensees, including to the WOAN upon request, as soon as the WOAN is licenced. The Authority must perform strict regulatory oversight to ensure compliance with this network and facilities leasing requirement;

(b) procurement of capacity in the WOAN as provided in paragraph 3.5(b)(iv);

(c) universal access and universal service obligations to ensure high quality network availability in rural and under-serviced areas; the obligations must be complied with in rural and under-serviced areas before the assigned spectrum may be used in other areas bearing in mind practicalities such as the unsuitability of certain high band spectrum for rural areas;

(d) a single entity may not control the spectrum; and

(e) compliance with empowerment requirements.

2.1.5 To the extent that this policy differs from the White Paper on the assignment of

high demand spectrum, this policy prevails.

3. POLICY DIRECTION ON THE LICENSING OF A WIRELESS OPEN ACCESS NETWORK

3.1 The Authority is directed, in terms of section 3(2) read with section 5(6) of the ECA, to issue an Invitation to Apply (ITA) and accept and consider applications for an individual electronic communications network service license for a WOAN. The WOAN is an important policy instrument to lower barriers to entry for smaller players, improve the ownership of the ICT sector by historically disadvantaged individuals and to promote service-based competition. The Authority should licence spectrum to the WOAN in a manner that enables it to fulfil its policy mandate and to thrive.

3.2 The Authority must consider that the WOAN should provide wholesale open access to its electronic communications networks and facilities and provide wholesale capacity, upon request, to any other person licensed in terms of the ECA and persons providing services pursuant to a licence exemption, on terms that are effective, transparent and non-discriminatory.

3.3 Based on the provisions of the White Paper, it must be considered that the following conditions must apply to the WOAN. The WOAN -

(a) must be a consortium of persons, at least 70% owned by South Africans, that participate voluntarily;

(b) must comply with the empowerment requirements contemplated in section 9(2)(b) of the ECA;

(c) must include diversity of ownership to ensure meaningful participation of all entities involved including SMMEs, and to prevent monopolistic behaviour;

(d) must include effective participation by targeted groups, including women, youth and persons with disabilities; and

(e) may include public entities as shareholders provided that the WOAN may not be a public entity, under the Public Finance Management Act,

1999 (Act No. 1 of 1999).

3.4 If any member of the consortium applying for the WOAN provides electronic communications services, the Authority must consider requiring functional separation between such electronic communications services and the member's participation in the WOAN, which must be provided by an independently operating business entity.

3.5 The Authority must consider the following for the WOAN—

(a) the terms and conditions, including universal service and access obligations; and

(b) incentives such as—

(i) a reduced spectrum application fee, only covering administrative costs;

(ii) reduced or waived radio frequency spectrum licence fees for a period of ten years;

(iii) immediate facilities leasing of electronic communications networks and electronic communications facilities of the radio frequency spectrum licensees, if any, and wholesale capacity from such licensees that are assigned high demand spectrum as contemplated in paragraph 2;

(iv) offtake i.e. a minimum of 30% national capacity is procured from the WOAN collectively as soon as the WOAN is operational, for a period of at least five years, by radio frequency spectrum licensees that are assigned high demand spectrum as contemplated in paragraph 2. The percentage to be procured by each licensee may be proportionate to the amount of high demand spectrum assigned to such licensee.

3.6 The Authority must consider —

(a) imposing regulatory remedies on the WOAN, to ensure effective service-based competition, and to avoid any anti-competitive effects;

(b) performing effective regulatory oversight; and

(c) ensuring that the applicants for a WOAN have a viable business plan, the technical capabilities and financial ability to build and operate a successful WOAN.

3.7 The Authority is directed to investigate and report to the Minister on the spectrum requirements of 5G in bands lower than 6 GHz and the millimeter wave (mmW) bands currently under study at the 2019 World Radiocommunication Conference (WRC-19). The report should be provided to the Minister within six months after the WRC-19. The investigation should cover the affected bands, the required ecosystem to support 5G in these bands, and the implications of the licensing of these bands on competition and the current structure of the mobile market. To this extent, the licensing of the 5G candidate bands will be informed by the outcome of the aforementioned investigation and report from the Authority. The Minister will thereafter, issue a separate policy direction on the 5G candidate bands.

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