

**EMBARGOED UNTIL DELIVERY/TABLING IN THE
NEGOTIATING COUNCIL**

**SPECIAL REPORT ON THE RESPECTIVE ROLES
AND POWERS OF THE POSTMASTER GENERAL
AND THE INDEPENDENT BROADCASTING
AUTHORITY**

**Technical Committee on the Independent Media Commission and the
Independent Telecommunications Authority,
Multi Party Negotiation Process
31 August 1993**

Recent discussions with the Postmaster General's office

Because of the circumstances set out hereunder we feel compelled to report on developments that have arisen out of discussions with the Postmaster General's office on Friday 27 and Saturday 28 August 1993. Certain amendments to technical aspects of the IMC and IBA Bills have been made by the Technical Committee as a result of the inputs from the Postmaster General's office. These amendments are referred to in the agenda prepared for the discussion of the 7th Draft of the IBA Bill.

The Technical Committee was approached on Friday 27 August, 1993 to consider certain further submissions of representatives of the Postmaster General which were, according to the said representatives, approved of by a Cabinet Committee. The essence of these submissions were set out in a memorandum signed by the Postmaster General (a copy of which is attached hereto as Annexure A) and a document containing proposed changes to be made to the Bills arising from the views expressed in Annexure A (a copy of which is attached hereto as Annexure B).

The representatives of the Postmaster General indicated that they were advised by the Postmaster General that, as the said submissions were approved of by the Cabinet Committee, they have no authority to agree to any other way of defining the respective areas of jurisdiction of the Postmaster General and the Independent Broadcasting Authority.

The representatives of the Postmaster General also requested the Technical Committee to minute their objection to having to deal with this matter in an inordinately rushed manner due to the fact that the Bill is, in terms of the time schedule of the Negotiating Council, to be finalised during the course of this week.

The Technical Committee does not wish to express any opinion on the reasonableness or otherwise of the time constraints within which the Department of Posts and Telecommunications had to deal with the matter, but wishes to point out the following:

1. During May 1993 the Technical Committee advised the Postmaster General that it will, in the course of its consideration of the future regulatory framework for broadcasting, have to deal with the issue of defining the jurisdiction of the broadcasting authority regarding such matters as -
 - 1.1 spectrum management and control in respect of broadcasting frequencies;
 - 1.2 cable broadcasting;
 - 1.3 broadcasting signal distribution; and
 - 1.4 related matters,

and suggested that the Department should submit its views in this regard to the Technical Committee, particularly the issue of control over the broadcasting services frequency bands.

2. The Department of Posts and Telecommunications subsequently submitted a Memorandum on spectrum management (a copy of which is attached hereto as Annexure C).
3. Thereafter the Technical Committee arranged a meeting with experts on spectrum management which was held on 2 June, 1993 and attended by Mr Lochner from the Postmaster General's office, Neël Smuts, Managing Director of Sentech (Pty) Ltd and Mr Andile Ngcaba, of the CDITP.
4. After a full discussion, the Technical Committee indicated their preference for the view that the Independent Broadcasting Authority should to be vested with full control of the administration, management and planning of the broadcasting services frequency bands, a position which was strongly supported by two of the experts.
5. This position of the Technical Committee was accordingly also reflected in the different draft bills tabled in the Negotiating Council and was accepted by the members of the Negotiating Council.
6. On 27 and 28 August, 1993, the Technical Committee spent another nine hours discussing this matter in depth with the said representatives of the Postmaster General, as well as other experts, including Mr Neël Smuts, who has for many years headed the **de facto** planning and control of the broadcasting services frequency bands in South Africa.
7. The essence of the proposals of the representatives of the Postmaster General were that -
 - 7.1 control of technical aspects concerning the broadcasting services frequency bands should be reserved for the Postmaster General;
 - 7.2 the IBA should only be given control of broadcasting services frequency bands **currently** used by broadcasting and those frequencies issued to it by the Postmaster General in terms of an agreement between the Independent Broadcasting Authority and the Postmaster General.
8. However, the Technical Committee remains convinced that -
 - 8.1 its fundamental position on the matter is the preferred option to take (namely that the Independent Broadcasting Authority should have full control of broadcasting telecommunications, in particular the broadcasting services frequency bands);

- 8.2 having regard to the views expressed by the experts, the underlying concerns of the Postmaster General can be adequately addressed in the legislation without compromising the independence of the IBA as would be the case if the proposals of the Department of Post and Telecommunications were to be accepted. Suitable changes in this regard proposed in the latest Bill. (See also further comments in respect of items 8 and 9).

The Technical Committee's views and comments with regard to the specific submissions and proposals of the Postmaster General set out in Annexures A and B, are briefly as follows:

9. Comments on Annexure A

9.1 Item 1.

The Technical Committee agrees with the proposition put forward by the Postmaster General that the frequency spectrum does not respect the borders of a country and its use in broad terms should accordingly, in the interest of orderly management, be planned and co-ordinated internationally.

9.2 Items 2 and 3.

The Technical Committee agrees that the Postmaster General presently represents South Africa at the ITU, but wishes to point out that it is not entirely correct to say that the ITU "regulates" the frequency spectrum internationally. A member state is not bound by the regulations issued by the ITU; it is only bound in so far as it agrees to adopt the "regulations".

The Technical Committee is at this point in time of the view that the Postmaster General should remain the representative of South Africa at the ITU, but suggests that he should in this regard be under a duty -

9.2.1 to duly consult with the Independent Broadcasting Authority concerning all issues that may affect broadcasting, and

9.2.2 to, with regard to his handling of broadcasting matters at the ITU and other international bodies, act in the best interests of broadcasting in South Africa.

Furthermore it is suggested that a representative of the Independent Broadcasting Authority should also attend the meetings of the ITU if the rules of that body will allow for such attendance.

9.3 Item 4.

The Technical Committee agrees with the view expressed by the Postmaster General - it is really in substance a repetition of what was said in Item 1.

9.4 Items 5 and 6.

The Technical Committee agrees with the view expressed that what one user of telecommunications does, could affect other users.

9.5 Item 7.

The Technical Committee accepts that the Postmaster General has an interest -

9.5.1 that all users in South Africa should comply with international agreements adopted by South Africa;

9.5.2 that all users in South Africa should be protected against radio interference.

The Technical Committee however is of the view that the Independent Broadcasting Authority will also have similar interests, particularly as far as broadcasting is concerned and submits (as is more fully explained under the discussion of item 8) that there is no reason why the relevant responsibilities could not be divided between the Postmaster General and the Independent Broadcasting Authority in a satisfactory way.

9.6 Items 8 and 9.

The high water mark of the submissions of the Postmaster General regarding control of the frequency spectrum is (as we understand it) that the -

9.6.1 responsibility in respect thereof cannot be fragmented between the Postmaster General and the Independent Broadcasting Authority;

9.6.2 the Postmaster General should have overall authority -

9.6.2.1 to prescribe the technical conditions to be complied with by broadcasters;

9.6.2.2 to determine what frequencies may be used for broadcasting (other than those currently used for broadcasting).

In this regard it was pointed out by the representatives of the Postmaster General that the Postmaster General is not in favour of transferring the control of all the broadcasting services frequency bands as designated by the ITU for broadcasting in South Africa, to the Independent Broadcasting Authority for the reason that efficient frequency spectrum management may necessitate the allocation of certain frequencies to users other than broadcasters.

10. From the views expressed by the different experts, it appeared -
 - 10.1 that for all practical purposes the broadcasting frequency bands were for the past thirty years under the **de facto** management and control of the SABC (the Postmaster General merely registered the frequencies allocated);
 - 10.2 that in resolving the problem, the focus should not be so much on who is to prescribe technical requirements but on the necessity to ensure that broadcasters will not cause unacceptable interference with the use of telecommunications by other user groups such as, say, mobile radio users, and vice versa;
 - 10.3 that the concerns of the Postmaster General, can be resolved by -
 - 10.3.1 imposing a duty upon the Independent Broadcasting Authority to ensure, as far as is reasonably possible, that broadcasters will not unreasonably (excessively) interfere with the lawful use by other user groups of radio frequencies allocated to them by the Postmaster General;
 - 10.3.2 imposing a similar duty upon the Postmaster General in respect to broadcasting licensees; and
 - 10.3.3 imposing a duty upon both regulators to consult with each other in this regard;
 - 10.4 that the concern of the Postmaster General that efficient frequency management may necessitate that certain frequencies within the broadcasting services frequency bands be made available to other telecommunications users, could be adequately addressed by providing in the Bill that if the Postmaster General wish to seek accommodation of other user groups within the broadcasting bands, the consent of the Independent Broadcasting Authority should be obtained, which consent may not **unreasonably** be withheld;

- 10.5 that, with regard to international agreements adopted by South Africa, the Independent Broadcasting Authority should be under a statutory duty to implement such agreements as far as it relates to broadcasting, thereby resolving the Postmaster General's concern as to compliance with international agreements.

The Technical Committee reviewed the relevant provisions of the draft Bill and proposes certain changes that will, in its view, adequately address the above concerns of the Postmaster General in accordance with the recommendations of the experts consulted. In that regard the inputs of the representatives of the Postmaster General were very helpful and positively contributed to the improvement of the draft Bill. The Technical Committee consequently wishes to express its gratitude for the assistance rendered by the said representatives as well as the other experts over the last weekend.

11. Re Annexure B

- 11.1 Following from the views expressed in Annexure A the Postmaster General, in Annexure B, proposed an amendment of the Radio Act to include a new section 7.A **inter alia** requiring the Postmaster General to issue the Independent Broadcasting Authority with an irrevocable licence to use the radio frequencies currently used for broadcasting, as well as additional frequencies agreed upon between the Independent Broadcasting Authority and the Postmaster General.
- 11.2 Apart from the reasons already given, this proposal is, in the view of the Technical Committee, unacceptable as it limits the control of the Independent Broadcasting Authority to the "radio frequencies **currently** used for broadcasting" and those consented to by the Postmaster General (who would thus have a right of veto). In our view the Independent Broadcasting Authority should have control of all the broadcasting services frequency bands designated by the ITU for broadcasting and accepted by South Africa.
- 11.3 The proposed provision that the Postmaster General is to issue a licence to the Independent Broadcasting Authority creates a perception that the Independent Broadcasting Authority is subject to control in certain respects by the Postmaster General, which in our view would be unwise.
- 11.4 The Technical Committee effected certain changes to sections 1 and 30 in the light of the submissions made by the representatives of the Postmaster General.

- 11.5 In so far as the proposed new section 29 provides that the Independent Broadcasting Authority shall comply with international agreements adopted by South Africa, it appears to be acceptable.
- 11.6 The Technical Committee disagrees with the proposal that section 79 should be deleted. This section is necessary in order to make it very clear that the provisions of this Bill shall not in any way be affected or qualified by other statutory provisions.
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Annexure 'A'

MEMORANDUM: SPEKTRUMBESTUUR TEN OPSIGTE VAN VOORGENOME UITSAAIWETGEWING

1. Die radiospektrum is internasionaal en respekteer nie landsgrense nie.
2. Die ITU (International Telecommunications Union) reguleer die spektrum internasionaal. Die ITU bepaal die tegniese reëls en beplan die frekwensiespektrum. Die ITU verander die reëls en die spektrum van tyd tot tyd.
3. Die Posmeester-generaal is verantwoordelik vir die nakoming van Suid-Afrika se verpligtinge ingevolge die ITU ooreenkomste en is ook Suid-Afrika se alleen verteenwoordiger by die ITU.
4. Wat ons in Suid-Afrika in terme van telekommunikasie doen kan mense buite Suid-Afrika benadeel en wat mense buite Suid-Afrika in hierdie verband doen kan ons in Suid-Afrika telekommunikasiegewys benadeel.
5. Wat sommige van ons in Suid-Afrika doen kan mense in Suid-Afrika telekommunikasiegewys benadeel.
6. Die benadeling kan ten opsigte van veiligheidsdienste en telekommunikasie in die algemeen wees maar in besonder ten opsigte van televisie en radiodienste.
7. Die Posmeester-generaal se belang is om te verseker dat ons buitelandse verpligtings nagekom word en om die gemeenskap in geheel teen radiosteuring te beskerm.
8. Die Posmeester-generaal kan dit nie doen as verantwoordelikheid vir die tegniese aspekte van die radiospektrum gefragmenteer word nie.
9. Om die onafhanklikheid van die Onafhanklike Uitsaai-owerheid (IBA) binne hierdie raamwerk te verseker - selfs te waarborg - word voorgestel dat die radiofrekwensies wat huidiglik aan uitsaai toegeken is, aan die Onafhanklike Uitsaai-owerheid by wyse van 'n onherroeplike Radiolisensie toegeken word en dat die uitsaai-owerheid op sy beurt lisensies binne hierdie raamwerk dan aan uitsaaiers toeken om die frekwensies te gebruik. Hierdie Onafhanklike Uitsaai-owerheid lisensies moet tegniese vereistes insluit en die enigste voorwaarde van die Posmeester-generaal se lisensie is dat die Posmeester-generaal die tegniese voorwaardes in die lisensies aan uitsaaiers moet goedkeur.
10. Daar is ook sekere tegniese aspekte wat in die voorgestelde Uitsaaiwetgewing by wysiging reggestel moet word.

PTT Joubert

POSMEESTER-GENERAAL
1993-08-27

CHAPTER 5

BROADCASTING FREQUENCY SPECTRUM

28A. **Grant of irrevocable licence to use broadcasting radio frequencies:** The Radio Act 1952 is hereby amended to include the following additional section:

7A. **Licence for the Independent Broadcasting Authority.** - (1) The Postmaster General is authorised and required to issue to the Independent Broadcasting Authority (in this section referred to as "the Authority") an irrevocable licence:

- (i) to use all radio frequencies currently used for broadcasting; and
- (ii) to issue to any broadcasting licensee permission to use those frequencies for broadcasting to.

(2) The irrevocable licence issued to the Authority and any permission issued by the Authority to a broadcasting licensee shall include conditions:

- (i) requiring the Authority or the broadcasting licensee as the case may be to consult the Postmaster General on technical issues;
- (ii) specifying the power limitations in respect of any station; and
- (iii) imposing requirements to prevent electric and other disturbances of radio reception or of any transmissions over any telecommunications line as defined in section 1 of the Post Office Act 1958.

(3) The Authority and the Postmaster General may from time to time agree:

- (i) the allocation to the Authority of different radio frequencies and the surrender by the Authority of any radio frequency which is the subject of the irrevocable licence; and
- (ii) modifications of such conditions and any permission issued or to be issued by the Authority shall include any such modification so agreed by the Authority.

29. Authority vested with certain powers in relation to administration, management and planning of broadcasting services frequency bands irrevocably licensed to the authority

- (1) As from the date of commencement of this Act, the Authority shall be vested with powers to administer, manage and plan radio frequencies which are licensed to the Authority under Section 7A of the Radio Act, 1952.
- (2) In administering, managing and planning the broadcasting services frequency bands, the Authority shall comply with the applicable standards issued by the International Telecommunications Union in its current Radio Regulations, as agreed to or adopted by the Republic.

Note: Changes to the following sections will have to be made:

Section 1:

- it will be necessary to change the definitions of "broadcasting" "broadcasting service" "broadcasting signal distribution" and "radio" and to delete the definition "broadcasting services frequency bands"

Section 30:

- line 1 Insert after "responsible for" the words "for advising the Authority on":
- delete in subparagraph (g) the words "participating in such conferences and, where applicable, implementing any decisions adopted at such conferences";
- delete subparagraph (i).

Section 79:

- delete whole section.

Annexure 'C'

MEMORANDUM BY THE DEPARTMENT OF POSTS AND TELECOMMUNICATIONS:
FREQUENCY SPECTRUM AND BROADCASTING LICENCES

In the Department's view the control and management of the complete electro-magnetic spectrum, including those parts used for broadcasting, should remain with the Postmaster General in accordance with the present provisions of the Radio Act, 1952. It is considered, however, that the power to issue broadcasting licences should no longer vest in the Postmaster General but should be transferred to the proposed new Broadcasting Authority. In the Act governing the functioning of the Broadcasting Authority, the procedure to be followed in applying to the Broadcasting Authority for a broadcasting licence should preferably be set out. It should also be stipulated that no broadcasting station may be put into operation in terms of such a broadcasting licence without a licence for operating that station having also been obtained from the Postmaster General.

In the Radio Act the conditions which the Postmaster General may prescribe in respect of a broadcasting station operating licence should remain restricted to technical matters. The present provision in the Radio Act permitting the Postmaster General to prescribe a condition relating to the broadcasting of reports, announcements, news or other information which is required to be broadcast in the public interest, should, however, be deleted.
