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OF THE

REPUBLIC OF NAMIBIA

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General Notices

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

No. 233

2015

NOTICE IN TERMS OF SECTIONS 101 AND 85 OF THE COMMUNICATIONS ACT, 2009 (ACT NO 8 OF 2009) AND THE REGULATIONS REGARDING LICENSING PROCEDURES FOR TELECOMMUNICATIONS AND BROADCASTING SERVICE LICENCES AND SPECTRUM USE LICENCES

The Communications Regulatory Authority of Namibia, in terms of Sections 85 and 101 of the Communications Act, 2009 (Act No. 8 of 2009) read with Regulations 5, 6 and 11 of the “Regulations Regarding Licensing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences”, in Government Gazette No. 4785, Notice No. 272, dated 29 August 2011,

herewith gives notice that the applications for a commercial broadcasting licence and spectrum use licence by TV Worx CC has been declined.

REASONS FOR THE DECISION ARE AS FOLLOW:

Application for Commercial Broadcasting Service Licence & Spectrum Use Licence

TV Worx CC (hereinafter referred to as “the Applicant”) submitted an application for a commercial broadcasting service licence and spectrum use licence in accordance with sections 85 and 101 of the Communications Act, 2009 (Act No. 8 of 2009) (hereinafter referred to as the “Act”) and regulation 5 and 6 of the Regulations regarding Licensing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences as published in Government Gazette No. 4785, General Notice No. 272 of 29 August 2011 (as amended), for providing television broadcasting services *via* satellite for consideration by the Authority on 6 November 2013.

The Applicant submitted an application for a commercial broadcasting service licence and a spectrum use licence indicating its intention to provide satellite based free-to-air television broadcasting services utilising Platco Digital decoders.

The Applicant envisaged broadcasting on sixteen (16) channels grouped into four (4) content categories as indicated below-

- (i) Entertainment – SABC 1,2 and 3, e.tv, eKasi+, eAfrica+, eMovies+
- (ii) Culture and lifestyle- Zest TV, ASTV, Deen TV
- (iii) Children and education – eToon+, Mindset TV, Da Vinci Learning, English Club
- (iv) Religion – Spirit World Channel, Inspiration TV.

The Applicant further intended to broadcast from the SES-5 satellite utilising the DBV-S2 broadcasting standard with MPEG-4 compression, selling decoders to the public to provide access to the services.

PROCEDURAL COMPLIANCE

Following due process in terms of Regulations Regarding Licensing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences, the Authority published a notice in the Government Gazette No. 5402, General Notice No 12, dated the 31 January 2014, allowing fourteen (14) days for public comment. No public comments were received within the aforementioned time period and therefore no reply comments were requested from the Applicant.

SUBSTANTIVE COMPLIANCE

Commercial Broadcasting Application

When considering the award of a broadcasting service licence, the Authority is obliged to consider the following provisions of section 85(8) of the Communications Act-

- “(a) *The character of the applicant or, if the application is a body corporate, the character of the directors;*
- (b) *the adequacy of the expertise, experience and financial resources available to the applicant;*
- (c) *the desirability or otherwise of allowing any person or association of persons, to have control of or a substantial interest in-*
 - (i) *more than one broadcasting service;*
 - (ii) *more than one radio station and one television station and one registered newspaper with a common coverage area and distribution area or significantly overlapping coverage and distribution areas;*
- (d) *whether the applicant is likely to comply with such technical broadcasting standards as the Authority may prescribe;*

- (e) *whether the conditions of a broadcasting licence will unjustly benefit one licensee above another;*
- (f) *the allocations of spectrum resources in such a manner as to ensure the widest possible diversity of programming and the optimal utilisation of such resources: Provided that priority may be given to broadcasters transmitting the maximum number of hours per day;*
- (g) *the reservation of radio wave spectrum resources for the future; and*
- (h) *the desirability of giving priority to community based broadcasts.”*

The Authority is of the opinion that –

1. The Applicant, despite intending to provide television broadcasting services via satellite by means of decoders, failed to provide programme schedules as required by Regulation 5 (2)(j) of the Regulations regarding Licensing Procedures for Telecommunications and Broadcasting Services Licences and Spectrum Use Licences on 12 March 2014 as well as proof of broadcasting rights. This was requested by the Authority;
2. The Applicant further referred to a meeting with NBC and indicated that they (NBC) would work in conjunction with OVHD to have the NBC channels on the Platco Platform. There was however, no evidence submitted to the Authority confirming this;
3. The Authority again requested the Applicant in a letter dated 10 April 2014 to submit the outstanding information in respect of the thirteen (13) remaining channels. The Applicant replied on 25 April 2014 that it cannot submit broadcasting rights for CNN, DW (Deutsche Welle) or Christian Network Channels on Intelsat 20. This information did not correspond to the original content submitted with its application;
4. The Applicant further alluded to the fact the Platco is in discussion with NBC for the use of its platform. However, the Applicant did not submit any proof of liaison with the NBC in this regard;
5. Subsequently, the Authority again requested the Applicant in a letter 17 June 2014 to submit the outstanding information. No reply was received from the Applicant;
6. The Authority further requested the Applicant to submit a five year business plan to prove future sustainability in the offering of its intended broadcasting services on 6 October 2014. No reply was received from the Applicant; and
7. A final letter was sent to the Applicant on 29 January 2015 informing the Applicant that the Authority is unable to consider its application without receiving the outstanding information in respect thereof. The Applicant has not submitted any response herein to date.

The Authority therefore declined the application for a commercial broadcasting service licence to Applicant.

Spectrum Use Licence Application

Pursuant to the provisions of section 101(6) of the Act, an applicant may only be issued with a spectrum use licence, where the operation of a network or the provision of broadcasting service or the use thereof entails the use of radio waves.

Section 101(7) of the Communications Act stipulates as follows:

“When a person applies for a licence to operate a network or provide telecommunications services or broadcasting services, that person must also apply for such spectrum licences as are necessary to render the service concerned.”

Section 101(8) places a duty on the Authority to consider the application for spectrum in conjunction with the application for a service licence and to ensure that such spectrum use licence as may be required is issued to enable the applicant to render the services for which the service licence is issued.

Read jointly, these sections suggest that if an applicant has applied for a broadcasting service licence, it must also have such spectrum use licence as is necessary to render the service concerned and further that a spectrum use licence is required in addition to a broadcasting service licence. It also indicates that a spectrum use licence cannot be issued for the provision of broadcasting services in the absence of a broadcasting service licence.

Subsequently a decline to the awarding of a broadcasting service licence, would naturally be accompanied by a decline of a spectrum use licence, because frequencies for broadcasting may only be utilized with a broadcasting service licence.

The Authority therefore declines the application for a spectrum use licence submitted by TV Worx CC.

L.N. JACOBS
CHAIRPERSON OF THE BOARD OF DIRECTORS
COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

No. 234

2015

NOTICE IN TERMS OF SECTIONS 31 OF THE COMMUNICATIONS ACT, 2009 (ACT NO 8 OF 2009) AND REGULATIONS 19 AND 20 OF THE REGULATIONS REGARDING LICENSING PROCEDURES FOR TELECOMMUNICATIONS AND BROADCASTING SERVICE LICENCES AND SPECTRUM USE LICENCES

The Communications Regulatory Authority of Namibia, in terms of section 31 of the Communications Act, 2009 (Act No. 8 of 2009) read with regulations 19 and 20 of the “Regulations Regarding Licensing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences”, in Government Gazette No. 4785, Notice No. 272, dated 29 August 2011 (as amended), herewith gives notice that it has reconsidered the applications for a broadcasting service licence and a spectrum use licence by Nafish Trading CC t/a Amesho FM.

THE FOLLOWING ARE THE REASONS FOR THE DECISION:

Nafish Trading CC t/a Amesho FM (hereinafter referred to as “the Applicant”) submitted an application for a commercial broadcasting service licence and spectrum use licence in accordance with sections 85 and 101 of the Communications Act, 2009 (Act No. 8 of 2009) (hereinafter referred to as the “Act”) and regulations 5 and 6 of the Regulations regarding Licensing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences as published in Government Gazette No. 4785, General Notice No. 272 of 29 August 2011 (as amended), for providing FM Radio broadcasting services on 5 February 2014.

The Authority published its final decision to decline the application for a commercial broadcasting service licence and spectrum use licence in Oshakati submitted by Nafish Trading CC t/a Amesho FM in Government Gazette No. 5632, Notice No. 435 dated 15 December 2014.

The Applicant submitted an application for reconsideration to the Authority on 13 January 2015 in terms of section 30 of the Communications Act, 2009.

SUBSTANTIVE ISSUES DURING THE INITIAL APPLICATION

During the initial consideration of the application, the Authority took into account a number of concerns as indicated below-

- i. The Oshakati area is well serviced by seven (7) commercial broadcasters (Omulunga Radio, Radio Energy, Radio Kudu, Fresh FM, Radio 99, Radiowave, Cosmos Digital Namibia), one (1) community broadcaster (Media for Christ) and the Namibia Broadcasting Corporation (NBC). It should be noted that the NBC is broadcasting services in nine (9) languages and a national radio channel. All existing broadcasters have a national footprint that presents an attractive marketing platform for businesses to advertise their products.
- ii. That a power output of 250 W from Oshakati will not provide broadcasting services to areas further afield than Oshakati as envisaged in the business case submitted. The Applicant will be required to apply for additional frequencies to construct more broadcasting transmitters to meet its business objectives resulting in higher capital investment. However, the Applicant has made no provision in the 5 year business case that they submitted, for leasing of infrastructure and spectrum use licences in Oshakati or any other area mentioned in the business or during the oral submission. These expenses have a significant impact on business operations and the exclusion thereof in the business raised serious concerns with the Authority on the sustainability of the business going forward;
- iii. That the Applicant's market plan is unrealistic in that it envisages a turnover of more than ten million Namibian Dollars in the first year of operation. The Authority is of the opinion that no proper market research was conducted to support the turnover forecast as the Applicant was unable to provide any numbers relating to the small and medium enterprise market, that it wish to provide service to. In addition thereto, the business case is not comprehensive, because an analysis of expenses indicates that major expenses such as leasing of infrastructure and licensing fees are excluded from the business case;
- iv. That the sole shareholder of the Applicant has no experience in the media or broadcasting industry; and
- v. That Mr Ipinge intends to fund the Applicant from his other businesses and has submitted management accounts for Nafish Trading CC only. It is noted that financial resources are insufficient to sustain the Applicant over a long period of time. The Applicant stated that it has not secured a loan from any financial institution to date.

Factors and relevant facts considered in initial application

When considering the award of a broadcasting service licence, the Authority is obliged to consider the following provisions of section 85(8) of the Communications Act-

“(8) When considering an application for the issue of a broadcasting licence the Authority must have regard to-

- (a) *The character of the applicant or, if the application is a body corporate, the character of the directors;*
- (b) *the adequacy of the expertise, experience and financial resources available to the applicant;*
- (c) *the desirability or otherwise of allowing any person or association of persons, to have control of or a substantial interest in-*
 - (i) *more than one broadcasting service;*
 - (ii) *more than one radio station and one television station and one registered newspaper with a common coverage area and distribution area or significantly overlapping coverage and distribution areas;*

- (d) *whether the applicant is likely to comply with such technical broadcasting standards as the Authority may prescribe;*
- (e) *whether the conditions of a broadcasting licence will unjustly benefit one licensee above another;*
- (f) *the allocations of spectrum resources in such a manner as to ensure the widest possible diversity of programming and the optimal utilisation of such resources: Provided that priority may be given to broadcasters transmitting the maximum number of hours per day;*
- (g) *the reservation of radio wave spectrum resources for the future; and*
- (h) *the desirability of giving priority to community based broadcasts.”*

After due consideration of the above captioned matters, the Board of Directors declined the application for a commercial broadcasting service licence and spectrum use licence in Oshakati submitted by the Applicant. The Board of Directors was of the opinion that the Applicant did not comply with the factors listed in section 85(8)(b), (d) and (f) of the Act in that-

- i. The Applicant indicated that it will provide a loan from its other business to finance its intended broadcasting services and has not secured any loan from a financial institution. Further thereto no provision was made for leasing of infrastructure and spectrum use licence fees in Oshakati or additional transmitters and aforementioned operational expenses for other geographical areas in the 5 year business plan submitted by the Applicant.

In the opinion of the Authority, the Applicant therefore does not have sufficient financial resources to cover all operating expenses associated with the operation of a commercial broadcaster;

- ii. That the sole shareholder of the Applicant has no experience in the media or broadcasting industry and therefore failed to convince the Authority that it has adequate experience and expertise to provide quality broadcasting services;
- iii. Given the fact that spectrum is a scarce resource and that the Applicant did not prove to the Authority that it will add value to the current broadcasting services available by adding new content not already available in Oshakati and surrounding areas, the Authority is of the opinion that the objectives of section 85(8)(f) to ensure the optimal use of spectrum will not be achieved by awarding a commercial broadcasting service licence to the Applicant; and
- iv. In the light of the consideration of the information submitted with the application and during the oral submission and evaluation thereof based on the criteria as set out in section 85(8)(b) and (f) of the Communications Act, 2009, the Authority is of the view that the Applicant should not be awarded a commercial broadcasting service licence and spectrum use licence in Oshakati.

APPLICATION FOR RECONSIDERATION

The Authority published its final decision to decline the application for a commercial broadcasting service licence and spectrum use licence in Oshakati submitted by Nafish Trading CC t/a Amesho FM in Government Gazette No. 5632, Notice No. 435 dated 15 December 2014.

The Applicant submitted an application for reconsideration to the Authority on 13 January 2015 in terms of section 30 of the Communications Act, 2009.

GROUNDS FOR RECONSIDERATION

The Applicant did not provide any grounds to the Authority in support of its application for reconsideration other than submitting a revised business case. The Authority thus proceeded to re-evaluate the business case provided.

SUBSTANTIVE ISSUES ON RECONSIDERATION

Based on the new facts presented, the Applicant intends to finance its broadcasting operations via an owner's contribution and a bank loan. Although the Applicant has submitted a letter of intent from a bank, no amounts are mentioned and it is clearly indicated that the loan will only be considered should the Applicant meet the Bank's credit criteria.

It should further be noted that the Applicant has amended the initial amount to be provided by Nafish Trading CC to the current owner's contribution.

The Applicant has also submitted a quotation from SatCom (Pty) Ltd for the supply of transmitter equipment. This amount in itself constitutes 56.7% of the initial capital amount envisaged by the Applicant to establish its operations. As a result of limited funds are available for other operational expenses to be encountered before the commercial launch of broadcasting services.

In order to evaluate the financial projects submitted by the Applicant, the Authority compared the projects with financial data collected from existing commercial broadcasters in Oshakati. The national broadcaster was not included in the comparison as it receives funding from government to carry out its obligations.

The Authority used data from the following broadcasters to compare to the financial projections submitted by the Applicant – Fresh FM, Omulunga, Radiowave, 99FM, Cosmos Digital Namibia (Pty) Ltd and Radio Kudu. It should be noted that these broadcasters provide services on a national basis and are not limiting their services to Oshakati only and therefore are able to generate advertising revenue from a national customer base.

The results of the comparison showed that on average operational expenses represent 99.2% of revenue. That implies that the profit margins for commercial broadcasters are very small. It was noted that the Applicant envisages that operational expenses will constitute only 58% of revenue. In the opinion of the Authority the expenses have been understated and the revised business case is very ambitious taking into account that the Applicant will only be broadcasting in Oshakati with no national advertisements whilst competing with commercial broadcasting, who broadcast nationally and are already earning a very marginal profit. The Authority is therefore of the opinion that the business case is not viable and herewith confirms its earlier view that the Applicant does not have sufficient resources to set up the radio station.

The Applicant has not submitted a new programme schedule to provide the Authority with an insight as to whether he will be able to gain a competitive edge in the market or provide content different from current broadcasters in the same geographical area.

In light of the reconsideration of the information submitted with the application and evaluation thereof based on the criteria as set out in section 85(8)(b) and (f) of the Act and further in terms of section 31 of the Act and the Regulations regarding Licensing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences the Authority herewith declines to award a commercial broadcasting service licence and spectrum use licence in Oshakati to Nafish Trading CC t/a Amesho FM.

Kindly note that section 32(2) of the Act further provides that any person who has a substantial interest in any proceedings before the Authority may not take any decision, order, regulation or any other action that is made or taken by the Authority as a result of such proceedings, on review after a period of six months from the date on which that person has become aware of the decision, order, regulation or action concerned.

L.N. JACOBS

CHAIRPERSON OF THE BOARD OF DIRECTORS

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

No. 235

2015

**NOTICE OF INTENTION TO MAKE REGULATIONS TO IMPOSE A UNIVERSAL
SERVICE LEVY ON TELECOMMUNICATIONS SERVICE PROVIDERS:
COMMUNICATIONS ACT, 2009**

The Communications Regulatory Authority of Namibia, in terms of regulation 4(3) of the Regulations Regarding Rule-Making Procedures published as General Notice No. 334 of 17 December 2010 publishes this Notice of Intention to Make “Regulations to Impose a Universal Service Levy on Telecommunications Service Providers”, which contains the following:

1. A draft of the proposed Regulations as set out in Schedule 1;
2. A concise statement of the purpose for the proposed Regulations as set out in Schedule 2.

The public may make oral submissions to the Authority on the proposed regulations at a time, date and place notified by the Authority by subsequent notice in the *Gazette*.

The public may also make written submissions to the Authority no later than thirty-one days from the date of publication of this Notice of Intention to Make Regulations, in the manner set out below for making written submissions.

Reply comments to written submissions may be submitted to the Authority-

- (a) no later than fifteen days after the time for the making of written submissions has lapsed; or
- (b) if the opportunity for the submission of reply comments is published in a subsequent *Gazette*, after the lapse of fourteen days from the date of such publication.

All written submissions must-

- (a) contain the name and contact details of the person making the written submissions and the name and contact details of the person for whom the written submission is made, if different; and
- (b) be clear and concise.

All written submissions must be sent or given in any of the following ways:

1. By hand to the head offices of the Authority, namely Communication House, No 56 Robert Mugabe Avenue, Windhoek.
2. By post to the head offices of the Authority; namely Private Bag 13309, Windhoek, 9000;
3. By electronic mail to the following address: legal@cran.na;
4. By fax to email to: 0886550852

**L.N. JACOBS
CHAIRPERSON OF THE BOARD OF DIRECTORS
COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA**

SCHEDULE 1

PROPOSED REGULATIONS TO IMPOSE A UNIVERSAL SERVICE LEVY ON TELECOMMUNICATIONS SERVICE PROVIDERS: COMMUNICATIONS ACT, 2009

The Communications Regulatory Authority, in terms of sections 56 read with section 129 of the Communications Act, 2009 (Act No. 8 of 2009), makes the regulations set out in the Schedule.

SCHEDULE

Definitions

1. In these regulations, any word or expression to which a meaning is assigned in the Act, shall have the same meaning and –

“Act” means the Communications Act, 2009 (Act No. 8 of 2009);

“annual turnover” means a licensee’s total revenue determined from its financial statements;

“financial statements” means a licensee’s audited annual financial statements or, if a licensee is not required by law to audit its financial statements, its annual financial statements signed and sworn by the accounting officer of the licensee;

“licensee” means a person to whom a telecommunications license has been issued in terms of section 38 of the Act;

Submission of documents to the Authority

2. Whenever documents are required to be delivered to the Authority, such documents must be delivered physically or electronically –

- (a) by hand to an employee of the Authority at its principal place of business, being Communication House, No. 56 Robert Mugabe Avenue, Windhoek;
- (b) by post, mailed to Private Bag 13309, Windhoek;
- (c) by electronic mail sent to legal@cran.na;
- (d) by facsimile faxed to +264 61 222 790; or
- (e) in any other manner or to any other address specified by the Authority from time to time.

Imposition of universal service levy

3. (1) Every licensee must annually pay the universal service levies as indicated in the table below for each telecommunications service license the licensee holds:

Category of License	Annual Percentage Levy
Telecommunications – Individual Comprehensive (ECNS and ECS)	Universal Service Levy %=Minimum (0.5%, 0.0000000002*Turnover)
Telecommunications - Class ECNS	Universal Service Levy %=Minimum (0.5%, 0.0000000002*Turnover)

Telecommunications - Class ECS	Universal Service Levy %=Minimum (0.5%, 0.0000000002*Turnover)
Telecommunications - Class Comprehensive (ECNS and ECS)	Universal Service Levy %=Minimum (0.5%, 0.0000000002*Turnover)

* The formula selects the lower value out of 0.5% and 0.0000000002*turnover.

(2) In instances where a licensee holds any combination of licences, such licensee may calculate the levy based on its annual turnover from the aggregated revenue generated from the combined licences.

Payment of levies

4. (1) Levies payable in terms of these regulations must be paid no later than 6 months after the end of the licensee's financial year.

(2) The levies, penalties and any interest payable in terms of these regulations must be paid to the Authority by electronic transfer or by direct deposit into the Universal Fund Account, contemplated in the Regulations Prescribing the Provision of Universal Service by Telecommunication Service Licensees as will be published in the *Gazette*.

Interest and Penalties

5. (1) If a licensee fails to pay any levy due and payable in terms of these regulations, the licensee must pay interest on the overdue amount from the due date for payment of such levy to the date of payment, at the rate of three percent above the overdraft interest rate charged by the Authority's bankers.

(2) If a licensee fails to submit its financial statements 6 months after the end of its financial year, the licensee must pay a penalty of N\$10,000-00 per day for each day of its default, calculated from the date its financial statements were due to the date of submission thereof.

(3) If a licensee fails to pay any levy due and payable in terms of these regulations within 45 days after the due date for payment of such levy has lapsed, the licensee must pay, in addition to paying interest contemplated in sub-regulation (1), a late payment penalty of 25 percent of the overdue amount.

(4) If a licensee fails to pay any levy due and payable in terms of these regulations within 120 days after the due date for payment of such levy has lapsed, the licensee must, in addition to paying the interest contemplated in sub-regulation (1)-

- (a) pay a late payment penalty of 50% of the overdue amount; or
- (b) surrender its licence or licences to the Authority.

(5) If a licensee fails to submit its financial statements within 120 days after the due date for submission of such statements has lapsed, the licensee must-

- (a) pay a penalty of N\$10,000-00 per day for each day calculated from the date its financial statements were due to the date of submission thereof; or
- (b) surrender its licence or licences to the Authority.

(6) If, within 6 months after due date, a licensee-

- (a) fails to pay any levy due and payable in terms of these regulations;

- (b) fails to submit its financial statements; or
- (c) fails to pay interest or the late payment penalties contemplated in this regulation; and
- (d) does not surrender its licence or licences to the Authority,

the Authority may declare all licenses held by the licensee cancelled and may impose a penalty not exceeding N\$5,000,000.00.

(7) Before declaring any licence of a licensee as cancelled in terms of sub-regulation (5) and before imposing any penalty contemplated in this regulation the Authority must follow the procedures specified in sub-regulations (7) and (8) hereunder.

(8) The Authority must give the licensee referred to in sub-regulation (7) an opportunity to be heard and must grant a period of not less than 14 days to the licensee within which to make representations to the Authority on the question of whether or not any license of the licensee should be cancelled or any penalty imposed.

(9) After consideration of the representations referred to in sub-regulation (6) or, if no such representations have been made, the Authority must determine if the licensee's license should be declared as cancelled or if a penalty must be imposed, as the case may be.

SCHEDULE 2

CONCISE STATEMENT OF THE PURPOSE OF THE PROPOSED REGULATIONS

The purpose of the proposed Regulations to Impose a Universal Service Levy on Telecommunications Service Providers is to:

- (a) impose a universal service levy to be paid into the Universal Service Fund in terms of section 56(2) of the Act; and
- (b) prescribe the criteria for the disbursements of the Fund and the implementation of Fund Projects pursuant to section 56 of the Act.

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

No. 236

2015

NOTICE OF INTENTION TO MAKE REGULATIONS PRESCRIBING THE PROVISION OF UNIVERSAL SERVICE BY TELECOMMUNICATIONS SERVICE LICENSEES: COMMUNICATIONS ACT, 2009

The Communications Regulatory Authority of Namibia, in terms of regulation 4(3) of the Regulations Regarding Rule-Making Procedures published as General Notice No. 334 of 17 December 2010 publishes this Notice of Intention to Make "Regulations Prescribing the Provision of Universal Service by Telecommunication Service Licensees", which contains the following:

1. A draft of the proposed Regulations as set out in Schedule 1;
2. A concise statement of the purpose for the proposed Regulations as set out in Schedule 2.

The public may make oral submissions to the Authority on the proposed regulations at a time, date and place notified by the Authority by subsequent notice in the *Gazette*.

The public may also make written submissions to the Authority no later than thirty-one days from the date of publication of this Notice of Intention to Make Regulations, in the manner set out below for making written submissions.

Reply comments to written submissions may be submitted to the Authority-

- (a) no later than fifteen (14) days after the time for the making of written submissions has lapsed; or
- (b) if the opportunity for the submission of reply comments is published in a subsequent *Gazette*, after the lapse of fourteen (14) days from the date of such publication.

All written submissions must-

- (a) contain the name and contact details of the person making the written submissions and the name and contact details of the person on behalf of whom the written submission is being made, if a different person is making such submission; and
- (b) be clear and concise.

All written submissions must be sent or submitted in any of the following manners:

1. By hand to the head offices of the Authority, namely Communication House, No 56 Robert Mugabe Avenue, Windhoek.
2. By post to the Authority; namely Private Bag 13309, Windhoek, 9000;
3. By electronic mail to the following address: legal@cran.na;
4. By fax to email to: 0886550852
6. By facsimile faxed to +264 61 222 790;

L.N. JACOBS
CHAIRPERSON OF THE BOARD OF DIRECTORS
COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

SCHEDULE 1

PROPOSED REGULATIONS PRESCRIBING THE PROVISION OF UNIVERSAL SERVICE BY TELECOMMUNICATIONS SERVICE LICENSEES: COMMUNICATIONS ACT, 2009

The Communications Regulatory Authority, in terms of section 57 read with sections 23, 41 and 129 of the Communications Act, 2009 (Act No. 8 of 2009), provides for the making of these regulations set out in this Schedule.

PART 1

Definitions

1. In these regulations, unless the content indicates otherwise, any word or -expression to which a meaning is assigned in the Act, shall have the same meaning and –

“Act” means the Communications Act, 2009 (Act No. 8 of 2009);

“Emergency centres” means centres that facilitate the carrying out of emergency communications to emergency organisations;

“Emergency organisations” means-

- (a) any police force;
- (b) a private or public health organization rendering ambulance services;
- (c) any traffic authority;
- (d) a fire brigade;
- (e) a coast guard; or
- (f) any other organization providing assistance to the public in case of emergency;

“Fund” means the Universal Service Fund as defined in section 1 of the Act;

“Health facility” means a health facility as defined in section 1 of the Hospitals and Health Facilities Act, 1994 (Act No. 36 of 1994);

“Higher education institution” means any institution established by or under any law or -registered as a higher education institution in terms of the Higher Education Act, No. 26 of 2003;

“Hospital” means a hospital as defined in section 1 of the Hospitals and Health Facilities Act, 1994 (Act No. 36 of 1994);

“ICT” means information and communications technology;

“Licensee” means a person to whom a telecommunications service license has been issued in terms of section 38 of the Act or deemed to hold such licence as contemplated in terms of section 45 of the Act;

“Market gap analysis” means the process of identifying and evaluating the requirements of a geographic area, market segment or target population and possible solutions to meet these requirements, and includes the identification of the true access gap zone and the smart subsidy zone;

“School” means any primary, secondary or special school as defined in the Education Act, 2001 (Act No. 16 of 2001);

“Smart-subsidy zone” means a specific geographic area, a segment of the Namibian population or other segment of the telecommunications market, which is unable to use telecommunication services and may require a subsidy to mitigate commercial risks, making the area or segment, as the case may be, more attractive to commercial operators;

“Status quo analysis” means an analysis of the current state of the ICT industry in a specific geographic area, a segment of the Namibian population or other segment of the telecommunications market including universal access and universal service provision;

“True access gap zone” means a specific geographic area, a segment of the Namibian population or other segment of the telecommunications market that is beyond the smart subsidy zone and commercial viability;

“Universal access” means the availability, affordability and accessibility of telecommunication services to the general public through public access points in accordance with the processes and criteria set out in these regulations;

“Universal service provision” means the extent of universal access to electronic communications services that are provided at affordable prices and identified by following the processes and criteria provided for in these Regulations for universal services; and

“Website” means the Authority’s official website with the uniform resource locator, www.cran.na.

Submission of documents to the Authority

2. Whenever documents are required to be delivered to the Authority, such documents must be delivered physically or electronically –

- (a) hand-delivered to an employee of the Authority at its principal place of business, being Communication House, No. 56 Robert Mugabe Avenue, Windhoek;
- (b) by post mailed to Private Bag 13309, Windhoek;
- (c) by electronic mail sent to operations@cran.na;
- (d) by facsimile faxed to +264 61 222 790; or
- (e) in any other manner or to any other address specified in writing by the Authority from time to time.

Minimum telecommunications services to be made available by licensee

3. The following telecommunications services are the minimum set of services that a licensee must make available-

- (a) fixed, mobile or broadband data services; or
- (b) fixed and mobile voice services; or
- (c) any electronic communications service that the Authority determines in writing.

Telecommunications facilities and services

4. (1) A licensee must, subject to its licence conditions, and as a minimum number make the following telecommunications facilities or services available to a community with a size of not less than fifty persons:

- (a) The services referred to in regulation (3);
- (b) infrastructure and facilities for the provision of the services referred to in regulation 3;
- (c) equipment and end user devices supporting the provision of the services referred to in regulation 3; and
- (d) end-user training and skills development.

(2) Notwithstanding sub-regulation (1) the Authority may provide subsidies to a licensee to make the services referred to in regulation 3 available in accordance with the requirements set out in these Regulations to a community with less than 50 persons but consisting of-

- (a) persons with disabilities;
- (b) elderly persons and other recipients of social grants; and
- (c) any other categories of users able to justify the need for universal service access on merit.

Telecommunications services and equipment

5. (1) A licensee must-

- (a) make the services referred to in regulation 3 available to; and
- (b) have available the equipment and end-user devices, duly type-approved by the Authority, necessary to support the provision of the services referred to in paragraph (a) in order to provide in the telecommunications needs of,

the categories of communities and customers specified by sub-regulation (2).

(2) The categories of communities and customers contemplated by sub-regulation (1) include-

- (a) small and medium enterprises and other informal business entities in both urban and rural communities;
- (b) non-governmental organizations engaged in promoting democratic participation and social welfare;
- (c) workers and communities in mines, farms, nature reserves and conservancies;
- (d) registered and recognised organisations representing persons with disabilities; and
- (e) households in both urban and rural areas.

Telecommunications services available to the public

6. (1) A licensee must make the services referred to in regulation 3 available to the general public or the category of place that serves the needs of the public or that are available for use by the public specified by sub-regulation (2).

(2) The category of place contemplated by sub-regulation (1) includes a school, higher education institution, library, hospital, clinic, health facility, or any similar public institution.

Deployment of technology

7. The Authority may within such period as the Authority deems fit require a licensee to provide periodic reports and returns regarding universal service provision and universal access and such other information concerning the implementation of these Regulations stipulated by the Authority in writing.

Administration of Fund

8. (1) The Authority must, to facilitate the administration of the Fund, open a bank account with a banking institution as defined in section 1 of the Banking Institutions Act, 1998 (Act No. 2 of 1998),

(2) The universal service levy referred to in section 56(2) of the Act and any other monies allocated for the provision of universal services must be paid into the account referred to in sub-regulation (1).

(3) The account referred to in sub-regulation (1) must be-

- (a) a separate account from the account established by the Authority for its operations;
- (b) used to defray the expenses directly relating to the administration, control and accounting of the Fund;
- (c) used to pay subsidies to licensees to subsidize universal service provision or the provision of infrastructure necessary for such service provision.

(4) The Chief Executive Officer of the Authority is responsible for the accounting of payments made to and from the Fund and for that purpose must keep or cause the keeping of proper accounts and records of the account referred to in sub-regulation (1) as are necessary to represent fairly the state of affairs of the Fund.

(5) The account referred to in sub-regulation (1) must be audited annually in the manner contemplated by section 58(2) of the Act.

Universal service department

9. (1) In order to ensure proper management and separate accounting of the Fund, and the proper management of universal access and service projects, the Authority has established a universal service department as part of its organizational structure.

(2) The universal service department shall-

- (a) strive to promote the goals of universal access and universal service provision as propounded in the Universal Service Policy as published in Government Gazette No. 5169, General Notice No. 82 on 08 April 2013 and the Act;
- (b) regularly conduct research into and keep abreast of national and international ICT developments and of universal access and universal service provision initiatives;
- (c) work closely with other departments of the Authority to reach its objective in monitoring and evaluating compliance with universal access and universal service provision obligations of relevant licensees ;
- (d) request from relevant licensees any information, documentation or reports, as may be necessary to perform its functions;
- (e) implement business processes including but not limited to the preparation of bid or tender documents, invitations to bid or tenders and communicating the outcomes of tender or bid processes;
- (f) conduct project management for the implementation and completion of contracts or any projects as may be approved by the Authority;

- (g) Cause the Authority to initiate legal or other proceedings in instances where licensees fail to comply with their obligations in terms of the Act, these regulations or any other applicable laws relating to universal access and service.
- (3) In conducting its research and monitoring functions, the universal service department, in conjunction with other departments, must conduct the following research:
- (a) Bi-annual data collections evaluating the extent to which universal service provision has been achieved;
- (b) a market gap analysis inclusive of status quo analyses able to identify the true access gap and the smart-subsidy zone, which analysis must be subjected to a public consultation process.
- (4) The market gap analysis referred to in sub-regulation (3)(b) must be conducted within 6 months of publication of these Regulations, and at least once every three years thereafter.
- (5) The final reports of the bi-annual data collections and market gap analysis referred to in sub-regulation (3) must be made available to the public and should be used to implement the processes necessary to address any lack of universal service provision identified therein.
- (6) The Authority must review the scope of universal service provision after three years following the completion of a market gap analysis.

Implementation of Fund projects

10. The universal service department is responsible for project management of every accepted tender proposal and allocation of subsidies related to universal service provision, and particularly to –

- (a) ensure compliance by the licensee with the agreement concluded in terms of regulation 11(12) including adherence to time frames and submission of reports;
- (b) inform the Authority timeously of any instances of non-compliance;
- (c) conduct independent assessment of compliance by licensee;
- (d) regularly assess whether the implemented project has had the impact as envisaged by the strategic plan of the Authority and the universal services department.

Fund disbursements and tender procedures

- 11.** (1) Monies from the Fund may only be disbursed-
- (a) upon approval by the Chief Executive Officer for the payment of expenses connected to the administration, control and accounting of the Fund;
- (b) upon a specific order by the Authority in terms of section 57(3) of the Act;
- (c) upon the award of a tender or bid after the Authority has invited tenders or bids by notice in the *Gazette* and after following a competitive tender process for any purpose related to universal service provision;
- (d) upon the award of a subsidy in terms of these regulations; or

- (e) For a process related to universal service provision and access to ICT if in any particular case, the Authority on good grounds deems it impracticable or inappropriate to invite tenders.
- (2) When awarding tenders and subsidies from the Fund, preference may be given to projects designed to address the smart subsidy zone.
- (3) Funds referred to in paragraphs (c) and (d) of sub-regulation (1) must be disbursed upon the completion of a competitive tender process as provided for in the Authority's Policy and Procedures Manual on Procurement Management, publicly available on the Authority's website.
- (4) The tender committee as defined and referred to in the Authority's Policy and Procedures Manual on Procurement Management is responsible for tender processes contemplated in these regulations.
- (5) In addition to the provisions contained in the Authority's Policy and Procedures Manual on Procurement Management, the tender process for the disbursement of funds from the Universal Service Fund requires the following procedures:
- (a) The Authority must publish in the *Gazette* and in at least two newspapers circulated throughout Namibia a request for tenders, including the tender requirements and information on the period within which such applications are to be made and the documents required by the universal service tender committee to select potential bidders;
- (b) If the request for tenders is made in terms of section 57(7) of the Act, such request must contain at least the following information, where applicable:
- (i) instructions to bidders for preparing tender proposals;
 - (ii) technical and quality related characteristics of the goods to be procured or the services to be rendered or the nature of the rights to be acquired or granted, which may include technical specifications, plans and drawings;
 - (iii) clarification on whether the pricing proposal and technical proposal must be submitted separately;
 - (iv) the manner in which the proposals in response to the tender has to be submitted, as well as the place and closing date for the submission of tenders;
 - (v) the period during which the tender proposals are in effect;
 - (vi) tender security to be furnished and conditions for its refund; and
 - (vii) public opening of bids.
- (6) The Authority may by notice in the *Gazette* stop a process of competitive bidding before the process has been completed.
- (7) The tender committee may not consider a tender proposal unless it complies with or does not materially alter or depart from all the characteristics, terms, conditions and other requirements set out in the request for tenders and the requirements set out in these regulations and the Authority's Policy and Procedures Manual on Procurement Management.

(8) The tender committee may at any time request further information from any bidder to clarify any matter related to the tender proposal, in such manner as may be determined by the committee in the examination, evaluation and comparison of tender proposals.

(9) If the bidder fails to comply with a request in terms of sub-regulation (8) or if the bidder resorted to corrupt practices to influence the committee in the selection of the tender, the committee may decide not to consider the bidder's tender proposal, provided that all the reasons for not considering a tender proposal are kept on record.

(10) All bidders must be notified in writing of the acceptance or rejection of their tender proposals and upon request must be furnished with the reasons for the tender committee's decision.

(11) All bidders must be informed of the name of the bidder whose tender proposal was accepted.

(12) Within 30 days from the date on which the bidder was notified of the acceptance of a tender proposal the Authority must conclude a written agreement with the bidder.

(13) The written agreement must include, but is not limited to, the following express requirements –

- (a) baseline information;
- (b) measurable deliverables;
- (c) timelines;
- (d) regular reporting requirements;
- (e) the conclusion of a service level agreement, where applicable;
- (f) repair and maintenance obligations, where applicable;
- (g) training services, where applicable;
- (h) payment schedules based on achievement of project deliverables;
- (i) monitoring and evaluation requirements;
- (j) penalty clauses; and
- (k) quality of service requirements, where applicable.

(14) The tender committee may withdraw the acceptance of a tender and accept the tender of another bidder or invite new tenders if the successful bidder fails to –

- (a) within 30 days after acceptance of a tender, enter into an agreement with the Authority, unless such period is extended by agreement between the Authority and the bidder, or
- (b) furnish security for the performance of the agreement, when required.

(15) After a tender award has been made upon completion of the tender process, any person may during normal business hours examine the applications and proposals received by the Authority in response to a tender request as well as the list of bidders and cost offers in respect of the tenders, and copies may be made thereof against payment of a fee determined by the Authority.

Subsidies for universal service

12. (1) Only licensees are eligible to receive subsidies from the Fund, subject to the Fund's projects and priorities determined by the Authority.

(2) The awarding of subsidies by the Fund to licensees embarking on projects aimed at universal service provision and universal access to-

- (a) schools and higher education institutions;
- (b) state hospitals and state health facilities;
- (c) emergency centres;
- (d) registered and recognised organisations representing persons with disabilities;
- (e) and any other projects as determined by the Authority

will enjoy priority.

Penalties

13. (1) Any licensee who fails to-

- (a) comply with its obligations set out in regulation 3 to 7;
- (b) submit any report, return or provide any information as required by the Authority within the period determined by the Authority in terms of these Regulations or, if such period has been extended by the Authority under regulation 14, within the extended period,

is guilty of contravening these Regulations.

(2) Where a licensee is guilty of contravening these Regulations in accordance with subregulation (1), the Authority may-

- (a) issue to a licensee a written warning and final date for submitting outstanding reports, returns or information, as the case may be;
- (b) require the licensee to implement a remedial plan within a time frame agreed with the Authority and submit additional information about the manner in which the licensee must comply with the regulations referred to in subregulation (1)(a);
- (c) impose a penalty of not more than N\$10,000.00 for each day during which a licensee fails to submit reports, returns or information as required by the Authority in accordance with subregulation (2)(b);
- (d) impose a penalty of not more than N\$500,000.00 for submitting or causing the submission of false or misleading information to the Authority;
- (e) impose a penalty not exceeding N\$1,000,000.00 for -
 - (i) each contravention of the regulations;
 - (ii) each repeated contravention of the regulations,

referred to in subregulation (1)(a);

- (f) impose a penalty not exceeding N\$5,000,000.00 for failure to implement the remedial plan referred to in subregulation (2)(b); or
- (g) take any other measure the Authority regards as reasonable in the circumstances.

(3) Any amount of penalty payable in terms of paragraphs (c), (d), (e) or (f) of subregulation (2) constitutes a debt due to the Authority by the licensee concerned and may be recovered by the Authority by means of proceedings instituted in any competent court.

(4) Notwithstanding the provisions of subregulations (2) and (3), the Authority may, on good cause shown, waive the payment of a penalty or refund the whole or any part of a penalty already paid at its sole discretion.

(5) Before imposing any penalty as contemplated by paragraphs (c), (d), (e) or (f) of subregulation (2), the Authority must give an affected licensee the opportunity to be heard in accordance with the rules of natural justice, whereafter the Authority may-

- (a) decide not to impose any penalty;
- (b) impose such penalty the Authority deems fit.

Request for extension of time

14. (1) If a licensee is unable to comply with any time period set for doing any act or taking any step in connection with its obligations in these regulations, the licensee may request the Authority for an extension of time at least 7 days prior to the time set, or within such other time period agreed by the Authority upon good cause shown.

(2) The Authority will respond to the request referred to in sub-regulation (1) as soon as practicable, and may grant or deny the request, depending on the reasons for non-compliance with the time period in question.

SCHEDULE 2

CONCISE STATEMENT OF THE PURPOSE OF THE PROPOSED REGULATIONS

The purpose of the proposed Regulations Prescribing the Provision of Universal Service by Telecommunication Service Licensees is:

- (a) To give effect to the provisions of Sections 56 and 57 of the Act providing for the establishment of the Universal Service Fund and the provision of Universal Access and Service in Namibia;
 - (b) To prescribe the scope of universal service provision in Namibia and eligible persons entitled to subsidies;
 - (c) To prescribe the minimum telecommunications services to be made available by licensees as required by the Act;
 - (d) To prescribe ancillary matters in terms of and in support of the provisions of sections 56 and 57 of the Act.
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