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30 October 2015

Chairperson

ICASA
Block A, Pinmill Farm
164 Katherine Street
Sandton

Via Email : Chairperson@icasa.org.za
Via Email : JDikgale@icasa.org.za

Dear Sir,

Re: Information Memorandum for Radio Frequency Spectrum Prospective Licence

MTN welcomed the release by the Authority of the aforementioned Information Memorandum, as it provides valuable insight on this topical issue.

MTN believes that this matter is of such importance to the sector, that constructive engagement with industry is critical to the future success of wireless broadband deployment.

MTN (Pty) Ltd hereby submits to the Authority our written representation on the Information Memorandum.

Should you have any enquiry please don't hesitate to contact me.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Geoffrey Blake', written over a light grey rectangular background.

Geoffrey Blake
Senior Manager: Technical Regulation & Mandated Provisioning
MTN (PTY) Limited

Directors: RSN Dabengwa (Chairman), M Nyati (CEO)*, NWC Moloape, SA Fakie, SSB Ntsele*, S Sooklal, A Fernandez ^β,
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Vat Reg. No. 4630140434



MTN'S SUBMISSION ON THE INFORMATION MEMORANDUM FOR RADIO FREQUENCY SPECTRUM PROSPECTIVE LICENCE TO PROVIDE MOBILE BROADBAND WIRELESS ACCESS SERVICES FOR URBAN AND RURAL AREAS USING COMPLIMENTARY BANDS 700MHZ, 800MHZ AND 2.6GHZ.

October 2015

1. INTRODUCTION

On 11 September 2015, (by way of Notice Number 914 of 2015) in Government Gazette No: 39203, ICASA (“the Authority”) published an Information Memorandum for Radio Frequency Spectrum Prospective Licence (“Information Memorandum”), specifically to provide mobile broadband wireless access services for urban and rural areas using the complimentary bands 700MHz, 800MHz and 2.6GHz.

MTN welcomes the publication of the Information Memorandum in that we believe that it provides some insights into the Authority’s thinking in respect of licensing operators in the high demand spectrum bands. Moreover, MTN supports the Authority’s stated objective of providing universal service and access for all and welcomes constructive engagement with the Authority. MTN believes that the licencing of this spectrum, if implemented effectively, will initiate a broadband revolution to the benefit to all South Africans.

MTN’s submission is structured as follows:

- Section 2 sets out general commentary to the Information Memorandum; and
- Section 3 provides specific comments to the Information Memorandum.

MTN confirms its willingness to participate in any oral hearings which may be scheduled in regard to the Information Memorandum.

2 GENERAL COMMENTS

MTN would like to commend the Authority in its consideration of simultaneously licensing all spectrums in the IMT700, IMT800 and IMT2600 bands for the following reasons:

1. MTN believes that this approach will create certainty for licensees and enable successful licensees to commence planning their network expansions in line with the Information Memorandum’s objectives.
2. Further to this, this may assist in reduce lengthy lead times experienced by licensees in obtaining the required local authority (and other departmental) approval for the roll-out of network infrastructure, as it would licensees to initiate approval process prior to the availability of the digital dividend spectrum.
3. Certainty around the licensing process (simultaneous or separate) will also provide any operator the opportunity to plan and/or source the necessary

financing to fund the acquisition of such spectrum and the resultant capital expenditure.

4. The Information Memorandum clarifies that the Authority will be in a position to simultaneously provide each licensee with spectrum from the higher (IMT2600) and lower (IMT700 or IMT800) spectrum bands, thereby enabling licensees to optimise their coverage by using spectrum in the lower frequency bands, whilst increasing capacity in key locations with spectrum in the higher frequency bands.

MTN submits that the simultaneous licensing of spectrum bands is further supported by a 2014 GSMA study¹, which states that the simultaneous awarding of spectrum offers operators the opportunity to make trade-offs between different quantities of spectrum in different bands therefore promoting allocation efficiency. In contrast, sequential processes of awarding spectrum may hamper the aggregation of optimal spectrum portfolios by operators. Therefore, simultaneous awards of incremental spectrum are more preferable and provide operators greater certainty over their spectrum holdings and contribute to the development of optimal deployment strategies.

According to the GSMA study (2014), the assignment of spectrum should be framed in such a manner that avoids the underutilisation or inefficient distribution of frequency among operators in order to avoid the introduction of supply-side constraints that may result in higher retail prices as well as delaying technological evolution in a market.

MTN submits that the simultaneous assignment of the IMT700 and IMT800 spectrum will ensure that none of the licensees in the IMT800 band would receive an unfair competitive advantage over the licensees in the IMT700 band.

2.1 Merits of a Wholesale open access network

With regard to the wholesale open access broadband model developed for Lot A, MTN believes the key success factor of this model is related to the manner in which it is applied and consideration should be had to ensuring its application does not undermine its declared objectives, that is, stimulating competition and ensuring services that are innovative and affordable.

Fundamentally, MTN agrees that broadband adoption is crucial for overall economic development and therefore an open access model must be considered only where there is

¹ 2014. The Cost of Spectrum Auction Distortions. *Review of spectrum auction policies and economic*, [Online]. Available at: <http://www.gsma.com/spectrum/wp-content/uploads/2014/11/The-Cost-of-Spectrum-Auction-Distortions.-GSMA-Coleago-report.-Nov14.pdf> [Accessed 01 December 2014].

insufficient competition, so that the entire economy can continue to fully leverage its competitive potential.

To ensure the successful adoption of a wholesale open access policy, the regulator should balance the benefits of such a policy against the incentives of continued investment in infrastructure and services by existing and new market players, especially where there is an obligation to “cost orientation” pricing. This is often seen as a trade-off between increasing competition and a potential negative effect on investment. For example, if wholesale open access prices are too low it may discourage investment in new networks by both incumbent firms and new entrants.

Thus MTN submits that the introduction of open access policies should be implemented in a manner that facilitates new investments and encourages incumbents to respond in kind, thus stimulating the economy and the overall market. The South African mobile market today is characterised by competitive wireless networks which have been deployed nationally, and compete at the retail and wholesale level. Therefore, MTN believes the challenge in today’s telecommunications market is not merely how to best distribute the benefits of existing infrastructure, but also crucially how to encourage operators to continue investing in infrastructure to deliver Broadband for all.

It is generally accepted by economists that the concept of a single wholesale open access network is most appropriate in instances where network competition is insufficient to deliver competition policy objectives. Historically this concept has been applied to the fixed network incumbent, where the scale of the sunk costs of the former state owned monopoly created large barriers to entry for potential network competitors.

However, this thought process of a single wholesale open network may not necessarily be appropriate in mobile as a policy decision, Frontier Economics recently assessed the case for a single wholesale network in mobile communications on behalf of the GSMA (September 2014)² and found that single wholesale access networks are only appropriate where network competition cannot deliver competition policy objectives.

MTN believes that the concept of service competition versus infrastructure competition is not in opposition to each other, but rather, they have a symbiotic relationship. Indeed it is generally accepted that in today’s mobile market, operators vigorously compete with one another on network coverage, as well as service specifications such as quality of service (“QoS”) and price.

² *Assessing the case for Single Wholesale Networks in mobile communications*, September 2014. GSMA by Frontier Economics

At this stage, it is not clear how the proposed open access model will stimulate competition for broadband services. To the contrary the proposal may artificially restrict competition by suppressing inter-operator service and price differentiation. Moreover, value-added innovative services that are highly sought after by customers require operators to configure their own networks to support them; these more innovative value-added services may not actually be available when customers are in 'open access' services areas as operators differentiate their service based on the adoption of newer technologies (i.e. LTE /4G) and this innovation is based on the control an operator exercises over the infrastructure deployed.

MTN notes that the success of wireless penetration may mean that wireless broadband services are becoming more essential for the development of broadband networks. We understand that the advantages of wireless networks include faster roll-out, potential wider subscribership (due to higher smartphone uptake), and a lower cost of deployment in rural and remote areas as against fixed technologies. However, the limitation with wireless broadband is that spectrum is a scarce resource. OECD countries have only granted a limited number of Mobile Network Operator (MNO) licenses, typically between three and five market players.

MTN submits that the number of operators and the availability of adequate spectrum bandwidth plays a pivotal role in the structure and competition that exists in a wireless market, in that the bands assigned to operators need to be wide enough to allow for efficient spectrum use, (i.e. the avoidance of spectrum fragmentation and be capable of transmitting high-speed data).

In South Africa, we note that infrastructure sharing agreements are playing an increasingly important role in mobile markets, more markedly in the context of the deployment of LTE technology. Wholesale-only models have emerged at different levels of the network (e.g. Lightsquared, American Tower) and are usually based on purely commercial arrangements.

The expected level of investments required for the deployment of LTE networks is clearly encouraging these commercial agreements. The increasing focus on infrastructure sharing, or even mandated sharing, could however potentially reduce competitive investment incentives for network rollouts. Therefore, MTN views the introduction of a wholesale open access network as an ex-ante regulatory remedy that should only be instituted in geographical areas where infrastructure competition is insufficient to deliver competitive objectives to appropriately address market failures identified.

In summation, regulatory best practice has dictated that that an open access network model be applied to address ineffective competition in the fixed line market through the unbundling

(i.e. LLU) of public resourced infrastructure. Where open access is extended to the mobile market, it has been introduced by promoting MVNO's access to mobile networks, national roaming and infrastructure sharing arrangements which are commercially negotiated. Hence, absent the articulation of the specific market failure in the mobile market, it is difficult to evaluate the appropriateness of the proposed wholesale open access model.

It is paramount to highlight that reserving spectrum for a single wholesale access network may not result in effective competition or sustainable market competition and in all likelihood could lead to the inefficient use of the spectrum resource.

3. SPECIFIC COMMENTS

3.1 Spectrum for the Award

Notwithstanding MTN's general comments made above, MTN seeks clarity on specific issues as it relates to the proposed Lot assignments. In particular, MTN notes that the Authority intends to have a separate licensing process for Lot A.

In this regard, MTN believes that for the sake of transparency and to provide operators with ample opportunity to develop an optimal strategy and business case, the details regarding the envisioned licencing process for Lot A should be clarified simultaneously to the other Lots. It is unclear whether operators who bid in Lots B,C,D,E and F will be allowed to bid (should they wish) on Lot A (wholesale open access lot).

If operators who participate in other bids are allowed to bid for the aforementioned Lot A, those applicants may choose to develop a business case that encompasses a scenario that incorporates both Lot A and a package from Lots B – F. It will also allow prospective applicants to decide on whether they will only bid for Lot A or only Lots B – F. Therefore MTN proposes that the rules of the auction process and the licencing of Lot A should be held simultaneously with the other proposed Lots B- F and not through a separate licensed process.

In addition, the scope of the proposed wholesale open access network, with an allocation of 2 x 20MHz in the 700MHz radio frequency band is not clearly defined, and therefore clarity is required as to whether the mandate of this network is to provide wholesale access to other operators in rural areas only, or is expanded to include more densely populated metropolitans, especially as the Information Memorandum states that the spectrum will be awarded on a national basis covering the entire territory of South Africa.

Furthermore, as applicants are only eligible to bid for one of the lot categories, with the exception of Lot A, MTN submits that Lots C and D should be considered generic lots, as these two lots are identical in the amount of spectrum being offered. The benefits of defining these two lots as generic, allows applicants to bid on either one and avoids the situation where multiple applicants are bidding on a single lot, where perhaps the other Lot is disregarded.

As it relates to Lot B, MTN has noted that the information within the Information Memorandum is not 100% aligned with recently published regulations, specifically, the IMT800 Radio Frequency Assignment Plan. MTN is in support of the proposed channel arrangement. The frequency band 791-821MHz paired with 832-862MHz provides a total bandwidth of 2x30MHz FDD for IMT800, this channel arrangements for the IMT800 band are based on the Region 1 recommendation by the ITU. However, a disparity arises between the Information Memorandum and the Radio Frequency Assignment Plan and the IMT Roadmap, where the latter provides for an allocation in Lot B of 2 x 9.305MHz within the 800MHz band. The Authority has provided no indication as to the reason why there is a reduction of 0.695MHz within this Lot assignment. Therefore, clarity is required as to the reduction of spectrum within this Lot assignment.

The channelling arrangement specified in the IMT700 Radio Frequency Assignment Plan indicates that the frequency band 703-733 MHz paired with 758-788 MHz provides a total bandwidth of 2x30MHz FDD for IMT700. MTN re-iterates its support for this channel arrangement, but highlights that the Authority should be cognisant of the immature nature of this band in Region 1, and hence the diffusion of appropriate CPE may be limited at the time of awarding the radio frequency spectrum. Subsequently obligations relating to coverage should take the prevalence, or lack thereof of such devices into account.

3.2 Obligations

3.2.1 Coverage

MTN has previously lauded and shared with the Authority regulatory approaches taken by more developed economies in the assignment of radio frequency spectrum, such as Germany, France and Romania. We therefore welcome the Authority's decision to adopt similar approaches. However, the Information Memorandum lacks clarity regarding the coverage obligations. Although we note a figure of 70% is identified, clarification is required as to whether this is for geographical coverage or population coverage.

In addition, regarding the provision to provide services to all identified underserved areas, MTN is concerned that there are no regulations that define the “less populated area” criteria, if the Authority means underserved areas as mentioned in paragraph 6.1.5 then the only guidance is from the current Under Served Area Regulations, published in Government Gazette No 35675 on 10 September 2012 (“the USA Regulations”). Where the USA regulations state that an area is an under-served where an electronic communications network has been constructed, but coverage of the inhabited parts of the area, falls below the national average.

Unfortunately, Annexure A of the USA Regulations identifies over 250 local municipalities, which includes but is not limited to areas with mobile network coverage and a mobile phone penetration of above 70 percent such as the City of Cape Town Metropolitan municipality, City of Johannesburg Metropolitan municipality and the City of Tshwane Metropolitan municipality. (There are 278 municipalities in South Africa, comprising eight metropolitan, 44 district and 226 local municipalities³.)

The Information Memorandum, by implication then currently identifies that over 90% of South Africa is considered to be under-served. MTN recommends that the Authority as a matter of urgency to clearly indicate the “identified underserved area” in question or have the existing aforementioned regulations amended to reflect a more realistic environment. If this is not rectified, it will distort the current situation by implying that over 90% of the Republic is underserved and hence winning operators would be able to roll out in such areas that are actually not underserved areas.

Further to this, MTN notes that there is currently no defined coverage obligations attached to the Wholesale Open Access Network (Lot A) or for Lot F. Assigning obligations on selective portions of the Lots could be considered discriminatory. Obtaining a 3 year obligation holiday from paying radio frequency spectrum licence fees without any clarification on the conditions which should be met is problematic, thus defeating the objective of increasing universal service and access by ensuring rural connectivity.

3.2.2 Duplication of Infrastructure

Given the lack of clarity regarding the coverage and throughput obligations for the wholesale open access network (WOAN), MTN seeks clarity on how the Authority intends to align coverage and throughput obligations with their discussion document on infrastructure

³ View: <http://www.gov.za/about-government/government-system/local-government>

sharing, which has the objective to reduce duplication of infrastructure. As it is currently laid out, each operator who acquires spectrum in Lot B – E would be required to rollout their own infrastructure, specifically in sparsely populated areas, while a WOAN is required to do the same. This would result in not only a duplication of infrastructure by operators but also removes the likelihood of uptake by operators to utilise the infrastructure by the WOAN. This in turn would compromise any business case of the WOAN.

3.2.3 Spectrum Payments

Although the Information Memorandum indicates that the licensing of Lot A will be done separately, MTN believes it would be beneficial if the Authority could provide detailed information of the envisaged licensing process including clarification on the nature of the proposed fee payment holiday mentioned in the Information Memorandum to allow prospective bidders to plan.

MTN raises the question whether this “fee payment holiday” is a deferment of the auction fees for a period of three years or whether the Authority is referring to the administrative incentive pricing (AIP) for the determination of such fees, which are payable annually. If the latter holds true, MTN questions how this lot will be auctioned, as auctions by nature result in a once off fee for the use of the requisite radio frequency spectrum for a predetermined length of time, usually 15 years. Finally, MTN considers the condition for the Wholesale Open Access Network (Lot A) in providing services at “*cost oriented with a reasonable rate of return*” to be subjective and by consequence difficult to enforce.

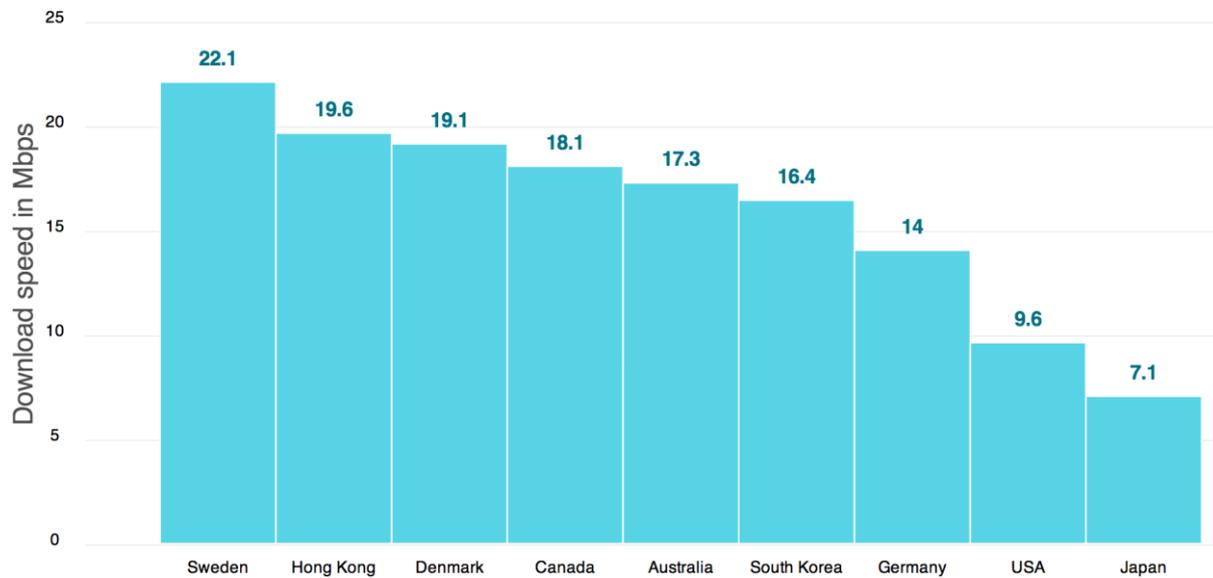
3.2.4 Throughput requirements

The Authority has detailed that the quality of the network coverage in providing data services should deliver an average downlink user throughput of 30Mbit/s. MTN finds this requirement to be overly ambitious.

It is clear that LTE represents a significant step forward in telecommunications technology. Its dramatic improvement in speed and latency from 3G shows that it has the potential to be as transformative and as advanced as the evolution from 2G to 3G. This is especially true in countries that do not have established fixed line internet infrastructure, meaning that broadband internet can be made widely available through mobile cellular connections.

According to an OpenSignal report,⁴ Sweden has the fastest average LTE speeds at 22.1Mbps, whereas Japan performs at 7.1Mbps.

⁴ Global State of LTE Report February 2013



This report notes that the countries where they record the fastest average speeds tend to be ones where the population is heavily concentrated in a small number of urban centres. Countries with a population that is more evenly spread seem to perform slightly worse, perhaps due to the difficulty of rolling-out LTE over a larger geographic area.

Further to this, as the penetration of smart services increases on the operators network, the quality of that network degrades. As a case in point, Japan's NTT DOCOMO launched LTE in December 2010, and at the time of the aforementioned report averaged 5.5Mb/s compared to its competitor KDDI, which launched two years later, in September 2012, and had less LTE subscribers attached to their network and where able to provide those subscribers with an average speed of 14.8Mb/s.

A white paper prepared by Motorola⁵, provides perspective on the real experience subscribers can expect. It concludes that the true performance of a wireless broadband network is reflected in more than just the peak data rate number. In effect, this theoretical peak rate figure fails to provide a fair picture of what users are likely to experience when using the technology in a real life situation.

It goes on to describe how sector throughput (as opposed to peak data rates) would offer the most realistic measure of real life network capacity and likely subscriber experience. This in turn provides operators a more accurate basis for business modelling and the total cost of ownership but also a realistic performance for marketing LTE services to the end-users.

The quality of subscriber experience is not only a factor of data rate, but also directly impacted by other factors such as connection time and latency, for this reason LTE can be

⁵ Realistic LTE Performance from Peak Rate to Subscriber Experience

considered the first technology that provides subscriber with a true mobile broadband experience.

The table below is an extract from the aforementioned report, it indicates the realistic average subscriber data rate, based on the technology deployed and the amount of spectrum available to be utilised for that technology.

Throughput Measurement	LTE (20MHz 2 X 2 MIMO)	LTE (10MHz 2 X 2 MIMO)	LTE (5MHz 2 x 2 MIMO)	HSPA R8 (64QAM + MIMO)
Realistic Median Mini-Maxi Sub Data Rate (kbps)	2000- 12500(kbps)	2000-7500 (kbps)	500 -4000 (Kbps)	300-3000 (Kbps)

Table 1: Realistic average subscriber data rate

From the above table, MTN has highlighted the realistic throughput that could be derived based on the Lots that have been pre-defined by the Authority, namely Lots B – E.

It is for this reason that MTN is of the opinion that the expected average downlink throughput of 30Mbit/s is unrealistic.

As recently as Quarter 2 of 2015, Akamai released its “State of the Internet” report. This report is based on data gathered from the company’s intelligent platform, and provides insights into global connectivity and internet metrics.

The report states that the global average connection speed is 5.1Mbps, a mere sixth of the Authority’s expectation, with the average connection speed of the leading European countries delivering data rates of 15Mbps/s.

MTN suggests that there should be a well-considered expectation on the throughput targets based on international trends and tailored to our specific South African environment.

The Authority states it is *“particularly impressed by the success of the model adopted in Germany.”*

With the above in mind, MTN would like to highlight the German operator’s obligations for underserved areas and downlink throughput and have provided extracts of the Presidents Chamber’s decisions relating to the awarding of 800MHz spectrum⁶ in 2010 for the Authority’s consideration:

⁶ Decisions of the President's Chamber of the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway of 12 October 2009 on combining the award of spectrum in the bands 790 to 862 MHz, 1710 to 1725 MHz and 1805 to

“...The degree of coverage refers to the entire population in all the specified towns and districts in each federal state. This rollout obligation must be met with spectrum from the 800 MHz band.

If, in the period up to 1 January 2016, towns and districts are served by other providers/technologies using equivalent or advanced broadband solutions, this coverage will count towards the 90% target rollout obligation.

Assignees can enter into cooperation agreements and lease frequencies as permitted under the regulatory and competition law frameworks.

...To respondents wanting a guaranteed transmission rate, the Chamber replied that, while a minimum rate was desirable in the consumer interest, telecommunications law did not make provision for it.

Transmission rates depended on a number of technical factors and could not be readily prescribed. Rather, the Telecommunications Act assumes that high data rates will be provided by the market, unless particular quality characteristics are prescribed under a universal service obligation. The Chamber assumes, however, that all the participants in the auction are familiar with, and support, the aims of the federal government's broadband strategy.”

Subsequent to the aforementioned 2010 auction, the German government also auctioned the 700MHz spectrum band that was finalised in May 2015. In this regard, we have provided extracts from the same body as it relates to the awarding of this spectrum below:⁷

“The coverage obligation has been changed to the effect that no guaranteed minimum transfer rate per subscriber will be set any longer.

1820 MHz with proceedings to award spectrum in the bands 1.8 GHz, 2 GHz and 2.6 GHz for wireless access for the provision of telecommunications services (Decision of the President's Chamber of 7 April 2008, reference: BK1-07/003 on the order for and choice of award proceedings and on the determinations and rules) and on the determinations and rules for conduct of the proceedings to award spectrum in the bands 800 MHz, 1.8 GHz, 2 GHz and 2.6 GHz for wireless access for the provision of telecommunications services (auction rules); Decisions taken under sections 55(9), 61 subsections (1), (2), (4) and (5), 132 subsections (1) and (3) TKG

7

Decision of the President's Chamber of the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen of 28 January 2015 on the order for and choice of proceedings and on the determinations and rules (award rules) and on the determinations and rules for conduct of the proceedings (auction rules) to award spectrum in the 700MHz, 900MHz and 1800MHz bands and additional spectrum in the 1452 to 1492MHz band for mobile/fixed communications networks (MFCN); decision taken under section 55(4), (5) and (10), section 61(1), (2), (3), (4) and (6) and section 132(1) and (3) of the Telecommunications Act (TKG)

Instead –as requested by respondents –a minimum downlink transmission rate of 50Mbit/s per sector has been stipulated.

This should ensure the general availability of transmission rates of 10Mbit/s and more in relation to the percentage of required household coverage.”

MTN would like to highlight that there are two important aspects which are addressed in these extracts. Firstly, Germany’s broadband target is based on a sector throughput as proposed by MTN. Secondly; the coverage is based on population coverage as opposed to geographic coverage. Therefore, based on this international regulatory practice, MTN supports a coverage obligation based on population.

If the Authority however insists on the 30Mbit/s average downlink user throughput, the additional investment required in a developing economy would increase exponentially. This exponential increase in investment driven by regulatory **xxxx** rather than socio-economic reality, would have a direct and detrimental impact on retail tariffs that can be charged, in order that licensees would be able to make a return on their investment. This pressure on investment would in turn work against one of the objectives as stated by the Authority namely “*ensure affordability of services.*”

3.3 Digital Terrestrial Television (DTT) Obligations

With regard to the Authority’s proposal to expedite the rollout and uptake of digital terrestrial television, MTN believes the following parameters should be considered to ensure the effective deployment of this programme:

- How would households that do not qualify for the set top box subsidy be identified where coverage is provided by multiple operators?
- Would operators be obliged to only utilise STB manufacturers identified by the DoC?
- Would the same resources utilised for the subsidised scheme, be available to qualifying applicants e.g. would the SAPO be responsible for distribution?
- What are the relevant costs in the deployment of this scheme i.e. acquisition costs, STB cost, installation costs amongst others that that are to be off-set from the auction fees?

While this is a laudable proposal, the lack of specificity makes it extremely difficult to comment on in a constructive manner.

3.4. BEE Obligations

The provisions of paragraph 6.4 of the Information Memorandum suggest that the holder of a Radio Frequency Spectrum ("**RFS**") licence must:

- achieve a level 2 broad-based black economic empowerment ("**BBBEE**") status within 24 months from the issue of the RFS licence; or
- increase equity ownership for Historically Disadvantaged Persons ("**HDP's**") by 3% within 24 months from the date of issue of the RFS licence.

By way of context to MTN's submission on this proposal, it is important to note that radio frequency spectrum, including the licensing thereof, is dealt with in Chapter 5 of the Electronic Communications Act 36 of 2005 ("**ECA**"). This chapter is distinct from, and does not overlap with, chapter 3 of the ECA, which deals with the licensing framework for individual licences. The concept of BBBEE is specifically dealt with in section 5(9)(b), Chapter 3, of the ECA. This section states that the Authority must, in granting an individual licence "*promote [BBBEE] including the empowerment of women and the youth and persons with disabilities, in accordance with the requirements of the ICT charter.*" It is noteworthy that chapter 5 does not contain a similar provision or obligatory mandate with regard to BBBEE in the RFS licensing framework.

It is against this background that MTN submits that the requirements in paragraph 6.4 of the Information Memorandum would, if imposed, be ultra vires the provisions of the ECA insofar as it pertains to the issue or maintenance of an RFS licence.

Furthermore, the Authority's attention is drawn to the provisions of section 10 of the Broad-Based Black Economic Empowerment Act 53 of 2003 ("**BBBEE Act**") which states as follows:

"Every organ of state and public entity must apply any relevant code of good practice issued in terms of the [BBBEE] Act in-

(a) determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law;

(b)" (our emphasis)

Accordingly, the Authority is obliged by virtue of section 10 to apply the applicable codes of good practice on BBBEE issued in terms of the BBBEE Act for purposes of determining qualification criteria for issuing licences or other concessions.

MTN submits that the Authority has already complied with, and in fact, exceeded its obligation in this regard by way of the imposition of disqualification criteria for an applicant of an RFS licence set out in section 7(3)(d) of the Radio Frequency Spectrum Regulations ("**RFS Regulations**")⁸. This regulation states that an applicant shall be disqualified from an application process for an RFS licence where such an applicant has (i) less than 30% equity ownership by HDP's; or (ii) is below a level 4 BBBEE status.

In this regard, MTN notes that the ownership target for maximum points for the ownership element in the generic scorecard contained in the generic Codes of Good Practice on BBBEE issued in terms of section 9(1) of the BBBEE Act on 11 October 2013⁹ (and which took effect on 1 May 2015) ("**the Revised Generic Codes**") is 25%+1 vote. This is below the 30% qualification criterion contained in the RFS Regulations. The 30% qualification criterion contained in the RFS Regulations is also on par with ownership target for maximum points for the ownership element contained in the scorecard of the Information and Communication Technology sector code of good practice issued in terms of section 9(1) of the BBBEE Act¹⁰ ("**ICT Sector Code**") (which is subject to a potential alignment process with the provisions of the Revised Generic Codes).

Furthermore, the additional qualification criterion of a level 4 BBBEE status in the RFS regulations sets another high qualification threshold, essentially translating into a threshold qualification criterion of a BBBEE recognition level of 100%. Of further concern is that the Revised Generic Codes (to which the ICT Sector Code is expected to align) generally sets higher targets and thresholds compared to those set out in the previous generic BBBEE Codes¹¹ ("**Old Codes**") and the ICT Sector Codes. For example, under the dispensation of the Old Codes, a measured entity needed a minimum of 65 points on the generic scorecard to attain a BBBEE level 4 status and a 100% BBBEE recognition level. Under the Revised Generic Codes a measured entity which has attained 65 points will be a level 7 BBBEE contributor. This is aggravated by the fact that the targets to attain maximum scores for various elements and sub-elements of the generic scorecard has changed and/or increased, making the attainment of a level 4 BBBEE status more difficult, and for many entities potentially unachievable.

Accordingly, MTN submits that Regulation 7(3)(d) of the RFS Regulations serves to already set considerably high BBBEE threshold requirements. Moreover, the consequences of not

⁸ Government Gazette number 38641, General notice 279

⁹ Government Gazette 36928, General notice 1019 of 11 October 2013

¹⁰ Government Gazette 35423, General notice 485 of 6 June 2012

¹¹ Government Gazette 29617, General Notice 112 of 9 February 2007

meeting these requirements are extreme constituting a basis for disqualification of an applicant.

The BBBEE obligations proposed in the Information Memorandum seeks to further load the onerous requirements of the RFS Regulations by requiring Licensees to achieve a level 2 BBBEE status or increase equity ownership by HDP's 3%, within 24 months of the issue of the licence. MTN submits that this (read against the background of Regulation 7(3)(d) of the RFS Regulations) exceeds the Authority's mandate and obligation as set out in section 10 of the BBBEE Act.

In this regard, the Authority's attention is drawn to section 10(3) of the BBBEE Act which states that:

"Subject to section 9(6), an enterprise in a sector in respect of which the Minister [of Trade and Industry] has issued a sector code of good practice in terms of section 9, may only be measured for compliance with the requirements of [BBBEE] in accordance with that code."(Our emphasis)

Section 9(6) states that, if requested to do so, the Minister of Trade and Industry may by notice in a Gazette permit organs of state or public entities to specify qualification criteria for procurement and other economic activities which exceed those set out in any applicable BBBEE Codes. MTN is not aware of the publication of any Gazette by the Minister of Trade and Industry permitting the Authority to exceed the targets set out in the ICT Sector Codes or the Revised Generic Codes for the issue of RFS licenses.

The Authority may also be aware of the provisions of section 3(2) of the BBBEE Act, which states that in the event of a conflict between any other law in force immediately prior to the commencement of the BBBEE Amendment Act 46 of 2013 ("**BBBEE Amendment Act**") (which commenced on 24 October 2014) and the BBBEE Act, the provisions of the BBBEE Act shall prevail. Since the provisions of the ECA predate the commencement of the BBBEE Amendment Act, the BBBEE Act prevails on issues pertaining to BBBEE.

Accordingly, MTN submits that the Authority is in law not entitled to exceed the targets set out in the ICT Sector Codes or Revised Generic Codes (as applicable). To the extent that the provisions of paragraph 6.4 are imposed on RFS Licensees, the Authority would exceed and in fact contravene the provisions of the BBBEE Act. MTN respectfully submits, therefore, that there is no basis to impose additional BBBEE requirements (to those already contained in the RFS Regulations) on RFS Licensees and accordingly the proposed obligations in paragraph 6.4 of the Information Memorandum should be deleted.

3.5 Auction Process

MTN agrees with ICASA’s proposal to utilise auctions as a mechanism to award radio frequency spectrum. Utilising modern spectrum management tools such as auctions ensure that spectrum is assigned to those applicants that can extract the maximum value from this limited resource. Thus, by using auctions ICASA will ensure that the radio frequency spectrum will be utilised in the most effective and efficient manner.

ICASA has put forward two formats of auctions namely simultaneous multiple round ascending auctions (SMRA) and Combinatory Clock auctions. Key considerations that the regulator must apply its mind to in choosing the relevant auction must be whether the auction is subject to the following

- Price discovery
- Exposure Risk
- Complexity
- Strategic complexity

An auction format is generally perceived as desirable when it facilitates price discovery, has no exposure risk and has low general and strategic complexity. The inherent problem in auction design is that there is no simple solution to an auction format given these preferences. Simple formats typically exhibit either exposure risk or no price discovery.

The table below characterises five auction formats according to the four features above.

Features of common spectrum auction formats [Source: Copenhagen Economics, 2015]

Auction format	Price discovery?	Exposure risk?	Complexity	Strategic Complexity
Sealed-bid auction	No	Yes	Very Simple	Very Complex
Clock auction	Yes	No/Yes*	Simple	Most Simple
SMRA	Yes	Yes	Simple	Simple

SMRA with switching	Yes	(Yes)**	Simple	Complex
CCA	Yes	No	Very Complex	Very Complex

Notes: * Some complex versions of clock auctions have no exposure risk, whereas simpler versions do.

** The SMRA with switching has less exposure risk than the regular SMRA auction format.

Finally, although ICASA states in 7.5 that “*the auction stage will take the form of a ‘simultaneous multiple round ascending’ (SMRA) auction*”, 8.2 states that ICASA is “*considering to use the SMRA auction or the Combinatory Clock Auction (CCA) with generic lots.*” As such MTN seeks clarity on which format ICASA intends to adopt, as applicants tend to prepare auction strategies based on the auction format used.

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