



# National Integrated ICT Policy White Paper

## Unpacking the White Paper - Part III - Spectrum

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The National Integrated ICT Policy White Paper (White Paper or ICT Policy) has been published, 26 September 2016. In this part III of a series, we unpack the spectrum policy (including the issue of a wireless open access network).

The White Paper rightly characterizes the policy on spectrum as a paradigm shift. As such, amendments to existing legislation will be required before the policy can be effected. Some of the specifics are discussed herein.

There are three aspects of the spectrum policy that seem to be key. The first is the development of a wireless open access network (WOAN). The second is the future of existing spectrum assignments/licences. The third is the changing roles of Icasa and the Minister.

### **Wireless Open Access Network**

The spectrum policy indicates that all spectrum that is deemed to be high demand spectrum by the Minister (including all IMT spectrum), will be assigned on an open access basis. The first part

of this policy is that all spectrum not currently assigned will be set aside for assignment to a WOAN.

The WOAN will be, according to the White Paper, a public-private consortium consisting of all entities wishing to participate. Icasa will be responsible to provide the WOAN with both electronic communications network service and spectrum licences. Icasa is required to follow the following principles.

- voluntary participation
- ownership structure that provides meaningful participation of all
- no single entity should be allowed the potential for dominance or control
- effective participation of women, youth and persons with disabilities
- the WOAN may only provide wholesale services



In addition, the White Paper indicates that the WOAN will be provided the following.

- reduced or waived spectrum fees
- access to public buildings and other public infrastructure
- allocation of universal service funds

Although the process is not to be competitive, Icasa is nevertheless required to “follow a public process” to evaluate the consortium’s technical plan, financial viability, ability to commence rollout, operational capacity, strategy to enter into agreements with existing wireless operators, and universal access strategy.

Although the White Paper states that no amendments to existing legislation are envisaged, there do in fact seem to be required amendments to make the WOAN a reality. The EC Act is not really set up to support a procedure like the one envisaged in the White Paper. The EC Act requires both service licensing as well as spectrum licensing, and treats the two separately. So, let’s look at them.

### *Service Licensing*

In terms of service licensing provisions of the EC Act, license applications for individual licences may be made only in response to an invitation to apply issued by Icasa, and in respect of a network license, the Minister must first issue a policy direction to Icasa. So, in order to proceed, Icasa will first need a policy direction issued by the Minister. Then Icasa will have to issue an invitation to apply.

The problem, however, is that the EC Act prohibits the Minister from issuing policy or policy directions regarding the granting, amendment, transfer, renewal, suspension or revocation of a

licence, except as permitted in terms of the Act. Unfortunately, however, there is nothing currently in the Act that permits the Minister to issue the type of policy or policy direction to Icasa that would permit licensing of the WOAN.

Another problem is that the EC Act and Icasa's regulations envisage actual applicants that will become actual licensees, which, according to the EC Act must be SA entities. The Act does not envisage Icasa cobbling together an applicant/licensee out of a group of volunteers.

The EC Act also provides that licenses will be issued on standard terms established by Icasa. The EC Act does not currently contemplate a wholesale only licence, with special terms relating to preferential access to public infrastructure and universal access funds, inter alia. Indeed, the very definition of electronic communications network service seems to negate a wholesale only licence. ECNS is defined as a service whereby a person makes available an electronic communications network, whether by sale, lease or otherwise for that person's own use for the provision of an electronic communications service or broadcasting service; etc.

### *Spectrum Licensing*

According to the EC Act, Icasa has the obligation to prescribe procedures and criteria for radio frequency spectrum licensing in instances where there is insufficient spectrum available to accommodate demand. Icasa has done this in the Spectrum Regulations 2015.

Once the network service license is issued, the White Paper envisages Icasa licensing it with spectrum set aside for the licensee. This, however, is not permitted in terms of the current regulations. First, the regulations indicate that high demand spectrum will be awarded on a competitive basis. In addition, the regulations do not permit the awarding of spectrum to an entity which includes any entities that already have spectrum in the same range.

In conclusion, before the licensing of a WOAN can take place, the EC Act will have to undergo some changes. One might look at the amendments that were necessary to cater for the licensing of Broadband Infracore in 2007.

### **Existing Spectrum Licences**

The White Paper is fairly brief in its treatment of existing spectrum assignments/licenses. It states that Icasa will be required to conduct an industry wide public consultation process to determine the terms and conditions, as well as the time frame,

under which currently licensed high demand spectrum will be returned. It further states that the terms and conditions will take into account market developments and the projected extent of availability of open access networks. Icasa is called upon to make recommendations for the Minister's approval, which will apply to currently assigned spectrum.

Of course, Icasa does conduct inquiries from time to time on issues relevant to the regulation of the industry and it could most likely conduct an inquiry into say, the duration of spectrum licenses and how they are renewed or not as the case may be. However, there are some provisions in the EC Act that may need to be amended if the idea is to amend or withdraw spectrum licenses.

For example, section 31(4) regarding spectrum licences provides as that Icasa may amend a licence for limited reasons, i.e., to implement a change in the radio frequency plan; in the interest of orderly radio frequency spectrum management; to effect the migration of licensees in accordance with a revised radio frequency plan or the transition from analogue to digital broadcasting; if requested by the licensee concerned to the extent that the request is fair and does not prejudice other licensees; or with the agreement of the licensee.

Furthermore, sections 31(8) provides the circumstance under which a spectrum licence may be withdrawn. It states that Icasa may withdraw a radio frequency spectrum licence when the licensee fails to utilise the assigned radio frequency spectrum in accordance with the licence conditions applicable to such licence.

### **Changing Roles**

In addition to the issue of spectrum licensing, there are changes to the roles played by Icasa and the Minister that may require amendment to the EC Act. Some examples are set out in the table below.

<b>Activity</b>	<b>EC Act</b>	<b>ICT Policy</b>
Band Planning	Icasa, with the approval of the Minister	Minister

Activity	EC Act	ICT Policy
Universal Service Obligations	Icasa [Universal Service Obligations are attached to service licenses, not spectrum licenses in terms of EC Act]	Icasa, with the approval of the Minister
Spectrum Fees	Icasa	Minister may waive fees
Spectrum Trading	Icasa	Minister
Spectrum Migration	Icasa	Minister
Determining High Demand Spectrum	Icasa	Minister, in consultation with Icasa