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Independent Communications Authority of South Africa

General Notice

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GENERAL NOTICE

NOTICE 529 OF 2010

REASONS DOCUMENT ON SPECTRUM LICENSING FRAMEWORK REGULATIONS AND INVITATION TO APPLY FOR 2.6GHZ AND 3.5GHZ BANDS

1 Background

On the 2nd November 2006, the Independent Communications Authority of South Africa ("the Authority"), pursuant to section 31(3) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) ("the Act"), published a discussion document soliciting written comments from interested persons regarding the procedures and criteria for granting a radio frequency spectrum licence for competing applications or instances where there is insufficient spectrum available to accommodate demand.

Public hearings were held on March 2007 followed by a draft position paper in the Government Gazette of 17 June 2008. A final position paper and draft regulations were published in Government Gazette 32436 and 32437 of 22 July 2009. A total of 17 written submissions were received with 13 of those requesting an opportunity to also make oral submissions. The position paper was outlining the thinking and motivation behind certain positions taken by the Authority in the Draft Regulations. Subsequent public hearings were held on 20 -21 October 2009.

Amongst the decisions taken by the Authority and published in Government Gazette No 32436 of 29 July 2009 was that:

- The 2.6GHz band shall be assigned to national operators in amounts of spectrum not exceeding 30MHz per licence.
- The 3.5GHz band shall be assigned on regional basis in amounts of spectrum not exceeding 30MHz.
- The granting methodology shall be published in the form of a regulation and will include pre-qualification criteria for a minimum of 30% ownership by historically disadvantaged individuals followed by an Auction process if warranted.
- Once the granting methodology comes into effect as a Regulation, the Authority shall commence with the functional procedures detailed in the Regulation which shall culminate in the granting of the radio frequency spectrum within the designated ranges.

The reasons behind these decisions are outlined in the July 2009 positions paper (Government Gazette No 32436) therefore won't be repeated in this document. In the following sections the Authority seeks to highlight the changes made pursuant to submissions received in response to the comments on the draft regulations. In doing so a synopsis of responses is presented.

The Authority wishes to state that the purpose of providing the synopsis of the respective views expressed by interested persons is to provide the context within which interested persons have comprehended the Authority's draft regulations. Furthermore, where the Authority provides the synopses, such synopses are not to be perceived as amounting to the comprehensive expression of interested persons' respective views. For the purposes of convenience the Authority shall as much as possible not seek to comprehensively restate the positions advanced by interested persons, but rather provide a concise articulation of the cumulative sentiments expressed by interested persons on matters which seemingly evoked significant contentious responses.

2 The regulations and the ITA key decisions.

2.1 Use of individual electronic communications network service (I-ECNS) and class individual electronic communications network service (C-ECNS) licence as a pre-qualification criteria.

Some respondents stated that the Authority must indicate which licence category is eligible to apply for radio frequency spectrum. They further stated that in the absence of such, the Authority risks receiving and processing many non-eligible applications that may place an unwanted burden on the Authority's resources. The Authority has therefore decided to restrict the invitation to apply to the holders of I-ECNS licences and C-ECNS licences for the 2.6GHz band and 3.5GHz band respectively. This

is also informed by the fact that the s31(2) of the ECA states that; “a *radio frequency spectrum licence is required in addition to any service licence contemplated in Chapter 3, where the provision of such service entails the use of radio frequency spectrum*”.

2.2 Publication of separate ITA for 2.6GHz and 3.5GHz.

There was a recommendation that all designated frequency bands be addressed as separate ITA’s considering that different frequency bands could potentially be used for different applications and services. The Authority has decided to publish separate ITA’s for 2.6GHz and 3.5GHz radio frequency bands.

2.3 Change of 30% BEE prequalification criteria to 30% HDI.

Some respondents noted that the terms BEE and HDI are being used interchangeable in the draft regulations and in the absence of a regulatory framework to regulate ownership and control in terms of section 13 of the ECA. It was further stated that the term BEE must be deleted from the draft regulations and be substituted with HDI highlighting the principle that the language used in the regulations must be aligned and consistent with the provisions in the ECA.

The Authority is of the view that granting of the radio frequency spectrum must as far as possible seeks to facilitate the attainment of the underlying policy imperatives of the Act, in particular those policy imperatives which are detailed in section 2 of the Act. Section 2(h) of the ECA provides that

the primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to promote the empowerment of historically disadvantaged persons, including Black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities. Nowhere in the Act is a reference to Black Economic Empowerment made. Furthermore Section 5(9)(b) of the ECA provides that the Authority must, in granting a licence promote the empowerment of historically disadvantaged persons including women and the youth and people with disabilities, in accordance with the requirements of the ICT charter.

ICASA decided to use HDI as opposed to BBBEE in both the regulations and the ITA's, on the basis that it is language consistent with the ECA. As a result the minimum 30% BEE prequalification criteria was changed to minimum 30% HDI and all references to BEE removed.

2.4 Implementation of “use it or lose it” principle.

Use-it-or-lose-it' provisions are requirements that a licensee begin provision of a service, within a mandated time period specified in a licence also referred to as “rollout targets”. If the Authority determines that the spectrum is not used, sanctions which may include revocation of a radio spectrum licence shall be applied.

The Department of Communications published a National Radio frequency Policy in a government Gazette No 33116 of 16 April 2010 wherein it also gives directives to ICASA to strictly apply the “use it or lose it” principle. In this policy s6(6) reads:

“The hoarding of spectrum is not conducive to efficient spectrum usage and this practice will be discouraged at all costs. ICASA shall strictly apply the principle of “use it or lose it” to all spectrum licensees.” ..

Therefore ICASA has decided to include the “use it or lose it” provision in the regulations and in the licence conditions.

2.5 Changes to Regulation 7b- Disqualification of an applicant from the application process.

The draft regulation 7b reads; “An applicant shall be disqualified from the application process where such applicant has been granted a radio frequency spectrum licence by the Authority within the designated range, to which the application relates”. One respondent stated that; “The validity of this criterion will depend on the amount of spectrum that an Applicant has already been assigned in the designated range. For example, if a licensee has been assigned only 10 MHz, but the maximum amount of spectrum that is allowed in terms of the process is for example 30 MHz, there is no reason why the existing licensee should not be allowed to apply for more frequency spectrum in the designated range”.

After consideration the authority decided to amend regulation 7b to create conditions for equitable access to the radio frequency spectrum. It now reads; “*An applicant shall be disqualified from the application process where such applicant has been granted a radio frequency spectrum licence by the Authority within the designated range unless the licensee has less than the maximum bandwidth made available in line with these regulations in which case they will only be allowed to apply for additional spectrum which results in total assignment not exceeding the maximum bandwidth made available*”.
