

South Africa's spectrum spectacle

National broadband services are currently available in South Africa, but mostly over fibre. The mobile networks are making an LTE service available, but the two largest operators, MTN and Vodacom, claim that this is at the expense of their voice services, as they are having to re-farm spectrum to meet the demand for data services.

ICASA, the regulatory authority, is tasked with licensing spectrum in South Africa. However, like most countries, the Minister of Telecommunications and Postal Services is the custodian of this scarce resource and represents the country at WRC. It is the Minister's responsibility to approve the national spectrum plan and make policy on spectrum fees.

Whilst the 2600MHz band is currently available, the availability of spectrum in the 700 and 800MHz bands is constrained because South Africa missed the various deadlines for digital migration and no new timeframe has yet been approved by Cabinet. Licensees will benefit from a little of the higher and lower band spectrum in order to achieve national coverage and appropriate speeds and it seems sensible to award them together as a result.

The South African broadband policy, known as SA Connect, was published in December 2013, almost 3 years ago. Since its publication there has been progress in achieving broadband rollout, but it is far from clear that this has taken place in response to the policy. Implementation of policy goals including meeting a speed target of 5mbps for 90% of the population by 2020 and 10mbps by 2030, seems haphazard at best and there is no central co-ordinating entity.

However targets aside, licensees have lamented the lack of available spectrum for years. In December 2011 both ICASA and the Minister issued documents intended to foreshadow the award of what has become known as "high demand spectrum". The Minister never published a final version of the draft policy direction which would have given ICASA some guidance on the process to follow in making any award. ICASA withdrew its invitation to apply for high demand spectrum in the face of opposition from many stakeholders whose firmly held view is that a policy direction must precede an award of spectrum.

In July 2016, ICASA surprised the nation and the Minister with the publication of a final form invitation to apply for spectrum in all 3 bands. Setting a high threshold for participation, ICASA determined that applicants would have to pay R3 million per application (although it is not clear if an application is required for each of the 4 lots available), and a reserve price which is the same for each lot, of R3 billion, which seems to bear no relation to the likely value of any lot. The financial burden on applicants is increased by the need to have a R100 million bank guarantee handy, and to produce proof that their business plan is fully-funded for 10 years. Add to this the fact that even if you cannot use some bands until they are released, licence fees are payable annually in addition to the winning bid price, and the invitation becomes something of a damp squib.

Applicants must also present themselves for qualification in October with at least 30% of their equity in the hands of "historically disadvantaged groups" or HDGs which term includes black people, coloureds, women, the youth and the disabled (but the emphasis is on black people). Only one mobile operator can currently claim to meet this threshold. Consortia are permitted but each member must hold an individual network services licence, which would seem to rule out bidders comprising future investors or HDGs who may wish to participate in a successful bidder in the future.

Turning to the spectrum that is available to prospective bidders, there are in fact 5 lots, but inexplicably ICASA has reserved Lot A for award at another time. The packaging of the lots

may result in inefficient assignment. There are no spectrum caps which is good news for well-heeled operators but not that exciting for smaller operators. There is little possibility of a new entrant being successful because of the financial hurdles and the requirement to hold a network licence in order to bid. The outcome of the process may therefore do nothing to promote competition in an already skewed market. Winning a lot means you also take on an obligation to cover 100% of the population by 2020 at speeds more than 3 times higher than those anticipated in SA Connect.

Finally, whilst ICASA is permitted to and indeed encouraged to seek advice from local or international experts and whilst auctions are considered to require expert input both on form and rules, ICASA does not seem to have sought expert assistance in drawing up what can only be described as a muddle. Called a simultaneous multi-round auction, it has this quality in name only. Contradictions in the rules mean a lack of clarity over how many lots can be bid for and whether or not bids can be made on different lots at the same time, whether waivers should be used or no bids, and whether bids are confidential or to be announced to all the bidders in between rounds.

This week the Minister instituted action against ICASA in the High Court to interdict it from giving effect to the application process on the basis that the invitation to apply is unlawful because ICASA has not waited (some more) for the Minister to issue a policy direction. ICASA's defence is that it is relying on a 2008 case which does not permit the Minister to become involved in licensing. Both parties are partly right but their arguments are far from acceptable – neither party has done its job. ICASA's document is extremely poor and on its face, cannot be given effect to even if anyone wanted to participate in the process which is highly doubtful given the risks. The Minister's failure to issue a policy direction or to manage digital migration properly is inexplicable. Both parties' abject failure to talk to one another is simply indefensible.

What is to be done? ICASA should withdraw its document and apologise for wasting stakeholder time and money. The Minister should issue the policy direction which his office has had at least 5 years to prepare, and ensure that it is properly considered and well-drafted. ICASA should then carefully consider the policy direction, seek input from the public, and appoint experts to assist it with a proper process. With a bit of luck, we might have national mobile broadband services by 2020.

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11 August 2016

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This article is not legal advice. The views are those of the writer informed by discussion and consultation with other industry experts.