

NOTICE 1109 OF 2014

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA



DRAFT RADIO FREQUENCY SPECTRUM REGULATIONS

EXPLANATORY DOCUMENT

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1. Introduction

In 2013, the Authority undertook a review of the Radio Frequency Spectrum Regulations, 2011 (Notice No. 34172 of 2011) (“the Regulations”) in order to ascertain the effectiveness of the Regulations.

2. Background

The findings of the review were as follows:

- (a) there are numerous numbering inconsistencies;
- (b) there are anomalies and contradictions;
- (c) no clear process on how renewal of a Radio Frequency Spectrum Licence is to take place;
- (d) no provisions to outline the consequence for failure to renew a Radio Frequency Spectrum Licence and the process the Authority will initiate in dealing with illegal users of the radio frequency spectrum;
- (e) no provisions to safeguard the rights of end-users prior to a licensee ceasing to provide services that require usage of the Radio Frequency Spectrum;
- (f) no penalty for the contravention of section 31(1) of the Electronic Communications Act (Act No. 36 of 2005); and
- (g) the regulations need to be in line with the amended Electronic Communications Act 2014.

3. The Draft Regulations

3.1 Renewal

In the current Regulations, there are contradictions and anomalies with regard to when the renewal application must be filed; the Regulations only stipulate when renewal fee must be paid. The provisions of regulation 14(3) of the Regulations (i.e. Extension period to file a renewal application) and item 11 of Form B (i.e. late filing) are meaningless in the absence of a regulation providing for when an application must be submitted with the Authority. The draft regulations attempt to set out a clear time line as to when Licensees must renew their Radio Frequency Spectrum license and the consequences of failing to renew such a license within the prescribed time period.

The Authority proposes the removal of Form B for the following reasons:

- (a) Not all applicants have post office facilities;
- (b) Mail sometimes gets lost, and this will have an impact on the timeous processing of the application;
- (c) Insufficient human capacity by the Authority to ensure that all applications are processed on time;
and
- (d) Most licensees have continued to renew by payment of application fee despite the requirement to complete Form B.

It is for this reason that the Authority proposes that the renewal of Radio Frequency Spectrum Licenses be effected by the simple payment of the renewal fee within the prescribed time frame. Failure to renew the license within the prescribed time frame will render the license invalid as it would have expired.

Another anomaly that needed to be resolved is with regard to the “license year” and “license renewal”. A “license year” is defined in Regulation 1 of the Regulations as meaning the period of twelve (12) months of each year from 1 April to 31 March, both dates inclusive. Whereas regulation 9 of the Regulations says the licensee must pay the renewal fee within forty (40) working days (i.e. 1 November) before the due date (i.e. 31 December). If the renewal fee is not paid by due date, then the radio frequency spectrum license will be deemed to have expired on the due date.

The Authority has attempted to correct these anomalies by clarifying the due date, deadline for payment of renewal fee and the effect of non-payment of renewal fees.

3.2 License Renewal v License Surrender

The Authority has come to realize that it needs to make clear distinction between renewal and surrender of a license. There have been numerous instances whereby a licensee decides to no longer provide services and instead of submitting an application for surrender of their license, they opt to wait for the expiry of their license. A license surrender process involves a number of requirements and obligations prior to the Authority confiscating the license; whereas renewal has no obligations. The effect however is that where a licensee waits for their license to expire, they tend to not take into account the interests of the end-users (i.e. providing sufficient notice to end-users).

The draft regulations proposes that where a licensee has no interest in renewing their Radio Frequency Spectrum License, then such a licensee must submit an application for surrender of their license to ensure

that the interests of consumers are taken care of and to also ensure that all outstanding amounts due to the Authority are settled.

3.3 Confiscation and sealing of radio apparatus

Section 32(1) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) (“the Act”) stipulates that **“no person may possess any radio apparatus unless he or she is in possession of a radio frequency spectrum license ... or exempted as prescribed in terms of section 31(6).”**

To ensure that the Authority fully complies with section 32 of the Act, an insertion to the Regulations has been proposed and outlines the process the Authority will follow in confiscating or sealing the radio apparatus. This will also ensure that the Authority does not contravene Constitutional rights of individuals and that it fully adheres to the provisions of Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) as amended.

3.3 Guidelines

The Authority proposes that guidelines be removed from the regulations and that such information be put on the Authority’s website and/or be published as in the Government Gazette as guidelines. An example of such regulations in the current Regulations include regulations 13.

3.4 Duration of a Radio Frequency Spectrum License

One of the objectives of the Act is to encourage investment and innovation in the communications sector, ensure efficient use of the radio frequency spectrum and promote competition in the ICT sector, the Authority proposes that spectrum licenses run parallel to the duration of the service license with respect to those licensees in possession of a service license contemplated in Chapter 3 of the Act. Licensees who do not possess a service license will still be required to renew their licenses on an annual basis (except for licences issued in the Amateur Radio, Aeronautical Band, Marine Band and Citizen Band Radio for Ski Boats).

3.5 Penalties

Taking into account the huge number of unauthorized users of the radio frequency spectrum, the Authority proposes the following:

- (a) Revision of the penalties in an effort to discourage non-compliance and discourage criminal conduct.

- (b) Since the Act has not provided for a penalty with regard to non-compliance to section 31(1) thereof¹, the Authority proposes to create a criminal sanction in this regard to ensure that this scarce resource is protected and interference is minimized.
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¹ Section 31(1): “... no person may transmit any signal by radio or use radio apparatus to receive any signal by radio except under and in accordance with a radio frequency spectrum licence...”