

Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

Vol. 533

Pretoria, 17 November 2009

No. 32725

CONTENTS • INHOUD

Page *Gazette*
No. *No.*

No.

GENERAL NOTICE

Independent Communications Authority of South Africa

General Notice

1536 Electronic Communications Act (36/2005): Notice in terms of sections 4(1)(d), 4(2)(b) and 31(3) of the Act 3 32725

GENERAL NOTICE

NOTICE 1536 OF 2009

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

1. The Independent Communications Authority of South Africa (“**the Authority**”) hereby gives notice of its intention to prescribe regulations set out herein in terms of sections 4(1)(d), 4(2)(b) and 31(3) of the Electronic Communications Act, No. 36 of 2005.
2. Electronic copies of the draft regulations are available on the Authority's website (www.icasa.org.za).
3. Interested persons are hereby invited to submit written representations, including an electronic version of the representation in Microsoft Word, of their view on the Draft regulation by no later than 16h00 on 4th January 2010.
4. Written representations or enquiries may be directed to:

Mr Paseka Maleka

Project Leader

164 Katherine Street

Pinmill Farm, Block D

Sandton

Tel: +27 11 566 3201 Fax: +27 11 566 3202

Email: pmaleka@icasa.org.za

5. All written representations to the Authority pursuant to this notice shall be made available for inspection by interested persons from 11th January 2010 at the ICASA Library and copies of such representations and documents will be obtainable on payment of a fee.
6. Written representations will be made publicly available except where respondents indicate that their responses or parts thereof are confidential. Respondents are requested to separate any confidential material into a clearly marked confidential annexure. Unconditional permission to use such

confidential material will be assumed unless the author expressly states otherwise. If, however, the request for non-disclosure to the public is refused, the person making the request will be allowed to withdraw the representation or document in question. Any copyright attached to responses will be assumed to have been relinquished unless it is expressly reserved.



PARIS MASHILE
CHAIRPERSON

REGULATIONS IN TERMS OF SECTION 4(1)(d), 4(2)(b) AND 31(3) OF THE ACT RELATING TO THE USE AND TO APPLICATION PROCEDURES AND CRITERIA FOR THE LICENSING OF RADIO FREQUENCY SPECTRUM LICENCES FOR THE PROVISION OF MOBILE TELEVISION BROADCASTING SERVICES

1. Interpretation

In these Regulations, any word or expression will have the meaning assigned to it in the Electronic Communications Act, No. 36 of 2005 and related legislation and unless otherwise specified:

- a) **“applicant”** means a person who has submitted an application in terms of the ITA;
- b) **“application”** means an application made by the applicant;
- c) **“designated range”** means the unallocated radio frequency spectrum designated for mobile television broadcasting services in terms of the Terrestrial Broadcasting Frequency Plan;
- d) **“mobile television broadcasting service”** means the provision of a television broadcasting service through a mobile device;
- e) **“mobile device”** means cellular mobile handsets or other handheld or portable devices enabled or configured to receive and/or provide mobile television broadcasting services;
- f) **“mobile TV multiplexes”** means mobile TV1 multiplex and mobile TV2 multiplex, and “mobile TV multiplex” shall refer to either of them, as the context shall indicate;
- g) **“mobile TV1 multiplex”** means the multiplex designated as MDTT1 in the Terrestrial Broadcasting Frequency Plan;
- h) **“mobile TV2 multiplex”** means the multiplex designated as MDTT2 in the Terrestrial Broadcasting Frequency Plan;
- i) **“multiplex”** means a network of frequencies used for the purposes of a multi channel broadcasting service;
- j) **“ITA”** means an invitation to apply for a radio frequency spectrum licence for the provision of mobile television broadcasting services over the designated range, issued by the Authority in terms of the provisions of Schedule 1 hereto;
- k) **“Regulations”** means these Regulations and includes any schedule, appendix and all annexes hereto;
- l) **“SABC”** means the South African Broadcasting Corporation Limited;

- m) “**Terrestrial Broadcasting Frequency Plan**” means the radio frequency spectrum plan published by the Authority as part of the national radio frequency plan in terms of section 34 of the Act

2. Purpose of Regulations

The purpose of these Regulations is:

- a) to provide for a regulatory framework for the licensing of radio frequency spectrum within the designated range for the provision of mobile television broadcasting services;
- b) to provide for procedures and criteria for the awarding of radio frequency spectrum licences for the provision of mobile television broadcasting services within the designated range; and
- c) to provide for other matters ancillary thereto.

3. Designation of Use of Radio Frequency Spectrum

- a) Two mobile TV multiplexes of radio frequency spectrum within the designated range, namely, the mobile TV1 multiplex and the mobile TV2 multiplex are hereby assigned exclusively for the provision of mobile television broadcasting services in terms of the Terrestrial Broadcasting Frequency Plan.
- b) One radio frequency spectrum licence shall be issued in respect of each mobile TV multiplex. No person shall be allowed to provide mobile television broadcasting services in respect of both mobile TV multiplexes at the same time.
- c) No data services with a return path shall be provided on any of the mobile TV multiplexes.
- d) Notwithstanding the provisions of regulation 6 below, there shall be one electronic communications network service licensee providing broadcasting signal distribution per mobile TV multiplex.
- e) The holder of a radio frequency spectrum licence issued in accordance with the provisions of these Regulations shall be required to utilise all the capacity available in the mobile TV multiplex assigned to it within a period of 6 (six) months from the date of issue of the licence. Notwithstanding the foregoing, the Authority may, upon application and on good cause shown, grant an extension for such further period as the Authority may deem appropriate in the circumstances.
- f) In the event the Authority is of the view that a licensee has failed to utilise fully the radio frequency spectrum assigned to it, the Authority may withdraw such radio frequency spectrum licence granted to such licensee in accordance with the provisions of section 31(9) of the Act.
- g) The holder of a radio frequency spectrum licence issued in accordance with the provisions of these Regulations shall not be allowed to sell or let the radio frequency spectrum allocated to it.

4. Eligibility To Apply

- a) Any interested person may make an application in accordance with the terms and conditions stipulated in the ITA for use of the radio frequency spectrum within the designated range for the provision of mobile television broadcasting services.
- b) Any applicant who is not a holder of a television broadcasting service licence of a national scope shall provide proof to the satisfaction of the Authority that it has entered into a commercial arrangement with a television broadcasting service licensee holding a television broadcasting service licence of a national scope which will enable it to provide mobile television broadcasting services within the time stipulated in the ITA.
- c) Any applicant who is not a holder of an electronic communications network service to provide broadcasting signal distribution shall provide proof to the satisfaction of the Authority that it has entered into a commercial arrangement with an electronic communications network service licensee to provide broadcasting signal distribution for the purposes of providing mobile television broadcasting services.

5. Application Procedures and Criteria For Awarding Radio Frequency Spectrum Licences for the Provision of Mobile Television Broadcasting Services

- a) Applications for a radio frequency spectrum licence within the designated range shall, in instances where there are competing applications or where there is insufficient radio frequency spectrum available to accommodate demand, be made in accordance with the procedures set out in Schedule 1.
- b) The Authority will award radio frequency spectrum licences, in instances where there are competing applications or where there is insufficient radio frequency spectrum available to accommodate demand, in accordance with the criteria set out in Schedule 1 and any other relevant provisions of these Regulations.

6. Carriage of Public Broadcasting Services

The holder of a radio frequency spectrum licence issued in accordance with the provisions of these Regulations:

- a) shall set aside at least 20% (twenty percent) of the capacity within the relevant mobile TV multiplex allocated to it, for the provision of public broadcasting services by the SABC. The provisions of this sub-regulation shall apply *mutatis mutandis* to the SABC; and
- b) may, subject to the provisions of sub-regulation 3(b) above, carry and broadcast programmes or channels of other broadcasting service licensee/s pursuant to a commercial agreement with such other broadcasting service licensee/s; provided that the number of programmes or channels of such other broadcasting service licensees shall not in the aggregate exceed its own programmes in the relevant mobile TV multiplex.

7. Duration of Licence

The radio frequency spectrum licence issued pursuant to the provisions of these Regulations shall be valid for a period of 15 years from the date of issue thereof or a period equal to the term of the television broadcasting service licence utilized by the holder of the radio frequency spectrum licence for the provision of the mobile television broadcasting service concerned, whichever is the earlier.

8. Offences and Penalties

Any person who fails to comply with:

- a) the provisions of regulations 3(c), 3(g) and 6(a) shall be guilty of an offence and, upon conviction, be liable to a fine not exceeding R750 000.00 (seven hundred and fifty thousand rand);
- b) any other provision of these Regulations shall be guilty of an offence and, upon conviction, be liable to a fine not exceeding R250 000.00 (two hundred and fifty thousand rand).

9. Resolution of Disputes

Resolution of disputes between holders of a radio frequency spectrum licence within the designated range shall take place in accordance with the provisions of section 33 of the Act.

10. Effective Date

These Regulations will take effect on the date published in the Gazette.

11. Short Title

These Regulations shall be called "Regulations Relating to the Use and Licensing of Radio Frequency Spectrum For the Provision of Mobile Television Broadcasting Services".

12. Amendment and Repeal of Regulation

The Authority may amend or repeal these Regulations by notice in the Government Gazette.

SCHEDULE 1

PROCEDURES AND CRITERIA FOR AWARDING RADIO FREQUENCY SPECTRUM FOR THE
PROVISION OF MOBILE TELEVISION BROADCASTING SERVICE

1) Interpretation

In this Schedule 1, unless otherwise specified:

- a) **"affiliate"** means any person that directly or indirectly, including through any one or more intermediaries, controls or is controlled by, or is under common control with, any person;
- b) **"application fee"** means the non-refundable fee specified by the Authority in the ITA which shall be payable by the applicant upon submission of an application;
- c) **"application process"** means the process of applying for radio frequency spectrum licences in terms of these Regulations, beginning from the period between the date on which the ITA is published by the Authority and the date on which the Authority awards radio frequency spectrum licences pursuant to the ITA;
- d) **"auction"** means an award of the radio frequency spectrum licence to the highest bidding applicant;
- e) **"BBBEE"** means broad based black economic empowerment as defined in the BBBEE Act;
- f) **"BBBEE Act"** means the Broad-Based Black Economic Empowerment Act, 2003;
- g) **"control"** means the ability to direct or cause the direction of the business affairs and management policies or practices of a person and "controlled" shall have a corresponding meaning;
- h) **"deadline"** means the date and/or time by which any requirement stipulated by the Authority pursuant to these Regulations or the ITA must be fulfilled;
- i) **"reserve price"** means the minimum price payable for each lot of the radio frequency spectrum within the designated range;
- j) **"supplementary information"** means any information, which may be requested by the Authority from time to time from an applicant throughout the course of an Application Process

2) APPLICATIONS FOR RADIO FREQUENCY SPECTRUM LICENCE

- a) All applications must be submitted pursuant to an ITA.
- b) All applications must be submitted:
 - i) in writing;
 - ii) at the place nominated in the ITA; and
 - iii) by the deadline.
- c) All applications must be delivered sealed and must contain the following information:-
 - i) a document containing the information detailed in Appendix A to this Schedule and duly signed by an authorised representative;
 - ii) a document containing the information detailed in Appendix B to this Schedule and duly signed by an authorised representative; and
 - iii) Appendix C duly completed and signed by an authorised representative.
- d) An application must be accompanied by the applicable application fee as set out in the ITA.

3) INVITATION TO APPLY

The ITA shall set out the following:

- a) the subject of the ITA;
- b) the place and deadline for submission of an application;
- c) an application fee including other costs relating to the application;
- d) the selection process;
- e) the evaluation criteria including points allocation;
- f) the terms and conditions relating to the application;
- g) the proposed licence terms and conditions; and
- h) any other information or requirements the Authority may deem necessary.

4) CHANGES EFFECTED AFTER SUBMISSION OF APPLICATION

- a) An applicant who, after submitting its application, effects changes to:

- i) its BBBEE profile;
 - ii) the documents containing the application information detailed in Appendix A and Appendix B,

must within 5 (five) days from the date that such change becomes effective, notify the Authority in writing.
- b) The Authority shall, after being notified by an applicant of the changes referred to in regulation 4(a) of this Schedule, determine whether:
- i) it shall consider the application with or without the alterations; or
 - ii) the application, so altered, is disqualified in terms of this Schedule, from the application process.
- c) The Authority shall notify the applicant of its decision in terms of regulation 4(b) above.

5) REQUEST FOR THE SUBMISSION OF SUPPLEMENTARY INFORMATION

- a) The Authority may at any time during the application process require an applicant to prepare and submit any supplementary information regarding any aspect of its application.
- b) The Authority may direct an applicant to submit any such supplementary information within 7 (seven) days of receipt by the applicant of a notice from the Authority requiring it to do so.

6) DISQUALIFICATION OF AN APPLICANT FROM THE APPLICATION PROCESS

An applicant shall be disqualified from the application process where such applicant:

- a) is an affiliate of another applicant; or
- b) has submitted more than 1 (one) application to the Authority for the grant of a radio spectrum licence within the designated range; or
- c) has submitted an application which contains false or misleading information; or
- d) has colluded or attempted to collude with another applicant in the submission of its application; or
- e) has obtained and utilised confidential information relating to another applicant; or
- f) has failed to notify the Authority of the changes referred to in regulation 4(a) of this Schedule; or
- g) has failed to comply with a request in terms of regulation 5 of this Schedule; or
- h) has failed to comply with the terms and conditions of the ITA.

7) SELECTION PROCESS

- a) The Authority shall use a comparative evaluation methodology to determine the successful applicant/s in respect of each application process using the evaluation criteria set out in regulation 8 below.
- b) In the event the Authority is unable to select a successful applicant by means of the comparative evaluation methodology the Authority may make use of an auction to determine the successful applicant subject to the terms and conditions stipulated in regulation 9 below.

8) EVALUATION CRITERIA

The Authority shall, in evaluating the applications, and taking into account the objects of the Act, consider the following factors:

- a) The applicant's BBBEE credentials in respect of ownership, management and control, employment equity, skills development, preferential procurement, enterprise development and residual contributions accompanied by verification certificate issued by an accredited BBBEE rating agency;
- b) The nature and extent of consumer benefits to be derived by the general public from award of the radio frequency spectrum licence to the applicant;
- c) The viability of the business plan of the applicant;
- d) The viability of the funding model proposed by the applicant;
- e) The viability and efficacy of the applicant's technical plan;
- f) The experience, expertise and credibility of the applicant and/or its employees in business in general and in electronic communications in particular;
- g) Any other additional factors that it may deem necessary and set out in the ITA.

9) AUCTIONS

In the event the Authority determines that the applications shall be granted by way of an auction to the highest bidding applicant, the following terms and conditions shall apply:

- a) Participation in the auction shall be limited only to the applicants who obtained an equal highest score under the comparative evaluation methodology.
- b) The Authority shall stipulate the reserve price for the auction in the ITA.
- c) The Auction shall be held at the offices of the Authority on a date and time as shall be determined by the Authority and stipulated in the notice calling upon the relevant applicants to participate in the auction.
- d) The Auction shall be conducted in such a manner and procedure as shall be stipulated by the Authority in the ITA.

APPENDIX A**APPLICATION INFORMATION****1 Applicant's details**

The applicant is required to provide the following details:

- 1.1 registered name;
- 1.2 registration number;
- 1.3 registered address;
- 1.4 contact address;
- 1.5 telephone number ;
- 1.6 fax number;
- 1.7 electronic mail address;
- 1.8 details and addresses of all persons directly or indirectly controlling the applicant and their respective shareholding interests;
- 1.9 details and addresses of all persons directly or indirectly controlled by the person(s) controlling the applicant and their respective shareholding interests;
- 1.10 details and addresses of all persons directly or indirectly controlled by the applicant, and/or the applicant's shareholding interest in such persons;

2. Identity of duly authorised person

The applicant is required to provide details including names and positions of at least 2 (two) persons, each of whom shall have the delegated authority to bind the applicant for all purposes relating to the application process and matters related thereto.

4. Qualification of the Applicant

The Authority requires the applicant to warrant that it has not engaged in any one of the activities that may result in the disqualification of the applicant's application in terms of regulation 6 of the Schedule.

5. Other Information

The applicant is required to provide details and certified or notarised copies of all agreements relating to the management of the applicant, including shareholders' agreement and/or consortium agreements.

APPENDIX B**SUBSTANTIVE INFORMATION**

The evaluation of the Applications will be premised on the following aspects of the information which, collectively ought to demonstrate a reasonable likelihood that the Applicant shall attain or exceed the stipulated terms and conditions of the radio frequency spectrum licence. Furthermore, applicants are required to submit binding commitments in relation to each of the factors detailed herein:

1 BBBEE

The applicant's BBBEE credentials in respect of ownership, management and control, employment equity,

skills development, preferential procurement, enterprise development and residual contributions

accompanied by verification certificate issued by an accredited BBBEE rating agency.

2. Consumer Benefits

The applicant is required to provide a detailed description of the anticipated benefits which the applicant would offer to consumer and / or subscribers. In this regard, the application is required to provide a detailed description of the following:

(a) Service Innovation and packaging

(i) The applicant is required to demonstrate their heightened understanding of consumer demand characteristics and unique consumer requirements for the services which the applicant intends rendering pursuant to the grant of the radio frequency spectrum licence in the designated range. Furthermore, the applicant shall present its proposed channels and programming and where applicable, the subscription charges and its plans for marketing of the mobile television broadcasting services.

(e) Quality of Service

The applicant is required to demonstrate a heightened understanding of consumer perception regarding quality of service and describing quality of service targets which serve as binding commitments. The applicant is also required to propose a methodology for the verification and attainment of quality of service targets.

3. Business Plan

3.1. The applicant is required to present a business plan analysis which is reflective of overall realistic assumptions and realistic financial forecasts for a minimum period of three years.

3.2. Furthermore, the applicant is required to provide the following details:

- (a) A detailed market analysis of the impact of the mobile television broadcasting services contemplated to be offered upon the grant of a radio frequency spectrum licence;
- (b) A detailed demand analysis for mobile television broadcasting services contemplated to be offered upon the grant of a radio frequency spectrum license;
- (c) Forecast of market share;
- (d) Forecast of the total market size and segmentation;
- (f) Pricing strategies for the mobile television broadcasting services, where applicable;
- (g) Investment strategy of the applicant; and
- (h) details of applicant's financing plan.

4. **Technical Plan**

4.1. The applicant must provide details of the following considerations relating to the implementation of the technical plan:

- a) The efficiency of network design;
- b) Details of network planning tools and design methodology;
- c) Network coverage and a detailed schedule of the rollout plans;
- e) Details of network capacity requirements;
- f) Demonstrate the efficient utilisation of the radio frequency spectrum;
- g) Details of technology solution selection;
- h) Details of the applicant's plans for network and security.

APPENDIX C

WARRANTY UNDERTAKING

I..... (duly authorised person)

Have prepared and/ or compiled, or directly supervised those who have prepared all or parts of this application and/or information constituting this application.

To the best of my knowledge, the application information contained herein, and any attachment thereto, is accurate and not misleading.

I further understand that should any information included herein be found to be false, misleading and/or inaccurate the entire application will be disqualified and the applicant precluded from further consideration within the application process.

Name and title of the person authorised to sign this undertaking:

Authorised Signature

Date
