

# COMPLAINTS AND COMPLIANCE COMMITTEE<sup>1</sup>

**Dates:** October and 18,20 November 2010

**Case number:** 53/ 2010

**INSPECTOR NEEPAL : REFERENCE BY INSPECTOR IN TERMS OF SECTION 17F(5)(d) of the ICASA Act 13 of 2000**

**Re: Alleged Non-Compliance by ADT(Pty) Ltd**

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## Committee

**JCW van Rooyen SC ( Acting Chairperson);M Ndhlovu<sup>2</sup>;  
N Ntanjana; Z Ntukwana; T Ramuedzisi; J Tlokana.**

**For the Inspector : T Motau SC instructed by Mkhabela-Huntley, Johannesburg.**

**For the Licensee : G Marcus SC ( with him A Friedman) instructed by Eversheds, Johannesburg**

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## INTERIM JUDGMENT

### JCW VAN ROOYEN SC

[1] At the end of 2010 Inspector Neepal, an inspector appointed by the Independent Communications Authority of South Africa (" ICASA") in terms of section 17F of the ICASA Act 13 of 2000, as amended, referred a matter of non-compliance by ADT, a security company and licensee in terms of the Electronic Communications Act 36 of 2005 to the Complaints and Compliance Committee in terms of section 17F(5)(d) of the ICASA Act. He averred that ADT was in non-compliance with sections 35 and 36 of the Electronic Communications Act 36 of 2005 in that it was using a frequency in Kwa Zulu Natal which was no longer allocated to it by ICASA; also that ADT was, accordingly, in possession of a large number of radios without a frequency spectrum licence. The third matter raised was that since ADT was no longer entitled to the frequency, it was also not permitted to charge a licence fee to its clients.

[2] It was common cause that the radios had been installed by ADT in the buildings of clients of ADT and that, as per contract, ADT remained the owner of the radios. The radio sends a signal

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<sup>1</sup> Established in terms of s 17A of the ICASA Act 13 of 2000 as amended

<sup>2</sup> Member appointed by Council in terms of section 17A(1) of the ICASA Act 13 of 2000

from a client's building when the alarm system via the radio indicates that there had been what was or would seem to have been an unauthorised entry.

[3] The present matter is not a "complaint" filed by an Inspector after such a complaint has reached him or her from the public,<sup>3</sup> but a matter raised by the Inspector himself in the exercise of his monitoring function. It should also be noted that an inspector acts from his original authority granted to him or her by the Act. He or she, accordingly, does not act on behalf of the ICASA Council although, of course, he or she is granted authority and duties by the Act for the very reason that he or she is an inspector appointed by Council.<sup>4</sup> Had the inspector been acting *on behalf* of the ICASA Council, this would have led to the unacceptable situation that the ICASA Council, which in accordance with section 3 of the ICASA Act is the body through which ICASA Acts and which also imposes sanctions in terms of the Act on the recommendation of the CCC, would also be involved in the reference of a non-compliance and, as it were, be both monitor and part of the quasi judicial procedure which, ultimately has to consider a sanction in the same matter. There are, however, instances where the Council could refer a matter to the CCC, but then it is done on a neutral basis (see sect 17B(a)(i)).<sup>5</sup>

[4] It should be added that during the CCC's investigation of this complaint it surfaced that the matter of migration to new frequencies is not a matter which is limited to the one frequency in Natal referred to us by Inspector Neepal. It is a problem which is pervasive throughout the Republic, where ADT is delivering its services. ADT has brought this aspect to the fore itself and it would amount to an head-in-the-sand approach to not investigate the whole matter. If such an approach were not followed, it would mean that further references by other inspectors would have to be dealt with on a piecemeal basis, which would be in conflict with fairness and a consistent approach to the addressing of this national problem.

[5] The third allegation as to the charging of a license fee will not at this stage be regarded as part of this investigation. Although Section 17(5)(c)(ii) of the ICASA Act refers to the power of an inspector to investigate and evaluate any alleged or suspected breach by a licensee of an agreement between such licensee and its subscribers, it would be inappropriate for the CCC to investigate such a matter without a complaint by a subscriber. In any case, it would seem that no specific provision in the relevant legislation provides that a licensee can be brought to book

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<sup>3</sup> This is provided for in section 17F(5)(e).

<sup>4</sup> See section 17F(1).

<sup>5</sup> This, for example, happened when the question arose before Council whether the SA Postal Services had complied with its roll-out obligations in terms of its licence. The CCC held that a fine which was imposed for non-performance by the Regulator which preceded ICASA in regard to the Postal Services, was no longer in function when the fine was imposed and that other procedural errors also made a finding against the SA Postal Services impossible in law. See *In Re SA Postal Services CCC case...../2009*.



by ICASA for a breach of contract. The matter is, accordingly left open for a future decision and hearing of this matter, if a complaint is received from a subscriber. If such a complaint is received before the disbandment of the CCC as presently composed for this matter, we will re-open this aspect for argument.

[6] ADT's defence was that the radios were, as in the past, transmitting on the frequencies that had been allocated to it by ICASA. It was, however, common cause that the said frequencies had been withdrawn by ICASA and that ADT was notified that it had to migrate to new frequencies. ADT's defence, which is accepted, is that it never received the notice. Furthermore, that given the more than 450,000 clients, it was impossible to have migrated immediately. This migration was an arduous task and extremely costly. ADT was, in fact, now in possession of two letters dated 17 January 2012 in which ICASA granted it time as to certain frequencies to migrate, in the one case by 17 January 2014 and the other by 17 January 2013. At the hearing on 23 April 2012 these dates were acknowledged and the relevant letters handed up. Mr *Marcus*, appearing for ADT, however conveyed to the CCC that the two letters did not address all the outstanding instances. The CCC requested him to convey to his client that it should provide the CCC with a full plan as to how ADT intended to address the migration in so far as it had not been done yet. The full plan is now, after its receipt within three days of the hearing, attached to this judgment as ATTACHMENT A.

[7] The hearing on the 23<sup>rd</sup> April was the fourth opportunity on which we have heard the parties in this matter. Mr *Motau* conveyed to us that his instructions were to withdraw the "complaint". ICASA would then monitor the timetable as agreed upon and take steps if ADT did not abide by that timetable. I accept that such "steps" could only mean that the matter would, once again, be brought to the CCC, which is the only adjudication body on the merits of non-compliance at ICASA.

[8] To fully understand the problem which faces the CCC it is necessary to relate the following facts. The non-compliance by ADT in Natal was referred to the CCC by Inspector Neepal. This matter was initially set down for hearing at the CCC on 15 August 2011. On 15 August 2011 the matter was postponed on the application of ADT to 12 September 2011. On 12 September 2011 we ruled as follows: the hearing was postponed *sine die* by agreement between the parties, in order to provide the parties with an opportunity to discuss *inter alia* a suitable migration plan which could be agreed upon as a settlement of the complaint; effectively, the Division at ICASA dealing with the allotment of frequencies, through the legal team representing the Inspector, was requested to provide the CCC with a progress report in respect of the negotiations between the parties within 30 days; the Division was requested to submit a further progress

report on or before 2 November 2011; the hearing would resume within the first 14 days of December 2011 at which time both parties would have the opportunity to make submissions to the CCC. The hearing was then set down for 13 December 2011. On 12 December 2011, ADT filed an affidavit in respect of which a proposed migration plan was submitted to the CCC. The matter resumed on 13 December 2011 at which time the CCC made the following order: the hearing was postponed *sine die* in order to allow the said Division additional time; it was required to submit a report to the CCC pertaining to the negotiations between the parties, by no later than 31 January 2012. A copy of the report was to be submitted to the co-ordinator of the CCC. The parties would provide the CCC with two alternative dates and times for the hearing to resume, such dates and times to fall within late February/early March 2012.

[9] On 15 December 2011, Hayley Ternent, ADT's attorney of record, addressed a letter to ICASA'S attorneys of record, Mkhabela Huntley Adekeye Inc ("*MHA Law*"). For ease of reference I will refer to the latter firm as "ICASA's" attorney of record. By "ICASA" is meant Inspector Neepal as well as the relevant division of ICASA which is tasked with frequency control and the frequency migration plan. In the aforementioned letter, Ms Ternent referred to the ruling made by the CCC at the hearing on 13 December 2011. She advised that ADT's migration plan is subject to ICASA's allocating additional exclusive frequencies to ADT in certain areas by January 2012. She further advised that to the extent that these new, so-called SABRE frequencies, were not allocated by January 2012, ADT would experience delays in the completion of the migration as per the proposed migration plan. Ms Ternent stated that it seemed unlikely that the additional frequencies would be allocated before the end of January 2012, and the time frames for the completion of the proposed migration would therefore need to be extended. On 17 January 2012 Ms Ternent addressed a letter to MHA Law in which MHA Law was reminded that ICASA was required to submit a report to the CCC pertaining to the negotiations by no later than 31 January 2012. In the letter MHA Law was invited to contact Ms Ternent in the event that it required any further information and/or assistance. On that same day Ms Ternent received an e-mail from MHA Law acknowledging receipt of the aforementioned letter and advising that MHA Law would revert.

[10] On 13 February 2012 Ms Ternent was copied with a letter addressed to MHA Law by the CCC. In terms of the letter, MHA Law was reminded that it was supposed to have submitted a report to the CCC by 31 January 2012 as agreed by the parties at the hearing in December. They were furthermore requested to provide information as to when the CCC could expect to receive the report. Ms Ternent addressed a letter to the



CCC on 15 February 2012 in which she advised that ADT had not received the aforementioned report and furthermore that ADT had met all its undertakings with regards to the report. On 16 February Ms Ternent was copied by the CCC with a letter in which the Chairperson of the CCC for the present matter informed MHA Law that: MHA Law must furnish the outstanding report to the office of the CCC by the latest, Monday, 20 February by 12:00 and full grounds as to why the report was not filed on or before 31 January 2012; the full report had to be filed, at the latest, by 28 February 2012. On 22 February 2012 Ms Ternent addressed a letter to the CCC in which she advised that ADT was not yet in receipt of the report which was due by 20 February 2012, and requested whether the CCC had been furnished with a report.

[11] On 7 March 2012 Ms Ternent addressed a further letter to the CCC. On 13 March 2012 the CCC addressed a letter to Ms Ternent. In this letter the co-ordinator for the CCC, Lindisa Mabulu, advised that she had been instructed by the Chairperson to advise both parties that the matter was to be set down for a hearing, and requested dates of availability in this regard.

[12] On 16 March 2012 Ms Ternent addressed a letter to the CCC in which the dates of availability of ADT's counsel were provided. On that same day Ms Ternent received an email from Ms Mabulu acknowledging receipt of her letter dated 16 March 2012. On 20 March 2012 the CCC addressed a letter to Ms Ternent advising that the matter had been set down for Monday, 23 April 2012. On that same day Ms Ternent was copied with a letter addressed to the CCC by MHA Law. In terms of the aforesaid letter the CCC was advised of *inter alia*, the following: *after due consideration, ICASA wished to withdraw the pending charges against ADT with a view to allowing ADT to undertake its migration process by no later than a date to be agreed with ADT; in the event that ADT does not migrate as shall be agreed, ICASA would take the appropriate action.*

[13] In an affidavit dated 12 December 2011 Ms Ternent put forward ADT's proposed migration plan together with a detailed explanation thereof. Despite the failure of the Division of ICASA which deals with frequencies to provide ADT with a response regarding the proposed migration plan, ADT nevertheless began implementing the migration plan. In the aforementioned affidavit ADT provided the CCC with a spreadsheet indicating the number of transmitters that had been migrated as at that date. ADT had begun implementing the plan because it, according to the affidavit, considered it important to comply with the goal of migrating fully to SABRE frequencies. Since the previous hearing, ADT had continued

to follow the proposed migration plan, according to what we were told at the hearing, to the best of its ability. It had, however, become necessary for ADT to submit an updated migration plan for the following reasons: the migration of transmitters in respect of certain frequencies had in fact been completed, and these frequencies could therefore be handed over to ICASA. Accordingly these frequencies were removed from the migration plan:

Johannesburg:143.9750MHz;160.9750MHz; Pretoria:147.35;

CapeTown:141.7500MHz;165.5250MHz.

[14] During January 2012 ADT received notification from ICASA that the migration periods in respect of several frequencies had been extended. It was therefore necessary for the migration plan to be updated to make provision for these dates. The following dates were provided in this regard : ICASA notified ADT that the migration in respect of the following frequencies in Johannesburg was to be completed by no later than 16 January 2014:-

a. 167.400MHz- 152.2875MHz;

b. 163.250MHz -152.2875MHz;

c. 149.700MHz- 152.2875MHz;

ICASA notified ADT that the migration in respect of the following frequencies in Johannesburg is to be completed by no later than 16 January 2013:

a. 157.5625MHz- 140.8750MHz.

[15] Ms Ternent has, according to her, taken the aforementioned factors into account in updating ADT's proposed migration plan. The plan was attached. It was pointed out that the success of the proposed migration plan was dependent on the allocation of new and exclusive SABRE<sup>6</sup> frequencies to ADT. In order for ADT to be able to complete the migration plan in time, ADT would require additional and exclusive SABRE frequencies in the following regions: 2 new SABRE frequencies for Johannesburg; 1 new SABRE frequency for Cape Town.

### **Addressing the Merits**

[16] At the last hearing of this matter on 23 April 2012, Mr *Motau* informed the CCC that



the “complaint” was withdrawn. ICASA would then come to an agreement with ADT as to when and how the non-compliance would be addressed and, if the agreement was not abided by, ICASA would take the necessary steps. Mr *Marcus* argued that despite the withdrawal, the CCC should give direction to the matter by making use of its advisory function for which the ICASA Act provides. He referred us to section 17B of the ICASA Act which provides as follows:

**17B. Functions of Complaints and Compliance Committee**

The Complaints and Compliance Committee -

- (a) must investigate, and hear if appropriate, and make a finding on -
  - (i) all matters referred to it by the Authority;
  - (ii) complaints received by it; and
  - (iii) allegations of non-compliance with this Act or the underlying statutes received by it;<sup>7</sup> and
- (b) *may make any recommendation to the Authority necessary or incidental to -*
  - (i) *the performance of the functions of the Authority in terms of this Act or the underlying statutes; or*
  - (ii) *achieving the objects of this Act and the underlying statutes.* (emphasis added)

[17] Mr *Marcus* undertook to provide the CCC with a draft order in this regard within two days. The draft order so received is attached to this judgment.

[18] Whilst the approach put forward by Mr *Marcus* is innovative and would seem to be a practical manner in which the CCC could approach the matter, we believe that given our wider task to investigate non-compliance before us, we have a duty to remain directly involved in this matter. The matter commenced with Inspector Neepal’s non-compliance from Natal, but as it proceeded it emerged that it was, indeed, a problem of national relevance. We have unanimously accepted that the notice from ICASA did not reach ADT and that it would be unacceptable in law to hold it responsible, at this stage, in terms of section 31 and 32 of the ECA. We are convinced that if reasonable time lines are not set within the ambit of this investigation, it would affect the safety of almost a half million clients of ADT. The safety of the clients of ADT is a national priority. Also, to hold ADT responsible for the impossible would run contrary to the

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<sup>7</sup> Mr Neepal’s reference of non-compliance falls in this category,

basic principles of our law. See *S v Bernardus* 1965(3) SA 287(A) at 292 where Steyn CJ quotes Plato in support of this principle.

[19] Furthermore, the draft order from ADT foresees that the CCC would be mandated by the ICASA Council to make amendments to the order by the Council. This would mean that the CCC would, as it were, lose contact with the matter and only, on occasion, be brought back into the investigation. The withdrawal of the “complaint” also foresees that ICASA would take steps when the arrangement with ADT is not abided by. Such steps may, of course, not be taken directly by ICASA or one of its General Managers, but would have to be referred to the CCC. Once again, the CCC would be brought back “blind” into the matter without having been involved in the ongoing procedure.

[20] Given these factors and the duty of the CCC to investigate a matter, we have decided not to exercise our right, as set out in section 17B(b) of the ICASA Act, to advise Council as to what it should do at this stage. In fact, the draft order received from ADT refers to section 17E(2)(c) of the ICASA Act, which provides that the CCC may recommend to Council that it *orders* the licensee to take such remedial or other steps which are not<sup>8</sup> in conflict with the ICASA Act or the underlying statutes. In effect, the draft has put the CCC in a position where it would be proposing to Council to make an order, the non-fulfilment of which could amount to an offence in terms of section 17H(1)(f) of the ICASA Act. Even if it is not an order which ICASA makes but a mere procedural ruling, it is not clear what will then happen.

[21] In the result we are not accepting the withdrawal of the complaint. In fact, the reference of the alleged non-compliance by Inspector Neepal to the CCC is not regarded as a *complaint* by the ICASA Act. It is a mere reference of an alleged non-compliance by an Inspector to the CCC, which then becomes seized with the matter until it has reached the stage where it is in a position to make a recommendation to Council. The CCC would, in effect, be abandoning its duty in terms of the Act to investigate and make a recommendation to Council as to what an appropriate sanction would be, if it were now to accept the “withdrawal”. Given the valid defence of impossibility to comply, it is most unlikely that the CCC would recommend any sanction

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<sup>8</sup> The word “not” is added to the subsection. It is a printing error in the Act and may be rectified by a body which applies the Act – see *S v Mpofo* 1979(2) SA 255(R) at 257 and *In re Duma* 1983(4) SA 469(N) at 479.



against ADT by Council. Yet, it is duty bound to see this matter through and be ready to hear ADT or the Inspectorate at any stage as to problems which arise. The approach of the CCC is that the safety of ADT's clients is a priority and that if ADT continues according to its draft plan, the matter would, seemingly, be resolved in such a fashion that the matter is simply closed with no recommendation to Council. Impossibility would, however, remain a constant criterion for the CCC and ADT is urged to approach the CCC, as presently composed for this matter, on an urgent basis for an amendment of the draft plan, which is now also accepted by the CCC, subject to possible amendment at a hearing on 4 October 2012. ADT is urged to act diligently in the execution of the plan, since an omission to act in this manner, might result in its no longer having the defence of impossibility on its side. In so far as the report from the Engineering is concerned – a report which we received after the last hearing of this matter is concerned (see ATTACHMENT B) – we will also hear that Division or any member of the Inspectorate on how the draft plan is being implemented. In fact, it is the duty of the Inspectorate and or the said Division to keep us informed as to how the draft plan is being implemented. We are also requiring ADT to keep us informed regularly.

[22] It should be noted that the acceptance of the plan from ADT is also motivated by what we regard as diligent steps taken by ADT. With respect, we have had very little guidance or assistance from the relevant Division of ICASA up to its letter of 8 May 2012 to come to a different conclusion than the conclusion to accept the Draft plan of ADT, subject to what we may decide on 4 October 2012. However, we realise that all kinds of circumstances might influence the execution of that plan and that the plan would probably be subject to amendments. Any amendments, also as proposed by the relevant Division of ICASA or other aspects raised by the Inspectorate, must be brought to the CCC for a decision as to what should be done to reach the aims of proper migration without placing the clients of ADT in jeopardy; constantly with objective impossibility as the criterion. The CCC will be available to hear any matter concerning this plan on an urgent basis. So as to keep contact with the execution of the Plan, regular reports are also required as set out in the preliminary order. The CCC will also, as the need arises, hold report back hearings with ADT, Inspector Neepal, other inspectors and the General Manager Engineering, or his representative.

[23] Since Inspector Neepal has brought the Natal matter to our notice, it would only be

proper to express our gratitude to him for having acted with due diligence in the execution of his functions. As indicated above, a contravention cannot, as matters presently stand, be found. However, when the draft plan is not diligently executed by ADT and the defence of impossibility, as it were, falls away generally or in regard to a certain aspect of the migration, we will expect a report from him. This report will then be followed up by the CCC, where necessary, with a hearing. The same principle will apply to all other inspectors within whose areas the execution of the ADT plan falls. In fact we expect all inspectors involved to bring any problem to our notice immediately. Once again, the criterion of impossibility, which will guide the CCC through the execution of the ADT Plan, should be monitored by all inspectors involved.

[24]The CCC holds as follows:

1. The ADT draft plan (Attachment A to this judgment) will not be sent to the ICASA Council as a recommendation.
2. The CCC accepts the draft plan of ADT subject to possible future amendments, where necessary. Such an amendment will be discussed at the 4 October 09:30 meeting with ADT and the Engineering Division of ICASA, in the light of the latter Division's Response to the ADT Draft Order in Attachment B to this judgment and the Reply of ADT, as in Attachment C to this judgment.
3. The CCC remains seized with the matter as referred to it by Inspector Neepal as well as all other matters concerning the migration of frequencies by ADT throughout the Republic as brought to the attention of the CCC by ADT, during the investigation of the matter.
4. At this stage the CCC, accordingly, makes the following procedural order:
  - (a) ADT is required to report once per three months ( at the end of the third month) via the Coordinator to the CCC as presently composed for this investigation, who will call upon any member of the inspectorate (if necessary) and the Engineering Division at ICASA involved in the planning and migration of frequencies and ADT and or its representatives to meet with the CCC for a hearing to discuss possible problems and or the achievement of the ADT plan as attached. The first report must cover the period up to the 15<sup>th</sup> August 2012. The further report dates will be determined at the 4 October hearing.
  - (b) **A hearing will, thus, be held on 4 October 2012 at 109:30 at ICASA.** ADT



and or its representatives are required to be present at all such hearings which are, in any case, regarded as part of the investigation and hearings of this matter. The members of the Engineering Division involved in this matter are also required to send a representative to keep us informed as to possible problems in the execution of the ADT plan. The response as in ATTACHMENT B and the Reply by ADT in ATTACHMENT C will also be discussed.

- (c) For the hearing of 4 October 2011 Inspector Neepal should also attend. Depending on the circumstances, the Engineering Division at ICASA may want to send any other inspector to this hearing as well.
- (d) The first report is expected on the last business day of August 2012, which report should deal with the migration that has been completed up to 30 July.
- (e) All further reports will deal with what has been achieved and, in each instance, include the previous report with a clear indication of what has been achieved since that report was filed.
- (f) The relevant dates for further hearings and reports will be determined by the CCC as the matter proceeds.
- (g) The CCC Coordinator will copy the Engineering Division of ICASA with all reports and expect a reply from such Division on such a report from ADT within the time period determined by the Coordinator.
- (h) Any application for the amendment of the ADT plan will be heard by the CCC as presently composed and may necessitate a hearing.
- (i) If, at any stage, the CCC is of the prima facie view that the plan has not been abided by on grounds unrelated to impossibility or another sufficient ground, the matter will be investigated and a hearing will be held.



JCW van Rooyen SC

Members Ntanjana, Ramuedzisi, Tlokana, Ntukwana and Councillor Ndhlovu, agreed with the procedural order and the Interim Judgment by the Chairperson.

# ATTACHMENT A

## Complaints Compliance Committee Hearing

In the matter between:

**R NEEPAL**

**Complainant**

and

**ADT SECURITY (PTY) LTD**

**Licensee**

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### DRAFT ORDER

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The Complaints Compliance Committee of the Independent Communications Authority of South Africa ("the CCC") makes the following recommendation in terms of section 17E(2)(c) of the Independent Communications Authority of South Africa ("ICASA") Act 13 of 2000:

- 1 The CCC accepts the withdrawal of the complaint and charges proffered against ADT as reflected in the letter from the legal representatives of ICASA appointed to prosecute dated 20 March 2012.



- 2 Notwithstanding the withdrawal of the charges, the CCC is mindful that the circumstances which gave rise to the initial complaint arose, in part, because of current inadequacies in the migration process of non-SABRE frequencies to SABRE frequencies.
- 3 Therefore, as remedial action as envisaged in section 17E(2)(c) of the ICASA Act, the CCC recommends to ICASA that ICASA require ADT to give effect to the following migration plan:

3.1 The following non-SABRE frequencies in the Johannesburg region should be vacated by no later than **December 2012**:

3.1.1 138.0250MHz

3.1.2 138.4250MHz

3.1.3 143.4500MHz

3.1.4 143.8750MHz

3.1.5 148.3750MHz

3.1.6 149.6500MHz

3.1.7 156.9750MHz

3.1.8 162.5625MHz

3.1.9 163.8250MHz

3.1.10 164.7000MHz

3.1.11 168.4750MHz

3.1.12 173.9500MHz.

3.2 The following non-SABRE frequencies in the Vaal region should be vacated by no later than **December 2012**:

3.2.1 151.2500MHz

3.2.2 152.7000MHz

3.2.3 161.2500MHz.

3.3 The following non-SABRE frequency in the Welkom region should be vacated by no later than **December 2012**:

3.3.1 156.2500MHz.

3.4 The following non-SABRE frequencies in the Pretoria region should be vacated by no later than **December 2012**:

3.4.1 149.5500MHz

3.4.2 155.4250MHz

3.4.3 156.2500MHz

3.4.4 158.4750MHz



3.4.5 164.9250MHz.

3.5 The following non-SABRE frequencies in the Durban region should be vacated by no later than **December 2012**:

3.5.1 157.6000MHz

3.5.2 157.6000MHz

3.5.3 158.4750MHz

3.6 The following non-SABRE frequency in the Garden Route region should be vacated by no later than **December 2012**:

3.6.1 140.7375MHz.

3.7 The following non-SABRE frequency in the Johannesburg region should be vacated by no later than 17 **January 2013** (as per instruction already issued by ICASA):

3.7.1 157.5625MHz.

3.8 The following non-SABRE frequency in the Garden Route region should be vacated by no later than **December 2013**:

3.8.1 141.7250MHz

3.9 The following non-SABRE frequencies in the Johannesburg region should be vacated by no later than 17 **January 2014** (as per instruction already received from ICASA):

3.9.1 149.7000MHz

3.9.2 162.2000MHz

3.9.3 163.2500MHz

3.9.4 167.4000MHz.

3.10 The following non-SABRE frequency in the Hermanus region should be vacated by no later than **December 2014**:

3.10.1 148.8500.

4 It is recorded that the above-mentioned timelines are dependent on the allocation by ICASA of additional SABRE frequencies to ADT, for which ADT has already applied, namely:

4.1 2 in Johannesburg; and

4.2 1 in Cape Town.

5 The Manager: Spectrum Licensing of ICASA is required, in terms of rule 8(1)(a) of the CCC's rules, to provide, within 14 days of the date of this order, the following information to the CCC:

5.1 An update on the progress that has thus far been made by ICASA in processing the applications made by ADT for the frequencies described in paragraph 4 above;



- 5.2 An indication of the deadline by which a decision will be taken in respect of the frequencies described in paragraph 4 above.
- 6 The CCC may, in the light of the information provided by the Manager: Spectrum Licensing, vary the terms of this order, after notice to the parties and an opportunity to be heard.
- 7 In the event that non-compliance with the timelines envisaged in paragraph 3 becomes unfeasible (most notably, owing to the non-allocation or late allocation of the frequencies listed in paragraph 4 above or for any reason), ADT is hereby afforded the right to approach the CCC, on 14 days' notice, for a variation of this order.

## ATTACHMENT B

## ATTACHMENT C



ICASA  
CCC: Coordinator  
Legal and CCC Division

lmabulu@icasa.org.za  
kobusvrooyen@telkomsa.net

Date 23 May 2012  
Your ref Ms Lindisa Mabulu  
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Dear Sir/Madam,

Inspector Neepal of ICASA / ADT matter before the CCC

1. We confirm that we submitted our client's migration plan to the attorneys for ICASA on 10 October 2012. Due to the lapse of time an updated migration plan was submitted on 20 April 2012.
2. The Spectrum Licencing office ("*the SL*") for ICASA submitted their proposal to the CCC on 8 May 2012, a copy of which was subsequently forwarded to our offices on 12 May 2012.
3. Our client has considered the proposal submitted by ICASA and has encountered a number of deficiencies with this proposal. Such deficiencies include the following:-
  - 3.1 The SL appears to have based their proposal on a spreadsheet reflecting the numbers of transmitters in November 2010. This spreadsheet is in fact provided to ICASA on a monthly basis by our client. In the circumstances, it does not appear that they have considered the migration with reference to accurate numbers of transmitters or to the proposal submitted by our client;
  - 3.2 Whilst different time frames are suggested for the migration of different frequencies, no mention is made of a start and/or completion date for the migration. For example: in respect of frequency 157.5625MHz the SL has suggested 7 months. They have however failed to indicate from when the seven months must be calculated;
  - 3.3 The SL have provided different migration periods to those suggested by our client in some circumstances, but have not however provided any explanation as to why the time periods suggested by our client are not acceptable and/or are unreasonable;
  - 3.4 The SL has suggested a migration period with regards to some frequencies, which is much shorter than, and contradicts the migration period which ICASA previously provided our client with by way of a formal notification. For example: in respect of frequency 157.5625MHz the SL has suggested a period of 7 months. Our client received notification from ICASA that this frequency is required to be migrated by January 2013, i.e. providing our client with one year within which to migrate. The SL has not provided any explanation for these discrepancies;
  - 3.5 There are a number of frequencies in our client's proposal which are not mentioned in the proposal from the SL, and hence no migration dates have been proposed by the SL in respect of these frequencies. For example: 143.4500MHz, 156.9750MHz and 143.8750MHz in Johannesburg;
  - 3.6 In certain regions, due to limited resources and the procedure involved in the migration process, our client submitted a longer time period despite there being



fewer transmitters in those areas. The SL has proposed much shorter and unrealistic time periods with regards to migration of these frequencies. For example: in the Vaal, frequencies 151.2500MHz and 161.2500MHz have been allocated 5 months by the SL. Our client however suggested a time period of one year for the reasons as stated above. The SL has neglected to provide an explanation as to why our client's proposal is unreasonable and/or unacceptable in this regard.

- 3.7 The SL has not addressed the issue regarding the allocation of additional SABRE frequencies as was set out in our client's proposal. It is fundamental that our client's migration plan is dependent on the allocation of additional frequencies.
4. In the circumstances we are strongly of the view that ICASA has not put up any evidence to suggest that our client's proposal is unreasonable, and therefore we submit that the CCC should adopt our client's proposal.
5. By way of conclusion, we wish to apologise for the late filing of this reply (which was due yesterday). Due to various factors beyond our client's control, we were only able to take detailed factual instructions and finalise this letter by today.

**Yours faithfully**

Hayley Ternent  
Senior Associate  
For  EVERSHEDES