

## DECISION

### **Amendment to the right of use for frequencies held by Onitelecom – Infocomunicações, S.A., for the use of fixed wireless access (FWA) systems**

#### **1. Onitelecom's communication**

By communication received on 12 December 2012, Onitelecom – Infocomunicações, S. A. (hereinafter Onitelecom), gave ICP - ANACOM an account of the following:

- By determination of 15 April 2011, ICP - ANACOM authorized OniTelecom to comply with a staged plan to shut down its FWA network, keeping to a minimum the number of base stations by geographical area according to the table below, which consists of Endorsement No 2 to Rights of Use for Frequencies ICP - ANACOM No 06/2006:

YEARS	2011	2012	2013	2014
Area 1	10	10	8	0
Area 2	5	3	0	0
Area 9	3	3	3	3

- In 2012, the company was obliged to anticipate the shutdown plan for Area 1, having disabled the base stations of Oeiras and Cais do Sodré as the respective equipment was in a status of end of life/end of support (EoL / EoS) since December 2008, and there were not spare parts available for replacement in case of malfunction. As such, these stations were shut down so that their components could be used as spare parts for the three geographical areas. The company attaches a communication from Ericsson, received on March 2009, with a proposal for FWA equipment planning and installing/disabling services by piecework, in which the provider informs that it is unable to continue to provide technical assistance and professional maintenance services to the FWA network, given that the equipment was in a status of end of support as from December 2008.

- OniTelecom informs that, after three years of EoL / EoS status, the management of malfunctions has become increasingly critical, being conducted on a piecework basis, for the three geographical areas, using spare components resulting from the shutdown of the two above-mentioned stations, which were chosen on account of a low degree of occupation with active clients and of the possibility to support the respective services in alternative network solutions. In some cases, the migration of clients was not even due to the shutdown of the station, but to the provision of new services which could only be supported in different access solutions.
- In 2013, the company claims that two additional stations in Area 1 required shutdown: Adro and EUA. The first for urgency reasons, as the building where the station is located is structurally instable, the roof running the risk of collapsing, as the pictures of the installation location attached as annex 2 shows. In this case, clients affected are being migrated to the Geophysics base station. The EUA station was covered by the original shutdown plan, thus it will have no active clients and be ready to be disabled in January 2013.
- The situation may thus be summarized as two shutdowns having been anticipated in 2012, a situation which will be maintained in 2013, relatively to the original plan. The company will however maintain the occupation of geographical areas over the years, as intended.
- Consequently, the current shutdown plan may be translated into the table below, the shaded boxes corresponding the changes occurred in the meantime:

YEARS	2011	2012	2013	2014
Area 1	10	8	6	0
Area 2	5	3	0	0
Area 9	3	3	3	3

## 2. The FWA RUF and radio license allocated to Onitelecom

OniTelecom is the holder of the **Rights of Use for Frequencies (RUF) ICP - ANACOM No 06/2006**, issued on 23 November 2006, which qualifies the company to use, until 1 January 2015, a block of 2x56 MHz, corresponding to the 24,549 GHz-24,605 GHz and

25,557 GHZ-25,613 GHz frequencies, for FWA systems, for geographical areas 1, 2 and 9, as defined in Administrative Rule No 1062/2004, of 24 August<sup>1</sup>.

By determination of 15 April 2011, ICP - ANACOM concluded that there was nothing to prevent the amendment of the referred RUF as requested by OniTelecom, thus this company became obliged to maintain a minimum number of installed central stations, respecting the following evolution and quantification:

YEARS	2011	2012	2013	2014
Area 1	10	10	8	0
Area 2	5	3	0	0
Area 9	3	3	3	3

By the expiry of the right of use for frequencies, OniTelecom is expected to have shut down all stations.

It should be recalled that in the context of the provision of FWA under RUF ICP - ANACOM No 06/2006, OniTelecom holds **radio license No 504242**, for use of a public fixed radio service - point-to-multipoint links, valid until 10 August 2016.

### 3. Analysis of the request

As referred above, according to paragraph 2 of clause 4 of RUF ICP - ANACOM No 06/2006, OniTelecom is bound to maintain a minimum number of installed central stations respecting a specific evolution and quantification.

Consequently, in the case under consideration, OniTelecom should have requested in a timely manner, or promptly notified in case of urgency or *force majeure*, the change (in the light of the respective shutdown) of the minimum number of installed stations it was bound to maintain.

Notwithstanding, although Optimus fails to request it explicitly, its communication consists in a change of conditions associated to RUF ICP - ANACOM No 06/2006, which this Authority can but analyse in the scope of spectrum management tasks assigned to it, namely the effective and efficient use of frequencies, weighing and assessing its effects

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<sup>1</sup> Which approved the change of the model of the FWA system operation, introduced a new coverage model per geographic areas, the permission to use frequencies in the transmission network and the overhaul of the radio fee system.

on the qualifying documents held by the company - the RUF and the radio license.

In particular, the company, before the end of 2012, communicated it had changed the minimum number of installed central stations it was obliged to maintain in 2012 and that this change would be reflected in the minimum number of stations required for 2013, in both cases concerning Area 1.

This change of conditions provided for in the RUF thus involves the change of conditions of the radio network license allocated to the company in the scope of that document for the purpose of the operation of FWA systems.

### **3.1. Framework**

Pursuant to article 20 of ECL<sup>2</sup>, the conditions that apply to the exercise of the activity, including rights of use, may be amended in cases of objective justification and in accordance with the principle of proportionality, by means of law, regulation or administrative act.

In these situations, the amendment to be adopted is subject to the general consultation procedure<sup>3</sup>, and interested parties, namely users and consumers, are allowed a sufficient period of time to express their views on the proposed amendments, which must be no less than 20 days, except in exceptional and duly justified circumstances (paragraph 3).

However, in the context of article 20 of ECL, the referred general consultation procedure may be dispensed with in cases involving minor amendments, which do not change the substantial nature of the general authorisations and the rights of use, namely not causing any comparative advantage, and which have been agreed with the holder of the rights of use (paragraph 4).

At radio licensing level, article 16 of Decree-Law No 151-A/2000 of 20 July<sup>4</sup> provides that radio licences may be amended both at the initiative of ICP - ANACOM or at the request of the licence holder.

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<sup>2</sup> Electronic Communications Law - Law No 5/2004, of 10 February, as amended and republished by Law No 51/2011, of 13 September.

<sup>3</sup> Provided for in article 8 of ECL.

<sup>4</sup> Statutory instrument that lays down the legal regime applicable to the licensing of radiocommunications networks and stations, the supervision of the installation of such stations and the use of the radio spectrum, as well as the regime applicable to the sharing of radiocommunications infrastructure.

The change in the number of installed stations thus entails an amendment of valid administrative acts, as performed by ICP-ANACOM, awarding the company a right of use for frequencies for FWA and the corresponding radio network license, permitted under article 147 of the Administrative Procedure Code, whereby repealing rules apply.

In this context, ICP-ANACOM is the authority with powers to undertake the necessary amendments, which must take the form of the repealed act (articles 142 and 143 of the APC, which apply by virtue of article 147).

Valid administrative acts as constitute rights or legally protected interests may be amended to the extent that they are unfavourable to the interests of the recipients or where all parties concerned give their consent to revoke the act and where it does not involve non-disposable rights or interests (article 140, paragraph 2 of the APC, which applies pursuant to article 147 of the same Code).

In the present case, the amendment of administrative acts under consideration results from a communication from OniTelecom, the addressee of such acts, further to actions the company itself carried out (shutdown of base stations), in the pursue of its own interests and ensuring, according to the company, those of its clients, so that not only were the latter not left without service but they also were migrated to better services, non-disposable rights or interests not being involved in the present case.

### **3.2. Analysis**

As regards the evolution of the FWA service provision and as ICP-ANACOM has previously stressed<sup>5</sup>, the CEPT concluded in its report on the evolution of the fixed service as well as of spectrum needs, approved in March 2012, that the use of the 24.5-26.5 GHz band has not shown a significant increase, compared to other frequency bands, and it has been more relevant for point-to-point links than for point-to-multipoint links (FWA systems).

At international level, investments in point-to-multipoint links have also not developed in the same proportion as point-to-point links, and a clear disinvestment at the level of

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<sup>5</sup> Vd. ICP - ANACOM decision of 13 December 2012, repealing the right of use for frequencies for the operation of fixed wireless access (FWA) systems held by Optimus - Comunicações, S.A., available at <http://www.anacom.pt/render.jsp?contentId=1147305>.

technologies and services provided by this type of application may be observed.

As such, further to these difficulties at the level of technologies/services and required investment to maintain an operational network, it seems natural that companies seek for technological alternatives for services provided via FWA.

It is therefore considered that, from a spectrum-management perspective, especially the principle of an effective and efficient use of spectrum, there is nothing to prevent the change promoted by the company.

ICP - ANACOM also believes that there is nothing to prevent the request for amendment of radio license No 504242 held by OniTelecom.

Moreover, according to information available at ICP - ANACOM, OniTelecom operates only in the business segment, being provided by the end of 2012 with only [Start Confidential Information] [End Confidential Information].

It must also be stressed that according to OniTelecom's communication, the company disabled in advance stations which showed a low degree of occupation with active clients and the possibility to support the respective services in alternative network solutions. In some cases, the migration of clients was not even due to the shutdown of the station, but to the provision of new services which could only be supported in different access solutions.

As such, bearing in mind in short the small number of OniTelecom's FWA subscribers and the fact that the market provides several services/offers in alternative to FWA systems, it may be concluded that the amendment of OniTelecom's qualifying document does not harm the public interest underlying the allocation of these frequencies.

It is deemed that paragraph 2 of clause 4 of the RUF may be amended so as to reflect the current minimum number of installed central stations which the company is bound to maintain, respecting the following accumulated evolution and quantification:

YEARS	2011	2012	2013	2014
Area 1	10	8	6	0

<b>Area 2</b>	5	3	0	0
<b>Area 9</b>	3	3	3	3

Additionally, and considering the specific requirements of article 20, paragraph 4 of the LCE, it is deemed that the amendment of conditions associated with the RUF does not alter the substantial nature of the right, given that, while a phased reduction is foreseen in the number of central stations, the company will maintain the right of use for frequencies granted to it until 1 January 2015 to operate FWA systems. On the other hand, this amendment will also not create any comparative advantage for the company, since it only concerns the process of phased shutdown of its network, in parallel to which the company promotes the migration of clients to new services supported by other access solutions.

As such, the elements of the present procedure lead to a decision that is favourable to OniTelecom and which meets its communication, whereby it is likewise considered that the requirement for the agreement of the RUF holder is fulfilled.

In this sense, and given the provision in paragraph 4 of article 20 of ECL, it is considered that the requirement to conduct a general consultation procedure may be waived as regards the decision to adopt the amendment to RUF ICP - ANACOM No 06/2006, resulting from OniTelecom's communication.

Moreover, considering that the decision is favourable to OniTelecom and meets its request, it is also considered that conditions for dispensing with the prior hearing of the company have been fulfilled, by virtue of paragraph 2 b) of article 103 of the Administrative Procedure Code<sup>6</sup>.

Lastly, bearing in mind that the amendment of acts under consideration may be granted retroactive effectiveness given that such amendment is favourable to the interested party, does not harm legally protected rights or interests of third parties and also because on the date OniTelecom's communication was received the preconditions justifying the retroactivity were already met (cfr. paragraph 2 a) of article 128 of APC), it is deemed that the effects of the amendment decision now put forward may be committed with effect from 12 December 2012.

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<sup>6</sup> Which provides that the prior hearing of the interested party may be dispensed with by the body examining the issue where the elements of the procedure lead to a decision that is favourable to interested party.

#### 4. Decision

In the light of the above, **the Management Board of ICP-ANACOM**, in the scope of powers provided for in article 6, paragraph 1 c) of its Statutes, published in annex to Decree-Law No 309/2001, of 7 December, and in the pursue of regulatory objectives set out in article 5, paragraph 1 a) and paragraph 2 d), and under articles 15 and 20 of ECL, in the exercise of competencies assigned under article 26 l) of the referred Statutes, article 16 of Decree-Law No 151-A/2000 of 20 July as amended and republished by Decree-Law No 264/2009, of 28 September, as well as article 147 and 140, paragraph 2b), of APC, hereby **determines**:

1. To amend the right of use for frequencies allocated to Onitelecom – Infocomunicações, S. A., for operation of FWA systems, as regards the minimum number of central stations to be maintained by the company (clause 4, paragraph 2) under the terms of endorsement No 3 to be included in the qualifying title, as attached hereto.
2. To alter, accordingly, radio licence No 504242 held by Onitelecom – Infocomunicações, S. A.
3. To determine that the amendment acts referred to in the preceding points take effect on the date the company's communication was received.
4. To dispense with the prior hearing of Onitelecom – Infocomunicações, S. A., by virtue of paragraph 2 b) of article 103 of the Administrative Procedure Code.

Lisbon, 29 May 2013.