



Independent Communications Authority of South Africa
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**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH
AFRICA**

**LICENSING PROCESS FOR INDIVIDUAL COMMERCIAL FREE-TO-AIR
SOUND BROADCASTING SERVICE LICENCES: NORTHERN CAPE**

REASONS FOR DECISION

FEBRUARY

2017



1. INTRODUCTION

1.1 This document sets out the reasons for the decision of the Independent Communications Authority of South Africa (the Authority) in relation to the applications for individual commercial free-to-air sound broadcasting service (I-CSBS) licence in the geographical market of the Northern Cape province (secondary markets).

1.2 The background against which the licensing process was conducted is as follows:

1.2.1 In 1996, the Authority's predecessor-in-law, the Independent Broadcasting Authority (**IBA**) published a Position Paper on Private Sound Broadcasting Services (the **Private Sound Broadcasting Position Paper**) detailing the policy approach that the IBA intended to follow in licensing commercial sound broadcasting services. The Private Sound Broadcasting Position Paper was prepared in the context of the Independent Broadcasting Authority Act, 1993 (Act No. 153 of 1993) ("the **IBA Act**") in terms of which broadcasting services in South Africa were regulated at the time.

1.2.2 In 2003, the Authority conducted a review of the policy framework for the ownership and control of commercial sound broadcasting services, which culminated in the publication of the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences Position Paper on 13 January 2004 (the Ownership and Control Position Paper). Like the Private Sound Broadcasting Position Paper, the Authority's review was conducted and the Ownership and Control Position Paper prepared in the context of the IBA Act read with the Broadcasting Act, 1999 (Act No. 4 of 1999) ("the **Broadcasting Act**").

1.2.3 In the Ownership and Control Position Paper, the Authority



stated its intention to licence additional commercial sound broadcasting services in primary markets (being Gauteng and the metropolitan areas of and surrounding Cape Town and Durban) and secondary markets (being geographical markets, including mainly metropolitan areas, outside the primary markets).¹

1.2.4 Pursuant to the publication of the Position Paper, the Authority licensed three commercial sound broadcasting services in secondary markets of Mpumalanga, North West and Limpopo provinces in 2007.²

1.2.5 On 19 July 2006, the Electronic Communications Act, 2005 (Act No. 36 of 2005) ("the **EC Act**") came into force. The EC Act repealed and replaced the IBA Act and certain provisions of the Broadcasting Act. Many of the provisions of the IBA Act were re-enacted in Chapter 9 of the EC Act.

1.2.6 On 2 February 2012, the Authority published a notice inviting interested persons to apply for I-CSBS Licences (Secondary Markets) for the provision of broadcasting services in the geographical markets of the Eastern Cape, Northern Cape and Free State provinces, under Government Gazette No. 35000³ of 2 February 2012 (the ITA).

1.2.7 The closing date for the submission of applications was 11h00 on 27 June 2012.⁴ The Authority extended the closing date for the submission of applications to 16h00 on 27 August 2012.⁵ No

¹ Position Paper, para 12, p 39.

² In the Position Paper (para 8.1 read with para 12.1), the Authority envisaged granting licences in secondary markets (i.e. towns situated outside of the primary markets, being Gauteng, Durban and Cape Town) in four provinces, namely Limpopo, Mpumalanga, Northern Cape and North West. The invitation to apply for these secondary market licences was published in *Government Gazette* 27474 of 8 April 2005. No applications were received for a licence in the Northern Cape.

³ Government Gazette Notice 94

⁴ Paragraph 18 of the ITA.

⁵ Published under GN 524 in *Government Gazette* 35470 of 25 June 2012.



applications were received for the the geographical market of the Northern Cape.

2. Legal Framework

2.1 The Authority is required to follow the process set out below when awarding individual licences- ⁶

2.1.1 The Authority must invite applications for individual licences by publishing a notice in the *Government Gazette*.

2.1.2 In the invitation, the Authority must stipulate the percentage of equity ownership to be held by historically disadvantaged persons (**HDPs**), which must not be less than 30% or such higher percentage prescribed by the Authority.

2.1.3 The Authority must invite interested parties to submit representations in relation to applications for individual licences within a particular period.

2.1.4 The Authority may conduct a public hearing in relation to any application for an individual licence.

2.1.5 After considering an application for an individual licence and any representations received in relation to that application, the Authority must notify the applicant of its decision, the reasons for its decision and any licence conditions that are applicable to a successful applicant, and publish that information in the *Government Gazette*.

⁶ Sections 9(2) and (5) of the Act.



3. THE INVITATION TO APPLY

- 3.1 On 03 August 2015, the Authority published an ITA for an I-CSBS Licences in the Northern Cape Province, with a closing date of 11 December 2015 at 16h00.⁷
- 3.2 On 30 September 2015, the Authority received a request from Mukoma Attorneys for the inclusion of additional frequencies as well as an extension of the closing date for submission from 11 December 2015 to 30 January 2016.
- 3.3 In a letter of reply to Mukoma Attorneys, dated 16 October 2015, the Authority advised Mukoma Attorneys that the available and/or applicable frequencies were the two specified in the ITA.
- 3.4 In the same letter of reply to Mukoma Attorneys, the Authority declined the request for an extension of the submission date on the basis that Mukoma Attorneys had failed to provide sufficient reasons for their request.
- 3.5 Subsequent to the above, the Authority received two (2) requests⁸ to extend the closing date. However, none of the persons requesting an extension provided sufficient reasons for their request and was therefore declined.
- 3.6 There were no applications received by the Authority by the closing date of 1 February 2016.
- 3.7 On 02 February 2016, Indiko FM sent the Authority an email requesting condonation for late submission as a result of a missed flight and indicated that the application will be submitted by 13h00 on Tuesday 02 February 2016. The Authority did not accede to the application for

⁷ Published under GN 799 in *Government Gazette* 39050 of 3 August 2015.

⁸ Northern Cape FM (formerly Conversations FM) and Office of the Premier of the Northern Cape (on behalf of Messrs Mdunge and Bozwana)



condonation as the ITA required applicants to submit applications before the closing date.

3.8 On 9 February 2016, the Authority took a decision to re-issue the ITA to give potential applicants an additional opportunity to submit applications. The re-issued ITA was published in Government Gazette No. 39700 of 2016, dated 16 February 2016 and the closing date for submission of applications was 22 April 2016 at 16h00.

3.9 The ITA stipulated that only one licence would be issued to the successful applicant in the Northern Cape province.⁹

3.10 In terms of the ITA, applicants were required to comply with, amongst other things, the following:

3.10.1 ensure that the original, 15 hard copies and three soft copies of the completed application were submitted to the Authority before the closing date;¹⁰

3.10.2 each application had to be permanently bound, using either heat binding or spiral binding;¹¹

3.10.3 each application was required to have a cover page indicating the name of the applicant, the licence being applied for and year of application;¹²

3.10.4 the page(s) of the application immediately following the cover page were required to be the contents page(s) which detail each section of the application and corresponding page numbers;¹³

3.10.5 pages of the application, including the appendices, were

⁹ ITA, Schedule A, para 20.

¹⁰ ITA, Schedule A, para 3.

¹¹ ITA, Schedule A, para 6.

¹² ITA, Schedule A, para 7.

¹³ ITA, Schedule A, para 8.



required to be numbered sequentially starting with the page immediately following the contents page(s) as page 1 and ending with the very last page of the application;¹⁴

- 3.10.6 each volume of the application had to have a cover page which specified the number of the part or volume;¹⁵
 - 3.10.7 each application had to be accompanied by a non-refundable application fee of R70 000;¹⁶
 - 3.10.8 ensure that they applied for the correct frequencies as contained in Schedule B to the ITA; ¹⁷
 - 3.10.9 include a percentage of equity ownership held by persons from historically disadvantaged groups, which must not be less than 30%;¹⁸ and
 - 3.10.10 take into account the restrictions in terms of sections 64, 65, 66 of the EC Act, amongst others, relating to limitations on foreign control of commercial services, limitations on control of commercial broadcasting services and limitations on cross-media control of commercial broadcasting services.¹⁹
- 3.11 The ITA stated that “[f]ailure to comply with any of the... requirements will render the application liable to disqualification”.²⁰
- 3.12 Schedule B of the ITA set out the areas and a list of FM frequencies available for commercial sound broadcasting services in the Northern Cape province, the sites from which radio services on these frequencies were to be transmitted, together with the maximum ERP or effective

¹⁴ ITA, Schedule A, para 9.

¹⁵ ITA, Schedule A, para 10.

¹⁶ ITA, Schedule A, para 16.

¹⁷ ITA, Schedule A, para 11.

¹⁸ ITA, Schedule A, para 12.

¹⁹ ITA, Schedule A, para 14.

²⁰ ITA, Schedule A, para 19.



monopole radiated power for each frequency. The towns and frequencies were as follows:

Northern Cape

Transmitter	Frequency (MHz)	ERP (kw)
Kimberley	95.4	10
Upington	93.5	8

4. THE APPLICATIONS

4.1 On 22 April 2016, the Authority received three applications from:

- 4.1.1 Kopano-Indibano Trust;
- 4.1.2 Northern Cape FM (Pty) Ltd; and
- 4.1.3 Mitzigenix (Pty) Ltd.

4.2 Acknowledgement letters were sent to Northern Cape FM on 22 April 2016 and Mitzigenix on 26 April 2016. Kopano-Indibano Trust submitted its application outside the cut-off time (i.e 16:00). Its representative was given a written note confirming receipt of the application and was advised to submit a request for condonation for late submission. To date no request for condonation has been received.

4.3 The following table indicates how the received applications complied with the requirements of the ITA:



COMPLIANCE ANALYSIS

ITA Requirements	Kopano – Indibano Trust	Northern Cape FM (Pty) Ltd	Mitzigenix (Pty) Ltd
1. Applications must be in writing	Yes	Yes	Yes
2. Has the Applicant submitted original plus all fifteen hard copies and all three soft copies of the completed application form before the closing time.	Only 15 copies and 1 soft copy were submitted at 16:15. The Original Copy was not submitted.	Only the original copy (vol.1&2) were submitted before the closing time. 15 copies and 3 soft copies at 18:28	Yes
3. In terms of section 4D of the Independent Communications Authority of South Africa Act, Act 13 of 2000 ("ICASA Act"), Applicants may request that any part of the application be treated as confidential. The Applicants must submit a separate original plus all fifteen hard copies and all three soft copies of the information which confidentiality is requested and clearly mark it as such before the closing time.	No request for confidentiality	No request for confidentiality	The entire application is marked confidential. However, the Applicant did not request confidentiality in terms of section 4D of the ICASA Act as expressly stipulated in paragraph 4 of Schedule A of the ITA.
4. Each application must be permanently bound (using either heat binding or spiral binding).	Yes	Yes	Yes



<p>5. Each application must have a cover page with the name of the Applicant, the licence being applied for and year of application on it.</p>	<p>Yes</p>	<p>Yes</p>	<p>Yes</p>
<p>6. The page(s) immediately following the cover page must be the contents page(s) which detail each section of the application and corresponding page numbers</p>	<p>No contents page</p>	<p>Contents page without corresponding page numbers</p>	<p>No contents page</p>
<p>7. Pages including the appendices must be numbered sequentially starting with the page immediately following the contents page(s) as page 1 and ending with the very last page of the application.</p>	<p>Application not sequentially numbered</p>	<p>Application not sequentially numbered</p>	<p>Application not sequentially numbered</p>
<p>8. In the event that the Applicant has to submit its application in more than one part or volume, each part or volume must have a cover page. In this case the cover page must specify the number of the part or volume (i.e. Part One, Part Two or Volume One, Volume Two). Each volume must also have the full set of contents page(s) and be sequentially numbered as indicated above.</p>	<p>The Application was one volume</p>	<p>Submitted 2 volumes without sequential numbering</p>	<p>The Application was one volume</p>



<p>9. Applicants must ensure that they apply for the correct frequencies as contained in Schedule B to this ITA.</p>	<p>Applied for correct frequencies</p>	<p>Applied for incorrect frequency in Kimberley</p>	<p>Applied for correct frequencies</p>
<p>10. Every application must be accompanied by a proof of payment of non-refundable application fee of R 70 000.00 (Seventy Thousand Rands only). The payment shall be in the form of an electronic transfer or via a direct deposit into ICASA bank account.</p>	<p>No proof of payment submitted but the Finance Department confirmed that the application fee was deposited into ICASA's bank account in February 2016.</p>	<p>No proof of payment was submitted</p>	<p>Proof of payment submitted</p>



<p>11.Applications must be addressed for the attention of the General Manager: Licensing and be submitted at Block A, Pinmill Farm, 164 Katherine Street, Sandton, Johannesburg.</p>	<p>The application is addressed to the Chairperson and was submitted in Block A</p>	<p>The application is addressed to the GM: Licensing and was submitted in Block A</p>	<p>The application is not addressed to anyone in particular and was submitted at the Registry of the Authority.</p>
<p>12.The closing date for the submission of applications shall be no later than 16:00 pm, South African time, on or before 22 April 2016.</p>	<p>The application was submitted at 16:15 on 22 April 2016. The applicant's representative was requested to submit a letter requesting condonation for the late submission. To date no letter has been submitted to the Authority in this regard.</p>	<p>Application (i.e. original copy only) was submitted at 15:59 on 22 April 2016. The remaining hard and soft other copies were submitted to the security at 18:28 on 22 April 2016</p>	<p>The application was submitted at the Registry at 14:20 on 22 April 2016.</p>



5. DISCUSSION

- 5.1 Clause 19 of the ITA provides that *"failure to comply with any of the above requirements will render the application liable for disqualification."*
- 5.2 The Authority derives its power to grant or refuse licence applications from section 4(2)(e) of the Independent Communications Authority of South Africa Act No. 13 of 2000 (**ICASA Act**). Section 9 of the EC Act in turn empowers the Authority to prescribe the procedures for the application and granting of Individual licenses.
- 5.3 The High Court decision in Millennium Waste Management²¹ which has been considered and approved by the Supreme Court of Appeal states as follows: -

"the Court held that both requirements – timeous payment and timeous submission – had to be interpreted to be peremptory. The Court held that, as a matter of law, an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It is only where the functionary is specifically afforded the discretion to condone non-compliance with a peremptory requirement that it may do so. The court held that the administrative functionary (the Chief Director in that case) derived all his (delegated) powers from the General Notice which contained the ITA. As the General Notice gave him no discretion to condone, he had none. This conclusion was reached as a matter of law despite the fact that Brand JA (on behalf of a unanimous court) expressed his "sympathy for unfortunate subsistence fishermen"²².

- 5.4 The ITA for an I-CSBS licence in the geographical market of Northern Cape province contains pre-emptory requirements. Consequently, and

²¹ Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province 2008 (2) SA 481(SCA); Te

²² Legal Opinion: paragraph 22.



in light of the abovementioned High Court decision, the Authority does not have any discretionary power to condone non-compliance with any of the stipulated ITA requirements.

6. DECISION

6.1 After evaluating compliance with the requirements of the ITA by all applicants for an I-CSBS licence in the geographical market of Northern Cape province as indicated in paragraph 3.3 above, the Authority noted that none of the applications received complied with all the requirements stipulated in the ITA.



KATHARINA PILLAY

COUNCILLOR

Date: 16/02/2017