

Lisa Thornton, Lisa Thornton Inc

Ideal Regulatory Framework for Broadband

25 March 2009

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Issues



- ◆ Market Structure and Licensing
- ◆ Spectrum Planning and Licensing
- ◆ Interconnection and Facilities Leasing
- ◆ Rights of Way
- ◆ Universal Service



History

- ◆ Pre - 1994
- ◆ White Paper and Telecommunications Act
- ◆ 2001 Amendments
- ◆ 2005 Liberalisations - 2008 *Altech* judgment
- ◆ ICASA Act
- ◆ Electronic Communications Act
- ◆ InfraCo Act
- ◆ Transitional Phase



Licensing



- ◆ Services Licences
- ◆ Spectrum Licences
- ◆ Equipment Type Approval

Ideal Licensing Framework

- ◆ General authorisations and forbearance
- ◆ Licensing by an independent regulator
- ◆ Technology neutrality
- ◆ Transparent, fair and speedy processes



Services



- ◆ Electronic Communications network services (ECNS)
- ◆ Electronic Communications services (ECS)
- ◆ Broadcasting services

Definition of ECNS

- ◆ Make available an ECN
 - ECN – system of ECF
 - ECF – anything that can be used for EC
 - EC – transmission or reception of information (excludes content service)

Definition of ECS

- ◆ Conveyance of EC over an ECN
- ◆ To the public, sections, subscribers ...
- EC – transmission or reception of information (excludes content services)
- ECN – system of ECF
- ECF – anything that can be used for EC

Definition of Broadcasting Service

- ◆ Broadcasting over an ECN
 - Not data only
 - Not incidental audio visual
 - Not exclusions prescribed by Icasa

- ◆ Broadcasting – unidirectional EC; to public, sections, subscribers ...; over an ECN
- ◆ ECS – conveyance of EC over ECN; to public, sections, subscribers ...
- EC – transmission or reception of information (excludes content services)
- ECN – system of ECF
- ECF – anything that can be used for EC



Licensing



- ◆ Individual
- ◆ Class
- ◆ Exempt

Individual Licences

- ◆ National and provincial ECNS
- ◆ Commercial and public broadcasting (national and provincial)
- ◆ Voice using own numbers
- ◆ ECNS, communications services and broadcasting owned more than 25% by state
- ◆ Others (determined by Icasa) having significant social or economic impact



Class Licences

- ◆ Municipal ECNS
- ◆ Community and low power broadcasting
- ◆ Others (determined by Icasa) not having significant social or economic impact



Licence Exempt

- ◆ Non profit electronic communications services
- ◆ Resellers of electronic communications services
- ◆ PTNs (not selling excess capacity)
- ◆ LANs

Licences

	Electronic Communications Network Services	Electronic Communications Services	Broadcasting Services
Individual	<ul style="list-style-type: none">- for profit national and provincial- state owns 25% +	<ul style="list-style-type: none">- voice telephony- state owns 25% +	<ul style="list-style-type: none">- commercial and public national and provincial- state owns 25% +
Class	<ul style="list-style-type: none">- for profit municipal	<ul style="list-style-type: none">- data services	<ul style="list-style-type: none">- community- low power
Exempt	<ul style="list-style-type: none">- private ECNs- small ECNs such as LANs	<ul style="list-style-type: none">- non-profit- resale of ECS	

Frequency Licensing

- ◆ Licence required in addition to services licensing
- ◆ Special procedures for competing applications (eg, WiMax)
- ◆ Icasa may exempt certain uses from licensing (eg, WiFi)

Transitional Provisions

- ◆ Existing regulations remain valid until converted
- ◆ Former licences converted in January 2009
 - lists
 - converted but not issued
 - spectrum not listed (except 1800 and 2100)

Recommendations - Licensing

- ◆ Licence types
 - individual
 - class
 - exempt
- ◆ Independent regulator
 - Individual ECNS
 - *Altech* judgment
- ◆ Spectrum
 - technology neutrality
 - WiMax
 - Audit of licensed but unused spectrum



Interconnection

... the physical or logical linking of two or more electronic communications networks, electronic communications services, broadcasting service, services provided pursuant to a licence exemption or any combination thereof.



Ideal Interconnection Framework

- ◆ Open Access
- ◆ Regulations
- ◆ Negotiations
- ◆ Submission and Review of Agreements by ICASA

Obligation to Interconnect

- ◆ All licensees must interconnect and all ECNS licensees must provide facilities
- ◆ Icasa may exempt those that do not have significant market power
- ◆ Those exempted may interconnect

Reasonableness Test

- ◆ Technically and financially feasible
- ◆ Will promote the efficient use of communications networks and services (not just the PSTN)



Essential Facilities

- ◆ Icasa must prescribe list of essential facilities that must be provided
- ◆ List must be provided and review it every 36 months



International Facilities

- ◆ No agreements with exclusivity provisions
- ◆ No provisions creating undue barriers to use of facilities
- ◆ No agreements restricting leasing, selling or otherwise providing
- ◆ Any existing provision is invalid from a date to be determined by the Minister

Regulations – EC Act

- ◆ Agreement principles, eg
 - Pricing
 - Quality
 - Co-location
 - Unbundling
- ◆ Framework / time frames / procedures
- ◆ May include Reference Offers (RIOs and RFLOs)

Reasonableness Disputes

- ◆ Requester notifies Icasa of dispute in terms of regulations
- ◆ Icasa determines reasonableness within 14 days or such longer period that is reasonably necessary

Unwillingness or Inability to Negotiate or Agree

- ◆ Either party notifies Icasa of dispute
- ◆ Party is deemed to be unwilling or unable to negotiate or agree if agreement not concluded within prescribed time frames
- ◆ No time frame legislated for Icasa to make a decision



Unwillingness or Inability Rulings by Icasa

- ◆ Impose terms and conditions
- ◆ Propose terms and conditions
- ◆ Refer the dispute to the Complaints and Compliance Committee



Implementation Disputes

- ◆ Either party may notify the Complaints and Compliance Committee
- ◆ Dispute is resolved in terms of regulations prescribed
- ◆ Dispute is resolved on an expedited basis

Submission of Agreements to Icasa

- ◆ Agreement becomes effective and enforceable upon submission, except
 - If court order otherwise
 - Icasa notifies parties of inconsistency with regulations
- ◆ Icasa must provide copies of agreements to anyone who requests them
- ◆ Icasa must publish facilities leasing agreements

Review of Agreements by Icasa

- ◆ Icasa must review all agreements, except where parties have been exempted from obligation to interconnect
- ◆ Review is for consistency with regulations
- ◆ If term(s) is not consistent, Icasa must direct the parties to renegotiate
- ◆ Renegotiated agreements must be submitted for review

Interconnection Regulations – Telecommunications Act

- ◆ Interconnection Guidelines – Notice 1259 of 2000
- ◆ Supplementary Interconnection Guidelines – Notice 3457 of 2002
- ◆ Amendment to Guidelines and Supplementary Guidelines – Notice 1301 of 2004
- ◆ Regulations on Carrier Pre-Selection – Notice 975 of 2005



Facilities Leasing Regulations – T Act

- ◆ Facilities Leasing Guidelines – Notice 1260 of 2000
- ◆ Supplementary Facilities Leasing Guidelines – Notice 1215 of 2002
- ◆ Amendment to Guidelines and Supplementary Guidelines – Notice 1301 of 2004

Abandoned Proposals for Interconnection Regulations

- ◆ Supplementary Interconnection Guidelines for Usals (2003)
- ◆ Supplementary Interconnection Guidelines for PSTS licensees (2003)
- ◆ Section 27 review of the transition to the LRIC pricing regime – Notice 3436 of 2003
- ◆ Proposal to replace all existing regulations – Notices 58 and 59 of 2005
- ◆ Proposal to include jump start and MTN in the category of Major Operator – Notice 791 of 2005



Pending Proposals for New Regulations

- ◆ Interconnection Regulations – Notice 898 of 2007
- ◆ Facilities Leasing Regulations – Notice 899 of 2007
- ◆ Essential Facilities Regulations - Notice 1800 of 2007

Recommendations - Interconnection

- ◆ SMP determinations need to be made
- ◆ Regulations need to be promulgated
- ◆ Pro-active and vigorous enforcement of regulations
- ◆ International facilities - eliminate discriminatory provision



Rights of Way

... a legal right of passage over land owned by another

... service providers must obtain right-of-way to dig trenches or plant poles for cable systems, and to place wireless antennas, etc



Rights of Way - EC Act

- ◆ Chapter 4 of the EC Act
 - Ministerial Guidelines
 - Icasa Regulations
- ◆ Environmental Assessment Impact Regulations

Who may exercise rights?

- ◆ Under Telecommunications Act – Telkom and other fixed line licensees
- ◆ Under EC Act - all ECNS licensees, whether individual or class



Rights Granted in Chapter 4

- ◆ Enter, construct and maintain facilities
- ◆ Use underground pipes
- ◆ Construct and maintain facilities under streets
- ◆ Place gates on fences
- ◆ Cut trees and vegetation

Regulatory Framework

- ◆ Ministerial Guidelines for the rapid deployment of ECF
 - In consultation with Ministers of Provincial and Local Government, Land Affairs, Environmental Affairs, and Icasa
 - Procedures for
 - Obtaining approvals or permits
 - Resolving disputes
- ◆ ICASA Regulations
 - licensees must exercise rights in accordance with regulations

Recommendations - Rights of Way

- ◆ Ministerial Guidelines
 - What is the legal status of Guidelines?
- ◆ ICASA Regulations
 - How are rights exercised pending promulgation of Regulations?



Universal Service and Access

- ◆ Terms used interchangeably ...
- ◆ Issues
 - Affordability
 - Quality
 - Advanced services / broadband



Universal Service and Access - EC Act

- ◆ Universal access
 - Universal access to ECNS, ECS and BS
- ◆ Universal service
 - Universal provision of ECS and BS
 - *Why not ECNS?*

Universal Access – Minister

- ◆ 82(3)(a)(i) – minister determines (on the recommendation of the USAASA) what constitutes –
 - Universal access (by all areas and communities) to ECS and ECNS
 - *Why not BS?*

Universal Service – Minister

- ◆ 82(3)(a)(ii) – minister determines (on the recommendation of the USAASA) what constitutes –
 - Universal provision (for all persons) to ECS [*Why not BS?*]; and
 - Access to ECN including elements or attributes thereof [*In definitions, part of universal access; in 82, part of universal service?*]

USAASA Functions – 82(1)

- ◆ Strive to promote the goal of UA and US
- ◆ Encourage, facilitate and offer guidance in respect of any scheme to provide UA, US or ECNS [*ECNS emphasized*]
- ◆ Foster the adoption and use of new methods of attaining UA and US

USAASA Functions – 82(4)

- ◆ May undertake investigations
- ◆ Must conduct research and keep abreast of developments in industry
- ◆ Must survey and evaluate the extent to which UA and US have been achieved
- ◆ Must issue information on US and UA
- ◆ Must, at the request of the Minister, make recommendations
- ◆ Must, at the request of Icasa, advise Icasa
- ◆ Must evaluate EC Act in relation to achievements in UA and US
- ◆ May liaise, consult and co-operate
- ◆ May appoint experts



USAASA Functions – 82(5)

- ◆ Manage the USAF

USAF Funding

- ◆ Licensee contributions
 - Icasa prescribed annual contributions - 0.2% of annual turnover
 - BS contributions to MDDA set off
- ◆ Any other source

USAF Subsidies

- ◆ Assistance of needy persons for ECS and BS
- ◆ For constructing ECN in under-serviced areas (by ECNS *and* BS licensees)
- ◆ Schools for ECS and BS *and access to ECNs* (with qualifications)
- ◆ BS
- ◆ Centres for accessing ECN



USAF – Icasa's Role

- ◆ Define under-serviced areas by regulation and listing of under-serviced areas
- ◆ Re-define bi-annually



USAF – Minister's Role

- ◆ Determine types of needy persons
- ◆ Determine persons who must apply and manner of application
- ◆ Determine manner of application and person to whom subsidies may be paid

Competitive Tenders

- ◆ USAASA must provide incentives to ECNS to construct ... in under-serviced areas
- ◆ USAASA must (in consultation with Icasa)
 - Publish notice and invite proposals
 - Identify under-serviced area, scope of project, judging criteria, projected cost of the project ...
- ◆ USAASA must supervise the execution of projects

E-rate – s 73

- ◆ Internet services must be provided to public schools at 50% discount
- ◆ Applicable to –
 - Connectivity
 - Equipment used for connectivity
 - Calls made to ISPs
- ◆ ECNS must be provided ISPs at 50% discount
- ◆ Implementation to be prescribed by Icasa
- ◆ Minister may extend discounts to other schools



Recommendations - Universal Service

- ◆ Ministerial determinations re US/UA
- ◆ Icasa determination re under-serviced areas
- ◆ Ministerial determinations re needy persons
- ◆ USAF procedures



Conclusion

- ◆ Political support for an enabling environment
- ◆ Strong, effective regulator
- ◆ Clear, easily implementable rules
- ◆ Certain, yet flexible, forward looking rules
- ◆ Effective competition

Questions?

Lisa Thornton Inc produced a weekly update of relevant legal and regulatory matters affecting the ICT industries. Should you wish to subscribe, send a request to info@thornton.co.za.