



Independent Communications Authority of South Africa

MINUTES OF AN ORDINARY COUNCIL MEETING		
Date	04 November 2021	
Time:	08:00	
Venue:	Microsoft Teams	
Present	[REDACTED]	Chairperson
	[REDACTED]	Councillor
	[REDACTED]	Councillor
	[REDACTED]	Councillor
	[REDACTED]	Councillor
	[REDACTED]	Councillor
By Invitation	[REDACTED]	CEO
	[REDACTED]	CFO
	[REDACTED]	CAE
	[REDACTED]	Corporate Secretary
	[REDACTED]	Secretariat Officer
	[REDACTED]	Secretariat Officer
Partial Attendees	[REDACTED]	Executive: Licensing and Compliance
	[REDACTED]	Acting Executive: LRCCC
	[REDACTED]	Executive: Policy Research and Analysis
	[REDACTED]	Manager: Broadcasting frequency Coordination
	[REDACTED]	Acting Executive: Engineering and Technology
	[REDACTED]	Manager: Communications
	[REDACTED]	External Legal Counsel
	[REDACTED]	External Legal Counsel
	[REDACTED]	External Legal Counsel (Senior Counsel)
	[REDACTED]	Radio Frequency Specialist
	[REDACTED]	Radio Frequency Specialist
	[REDACTED]	Senior Manager: Litigation, Contracts & General Legal Support



Apologies	Adv. Dimakatso Qocha	Councillor
	Palesa Kadi	Councillor

No.	Action Item	Person Responsible
1.	<p>Opening and apologies</p> <p>1.1. The Chairperson opened the meeting at 08:00 and welcomed all present.</p> <p>The following apologies were noted:</p> <p>1.2. Councillor [REDACTED] was having connectivity difficulties and held up from joining the meeting;</p> <p>1.3. Councillor [REDACTED] was on leave; and</p> <p>1.4. Councillor [REDACTED] had another engagement and was to join the meeting following her other engagement.</p> <p>The opening and apologies were noted.</p>	Chairperson
2.	<p>Declaration of interest</p> <p>No conflict of interest was noted.</p>	Council
3.	<p>Ratification of the Agenda</p> <p>The agenda was adopted as presented.</p>	All
4.	<p>Licensing of IMT</p> <p>The Acting Executive: Legal Risk and CCC introduced the presentation.</p> <p>4.1. The legal opinion dated 22 October 2021, was triggered by the case management meeting that took place between the parties and the Deputy Judge President (DJP) of the High Court, to discuss the date for the hearing of the interdict application.</p> <p>4.2. The date of the hearing of the application was moved closer to the termination date, which will be on the 15th and 16th November 2021.</p>	Council

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	<p>4.3. The Authority has requested a legal opinion on the implications of the hearing dates having been pushed further to 15 and 16 November 2021, given the fact that the temporary spectrum regime terminates on 30 November 2021.</p> <p><u>The legal opinion advised that:</u></p> <p>4.4. The centre of this litigation will be whether switching off the temporary spectrum on 30 November 2021 will disrupt the operations and inconvenience the public, affect network capacity, speed, create network volatility, connection interruptions and frequent drop calls.</p> <p>4.5. The second question is whether the current holders of the temporary spectrum licenses are able to switch off the operations in the matter of a week or days, which is, between the date of the judgment if they lose and the cut-off date of 30th of November.</p> <p>4.6. Telkom has alleged in its papers that it will require 6 to 7 months to switch off its operations. That allegation seems to be supported by MTN and Vodacom. Rain has countered the allegation. It alleged in its answering affidavit that it can switch off its operations in the matter of minutes or an hour.</p> <p>4.7. The Court is unlikely to decide this dispute in the urgent Court particularly in the light of the relief sought which is an interim interdict. The right that the applicant must establish for an interim interdict is prima facie right although open to some doubt. In the circumstances the Court is likely to agree with Telkom, MTN and Vodacom on this issue.</p> <p>4.8. ICASA has given the operators three months to wind down their operations. It seems on objective facts that the winding down of operations needs some time, three months or so depending on the nature of technology and equipment in use by each operator.</p>	

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	<p>4.9. Regulation 6(6) of the ICT Covid-19 regulations published on 6 April 2020 extends the life span of temporary spectrum licenses to three months after the termination of the National State of Disaster.</p> <p>4.10. This period can realistically be understood to be the winding down period. Similarly, in the 31 August 2021 amendment regulations, ICASA has granted three months winding down extension period to operators until 30 November 2021. It can objectively be established that the realistic time to wide down operations on temporary spectrum is at the very least three months.</p> <p>4.11. In our view ICASA will be constrained to gainsay Telkom, MTN and Vodacom's proposition on the realistic time required to switch off the operations. This will tilt the scales in favour the Court granting an interdict in favour of Telkom, MTN and Vodacom.</p> <p>4.12. The hearing of the interdict application closer to the termination date bolsters the chances of Telkom, MTN and Vodacom being granted an interdict. The Court will weigh competing interests. The interest of ICASA to switch off in terms of its regulatory powers as against the interest of the operators to provide quality uninterrupted service to the public during the National State of Disaster.</p> <p>4.13. This means that, weighing competing interests and taking into account the public interest, the Court is likely to rule in favour of the public interest, and grant the interdict.</p> <p>4.14. Neither ICASA nor the government can predict as to when the National State of Disaster will end, given the mutation of the virus and the slow pace of the vaccination program. It seems to us that it will be pre-mature for ICASA to terminate the temporary spectrum regime.</p> <p>4.15. It would be pre-mature for ICASA to terminate the temporary spectrum regime. At best ICASA should consider other available</p>	

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	<p>options within its powers on how best to continue with the temporary spectrum regime albeit in different form and shape from the one terminating on 30 November 2021.</p> <p>4.16. ICASA should consider other options, lest it may invite serious criticism from the Court that it is acting in a high-handed manner. A criticism of this nature will be undesirable and damaging to ICASA's image and reputation, particularly coming at the back of the recent scathing remarks and criticism by Baqwa J in the 8 March 2021 judgment against ICASA.</p> <p>4.17. Coming to the second question of the possibility of the Court overlooking the delay in the launching of the urgent application by Telkom, MTN and Vodacom, the Court is highly likely to overlook the delay and adjudicate the merits of the interdict application.</p> <p>4.18. The third question of whether there are realistic prospects of the Court granting an interdict, having considered the papers filed on behalf of Vodacom and MTN, the prospects of ICASA successfully opposing the interdict have further diminished.</p> <p>4.19. ICASA should seriously consider other options and not to solely focus on opposing the current interdictory litigation by Telkom, MTN and Vodacom. The available options may be considered and even pursued along side the opposition of the interdict application. Ultimately, ICASA should avoid an interdict against it.</p> <p>4.20. The first option is for ICASA to restructure the temporary spectrum regime and commence a process where it invites operators to apply for temporary spectrum licences which will be operational with effect from 1 December 2021 when the current temporary spectrum regime terminates.</p> <p>4.21. The new temporary spectrum regime should be linked to the award of the permanent spectrum in March 2022 or the termination of the National State of Disaster, whichever comes first.</p>	

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	<p>4.22. In this regard, this will remove the administrative burden of ICASA having to amend the regulations after every three months or so as it has been doing in the past nineteen months of the National State of Disaster and the promulgation of the ICT Covid19 regulations.</p> <p>4.23. The second option is for ICASA to consider whether part A which seeks an interim interdict should not be removed from the roll and ICASA grants a temporary extension by issuing regulations amending regulation 6(7) to make provision for the further extension of two months with effect from 1 December 2021 to 31 January 2022.</p> <p>4.24. In the meantime, until such time that ICASA takes a firm view or decision on any of the available options, ICASA should proceed to file its answering affidavit on Monday, 25 October 2021.</p> <p><u>The legal memorandum advised / recommended as follows:</u></p> <p>4.25. ICASA should consider other options other than solely opposing the interdict application.</p> <p>4.26. The first option is for ICASA to consider the restructuring of the current temporary spectrum regime which terminates on 30 November 2021 and issue new temporary spectrum licenses valid until the award of the permanent spectrum licenses or three months after the termination of the National State of Disaster.</p> <p>4.27. The second option is that ICASA may consider amending the ICT COVID-19 National State of Disaster Regulations and award temporary spectrum licenses valid until 31 January 2022, whilst introducing a new temporary spectrum regime proposed above.</p> <p>4.28. ICASA should consider whether it is necessary to consult with the ICT sector role players and/or to embark on public participation when introducing a new temporary spectrum regime.</p>	



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	<p>4.29. ICASA should still file an answering affidavit by 25 October 2021.</p> <p><u>The following comments were made:</u></p> <p>4.30. Council inquired about the nature of the meeting between the Authority and Industry players and further requested that Councillors not attend the meeting as Councillors are decision makers.</p> <p>4.31. The legal team informed Council that the meeting will be between the CEO and his team and the industry players, and further explained that Councillors will not be attending the meeting.</p> <p>4.32. Council expressed concern that operators having access to the temporary spectrum and its use thereof, undermines the ITA and creates an incentive for those licensees to delay, litigate etc around the ITA process. Council expressed concern with the extension on the temporary spectrum.</p> <p>4.33. Council was of the view that any new player being awarded the temporary spectrum would not be able to utilise the spectrum in advance of the Auction.</p> <p>4.34. Council was concerned about the public perception of the Authority should the temporary spectrum be extended, as it would seem that the Authority flip flops as it is litigated.</p> <p>4.35. Council expressed that the Authority is not spectrum hoarders. Council was of the view that a plan should be put in place to ensure that the possible under-performance of network operators after 30 November not be attributed to the decision of the Authority.</p> <p>4.36. Council expressed that the most important thing to mitigate against is to have spectrum being awarded through a Court order, which might jeopardise the Auction.</p>	



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	<p>4.37. Council inquired how the Authority should go about extending the temporary assignment of spectrum. Council further inquired if there was a possibility of obtaining a settlement agreement with Telkom before the set-down date?</p> <p>4.38. Council expressed that should the Authority continue the assignment of temporary spectrum, there should be a fees collected by the Authority. There should be an acquisition fee to use the temporary spectrum at a prorated fee.</p> <p>4.39. Council inquired if it was <i>functus officio</i> in relation to the extension of the existing format of the temporary spectrum, and if Council would be allowed to introduce a new format of temporary spectrum.</p> <p>4.40. Council cautioned that the need for temporary spectrum arose from the need for economic recovery from the Covid-19 pandemic. Council cautioned further that the pandemic is not over, and the Authority should not be seen as taking decisions that is not in line with the interest of the public and the recovery of the economy.</p> <p>4.41. Council was of the view that the Authority does not have a perfect case but there is a serious case to defend, this is supported by the Affidavit that was filed by Rain.</p> <p>4.42. Council further expressed that there is no person “high-up” that can instruct the Authority on what to do, Council is the final decision-making body, and it is independent. The Council of the Authority reports to Parliament and there is an administrative line of reporting to the Minister.</p> <p>4.43. Management inquired on the assumption that should Council be minded to approving the reconfiguration of temporary spectrum proposed by Management, how should the issue of consultation and informing stakeholders be handled?</p> <p>4.44. Senior Counsel advised Council that the stance of the Authority with regards to the existing temporary spectrum is that it is</p>	



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	<p>skewed and is objectionable to the extension after 30 November 2021. The Authority, however, is of the view that should there be a re-allocation of temporary spectrum and that the re-allocation should be reconfigured and industry should submit new applications for the new regime.</p> <p>4.45. Senior Counsel advised that the Authority could agree to an extension of the temporary spectrum, for the purpose of the Authority re-allocating the temporary spectrum. The above process will create a need for negotiation between the Authority and the parties involved in the litigation.</p> <p>4.46. Council was advised that the decision being taken by Council does not make is not <i>functus officio</i>, the decision taken simply states that the temporary spectrum should come to an end on 30 November 2021 and that the operators should switch off their networks. The above decision taken by the Authority can be reversed, as when reversed it would not cause harm to those who are complaining, although this might be a decision that would not find favour with operators like Rain. The harm that might be suffered by operators like Rain who were not part of the current assignment can be corrected through a re-assignment of the temporary spectrum and their inclusion should they apply.</p> <p>4.47. Management requested that Council guard against regulating through negotiations, Council was advised to take matters into its hands and not allow the “towing and throwing” that occurs during negotiations.</p> <p>4.48. Council resolved that the meeting with industry players will be a fact-finding meeting, and it will not be a negotiation process. The discussion point of the meeting would be that aside from the on-going Court case, the Authority may be minded to considering a new form of a regime with regard to the temporary spectrum between December 2021 and end of March 2022.</p> <p>4.49. Council resolved that the meeting with the industry players be held on Monday 08 November 2021, and the meeting be</p>	



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	<p>between the CEO and his delegation and the CEOs of the industry players.</p> <p>4.50. Council resolved that Management should tailor the appropriate approach and share it with Council as well as the letters to the six industry players by 09:00 am on 05 November 2021.</p> <p>4.51. The legal team advised that the meeting with industry players should be clearly defined as a formal meeting and that will serve as part of the consultation process. The Authority was advised that it should be clear that the meeting forms part of the consultation process on the new temporary spectrum regime that the Authority wishes to embark on.</p> <p>Council resolved that Management provide feedback from the meeting with industry at the normal sitting of Council.</p>	
5.	General	All
6.	<p>Closure</p> <p>The Chairperson thanked all who were present at the meeting and closed it at 10:11 am.</p>	Council
7.	Date of next meeting: TBA	Secretariat

Signed:  _____

Date: 26/04/2022

(Chairperson)