

**Representations by Orbicom (Pty) Ltd on the
Draft Update of the National Radio Frequency
Plan and the 2nd Draft Frequency Migration
Regulations and Radio Frequency Migration Plan**

15 February 2013

Introduction

- 1 Orbicom (Pty) Ltd welcomes the Authority's invitation for written representations on the Draft Update of the National Radio Frequency Plan ("the draft National Plan") and the 2nd Draft Frequency Migration Regulations and Radio Frequency Migration Plan¹ ("the 2nd draft Frequency Regulations and Plan").
- 2 The Frequency Regulations and these Plans raise important issues for current and future broadcasting services, electronic communications services and electronic communications network services.
- 3 Orbicom requests an opportunity to participate in any oral hearings the Authority may hold concerning these issues. Since Electronic Media Network Ltd ("M-Net") supports Orbicom's representations, and has submitted a letter to that effect to the Authority, we would like Orbicom and M-Net to share a slot at any such hearings.

Failure by Authority to adhere to ITU WRC-12 resolutions

- 4 The International Telecommunications Union ("ITU") primarily manages spectrum by convening a conference called the World Radio Communications Conference (WRC) every three to four years. At this Conference, member states decide on the allocation of spectrum for different purposes through a consensus building exercise. In many instances, spectrum in a particular band is allocated on a shared basis. There are also instances where services are allocated on a secondary or co-primary basis.
- 5 The Authority's gazetting of the 2nd draft Frequency Regulations and Plan raises a fundamental concern, namely that the Authority's proposals for migrating existing users are contrary to the decisions of WRC-12. Importantly, WRC-12 has made allocations on a shared basis with current users of particular bands. Yet, instead of exploring co-allocation, the Authority appears

¹ Notice No 1060, Government Gazette No. 36025 of 21 December 2012 and Notice No 1064, Government Gazette No. 36031 of 24 December 2012

to have interpreted co-allocation to mean that existing users must be migrated. This is not only incorrect, but a violation of radio regulations which should form the basics of spectrum management.

- 6 It is not clear why the Authority has totally ignored the content of the WRC-12 resolutions with regard to co-allocation. If it is the Authority's intention to invoke Article 4.4 of the radio regulations, which allows member states to deviate from the ITU Table of Allocations on a non-interference basis, then the Authority should make this clear. However, even if this were the case, it is our view that such a process should be done separately for each band because the migration processes in each band would be different.

Authority's proposals re band 694–790 MHz

- 7 When dealing with band 694-790 MHz (at pg 72 in the draft National Plan), the Authority makes the following comments: "Broadcasting Allotments in accordance with GE89 plan in the process of conversion to GE06". At face value, this comment would appear to accord with the radio regulations. However, if one considers the Authority's more detailed proposals in the 2nd draft Regulations and Plan, this is in fact not the case. There, the Authority proposes the migration of existing broadcasters in the band 694-790 MHz (pgs 39 – 40) and further states that the migration will end in 2015. The Authority is well aware that WRC-12 made an allocation on a co-primary basis in this band to IMT pending the outcome of WRC-15. It is our view that the migration of existing users in this band is not only premature, but also contrary to the decisions of WRC-12.
- 8 The allocation on a co-primary basis means that both services enjoy equal rights to the particular band, and in this case it will mean that both broadcasting and IMT have equal rights to this spectrum. The resolution that accompanied the decision to allocate this band on a co-primary basis pending the decision of WRC-15 is Resolution 232.

- 9 The resolution is clear on the considerations each member state needs to take into account prior to deciding on the allocation or implementing IMT in this band. For some reason, the Authority has not considered the needs of the current broadcasters occupying the band and whether migrating them will leave enough spectrum for their immediate and future needs. The resolution makes it clear what steps each member state should follow prior to making a decision. The Authority has not undertaken any of the steps identified in this resolution. The resolution also makes it clear that this spectrum is for broadcasting and the deployment of IMT should take into account the existing services in the band.
- 10 Furthermore, the resolution invites the ITU to conduct studies on the compatibility between broadcasting and IMT services. However, the results of such studies are only going to be made available at WRC-15.

Grounds upon which the Authority may initiate the process of radio frequency migration

- 11 By virtue of draft regulation 4(b) the Authority proposes that it be empowered to initiate a process of radio frequency migration in a number of circumstances, including "Where a change in the use of a radio frequency band is required to bring the South African National Frequency Plan into line with ITU Radio-regulations or the final acts of the latest WRC".
- 12 Similarly, in paragraph 3.1 at pg 23 of the Government Gazette the following is stated:

"Bands are identified for radio frequency migration according to the following hierarchy:

- First Level – where the ITU radio regulations/decision of a World Radio Conference (WRC) require a change in national allocation that will require existing users to be migrated;
- Second Level – where a Regional Radio Conference require a change in national allocation that will require existing users to be migrated;"

- 13 These statements seem to suggest that services allocated in a particular band must migrate if the ITU has made a new allocation. However, this interpretation is incorrect. If, despite a new allocation, services could co-exist, then migration may not be necessary.

Concerns in relation to existing radio frequency spectrum licences

- 14 There are a number of provisions in the Authority's gazetted document, which suggest a somewhat cavalier approach on the part of the Authority towards the rights of radio frequency spectrum licensees. For example, the Authority states that "The spectrum licence is currently valid for one year only and a spectrum assignment can be revoked at any time."² And draft regulation 3(5) provides: "The users to be migrated shall not be entitled to be compensated by the Authority for the costs of the migration."
- 15 The reality is somewhat different. Regulation 15(2) of the Radio Frequency Spectrum Regulations provides that "... a Radio Frequency Spectrum Licence will remain valid from 01 April until 31 March of the following year and is thereafter renewable by payment of the prescribed annual licence fee in terms of these regulations." Regulation 9(1) provides: "Renewal of a Radio Frequency Spectrum Licence is performed on an annual basis by payment of the prescribed annual licence fees, except ...". Thus, provided a spectrum licensee timeously pays its annual licence fees, its spectrum licence will run from year to year for as long as the service licence to which the spectrum licence relates continues to be in place.
- 16 Nor may a spectrum licence/assignment be revoked at any time. It would only be justified in exceptional cases where there has been a material and repeated failure by the spectrum licensee to comply with the relevant legislation, regulations and its licence conditions, alternatively where there are overwhelmingly strong public interest considerations.

² Para 2.3.1, pg 21 of the Gazette

- 17 The Authority also seems to fail to appreciate that it is the existing terrestrial television broadcasting service licensees which are having to relinquish valuable spectrum and it is those licensees which are creating the digital dividend. Those licensees ought to be properly compensated through the assignment of other spectrum so that post analogue switch-off they are each assigned sufficient spectrum to have their own multiplex. There also has to be greater consideration given as to who has to bear the costs of migration.

Concerns about consultative process

- 18 As we've indicated, a separate process should be undertaken where the Authority sees the need to migrate existing users of a band. Any regulations governing that process ought to include procedural protections for those spectrum licensees, which may have to migrate.
- 19 Prior to proposing migration from a band, the position of existing services should be carefully considered in relation to the capacity of the spectrum to which they are being migrated, and a detailed study of whether those services can be properly accommodated in another band must first be conducted.
- 20 It is only if they can be properly accommodated that the Authority could propose such a migration of services.
- 21 Furthermore, the Authority should then publish a detailed draft plan, specifying, for example, the proposed assignment plan, the duration of the migration period, how any possible interference is to be dealt with, the costs anticipated, and proposals on who will bear the costs, and invite comments from the public.
- 22 However, the way in which the gazette is drafted suggests that the Authority has already decided to migrate existing users, and without sharing any plans for such a migration.
- 23 It is also our understanding that the Authority had not conducted the necessary studies. If our understanding is incorrect, it is imperative that they be shared with all stakeholders.

Concluding comments

- 24 Our analysis of the 2nd draft Regulations and Plan has revealed that the proposals made by the Authority do not correctly reflect the resolutions adopted at WRC-12. We urge the Authority to adhere fully to those resolutions.
- 25 Nor should the migration of services be a foregone conclusion.
- 26 Once again, Orbicom would like to thank the Authority for this opportunity to make written representations. The 2nd draft Frequency Regulations and Plan raise complex issues which require input from the sector and careful consideration by the Authority.