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GENERAL NOTICE

NOTICE 725 OF 2012



Independent Communications Authority of South Africa
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INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

GENERAL NOTICE – FINDINGS ON REVIEW OF UNIVERSAL SERVICE ACCESS OBLIGATIONS (“USAO”)

- (1) On 17 August 2010 in Government Notice 807 published in Government Gazette Number 33467, the Authority published the Discussion Document on the Review of Universal Service and Access Obligations. The Authority also invited interested parties to submit written representations on the discussion document.
- (2) The closing date for submissions was 12 November 2010 and hearings were held on 8 and 9 December 2010. All parties who had expressed an interest to participate in oral hearings were afforded such an opportunity.
- (3) The Authority hereby publishes the attached Findings Document to reflect its findings and a proposed way forward, where the context requires.

A handwritten signature in black ink, appearing to be 'S Mncube', written over a horizontal line.

Dr Stephen Mncube
Chairperson
ICASA

REVIEW OF UNIVERSAL SERVICE AND ACCESS OBLIGATIONSs (“USAO”) FINDINGS DOCUMENT

BACKGROUND AND DISCUSSION

- (1) In April 2010 the Authority published a discussion document on the Review of Universal Service and Access Obligations (USAO) framework, after it had commissioned research to look at the USAO regulatory framework and assess the level of compliance with those USAOs. The purpose of the review was to establish the need for a revised USAO regulatory framework and the development and publication of regulations, if necessary, in terms of section 8(4) of the Electronic Communications Act, Act No. 36 of 2005 (the ECA).
- (2) The research conducted then covered the following aspects:
 - a. Analysis of the existing obligations imposed on licensees (see Annexure C for sample analysis in addition to BMI-T report published by the Authority in March 2010) in terms of the then Telecommunications Act of 1996.
 - b. Investigation of compliance by licensees with imposed obligations and analysis of the reasons for the non-compliance;
 - c. Assessment of the effectiveness of the current model;
 - d. Bench-marking with similar international jurisdictions (See BMI-T report published in March 2010) as regards the implementation of USAOs;
 - e. Recommendations on the way forward.
- (3) The USAO review process became imperative given the need for parity after conversion¹ of the “old” licences. In terms of the Telecommunications Act, the old licensees (i.e. VODACOM, MTN, NEOTEL, SENTECH, CELL C, IBURST (WBS), and TELKOM) had several obligations imposed on them in lieu of being granted a service or spectrum licence, aimed at ensuring the achievement of universal service and universal access whilst new entrants had no obligations imposed on them.

¹ To either ECNS, ECS or BS licences as required by the Electronic Communications Act (Act No. 36 of 2005) as amended.

- (4) In terms of the Telecommunications Act dispensation, universal service obligations were contained in the issued licences and explicit timeframes for the completion of the obligations were also stipulated in the licences.
- (5) During the time period set out for compliance with the obligations, the Electronic Communications Act (Act No. 36 of 2005) ("ECA") was promulgated, effective from 19 July 2006. The Authority then commenced with the mandatory licence conversion process as required by section 93 of the ECA. Licensees were issued with an Electronic Communications Service (ECS) Licence, Electronic Communications Network Service (ECNS) Licence, Broadcasting Service Licence or a combination of these licences, depending on the type of services they were able to provide in terms of their old licences.
- (6) In addition, a separate spectrum licence containing prescribed obligations was issued in accordance with the previous licensing regime ².
- (7) Analysis of Obligations in summary, the Authority has reached the following conclusions:
- a. the rollout of Community Service Telephones have been completed
 - b. the rollout of internet connectivity to public clinics has not taken place
 - c. the rollout of internet connectivity to public schools has had limited success
 - d. Provision of SIM cards was overtaken by market forces.
- (8) There is a valid argument for a comprehensive policy framework; however, there still remains a need to ensure compliance with the obligations imposed in terms of the current framework. It appears that there is an overwhelming consensus from the industry that USAOs related to schools are an absolute necessity and there is merit in ensuring that the current unimplemented USAOs are achieved. The benefits that have been identified include the creation of a knowledge-based society, the creation of new markets and the improvement of the Republic's education system through various collaborative efforts. It has also been submitted that a more efficient process needs to be put in place to ensure that licensees implement USAOs as soon as possible.

² Section 31(2) of the Act

- (9) Based on the submissions received, there also appears to be an industry consensus on the need for an evaluation of the other USAOs not related to schools connectivity. The views from the licensees who had USAOs imposed on them is that those USAOs need to be evaluated for continued relevance and appropriateness. The argument was more evident in relation to the obligation for the delivery of SIM cards.

FINDINGS

1. LEGISLATIVE AND REGULATORY ISSUES

1.1.1. Must licensees continue to carry USAOs? (in answering these questions you are requested to comment on whether broadcasters must carry such obligations).

GENERAL STAKEHOLDERS VIEW

The Authority should not continue to impose obligations because they have proven to be ineffective previously. However, licensees respect the Authority's right to impose such obligations, and if such obligations are imposed, they should be done in an equitable manner that does not discriminate among licensees.

1.1.2. If so:-

1.1.2.1. Which factors/considerations must be taken into account in determining whether a particular licensee or category of licence must carry USAOs or not?

GENERAL STAKEHOLDERS VIEW

Should the Authority decide to impose USAOs, then financial implications associated with the network roll-out in areas where there is lack of infrastructure development, as well as the market gap and the extent to which a particular service in an under-serviced area addresses problems of social exclusion should be considered.

1.1.2.2. Which licensees (electronic communications network service ("ECNS"), electronic communications service ("ECS") and / or Broadcasting Licensees ("BS") must carry the USAOs?

GENERAL STAKEHOLDERS VIEW

There is a common view that both ECS and ECNS Licensees should carry obligations and Spectrum licensees should be exempted; whilst another view is that these obligations should be imposed based on the core functions that licensees conduct.

1.1.2.3. Should all licensees or some continue to carry USAOs (ECNS, ECS and BS) or which, if not all, must carry USAOs? (Please indicate what the role of licensees no longer carrying USAOs should be towards the goal of achieving US/UA).

GENERAL STAKEHOLDERS VIEW

USAOs should not be mandatory since the Authority is not obliged (but can use its discretion) to impose them on any licensees in terms of section 8(4) of the ECA. Further, should the Authority decide to impose such obligations, both ECNS and ECS licensees should continue to carry them. No comment was provided on what should be the role of other licensees who no longer carry USAOs.

1.1.2.4. Do you submit that licensees falling within the same category of a licence must carry the same obligations, including similarity in terms of nature and quantity? (You are requested to refer to experiences encountered in the implementation of the existing obligations, if any).

GENERAL STAKEHOLDERS VIEW

Licensees falling within the same category of a licence must not carry the same obligations. Further reasons were not given.

1.1.3. What approach should be carried in respect of USAOs imposed under the Telecommunications Act which were not carried over into the converted licences issued under the ECA? (You are also requested to consider what should happen to such obligations which were not carried over into the converted licences).

GENERAL STAKEHOLDERS VIEW

Obligations that were not imposed during the licensing conversion should not be carried over into the new regime considering that they were imposed under the old licensing regime. However, should the Authority decide to carry them over as per section 67(8) of the ECA, it should ensure that it establishes alternative methods of delivery by addressing all challenges associated with the current system.

1.1.4. What kind of obligations must be imposed on the licensees that you submit need to carry USAOs? (You are requested to refer to experiences in implementing the existing obligations, if any, that you think must be taken into account in determining obligations that individual licensees or licences have to carry. You are requested to deal with BS licensees separately in your answer ;)

GENERAL STAKEHOLDERS VIEW

Obligations should not be imposed without the assessment of whether or not there is a need for them. Assessments could take the form of a market access gap study and their implementation should be motivated by such findings, taking into account the determination by the Minister of Communications, published in Government Gazette 32939 and the need to provide definitions to the concepts of “universal service” and “universal access”.

1.1.5. Would you submit that there is currently a clear or sufficient link between USAOs and the processes undertaken by USAASA and the Media Diversity Development Agency (“MDDA”) in terms of the ECA? (You are requested to provide full details in your answer).

GENERAL STAKEHOLDERS VIEW

Although the ECA in terms of Chapter 14 seems to recognize the co-existence of the two agencies, it does not impose double payment and allows the offsetting of payment made to MDDA. The common view is that there is no clear link between the two agencies.

1.1.5.1. If not so what would you submit has to be done to improve the harmonization of those processes towards the achievement of the goal of USAOs?

GENERAL STAKEHOLDERS VIEW

In order to improve those processes towards the achievement of USAOs, there should be a committee established to deal with all issues of universal service and access.

1.1.6. What should happen to the obligations which were not completed or implemented at the time of the conclusion of the licence conversion or were not carried over into the converted licences and those that were carried-over into the

converted licences, where applicable, and new ones which were imposed upon conversion of the licence, where applicable?

GENERAL STAKEHOLDERS VIEW

Obligations that were not implemented should not be carried over into the new regime considering that they were imposed under the old licensing regime. However, those licensees who did not fulfil them should be penalised accordingly.

1.1.6.1. Would you submit that licensees should carry an obligation to maintain the obligations that have already been implemented? (Please provide reasons for your answer).

GENERAL STAKEHOLDERS VIEW

The general stakeholders view shared is that such obligations should be maintained only to the extent that they have been implemented and have brought a tangible benefit to consumers, particularly those in underserved areas.

1.1.7. Must licensees continue to make a contribution into the USAF?

GENERAL STAKEHOLDERS VIEW

The ECA is clear in this regard and all licensees are accustomed to making USAF contributions. However, there should be a clear framework identifying how the funds are to be utilised to achieve the universal service and access considering the current absence of such a framework.

1.1.7.1. If so taking into account your answers above on whether licensees should carry or not carry USAOs, would you submit that the existing amount of contribution is or would be sufficient?

GENERAL STAKEHOLDERS VIEW

The majority view seems to suggest that the current contribution is sufficient. However, there is another common view that suggests that should the amount not be deemed sufficient, then alternative funding from Government should be considered. The Public Private Partnership model can also work in these circumstances.

1.1.7.2. If not so from which sources do you think the USAF should be funded?**GENERAL STAKEHOLDERS VIEW**

The majority view seems to suggest that in the event that such contribution is not sufficient, government funding should be looked at as alternative source.

1.1.7.3. If you submit licensees should not continue to carry USAOs, what would you submit the role of licensees should be towards contribution to the goal of US/UA?**GENERAL STAKEHOLDERS VIEW**

Where a licensee has not assumed USAOs through a competitive process which specifically provides for the offset of USAF contributions or a portion thereof against contributing towards USAO, then such licensees should be seen as contributing to achieving UA and US goals through the payment of the USAF contribution.

1.1.7.4. If you submit that licensees should continue to carry USAOs, would you submit that such obligations must be adjusted up in view of the relief from contribution into the USAF?**GENERAL STAKEHOLDERS VIEW**

Contributions to the Fund need to be standardized in order to promote the goals of attaining universal service and access for all.

1.1.8. Which concepts or terms used in the ECA that have a bearing on USAOs and/or the USAF must be defined or amended? (You are requested to refer to difficulties encountered in implementing or interpreting such terms and/or concepts, if any).**GENERAL STAKEHOLDERS VIEW**

The general stakeholder's view is that the Authority should provide clear definitions as to what "*universal service*", "*needy persons*" and "*under-serviced area*" mean, particularly in relation to the ECS/ECNS.

1.1.9. Which method has to be used in defining or amending such terms and/or concepts, including whether in the ECA itself, by ICASA, USAASA or any other relevant body?

GENERAL STAKEHOLDERS VIEW

Licensees all proposed that the process to be followed in this regard should be consultative and take place within the context of the existing legal framework.

AUTHORITY'S VIEW ON LEGISLATIVE AND REGULATORY ISSUES

Transition, Licence Conversion & Obligations

1. **Transition** Section 93 (4) (b) of the ECA states "*The following framework must be used by the Authority for converting existing licences and issuing new licences:*

Consistent with the licence types set out in Chapter 3.

(b) As part of the conversion process, the Authority may grant rights and impose obligations on the licence, in order to ensure that the existing licenses comply with this Act, including the continuation of any obligations imposed upon existing licensees by virtue of a previous determination. Such obligations remain in force until such time as the Authority completes a review in terms of section 67(8)."

Given the above it is the Authority's view that the obligations which were imposed during the Telecommunications Act are still binding.

Added, in the General Notice on converted licences in terms of section 93 of the ECA (gazette No. 31803 published on the 16th January 2009), it was the Authority's decision to have all obligations in lieu of spectrum issued under the Telecommunications Act to be reflected under the Spectrum Licence and remain binding until such time the Authority reviews the same obligations.

The notice states that during the transition period all obligations imposed during the Telecommunications Act relating to roll-out of services shall remain. Licensees have a continuing obligation to ensure that services provided remain available until such time the Authority reviews such under section 67(8) of the ECA.

2. **Licence Conversion**, prior to the ECA licensees used one document to reflect all the licence terms and conditions and obligations amongst other items. In the ECA, it provided for licences to be issued in three separate documents as per the

following categories: Broadcasting Service, Electronic Communications Service (“ECS”) and the Electronic Communications Network Service (“ECNS”) licences.

3. With an exception of Neotel, all licences carried **obligations** in lieu of spectrum via section 30A and 30B and as per the unanimous view from Industry Members.

Contributions to the Fund

1. In terms of section 89 (1) of the ECA all licensees are obliged to contribute to the USAF. It is the Authority’s view that the goal to achieving US/UA should be attained by making use of the fund through the use of appropriate sections of the ECA.

It is the Authority’s view that in contributing into the USAF each licensee is contributing towards the goal of achieving Universal Service (“US”)/Universal Access (“UA”). The fund can be utilised to support projects for the provision of communication services in under-serviced areas.

Universal Service Access Agency South Africa and the Media Diversity and Development Agency

1. Under chapter 14 of the ECA the functions, objectives and processes of USAASA have been clearly outlined. Section 82 (1) (a) to (c) emphasis that the USAASA must promote, encourage and facilitate the goal of UAS.
2. Sections 88, 90 and 91 of the ECA outlines application of the funds, the process by which the funds could be utilised and the accounting process of the funds respectively by USAASA.

ECA, USAO and USAF

1. The ECA has the following term which has a bearing on USAOs, *under-serviced areas*. The Authority is required under section 88 (2) to define under-serviced areas, at present the Authority has gone through the process of prescribing the definition of under-serviced areas.
2. Section 88(4) makes reference to *needy person*; USAASA published a gazette notice No. 31333 on 15 August of 2008 making recommendation to Minister for definition of what constitutes a needy person.

3. Section 89(3) of the ECA states that broadcasting contributions to the MDDA must be set off against their prescribed annual contribution to the USAF. Section 88 clearly states that broadcasting services is a recipient of the USAF, having said that it has been noted that some broadcasters at present do not contribute into the USAF, however the broadcasting sector is eligible for use of the funds in attaining UAS. The Authority notes the views of the stakeholders that broadcasters need to contribute to the fund if they are to be recipients of the fund. Hence it is the Authority's view, that in terms of section 89 (3) all broadcasters should pay directly into the USAF.

Way Forward

1. With regards to imposed obligations prior to the ECA, it is the Authority's view that all the obligations are still binding. It is the Authority's view that licensees have a continuing obligation to ensure that services provided remain available to communities' dependant on them.
2. However, in moving forward it is the Authority's view that in attaining UA and US some of the obligations which were imposed but not implemented by licensees should be suspended, licensees and the Authority must renegotiate on the said obligations by invoking section 10 (1) (g) of the ECA.
3. The Authority is of the view that all licensees such as ECNS, BS or ECS will be subject to payment of USAF as required in terms of Section 89 of the ECA. All such funds will be used to advance universal service and access as required in Section 90. In order to fulfil the requirements of Section 90, the Authority proposes that a pay and or play model be invoked. In other words funds will be used by any ECNS provider to meet the needs of under-serviced areas (in terms of Section 90) as predetermined by ICASA in terms of Section 88 (subsections 2 & 3).
4. Universal Access and Service Funds (UASFs) are rising in popularity, and in 2007, 60 per cent of countries that responded to the ITU survey (See attached Annexure D) are using USF;
5. The Authority is of the view that licensees from the same category need not be subject to the same obligations in other words they cannot be compelled to carry

equal obligations by virtue of the type of licence category alone, other factors must be considered; such as market presence, size of the entity and revenues generated.

6. The Authority cannot rely on market access gap studies alone, for instance where communities approach the Authority, the Authority should be free to investigate and consider their needs without having to conduct protracted market access gap studies. Further, new technological developments may compel the Authority to ensure that all communities gain access to new services as provided in terms of Section 10 (1) (d). For example, the rapid geographic spread of 4G services cannot be delayed or curtailed by market access gap studies.
7. As long as consumers benefit from the service/s, there is no need to review related obligations.
8. Universal service and access cannot be limited to services alone, there are network access issues too which the Authority needs to consider.
9. Implementation of Universal service and access will be based strictly on following legislative requirements:

Provisions of the ECA

Section 10 which provide framework for amendments where necessary.

Section 88 (2) to define under-serviced areas

Section 89 contribution to the fund

Section 90 provides for the tendering process to be implemented

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