



Independent Communications Authority of South Africa

MINUTES OF A SPECIAL MEETING OF COUNCIL

Date 29 January 2021

Time: 09:00

Venue: Microsoft Teams

Present	[REDACTED]	Chairperson
	[REDACTED]	Member
	[REDACTED]	Member
	[REDACTED]	Member
	[REDACTED]	Member
	[REDACTED]	Member
	[REDACTED]	Member
	[REDACTED]	Member
	[REDACTED]	Member

By Invitation	[REDACTED]	CEO
	[REDACTED]	CAE
	[REDACTED]	CFO
	[REDACTED]	Corporate Secretary
	[REDACTED]	Secretariat officer

Partial Attendees	[REDACTED]	Executive:Legal Risk and CCC
	[REDACTED]	SM:Litigation,Contracts and Legal Services

Km

No.	Action Item	Person Responsible
1.	<p>Opening and apologies</p> <p>The Chairperson opened the meeting at 09:00 and welcomed all present.</p> <p>Apologies</p> <p>No apologies were noted.</p>	Chairperson
2.	<p>Ratification of the Agenda</p> <p>Only one (1) item was considered by Council.</p> <p>1. Update on the application by Telkom SOC Limited, e.tv and MTN Court applications and proposed timelines.</p> <p>The agenda was ratified as it was presented.</p>	Council
3.	<p>Declaration of interest</p> <p>No conflict of interest was noted.</p>	Council
4 .	<p>Update on Telkom Court application and proposed timelines</p> <p>The purpose of the submission was to provide an update to Council on the litigation instituted by Telkom SOC Limited, e.tv and MTN on the licensing of the IMT Spectrum and for Council to note the update including the proposed timelines.</p> <p>The Executive:Legal,Risk and CCC presented the item.</p> <p><u>Telkom's Review Application</u></p> <p>4.1 The Policy on High Demand Spectrum and Policy Direction on the Licensing of a Wireless Open Access Network (WOAN) was issued on 26 July 2019.</p> <p>4.2 The Authority undertook a consultative process on the licensing of high demand spectrum and the WOAN through the publication of an Information Memorandum (IM) on 1 November 2019.</p>	LRCCC

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4.3	<p>Following the consultative process, ICASA published a composite Invitation to Apply (ITA) for an Individual Electronic Communications Network Service (I-ECNS) and Radio Frequency Spectrum Licences for the WOAN and an ITA for IMT Spectrum on 2 October 2020 outlining the following:</p>	
4.3.1	<p>28 December 2020 was the closing date for applications for the IMT spectrum; and</p>	
4.3.2	<p>30 March 2021 would be the closing date for the WOAN applications.</p>	
4.4	<p>On 22 December 2020 Telkom filed a review application to set aside envisaged spectrum auction in March 2021, seeking the following relief:</p>	
4.4.1	<p>Part A – A substituted service;</p>	
4.4.2	<p>Part B – an order interdicting ICASA from assessing applications received on 28 December 2020 in respect of the auction and suspending closing date for the WOAN; and</p>	
4.4.3	<p>PART C – several orders including:</p>	
4.4.3.1	<p>an order setting aside the respective ITAs as unlawful.</p>	
4.4.3.2	<p>An order directing the Minister to complete digital migration by 30 June 2021 and to report to court regarding the implementation measures thereof.</p>	
4.4.3.3	<p>An order directing ICASA to issue (extend) temporary spectrum licenses.</p>	
4.4.3.4	<p>An order directing the Minister to issue 5G Policy within 3 months from the date of the court order.</p>	
4.5	<p>According to Telkom, the first fundamental flaw made by ICASA was that the IMT ITA involved the auction of portions of spectrum in the 758-788 MHz(the 700MHz) and the 791-821MHz) paired with 832-862 ,the (800MHz) frequency</p>	Km


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	bands, which it argued were not immediately available for use on a national basis by a licensee who may ultimately succeed in its bid during auction process.	
4.6	Telkom was also concerned about the lawfulness and rationality of the authority's decision to include the 700 MHz and 800 MHz frequencies.	
	<u>Implications of the Litigation on the IMT Spectrum applications deadline.</u>	
4.7	The Authority received applications for the IMT Spectrum on 28 December 2020.	
4.8	Six applications were received including that from Telkom.	
4.9	On or about 7 January 2021, Telkom filed a notice to withdraw Part A of its application upon being provided with the details of all parties that have submitted their applications in response to the IMT Spectrum ITA and those that have submitted written inquires in respect of the WOAN ITA.	
4.10	On 12 January 2021, e.tv filed its papers in the matter seeking substantially the same order sought by Telkom in Part B & C.	
4.11	E.tv supports Telkom's submission that it was irrational and unlawful for ICASA to auction spectrum in the 700MHz and 800MHz frequency bands where these spectrum bands were still being used by broadcasters and where there was no clarity as to when the digital migration process will be completed.	
4.12	Given the magnitude of the matter and the number of parties involved, the Authority's legal representative have requested Telkom's legal representatives to approach the Office of the Deputy Judge President in relation to the following: <ul style="list-style-type: none"> 4.12.1 special allocation of a Judge for the matter and (b) schedule a case; and 4.12.2 management meeting – prior to the matter being set down for hearing 	
4.13	ICASA was opposing Part B and C of Telkom's application. Part B was set down for hearing for 9 Feb 2021.	km

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	<p>4.14 A number of the parties cited have either filed their notices to abide or oppose Part A, B and or C.</p> <p>4.15 Telkom had in the interim requested that ICASA concede on Part B of the application in order for the parties to focus on Part C . Telkom was requesting ICASA to interdict itself. The request has been rejected ICASA.</p> <p>4.16 ICASA's external legal representations have since proceeded to request the Deputy Judge President to allocate a judge to convene the case management meeting.</p> <p>4.17 In the absence of an interdict contemplated in Part B of the application or an agreement between the parties, ICASA can still proceed with accepting bids and adjudicating same in line with the ITA's published on 2 October 2020.</p> <p>4.18 It was agreed that a follow-up meeting will be arranged in order for the Department to obtain certain clarity on, inter alia, the alignment between the ITAs and the Minister's policy direction, which will presumably inform the Minister's position in relation to the litigation in this matter.</p> <p>4.19 There was, however, a risk that ICASA must accept that when proceeding, that such processes and steps may be invalidated at a later stage by the court should the court agree with Telkom and grant a court order in its favour as prayed for in part B and C of its application.</p> <p>4.20 On 25 January 2021, the Chairperson of ICASA together with the CEO, Executive: LRCCC and Corporate Secretary met with the Minister to brief her on the licensing processes pursuant to the issuance of the WOAN and IMT Auction ITAs and the resultant litigation.</p> <p>Recommendation to Council</p> <p>It was recommended that Council note the litigation instituted by Telkom ande.tv with regards to the licensing of IMT and the related timelines, and also approve that the Authority oppose the applications.</p> <p>The recommendation was approved .</p>	<p>km</p>

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<p>5.</p>	<p>Update on MTN Court application and proposed timelines</p> <p>The purpose of the submission was for Council to note the application instituted by MTN, the related timelines, and to oppose the application.</p> <p>The Executive: Legal Risk and CCC presented the item</p> <p>5.1 MTN has lodged an urgent court application to challenge parts of the ITA.</p> <p>5.2 MTN was challenging ICASA's decision to classify operators in two groups, Tier 1. and Tier 2. Only MTN and Vodacom were classed as Tier 1 operators.</p> <p>5.3 MTN was objecting to the approach ICASA took in classifying operators, which the company says was based on an arbitrary number of municipalities, and incorrectly relied on retail market share.</p> <p>5.4 MTN was also objecting again that the Tier 1 operators were not allowed to participate in the initial "opt in" round of the auction which MTN says would include the 3500 MHz band which it claimed was optimal for the 5G use.</p> <p>5.5 MTN was concern that it won't be able to bid for this band if Tier 2 operators take up the bulk of the Spectrum in the initial auction. MTN in its affidavit said that Icasa's approach to both tier classifications and the initial round of the auction was 'impermissibly vague'. It claims that it was impossible for prospective bidders to understand the basis for these interventions or to anticipate their outcome".</p> <p>5.6 MTN case had been scheduled for set down on the 09 March 2021</p> <p>Recommendation to Council</p> <p>It was recommended that Council note the litigation process instituted by MTN (Pty) Ltd with regards to the auction process and the related timelines , and also approve that the Authority defends the litigation.</p> <p>The recommendation was approved.</p>	<p>LRCCC</p> <p><i>KM</i></p>
<p>6.</p>	<p>Closure</p>	<p>Chairperson</p>



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	The Chairperson thanked all present at the meeting.	
7.	Date of next meeting: 10 February 2021	Secretariat

Signed:  _____

Date: 10/03/2021

(Chairperson)