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OF THE

REPUBLIC OF NAMIBIA

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General Notices

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

No. 32

2015

NOTICE IN TERMS OF SECTION 53 OF THE COMMUNICATIONS ACT, 2009 (ACT NO. 8 OF 2009) READ WITH THE REGULATIONS REGARDING THE SUBMISSIONS OF INTERCONNECTION AGREEMENTS AND TARIFFS

The Communications Regulatory Authority of Namibia, in terms of section 53 of the Communications Act 2009 (Act No. 8 of 2009) hereinafter referred to as the “Communications Act”) read with regulation 8 of the Regulations Regarding the Submission of Interconnection Agreements and Tariffs as published in Government Gazette No. 4714, Notice No. 126, dated 18 May 2011, herewith gives notice that it has approved the High Speed Broadband Asymmetric Permanent Packages as

submitted by **Telecom Namibia Limited** which came into force and effective, from 1 September 2014, notwithstanding date of publication.

REASONS FOR THE APPROVAL OF THE TARIFFS:

Telecom Namibia Limited (hereinafter referred to as “Telecom Namibia”) filed for the approval of tariffs for High Speed Broadband Asymmetric Permanent packages on 1 July 2014 in terms of section 53 (1) and (7) of the Communications Act.

The proposed tariffs were published for public comments, in General Notice No. 286 in the Government Gazette No. 5534 dated the 15 August 2014. Comments were received from Paratus Telecom (Pty) Ltd in respect of the tariffs, and as such reply comments were required from Telecom Namibia. However, no reply comments were received from Telecom Namibia. The tariffs were submitted on 1 July 2014 and the date of implementation is 1 September 2014, been 60 days from date of submission as required by section 53 (8) of the Communications Act.

High Speed Broadband Asymmetric

Package	5M	10M	15M	25M	50M	75M	100M	120M	150M	200M
Downlink Speed	5M	10M	15M	25M	50M	75M	100M	120M	150M	200M
Uplink Speed	2M	5M	7M	10M	15M	25M	35M	40M	50M	70M
Monthly Charge (N\$) (12-month)	1,285	1,978	2,629	3,879	6,899	10,149	13,389	15,849	19,659	26,249
Monthly Charge (N\$) (24-month)	1,157	1,780	2,366	3,491	6,209	9,134	12,050	14,264	17,693	23,624
Monthly Charge (N\$) (36-month)	1,092	1,681	2,235	3,297	5,864	8,627	11,381	13,472	16,710	22,312

Note: Installation charges of **N\$222** within minimum rental area and **N\$333** outside minimum rental area will be applied.

High speed Broadband Symmetric

Package	1M	2M	5M	10M	15M	25M	50M	75M	100M	150M	200M
Downlink Speed	1M	2M	5M	10M	15M	25M	50M	75M	100M	150M	200M
Uplink Speed	1M	2M	5M	10M	15M	25M	50M	75M	100M	150M	200M
Monthly Charge (N\$) (12-month)	999	1,175	1,709	2,595	3,479	5,255	9,689	14,245	18,149	27,019	36,415
Monthly Charge (N\$) (24-month)	899	1,058	1,538	2,336	3,131	4,730	8,720	12,821	16,334	24,317	32,774
Monthly Charge (N\$) (36-month)	849	999	1,453	2,206	2,957	4,467	8,236	12,108	15,427	22,966	30,953

Installation charges of **N\$222** within minimum rental area and **N\$333** outside minimum rental area will be applied.

Notes on costs of 2 Meg uplink /downlink:

The tariff packages submitted are competing with the Speedlink packages. The same price will be charged for home and business customers. However, operators will be offered a 15% discount on retail pricing. All packages in this submission will be offered as unlimited/uncapped.

The Customer Premises Equipment (CPE) is excluded and charged for separately (customers will have the option to rent or purchase the CPE of their choice).

The tariffs as submitted provide customers with a wider choice of products and services and are at the same time competing against the Speedlink packages also offered by Telecom Namibia.

All requirements in terms of section 53 of the Act that deals with the approval of tariffs have been adhered to as follows:

1. The tariffs were published as stipulated in section 53(10) for comment and Telecom Namibia stated that the tariff would come into force on 1 September 2014 as required by section 53(8) of the Act that the Licensee has to indicate the date that the tariffs will come into force.
2. All pertinent information as required by section 53(9) was submitted to the Authority such as the terms and conditions, which includes rights and remedies available to customers in the event of disputes.

In light of the above, the Authority approved the tariffs for High Speed Broadband Asymmetric Permanent packages. Since these tariffs and packages offered are competitive offers, it might create more competitive pressure in the market which might lead to lower prices in the long run. As such the tariffs are reasonable, are not deemed discriminatory or impairing competition.

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

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

No. 33

2015

**NOTICE IN TERMS OF SECTIONS 85 AND 101 OF THE COMMUNICATIONS ACT, 2009
(ACT NO. 8 OF 2009) AND REGULATION 19(1) REGARDING LICENSING PROCEDURES
FOR TELECOMMUNICATIONS AND BROADCASTING SERVICE LICENCES AND
SPECTRUM USE LICENCES**

The Communications Regulatory Authority of Namibia, in terms of section 85 and 101 of the read with regulation 19(1) 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 the application for a Commercial Broadcasting Service License and Spectrum Use Licence for **Digital Satellite Television (Pty) Ltd** (hereinafter referred to as “Digisat”) Limited has been declined.

THE FOLLOWING ARE THE REASONS FOR THE DECISION:

1. INTRODUCTION

- i. Digisat submitted a broadcasting licence application to the Namibian Communications Commission (NCC) prior to the commencement of the .
- ii. Digisat also submitted an application for a broadcasting service licence to the Authority dated 13 March 2013 in terms of section 135(11) of the Communications Act. Digisat submitted all previous correspondence with the Namibian Communications Commission dating back to 19 March 2007 to the Authority. The Authority is therefore, considering this application in terms of Section 135 (10) (11) of the Act.
- iii. From the outset, it must be noted that because this application was pending before the Namibian Communications Commission, it was dealt with in terms of section 135(10) of the Act and therefore, procedurally the requirements in the Regulations Regarding Transitional

Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences will be applicable.

- iv. As indicated above, the application was amended in terms of section 135(11) to ensure compliance with the provisions of the Communications Act, the Regulations Regarding Licensing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences, will be used to determine compliance with substantive provisions.

2. BACKGROUND TO APPLICATION

It is important to note that the correspondence between the Namibian Communications Commission and Digisat was used to validate the application in terms of Section 135 (10) of the Act and Regulations regarding Transitional Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences. These various correspondences between Mbok Investments Company Ltd on file with the Authority and NCC forms the basis for the Authority's decision to consider the application in terms of Section 135(10) of the Communications Act, 2009.

2.1 Background to the application under the Communications Act

- i. Mbok Investments Company Ltd submitted a letter to the Authority on 12 June 2012 providing a background on its structure and affiliations, raising several questions in relation to digital television and also attaching the correspondence between Mbok Investments Company Ltd and the Namibian Communications Commission as referred to above.
- ii. In January 2013, the Authority conducted an assessment on how it should deal with the applications submitted by Mbok Investments Company Ltd, both to the then Namibia Communications Commission and to the Authority. It was noted that there is ample correspondence on file that demonstrates Mbok Investments Company Ltd.'s desire is to have its services licensed and regulated.
- iii. The lengthy correspondence with the Namibian Communications Commission evidences that Mbok Investments Company Ltd has been in constant contact with the Namibia Communications Commission in as far as getting its services licensed is concerned. However, it is not clear why Mbok Investments Company Ltd did not submit the information form within 60 days after the commencement of the Act, as required by the Regulations Regarding Transitional Procedures for Telecommunication and Broadcasting Service Licences and Spectrum Use Licences as published in Government Gazette No. 4737, Notice No. 171 dated 17 June 2011.
- iv. In the premise, the Authority was of the view that owing to the fact that an application for broadcasting service licence had already been submitted to the Namibia Communications Commission, Mbok Investments Company Ltd must be allowed, to submit an information form and amend its application in terms of section 135(11).
- v. On 5 February 2013, the Authority directed a letter to Mbok Investments Company Ltd advising that the Company must submit information forms as provided for in the Regulations Regarding Transitional Procedures for Telecommunication and Broadcasting Service Licences and Spectrum Use Licences. The Authority received an application for a commercial broadcasting service licence from Digisat Satellite Television (Pty) Ltd, owned by the Mbok Family Trust on 15 March 2013.
- vi. The aforementioned application was accompanied by a spectrum use licence application form indicating that Mbok Investments Company Ltd solely relies on satellite broadcasting and will therefore, not require terrestrial television frequencies to provide broadcasting services.
- vii. It must be noted that all correspondence with Namibia Communications Commission was in the name of Mbok Investments Company Ltd, however, the forms submitted to CRAN were in the name of Digisat.
- viii. We will therefore, refer to applicant as Digisat from here going forward.
- ix. Digisat submitted the following outstanding information as requested by the Authority on 16th of May 2013 in terms of Regulation 9(8) and (9) of the Regulations regarding Transitional

Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences;

- (a) The physical address for Digisat Ltd;
- (b) Programme schedule detailing daily transmission times allocated to different programme types;
- (c) Certified copies of company registration;
- (d) Statement of accounts setting out financial resources available; and
- (e) Expertise and experience of the applicant.

3. PROCEDURAL COMPLIANCE

Following due process in terms of the Regulations Regarding Transitional Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences, the Authority published a notice in the Government Gazette 5282, Notice No. 354, dated 12th September 2013 allowing thirty (30) days for public comment as required by regulation 9(3) of the aforementioned Regulations. No public comments were received and subsequently, no reply comments were requested from Digisat.

4. SUBMISSION TO BOARD FOR APPROVAL

- i. On 13 November 2013, the Authority made a submission to the Board for the approval of the issuance of a broadcasting service licence to Digisat.
- ii. In the submission, the Authority took into account that Digisat has an existing customer base that will be affected financially should a commercial broadcasting service licence not be issued to Digisat, enabling it to continue with the provision of services. It was further noted that the customers have entered into legally binding agreements with Digisat.
- iii. The submission further noted that there is limited competition within the subscription based broadcasting market in Namibia, which presents customers with limited choice in selecting television-broadcasting services. It was therefore, recommended that Digisat should be awarded with a commercial broadcasting service licence.
- iv. The submission was made on circulated board resolution in terms of section 15 of the Communications Act. The recommendation was declined by one of the Directors and was referred to full Board. Please note that it is custom that if a recommendation is declined by one member, it must be discussed at full Board.

5. BOARD MEETING 08 AUGUST 2014

- i. At its ordinary meeting held on 8 August 2014, the Board discussed the matter and resolved that:
 - a) The Authority must seek an opinion to ascertain whether the ownership structure submitted by Digisat complies with the provisions of section 85(3) of the Act;
 - b) That the legal opinion must also clarify whether the character of the applicant complies with the provisions of section 85(8) of the Communications Act;
 - c) That the Authority should confirm the nationality of the applicant with the Ministry of Home Affairs and Immigration;
 - d) That a letter must be addressed to applicant informing him that his application is still under consideration;
 - e) That it is of the opinion that Digisat is providing services illegally without a license and that the Authority must proceed to invoke the provisions of section 114-116 of the Communications Act.
 - f) That the Authority should issue a media release informing the public that Applicant is not licensed to provide services and that it should cease to provide any broadcasting services with immediate effect.

6. SUBSTANTIVE ISSUES

6.1 Ownership interest in Digisat

i. Section 85(2) of the Communications Act provides as follows:

Subject to subsection (3) and (4), the Authority may issue a broadcasting licence only to –

- (a) a Namibian citizen; and
- (b) a juristic person of which at least 51 percent of the shareholding is beneficially owned by Namibian citizens and which is not controlled directly or indirectly by persons who are not Namibian citizens and which has its principal place of business or registered office in Namibia (Our emphasis).

ii. The application submitted to the Authority on 15 March 2013, states that Digisat is owned wholly by the Mbok Family Trust. The Deed of Trust as submitted by Mr. Mbok to the Authority indicates that five of Mr. Mbok's children are the beneficiaries. However, the Authority obtained a certified copy of the Trust Deed from the office of the Master, which reflects that four of Mr. Mbok's children are the beneficiaries of the Mbok Family Trust.

iii. Clause 7.6 of the Trust Deed reads as follows:

“The office of a trustee shall be deemed to have been vacated if the majority of the Trustees then in office, by written instrument, requires him or her to resign. Provided that it shall not be competent for the other Trustees to require the founder to resign as a Trustee”.

iv. Clause 18 of the Trust Deed provides that the trustee has “absolute” discretion with regard to the appropriation of income and capital of the Trust for the education of the beneficiaries.

v. It is trite law that a Trust is a separate legal entity, but neither a legal *persona* nor a juristic person. A trust is created by a contract referred to as a Trust Deed and does not have shareholders. The elements of a trust are a founder, a trustee and a beneficiary. The common law does not recognize a Trust as a juristic person.

vi. The critical question that the Authority considered in ascertaining compliance with the provisions of section 85(2) (b), is whether the shareholding in Digisat is beneficially owned by Namibian citizen/s and not controlled directly or indirectly by persons who are not Namibian citizens.

vii. Therefore, in order for Digisat to be awarded a licence, the Authority must amongst other matters, establish the following:

- a) That at least 51 per cent of its shareholding is beneficially owned by Namibian citizens;
- b) That it is not controlled by foreign nationals (whether directly or indirectly); and
- c) That it has its principal place of business registered in Namibia.

viii. The Authority notes that the provisions of section 85(2) are not in the alternative to each other and is of the view that the Legislature intended that all the above requirements must be met by an applicant.

ix. The application for the broadcasting service and for the spectrum use licence indicates that Mr. Mbok, one of the directors of Digisat, is a foreign national (Cameroonian). The question to be asked to satisfy Section 85(2) (b) is thus whether Mr. Mbok controls (directly or indirectly) the company in question. The Authority is of the view that the answer to that

question is intertwined with the fact that the company is a wholly owned subsidiary of the Mbok Family Trust and that the foreign national is the only Trustee in the said trust.

6.2 The beneficial ownership of Digisat

- i. As indicated above, the facts reveal that Digisat is a wholly-owned subsidiary of the Mbok Family Trust. Since the trust was incorporated in Namibia, the next enquiry is whether it owns the shares for its own benefit or whether the benefit in the shareholding is enjoyed by other persons. This is referred to as the *conduit* principle.
- ii. The Board in considering the aforesaid question took due regard to the law and legal events governing ownership of entities.
- iii. A scrutiny of the trust deed shows that:
 - a) The founder and sole Trustee is Mr. Antonie Mbok (clause 4.1 of the trust deed); and
 - b) The beneficiaries are Mr. Mbok's five children (June 2010 amendment) previously four beneficiaries (March 2010 deed).
- iv. The Authority is of the view that in order to determine whether or not 51 per cent of the shares in Digisat are beneficially owned by Namibian citizens, one must pierce the veil of the Mbok Family Trust and determine to whom the shareholding benefits accrue. The Authority is of the further view that one way of doing this is by looking at the Trust Deed itself in order to determine the question of vesting of the benefits of the Trust.

6.3 Is Digisat controlled (directly or indirectly) by foreign nationals?

- i. The Authority is of the view that neither the Communications Act nor the Companies Act contains a definition of control. However an assessment of the word reveals the following:

Effective: having a definite or desired effect; Powerful in effect; impressive; actual; existing in fact rather than officially or theoretically.

Manage: Organise, regulate, take or have charges or control of; to be in charge of management.
- ii. According to Goosen, the use of the adjective "effective" in the phrase "place of effective management" implies realistic, positive management. Goosen argues that being a director or manager in name rather than in reality will not constitute effective management. This will merely constitute theoretical management, but not prove actual or official management.
- iii. In the premise, the Authority is of the view that this proposition of law is squarely in keeping with the legislative intent under section 85(2) in that it seeks to pierce the veil and seeks to determine who really manages Digisat.
- iv. Bearing in mind that there is particular set of guidelines in the Act, it is proposed that the following be used to determine the control of a juristic person (the set is by no means an exhaustive list);
 - a) The center of top level management of the entity;
 - b) The functions performed at the principal place of business;
 - c) The business operations of the entity and who performs them;
 - d) Who directs or makes management and commercial decisions in relation to the entity;
 - e) The experience and skills of the directors, managers, trustees or designated managers who purport to direct or manage the entity;
 - f) The nature of the powers conferred upon the representative of the entity; and

- g) The manner in which those powers are exercised by the representative and the purpose of conferring the powers to the representatives.
- v. Having regard to the above guidelines and the exposition above, the Authority is of the view that Digisat is controlled by Mr. Mbok, a foreign national. The Authority follows the reasoning in ITC 388 above that the Mbok Family Trust controls Digisat by virtue of the trust being the sole shareholder of Digisat. The Authority is of the further view that a trust acts through its trustees and if Mr. Mbok is the only Trustee then he effectively and indirectly controls the affairs of Digisat.
- vi. The application before the Authority reflects that Mr. Mbok is a Cameroonian citizen, and thus not a Namibian citizen. It is also trite law that the acquisition and loss of Namibian citizenship is provided for in Article 4 of the Namibian Constitution and reserved for natural persons. Thus it is impossible for a trust or a legal or juristic person to acquire Namibian citizenship. Consequently, the shares in Digisat are neither owned nor controlled by Namibian citizen/s.

6.4 Does Digisat have a place of business or registered office in Namibia?

- i. The Companies Act (Act No 71 of 2008) defines a ‘place of business’ to mean: **“any place where the company transacts or holds itself out as transacting business and includes a share transfer or share registration office.”**
- ii. The facts from the application form indicate that Digisat’s place of business is in Namibia. The Authority is mindful of the fact that in its correspondence, Digisat has changed its place of business a number of times.

6.5 THE CHARACTER OF MR. ANTONIE MBOK

- i. Section 85 (8) of the Act provides that:

“When considering an application for the issue of broadcasting licence the Authority must have regard to –

 - (a) the character of the applicant or if the applicant is a body corporate, the character of its directors”.
- ii. The Authority notes that during the week of 23 – 29 January 2014, the Confidante newspaper issued an article on Mr. Antonie Mbok, who is a director of Digisat, concerning contracts he entered into with his seemingly dissatisfied clients to offer certain services which he apparently did not fulfill, yet he is apparently deducting specific amounts from their accounts in respect of these services.
- iii. According to the Confidante, one client claims not to have had any knowledge that she concluded a contract with Digisat and that Mr. Mbok misrepresented her to do so. Two of Digisat’s clients have opened cases against Mr. Mbok with the Namibian Police, which are still under investigation.
- iv. On 24 September 2014, the Authority received a complaint in which the Complainant stated that Digisat is receiving payments from her for broadcasting services and she is not satisfied with their services. Complainant provided the Authority with her bank account statements reflecting deductions to Digisat in this regard.
- v. During the week of 13 to 18 December 2013 in an article published in the Bottom Line Consumer Newspaper, dated 14 March 2014, Mr. Mbok was also accused of **“dubious**

decoder scam". The article about Digisat under the title **"Satellite television provider accused of fraud by customers"**, in which Digisat is accused of deducting money from its former customer's banking accounts, despite the fact that they cancelled their subscription.

vi. Section 85(8) of the Communications Act provides as follows:

(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 applicant is a body corporate, the character of its directors;

vii. By the use of the word "must" in the section, the Legislature clearly deemed the character of individual applicants or directors as a grave consideration. After due consideration of the law, the Authority is of the view that it can only use evidence of character against an applicant if same has been established.

viii. The Authority noted that the allegations against Mr. Mbok are still being investigated, but there is no pronouncement on the character of Mr. Mbok known to the Authority and therefore, the Authority is of the view that it cannot successfully invoke section 85(8)(a).

ix. The Authority is further constrained and mindful of the right to be presumed innocent until proven guilty as enshrined in Article 12(1) (d) of the Namibian Constitution.

7. EXPERTISE, EXPERIENCE AND FINANCIAL RESOURCES

i. Digisat submitted the necessary financial information and programme schedules to the Authority as required by regulation 5(2) of Regulations regarding licensing procedures.

ii. The Authority is of the further view that no investments would be needed by Digisat other than the capital to purchase the decoders and operational costs. The Authority is also mindful of the fact that Digisat is already providing services.

8. TECHNICAL BROADCASTING STANDARDS

i. There are currently no specific technical conditions that Digisat would have to comply with for the selling of decoders and installing satellite televisions dishes.

ii. If Digisat were to be granted a licence, it would have to comply with type approval requirements once the regulations are finalized.

9. APPLICATION FOR SPECTRUM USE LICENCE

i. As indicated above, the application was amended in terms of section 135(11) to comply with the licensing provisions of the Communications Act, which are set out in the Regulations Regarding Licensing Procedures. Regulation 4 of the Regulations Regarding Licensing Procedures Licensing Procedures for Telecommunications and Broadcasting Service Licenses and Spectrum Use Licences requires the applicant of a broadcasting service licence to submit a spectrum use licence application together with the service licence application.

ii. The Authority notes that Digisat indicated on their application form that no spectrum will be utilized to deliver satellite-broadcasting services and thus no spectrum use licence application was submitted to the Authority. The Authority accepts this submission, because it is common course that Digisat does not utilize spectrum.

10. DECISION

In light of the above, Digisat does not comply with the provisions of Section 85 of the Act, read with regulation 10(10) of the Regulations Regarding Transitional Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences, being that Digisat is owned and controlled by a Cameroonian national. In light thereof and pursuant to the provisions of section 85(10) of the Act, the application for a Commercial Broadcasting Service Licence by Digisat Satellite Television (Pty) Ltd is refused, effective from date of publication in the *Gazette*.

The full information of the decision can be obtained at the offices of the Authority.

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

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

No. 34

2015

**NOTICE OF RECONSIDERATION IN TERMS OF SECTION 31 OF THE COMMUNICATIONS
ACT, 2009 (ACT NO. 8 OF 2009) AND REGULATIONS 11 & 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 (No 8 of 2009) read with regulations 11 and 20 of the “Regulations Regarding Licensing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licence, in Government Gazette No. 4785, General Notice No. 272 dated 29 August 2011 (as amended) herewith gives notice that **Nafish Trading CC t/a Amesho FM** has submitted an application for reconsideration, dated 14 January 2015. The application is in respect of a decision by the Authority to decline the application for a broadcasting service licence and spectrum use licence, which decision was published in Government Gazette No. 5672, General Notice No. 435, dated 15 December 2014.

The reasons and grounds for the application for reconsideration are contained in the application which can be inspected at the offices of the Authority.

The public may submit comments in writing to the Authority within a period of fourteen (14) days from the date of publication of this notice in the *Gazette*.

Nafish Trading CC t/a Amesho FM may submit written reply comments within fourteen (14) days from the due date of the written public comments.

All written submissions must 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 be clear and concise.

All written submissions and reply comments must be made either physically or electronically –

- (1) By hand to the head offices of the Authority, namely Communication House, 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 facsimile to the following facsimile number: +264 61 222790; or
- (5) By fax to e-mail to: 0886550852.

L.N. JACOBS

CHAIRPERSON OF THE BOARD OF DIRECTORS

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

No. 35

2015

NOTICE IN TERMS 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 92 and section 135 of the Communications Act, 2009 (Act No. 8 of 2009) read with Regulations 19 of the “Regulations Regarding Licensing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licence, in Government Gazette No. 4785, General Notice No. 272 dated 29 August 2011 (as amended) herewith gives notice that it has made a determination that the licences issued to **Iburst Namibia (Pty) Ltd** by the Namibian Communications Commission have expired and are no longer valid.

REASONS FOR THE AUTHORITY’S DECISION

1.1 INTRODUCTION

On 29 July 2008, IBurst Namibia Wire (Pty) Ltd (hereinafter referred to as “IBurst”) was issued a private wireless telecommunications licence and a licence to operate a very small aperture terminal (VSAT) satellite station by the then Namibia Communications Commission. IBurst was also issued (on the 03rd of November 2008) with the following frequencies: Point to multipoint 1787 – 1797 MHz (including the guard band) access method TDD and point to point: CH 04_14599.00/15019.00 MHz; CH 05 – 14627.00/15047.000 MHz and CH 06 – 14655.000 / 15075.000 MHz. The licence prohibited the offering of any voice services.

On 10 November 2011, IBurst submitted an information form in terms of sections 92 and 135(2) of the Communications Act, 2009 (Act No. 8 of 2009) hereinafter referred to as the “Act”). The form indicated that IBurst would build, maintain and use a telecommunications network utilising various technologies. The form further indicated that the network will enable them to provide data and voice services including, but not limited to data transmission, Internet access, video conferencing, videophone etc.

In a letter dated 17 July 2014 addressed to the Authority from IBurst’s Legal Practitioners, pursuant to a meeting held between the parties, IBurst stated that the licence was for a fixed period of 5 years and that it lapsed on 28 July 2013.

1.2 LEGAL CONSIDERATIONS

The provisions of regulation 9(10)(b)(i) of the Regulations regarding Transitional Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences¹ are applicable to the transition of licences and specifically to Licences contemplated in sections 92 and 135(2) of the Communications Act, (8 of 2009 hereinafter referred to as the “Act”).

Section 92(1) and 135(2) of the Act makes the Act applicable to licences issued in terms of the previous statute being the Namibian Communications Act². It is a provision aimed at continuity and transition, it is however, clear that in order for the transition and continuity to take place the Authority must, within a period of six (6) months from the commencement of the Act, review all existing broadcasting licences and issue a broadcasting licence in question.

The word “must” in section 92(2) of the Act shows that the legislature intends to cast a duty on the Authority to review all existing licences issued in terms of the previous Act and where appropriate, to issue licences in the relevant categories.

The effect of section 92 (read with section 135 of the Act is to transition the licences from the old dispensation and bring them into the fray of the Communications Act and concomitantly under the control and regulation of the Authority. It must be noted that Parliament clearly intended this to be done within (6) months from the date of coming into effect of the said Act. The Act commenced on 18 May 2011.

The question that arose was, whether the licence issued to IBurst Wireless (Pty) Ltd has expired. It should be noted that the collective effect of sections 92 and 135 is to make the Act applicable to licences issued under repealed legislation. As a result of IBurst Wireless (Pty) Ltd not paying the required licence fees the Authority did not review the licence in question and as a result of lack of review the licence was not transitioned. Further section 135(4) of the Act provides that in reviewing the licence in question, the Authority may not change the period for which it was originally issued.

The synopsis of the issue is that the transitional provisions under the Act have not been met, because the Authority did not review the service and spectrum use licence in question within the six (6) months prescribed by section 92(2) of the Act. The conclusion is therefore, that both licences were not transitioned and consequently, the provisions of the Communications Act do not apply to this matter. It further follows that the Authority is not entitled to charge IBurst the licence fees it did under the Act and the regulations.

a. Legal Issue: Have the licences expired?

Clause 7 of the service licence provides that:

“This licence shall come into effect on the date of issue and shall remain valid for a period of five (5) years from date unless revoked in terms of condition 5.”

The effect of sections 92 and 135 (2) is to make the Act applicable to licenses issued under repealed legislation. As mentioned above, due to a lack of review by the Authority, the licence in question was not transitioned. Hence, the sections mentioned above do not apply to service licences. Similarly, the spectrum use licences were also not transitioned in terms of sections 92 and 135(2) of the Act. Therefore, both the service and spectrum use licences in question are thus not valid.

¹ The said Regulations are contained in Government Gazette 4737 of 17th June 2011

² Namibian Communications Act No. 4 of 2009.

In light of a foregoing, the Authority was unable to review and subsequently transition the licences issued to Iburst Namibia (Pty) Ltd, within a period of six months as prescribed in section 92(2).

Due to the fact that the licences could not be reviewed and transitioned in terms of sections 92(2) and 135 of the Act, the Act is not applicable to the licences and as a result, the licence fees charged were not due and payable to the Authority.

1.3 DETERMINATION BY THE AUTHORITY

In light of the above, the Authority made a determination that the licences issued to Iburst Namibia (Pty) Ltd by the then Namibia Communications Commission have expired on the 28th of July 2013 as indicated in clause 7 of the licences and are no longer valid as they were not reviewed and transitioned to the new dispensation.

L.N. JACOBS

CHAIRPERSON OF THE BOARD OF DIRECTORS

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA
