



15 February 2013

To: ICASA
Attention: Mr Manyapelo Richard Makgotlho
By e-mail: rmakgotlho@icasa.org.za
From: Karen Willenberg

Dear Mr Makgotlho

DRAFT UPDATE OF THE NATIONAL RADIO FREQUENCY PLAN (“THE DRAFT NATIONAL PLAN”) AND THE 2ND DRAFT FREQUENCY MIGRATION REGULATIONS (“THE 2ND DRAFT FREQUENCY MIGRATION REGULATIONS”) AND DRAFT 2ND FREQUENCY MIGRATION PLAN (“THE 2ND DRAFT PLAN”)

1. We refer to the following documents published by the Authority for comment:
 - 1.1. The draft National Plan;
 - 1.2. The 2nd draft Frequency Migration Regulations and the 2nd draft Plan.
2. M-Net is of the view that these documents cannot be considered in isolation. For this reason, this submission sets out our concerns regarding a particular proposal which is reflected in each of these documents. The Authority should consider this submission as M-Net's response to each of the documents listed in paragraph 1 above.
3. In addition, M-Net endorses the representations made to the Authority by its sister company and signal distributor, Orbicom. Should the Authority elect to hold further hearings, then we request that M-Net and Orbicom be permitted to share a presentation slot at such hearings.
4. M-Net's primary concern is the proposed migration of broadcasting services out of the band 694-790MHz and it is with great regret that we note the Authority has not taken into account any of the concerns raised by the broadcasting industry at the hearings on the 1st Draft Frequency Migration Regulations and Frequency Plan held in November 2012.

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5. The proposed migration will have far-reaching consequences for existing broadcasters and yet, the Authority has failed to address the issues raised by the very licensees who will be most impacted by its proposals. Not only have these concerns been overlooked, the Authority has not provided any reasons to explain why valid concerns have not been taken into account. In light of this, we reiterate the issues previously raised by M-Net and the broadcasting industry. In particular that:

The Authority has erred in the interpretation and application of WRC-12 Resolution 232

6. Resolution 232 of the 2012 World Radio Conference ("WRC") does not require that existing users migrate out of this band. As the Authority is aware, the resolution provides for the allocation of the band to mobile services on a co-primary basis with broadcasting services.
7. The allocation on a co-primary basis to mobile services will only be effective after WRC-15 and, most importantly, the conditions for co-allocation will be determined after the necessary studies have been conducted, including studies on the spectrum requirements of users. Notwithstanding this provision, the Authority is proposing that the migration be completed by 2015.

The Authority has not conducted any studies of the future spectrum needs of the broadcasting sector

8. The proposed migration of broadcasters out of the band 694-790MHz should not even be considered until a proper study has been done to understand the future spectrum needs of the broadcasting industry. Without such a study, the Authority cannot know whether the capacity in the proposed band of migration is adequate.
9. The Department of Communications has appointed consultancy firm Deloitte (with Z-Comms), to investigate policy considerations for the exploitation of the dividend. The consultants have already engaged broadcasters (through the NAB) to assess the spectrum requirements of broadcasting services over the next ten years, and to also determine the maximum sustainable number of television broadcasting channels for South Africa. It would be premature for the Authority to proceed with the migration of broadcasters out of this band before this study has been concluded.

The Authority persists with its cavalier approach to users' rights to radio frequency spectrum which has been licensed to them

10. The view that a spectrum assignment can be revoked by the Authority at any time is incorrect. In order to understand the nature of the rights enjoyed by licensed users of spectrum, it is necessary to consider the provisions of the Radio Frequency Spectrum Regulations. These regulations explain how renewals of spectrum licences will be dealt with by the Authority. Specifically, Regulation 15(2) provides that after one year, a Radio Frequency Spectrum Licence is "renewable upon payment of the annual license fee".

11. As a licensee in possession of a 15 year broadcasting licence, M-Net has a legitimate expectation that for the duration of its broadcasting service licence, its spectrum license will be renewed "upon payment of the annual license fee". Revocation of a spectrum licence/assignment would only be justified in exceptional cases and the Authority's position that spectrum licences can be revoked at any time without any compensation is quite alarming.

The Authority has not addressed the issue of compensation

12. If migration is inevitable, then two aspects concerning compensation must be addressed:
 - 12.1. Compensation to broadcasters for the costs of undertaking any proposed migration; and
 - 12.2. Compensation to migrating broadcasters for the release of the digital dividend.
13. The Authority does not appear to have given any consideration to the practical consequences of requiring a broadcaster to migrate. The process is costly and potentially very disruptive - communication campaigns must be launched to notify viewers/subscribers, new transmitters and new combiners will have to be acquired and installed, and the migration to a different frequency could result in transmission disruptions lasting anything from 2 days to a week (depending on the transmitter affected).
14. The 2nd draft regulations offer no guidance on how these issues will be dealt with and it appears that the Authority's expectation is that broadcasters will migrate out of particular bands, cover all the direct costs and absorb the revenue losses which result from migration, return licensed spectrum to the Authority after the migration is complete and do all this without any compensation whatsoever, while at the same time launching and promoting a new DTT platform. This proposal is clearly prejudicial to affected broadcasting licensees. The regulations could, for example, provide that the licensees acquiring this spectrum make a contribution to the costs incurred by migrating broadcasters.
15. A second aspect which has not been addressed is guaranteeing migrating broadcasters, whose rights to use the radio frequency spectrum licensed to them have been expropriated, appropriate and adequate spectrum in return.

16. The final Digital Migration regulations propose the allocation of a portion of an 8 MHz multiplex to each of the migrating analogue broadcasters. Due to severe spectrum scarcity during the period of dual illumination, additional spectrum could not be allocated to migrating broadcasters. However, these allocations cannot be considered adequate compensation for the dividend which will be returned by these broadcasters when they relinquish spectrum which has been licensed to them.
17. M-Net has repeatedly alerted the Authority to the inadequacy of the multiplex allocations. The allocation proposed in the latest version of the DTT regulations will not even permit M-Net to dual illuminate its existing services in HD, let alone offer any digital incentive channels. Multi-channel and HD will become the standard for the DTT platform and this will require additional spectrum allocations for broadcasting services. Moreover, if multi-channel and HD are the norm for free-to-air, there will be no incentive for consumers to pay for any terrestrial subscription service which does not have an offering which is (at the very least) comparable.

Conclusion

18. The necessary studies on the future spectrum needs of broadcasting are underway. We strongly urge the Authority to hold off the finalization of the current proposal to migrate broadcasters out of the band 470-690 MHz until this exercise has been completed. Since the co-allocation provided for in Resolution 232 will only be effective after WRC-15, the Authority has sufficient time to do so.
19. We trust this submission will be of assistance.

Yours sincerely

P. P. Wilenberg

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