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GENERAL NOTICE

NOTICE 930 OF 2006



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

The Independent Communications Authority of South Africa (hereinafter referred to as "the Authority"), hereby makes known the outcome of the process initiated by notice in the Government Gazette No. 28547 of 22 February 2006, into its intention to use Channel 65 as described in the Annual Terrestrial Broadcasting Frequency Plan (822-830 MHz) for non broadcasting services.

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1. **Background**

1.1. The Authority published a notice in the Government Gazette, Notice Number 23618 on 12 July 2002, inviting representations with regard to amendment of note 3.9.2 of the radio frequency band plan for frequency in the range of 20MHz to 3GHz (SABRE1). The closing date for submissions of written comments was 17 August 2002 at 16H00.

1.2. A public hearing on the subject was held on the 23rd of January 2003 at the Authority's head office in Sandton from 09H00 to 16H00 as per Government Gazette No.24263 dated 15 January 2003. The Authority, after having received written comments and conducted a hearing, published its findings in the Government Gazette, Notice Number 25990 on the 3rd of February 2004. The findings were:

- that there appears to be a tangible need for sharing in the 800MHz broadcasting band with WLL and link systems;
- that there appears to be technical and administrative feasibility in sharing the UHF TV channels 64 to 68;
- that the impact on broadcasting can be reduced through proper engineering considerations; and
- that the socio-economic benefits derived from band sharing cannot be overemphasised.

1.3. The Authority subsequently published a Notice on the 22nd of February 2006 ("the 2006 Notice"), under Government Gazette No.28547, inviting representations on its intention to use channel 65 as described in the Annual Terrestrial Broadcasting Frequency Plan (822-830MHz) for non-broadcasting services. The purpose of the discussion paper was to generate comments from all interested parties in relation to the issues raised in the 2006 Notice or on any

other relevant issue to the matter at hand, not specifically raised in the 2006 Notice, including but not limited to the following:

- the overall economic benefit;
- the potential interference to existing users;
- the quality of services that could be offered; and
- the cost of migration of existing broadcasting users.

2. Process undertaken by the Authority

2.1. The 2006 Notice was published in terms of section 29 (4) of the Telecommunications Act 103 of 1996 ("the Telecommunications Act") and in terms of section 31 (2) of the Independent Broadcasting Authority Act 153 of 1993 ("the IBAA"). Thus, the 2006 notice was published under the auspices of two different sections, from two different pieces of legislation. In terms of the Telecommunications Act, section 29 (4) cannot be read in isolation.

In this regard, Section 29 of the Telecommunications Act provides as follows:

"(1) The Authority may from time to time prepare a frequency band plan in respect of any part of the radio frequency spectrum.

(2) A frequency band plan shall –

- (a) define how the radio spectrum shall be used;*
- (b) aim at ensuring that the radio frequency spectrum is utilised and managed in an orderly, efficient and effective manner;*
- (c) aim at reducing congestion in the use of frequencies and at protecting frequency users from any interference or other inability to make use of the frequencies assigned to them;*

- (d) *avoid obstacles to the introduction of new technologies and telecommunication services;*
 - (e) *aim at providing opportunities for the introduction of the widest range of telecommunication services and the maximum number of users thereof as is practically feasible.*
- (3) *In preparing a frequency band plan in terms of this section, the Authority –*
 - (a) *shall have due regard to the report of experts in the field of spectrum or frequency band planning and to internationally accepted methods for preparing such plans;*
 - (b) *shall take into account existing users of the radio frequency spectrum and any frequency band plans in existence or in the course of preparation.*
- (4) *The Authority shall give notice in the Gazette of its intention to prepare a plan and in such notice invite interested parties to submit their written representations to the Authority within such period as may be specified in such notice.*
- (5) *The Authority may, after the period referred to in subsection (4) has passed, hold a hearing in respect of the proposed plan.*
- (6) *After the hearing, if any, and after due consideration of any representations received pursuant to the notice mentioned in subsection (4) or tendered at the hearing, the Authority shall adopt the frequency band plan in question, with or without amendment, and cause such plan to be published in the Gazette.*
- (7) (a) *Any frequency band plan adopted in terms of this section and all such comments, representations and other documents as have been received in response to the notice contemplated in subsection (4) or tendered at the hearing, shall be kept at the offices of the Authority and shall, subject to (b), be open to public inspection by interested persons*

during the normal office hours of the Authority and the Authority shall at the request of any person and on payment of such fee as may be prescribed, furnish him or her with a copy thereof.

(b) The provisions of section 34 (4) and (5) shall apply, with the necessary changes in relation to any comments or representations contemplated in paragraph (a).

(8) *(a) The Authority may review a frequency band plan adopted in terms of this section.*

(b) The provisions of subsection (2) to (7) shall apply, with the necessary changes, in relation to any amendment contemplated in paragraph (a).

2.2. Therefore, in relation to the notice that was published, due regard must be given to section 29 of the Telecommunications Act, in its entirety. Section 29 (1) of the Telecommunications Act makes provision for the Authority to prepare a frequency band plan, from time to time, in respect of any part of the radio frequency spectrum. Section 29 (8) (a) of the Telecommunications Act further makes provision for the Authority to review a frequency band plan adopted in terms of this section. It is submitted that the Authority, in terms of the 2006 Notice, is undertaking a review of the band plan. Section 29 (8) (a) of the Telecommunications Act does not specifically state as to whether such a review is to apply to the band plan in its entirety or to specific parts of the band plan thereof. However, the Authority, in terms of the 2006 Notice, is undertaking the review for Channel 65 (822MHz – 830MHz). As such, and in terms of section 29 (8) (b) of the Telecommunications Act, the provisions of sections 29 (2) to (7) are applicable to the process at hand.

- 2.3. Section 29 (4) of the Telecommunications Act, read together with section 28 (a) and 28 (b) of the said Act, obliges the Authority to give notice in the Gazette of its intention to *review* a plan and give interested parties an opportunity to submit written representations within a timeframe to be prescribed in the notice. The Authority had stipulated such a period in the 2006 Notice. In terms of section 29 (5) of the Telecommunications Act, the Authority *may* hold a hearing after the period as contemplated in section 29 (4) of the said Act has passed. Taking into account the interests of the public at large, the Authority decided to hold such hearings. During the public hearing that was held, the provisions of section 29 (2) and 29 (3) of the Telecommunications Act were taken into account, through the various representations that were made by the different parties.
- 2.4. Section 29 (6) of the Telecommunications Act states that after the hearing is held, and after "*due consideration*" is given by the Authority to all written and oral representations made, "the Authority *shall* adopt the frequency band plan in question, *with or without amendment*, and cause such plan to be published in the Gazette" (italicised words are our emphasis). It is clear that the Authority is obliged to adopt the frequency band plan whether or not amendments are effected to it, subsequent to the processes in terms of sections 29 (4) and (5) of the Telecommunications Act, have been undertaken. However, prior to such an adoption, the Authority must have given *due consideration* to the written and oral representations made. The Authority submits that in terms of the written and oral representations made, it was apparent that prior to any decision being undertaken in terms of adoptions of the frequency band plan to be made, a study is to be undertaken.

2.5. Section 31 of the IBAA states as follows:

(1) The Authority shall, as soon as may be reasonably practicable after the commencement of this Act prepare a frequency plan whereby the maximum number of frequencies available for broadcasting services is determined.

(2) In preparing a frequency band plan in terms of this section, the Authority shall-

- (a) have due regard to the reports of experts in the field of frequency planning and to internationally accepted methods for preparing such plans;*
- (b) take into account the existing frequencies used by broadcasting services; and*
- (c) reserve frequencies on all bands for the different categories of broadcasting licences referred in section 40 (1),*

and publish its draft plan by notice in the Gazette and in such notice invite interested parties to submit their written comments and representations to the Authority within such period as may be specified in such notice.

(3) After due consideration of the comments and representations (if any) received pursuant to the notice referred to in subsection (2), the Authority shall determine the frequency plan and cause such plan to be published in the Gazette.

(4) (a) Any frequency plan determined in terms of this section and all such comments and representations as have been received in response to the notice contemplated in subsection (3), shall be kept at the offices of the Authority and be available for inspection by members of the public during normal office hours of the Authority.

(b) The Authority shall at the request of any person and on payment of such fee as may be prescribed (if any), furnish him or her with a certified copy of or extract from any part of the documentation contemplated in paragraph (a).

(5) (a) The Authority shall annually review a frequency plan determined in terms of this section.

(b) The provisions of subsections (2), (3) and (4) shall mutatis mutandis apply in relation to any amendment contemplated in paragraph (a) of this subsection.

2.6. Once again, and in relation to the IBAA, the provisions of section 31 must be read in its entirety. Section 31 (1) of the IBAA is akin to that of section 29 (1) of the Telecommunications Act in that provision is made for the Authority to prepare frequency band plans. Section 31 (5) (a) of the IBAA further provides that the Authority may review a frequency plan, determined in terms of this section. However, whereas section 29 (8) of the Telecommunications Act does not state a timeframe in which such a review or reviews are to be undertaken, section 31 (5) (a) of the IBAA states that such a review can only be taken annually. The Authority has not, during the course of the year at hand, undertaken such a review. It is submitted that the Authority, in terms of the 2006 Notice, is undertaking an annual review of the frequency plan. Section 31 (5) (a) does not specifically state as to whether such a review is to apply to the frequency plan in its entirety or to specific parts of the frequency plan thereof. However, the Authority, in terms of the 2006 Notice, is undertaking the review for Channel 65 (822MHz – 830MHz). As such, and in terms of section 31 (5) (b), the provisions of sections 31 (2), (3) and (4) are applicable to the process at hand.

2.7. Section 31 (2) requires that in the case of a review being undertaken, a notice is to be published in the Gazette, and interested parties are to be

invited to make representations in this regard, within the period stipulated in the notice. Whilst no specific mention is made in this section to the Authority holding a public hearing, provision is made for "written comments and representations" to be made to the Authority, and arguably, the Authority can in terms of this section hold public hearings. However, notwithstanding the fact that no specific mention is made for hearings to be held, hearings were held under the auspices of the Telecommunications Act, though the Authority has the discretion not to have such hearings in terms of section 29 (5) of the Telecommunications Act. Section 31 (2) further contains provisions to be taken into account by the Authority in reviewing a frequency plan, and during the public hearing that was held, the provisions of section 31 (2) (a) to (c) were taken into account, through the various representations that were made by the different parties.

- 2.8. Section 31 (3) states that "*after due consideration*" has been given by the Authority to the comments and representations received, "the Authority *shall* determine the frequency band plan and cause such plan to be published in the Gazette" (italicised words are our emphasis).
- 2.9. It is clear that the Authority is obliged to determine the frequency plan, subsequent to the processes in terms of sections 31 (2), having been undertaken. However, prior to such a determination, the Authority must have given *due consideration* to the written and oral representations made. It is important to note that the IBAA differs from the Telecommunications Act with regard to the authority of the Authority subsequent to the processes having been undertaken in terms of section 31 (2) of the IBAA and sections 29 (4) and (5) of the Telecommunications Act. Section 31 (3) of the IBAA makes provision for the Authority to "determine the frequency plan" whilst section 29 (6) of the Telecommunications Act makes provision for the Authority to "adopt the frequency band plan". However, both the adoption and the determination

are to be preceded by *due consideration* to be given to the comments and representations received.

3. Outcome of the process undertaken by the Authority

- 3.1. The Authority submits that in terms of the written and oral representations made, it was apparent that prior to any decision being undertaken in terms of determinations of the frequency plan to be made, a study is to be undertaken.
- 3.2. It is clear that in terms of both section 29 of the Telecommunications Act and section 31 of the IBAA, no provision is made explicitly for the Authority to publish findings and conclusions in respect of the review exercises that have been undertaken. What is however contemplated is for the Authority to have given due consideration prior to any adoption or determination of any part of the frequency band plan. The outcome of the processes in terms of section 29 of the Telecommunications Act or section 31 of the IBAA is the publication of the frequency band plan or frequency plan in the Gazette.
- 3.3. However, such a publication, which is predicated on adoption or determination, cannot be done without due consideration being given to the written and oral representations made.
- 3.4. At the public hearing that was held, it became apparent to the Authority that the question as to whether channel 65, as described in the Annual Terrestrial Broadcasting Frequency Plan (822-830MHz), to be used for non-broadcasting services, cannot be considered duly, in the absence of a study being undertaken to determine such use. In this regard, it must also be noted that persons were not precluded, in terms of the 2006 Notice,

from making representations on any other relevant issue, whether or not such issue was raised in the discussion document. In this regard, representations focussed not only on channel 65, but went on to elicit other relevant points.

4. The process going forward

4.1. In terms of the representations, both oral and written that were made, the process going forward will be as follows:

- (a) that a study will be conducted on the technical feasibility of sharing in channel 65 (822MHz to 830MHz) and channel 66 (830MHz to 838MHz) and that this study will be managed by the Authority with participation from interested persons. It must be noted that there were a significant amount of representations made in relation to that of channel 66. Any adoption or determination on the use of channel 65 for non broadcasting purposes cannot be made at the exclusion of representations in relation to channel 66. This is in line with the scope as set out in the 2006 Notice, which allowed for representations to be made on any matter relevant to the issue at hand, whether or not such issues were raised specifically in the 2006 Notice;
- (b) the study will entail the investigation into sharing possibilities with the outlook of formulating the sharing details and in particular, the sharing criteria and the appropriate protection ratio in order to ensure that broadcasting and non broadcasting services are able to co-exist effectively; and
- (c) that a meeting is therefore scheduled for the 11th of July 2006 at 09H00, Block C Presentation Room, at the ICASA offices and ICASA hereby invites all interested parties. The purpose of the meeting is to map the process going forward in relation to the study that is to be undertaken.

4.2 It must be noted that the Authority has not concluded the processes of adopting the frequency band plan in terms of the Telecommunications Act or determining the frequency plan in terms of the IBAA.

4.3 As indicated above, the Authority is in the process of giving due consideration to the issues at hand prior to the conclusion of the processes as outlined in section 29 of the Telecommunications Act and section 31 of the IBAA.
