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OPENNESS & TRANSPARENCY AT ICASA

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Executive Summary

The importance of the Independent Communications Authority of South Africa (Icasa) to the information and communications technology (ICT) industry in South Africa is unique. That Icasa is the independent body tasked with regulating the industry is set out up front in the legislation empowering it, the Independent Communications Authority of South Africa Act (Icasa Act), which flows from the Constitution. In terms of section 2 of the Icasa Act, Icasa must regulate in the public interest. In terms of section 3(3), Icasa must act independently, subject only to the Constitution and other law, and must act in a manner that is impartial, and without fear, favour or prejudice. In terms of section 3(4), Icasa must act without interference, either political or commercial.

This unique position that Icasa holds was not lost on the learned judge in the recently decided *Altech Autopage Cellular (Pty) Ltd v The Chairperson of the Council of the Independent Communications Authority of South Africa and Others* (unreported judgment dated 31 October 2008). That Icasa is the body responsible for regulating the industry was emphasised where it was stated that Icasa is clearly the authority to “see to the implementation of both the declarations contained in this judgment and in the provisions of the ECA [Electronic Communications Act]”.

This Paper is intended to put the spotlight on the issue of openness and transparency at Icasa. The only way that Icasa can successfully fulfill its mandate is to do so in an open and transparent manner. The goal of publishing this paper is to spark the discussion and lead to the adoption of all or some of the recommendations made herein, leading, in turn, to a more open and transparent Icasa.

A more open and transparent Icasa will, in turn, lead to the industry having more confidence in and acceptance of Icasa's decisions. Litigation will decrease. The regulatory environment will be more secure, facilitating more investment in the ICT industry in South Africa. Icasa will better be able to do its job effectively and efficiently. This will in the end, lead to the achievement of universal and affordable service, the paramount goal of regulating the industry in the first place.

This paper is organised as follows. First, it looks at the Constitutional and statutory requirements about openness and transparency, imposed upon Icasa. Next, the results of a survey regarding openness at ICT regulators in selected countries are set out, to highlight best practices. This paper concludes with some recommendations on what to do and how to do it, with a suggested list of priorities.

LEGAL REQUIREMENTS

That Icasa must act in an open and transparent manner is unequivocal. It is set out in various provisions of the law. The legislation discussed herein includes the Constitution, the Promotion of Administrative Justice Act (PAJA), the Promotion of Access to Information Act (PAIA), the Independent Communications Authority of South Africa Act (Icasa Act), and the Electronic Communications Act (EC Act).

Constitution

The Constitution is premised on, among other things, the creation of open and accountable government. The preamble states, among other things, that the people adopt the Constitution to “lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law”. Section 1 of the Constitution places “accountability, responsiveness and openness” at the core of the multi-party democracy that the Constitution entrenches.

In the Bill of Rights, we find protections for the rights of access to information (section 32), just administrative action (section 33), and freedom of expression (section 16), amongst others. Section 36 indicates the only manner in which rights found in the Bill of Rights may be limited, and it sets at the core of the test, an “open and democratic society”. Similarly, in section 39(1), which indicates the manner in which rights must be interpreted, it is stated that interpretations must “promote the values that underlie an open and democratic society”. Section 39(2) requires interpretations of legislation to promote the “spirit, purport and object of the Bill of Rights”.

Section 41(1)(c) of the Constitution requires all spheres of government and all organs of state within each sphere to “provide effective, transparent, accountable and coherent government for the Republic as a whole”.

Section 195(1) of the Constitution states that public administration must be governed by the democratic values and principles enshrined in the Constitution, including that “public administration must be accountable” (section 195(1)(f)), and “transparency must be fostered by providing the public with timely, accessible and accurate information” (section 195(1)(g)). Section 195(3) provides that national legislation must ensure the promotion of the values and principles listed in section 195(1). It follows therefore that national legislation must also be interpreted to promote these values.

Promotion of Administrative Justice Act

Section 33 of the Constitution provides that:

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(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

Section 33(3) provides that national legislation must be enacted to give effect to the rights associated with just administrative action. The Promotion of Administrative Justice Act was promulgated to give effect to this mandate. This Act spells out what is required to ensure procedurally fair administrative action and details further the grounds for reviewing administrative action.

Administrative action affecting a person/entity

Section 3 of PAJA provides that if Icasa takes administrative action affecting a person that materially and adversely affects that person, then Icasa must give that person adequate notice of the action, an opportunity to make representations, a clear statement of the action and adequate notice of a right to review and a right to request written reasons.

Administrative action affecting a person/entity

Section 4 of PAJA provides that if Icasa takes administrative action affecting the right of the public, Icasa must decide whether to hold a public inquiry or follow a notice and comment procedure.

If a public hearing is held, Icasa must compile a written report and provide written reasons for any administrative action taken or recommended.

If a notice and comment procedure is followed, Icasa must communicate the administrative action to those likely to be materially or adversely affected and call for comments.

Right to written reasons

Section 5 of PAJA provides that any person whose rights have been materially or adversely affected by administrative action may request written reasons, which must be provided within 90 days.

Promotion of Access to Information Act

Section 32(1) of the Constitution provides that:

Everyone has the right of access to -

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

Section 32(2) provides that national legislation must be enacted to give effect to the right of access to information. The Promotion of Access to Information Act was promulgated to give effect to this mandate. This Act, like much access to information legislation around the world, provides a procedure for one to follow in requesting information, and sets out the circumstances when access can be may be refused.

What is just important are the provisions relating to the gratuitous disclosure of information by the state.

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Publication of manual of functions and index of records

Section 14 of PAIA provides that Icasa (as a public body) must publish a manual that includes a description of its structure and functions, the contact details of information officers, details on records held including subject matter, categories and descriptions, categories of records that the public body automatically makes available without a person having to request access in terms of PAIA, a description of the services offered by Icasa, details on how an interested party can make representations and participate in decisions of Icasa including policy decisions, and a description of remedies available if Icasa acts or fails to act.

Voluntary disclosure and automatic availability of records

Section 15 of PAIA requires that the Icasa must yearly submit a description of the categories of records Icasa automatically makes available without a person have to request access in terms of PAIA, and how one can obtain those records.

Independent Communications Authority of South Africa Act

Icasa acts through its Council in terms of section 3(2) of the Icasa Act. In terms of section 3(3), Icasa is independent and must be impartial and must perform its functions without fear, favour or prejudice. Council decisions should not only be made public, but should be made in the public's view as well.

In terms of section 4(4)(a), Icasa may delegate any power, function or duty (except the regulation making power) to any councilor, committee of Council, or the chief executive officer (CEO) who may in turn delegate to staff. Licensing decisions may not be delegated to the CEO. Delegations of powers and functions, as well as decisions made by persons to whom powers and functions have been delegated, should also be made public and in certain circumstances in the public's view.

Minutes of Meetings

Section 11A of the Icasa Act requires minutes of meetings to be kept for Council meetings and meetings of Committees of Council. The minutes are to be considered *prima facie* evidence at proceedings before a court of law or any tribunal with competent jurisdiction.

Minutes of Council meetings are not made public as a matter of course, although some find their way into the public's view for various reasons, including litigation.

Minutes of Council meetings should, as a matter of course, be made public.

Register of Licences

Section 4A of the Icasa Act provides that Icasa must keep a register of all licences granted, amended and transferred. The register must be open to public inspection and a copy of the register or any part thereof must be provided to the public upon request and payment of the prescribed fee (hereinafter simply referred to as "open to public inspection").

Inquiries

Section 4B of the Icasa Act provides that Icasa may conduct inquiries. Icasa must, in respect of inquiries, give notice in the Government Gazette of its intention to conduct an inquiry, invite written representations (which must be open to public inspection) and may hold oral hearings open to the public.

Findings in respect of inquiries must be made within 180 days and notice thereof must be published in the Government Gazette. The findings themselves must be available for public inspection. Icasa should maintain a database or other searchable public record of decisions.

Annual Reports

Section 16 of the Icasa Act requires Icasa to submit an annual report within three months after the financial year end to the Minister. The Minister must table the report in Parliament.

The annual report, as well as any strategic and business plans should be published or otherwise made available to the public.

Complaints

Section 17C of the Icasa Act sets out a procedure for submitting complaints against licensees. Once a complaint is submitted to Icasa, Icasa may refer it to the Complaints and Compliance Committee (CCC). In terms of section 17C(2) of the Icasa Act, the CCC must provide that licensee a copy of the complaint and a notice setting out the allegations. The licensee has an opportunity to respond, the complainant an opportunity to reply, and the CCC must hold an oral hearing.

In terms of section 17C(7), the CCC must keep a record of all complaints received by it and notices sent, as well as a record of all proceedings and findings. These records must be open to public inspection.

In terms of section 17D, the CCC must submit its findings and recommendations to Icasa for all complaints. In terms of section 17E, Icasa must make the decision on complaints in writing.

Requests for Confidentiality

Section 4D(2) of the Icasa Act provides that Icasa must inform a person requesting that information submitted to Icasa be treated confidential, of its decision in writing within 14 days.

Icasa should at least make the fact of these confidentiality decisions public and ideally should publish all such decisions.

The issue here is one of transparency rather than openness. Icasa cannot always be open with the information that it considers; that is the point behind the confidentiality provisions. However, Icasa should, when making a decision that relies on confidential information, indicate that it has considered confidential information and how this information has affected its decision.

Electronic Communications Act

Regulations

Licences

Chapter 3 of the EC Act concerns service licensing and Chapter 5 spectrum licensing. These chapters provide that Icasa grants licences.

Section 9(5)(b) requires decisions regarding all individual licence applications, reasons for such decisions, and licence conditions, to be not only communicated to the applicants, but also published in the Government Gazette. Section 14(3) requires Icasa to publish licence suspensions and cancellations in the Government Gazette.

Section 16(5) requires Icasa to annually publish a list of class licensees in the Government Gazette.

Section 93(3) required Icasa to publish, soon after the EC Act came into force, a list of all licenses for the purposes of licence conversion, which is to be completed by 19 January 2009.

Radio Frequency Spectrum Plans / Technical Specifications

Sections 34(12) and 34(14) of the EC Act require Icasa to publish the radio frequency band plan and make copies available upon request.

Section 36(3)(f) requires Icasa to make all technical specifications available to the public.

Interconnection and Facilities Leasing Agreements

Section 39(3) of the EC Act requires Icasa to make copies of interconnection agreements (including rates and charges) available to anyone paying the fee prescribed for making copies.

Section 45(3) requires Icasa to publish facilities leasing agreements and section 45(4) requires Icasa to make copies of facilities leasing agreements (including rates and charges) available to anyone paying the fee prescribed for making copies.

COMPARISONS

Attached are the results of a survey conducted by reviewing the websites of several regulators around the world. The regulators in the USA, Hong Kong, and Mauritius were chosen based on the fact that their websites were considered superior in studies conducted by Lirne.net and funded by the International Development Research Centre of Canada as set out in: Lara Alawattagama and Chanuka Wattagama, June 2008, Benchmarking Asia Pacific National Telecom Regulatory Authority Websites; Opal Lawton, Draft Working Paper, June 2008, Benchmarking Caribbean and North American National Regulatory Authority Websites; and Monica Kerretts-Makau, Draft Working Paper, July 2008, Benchmark Indicators for African National Regulatory Authority Websites.

Although some further information may be made available by a particular regulator, just not on its website, it was impractical at this stage to do more on-the-ground research at those regulators. Although an email request for information was forwarded to those regulators, only one regulator responded with any useful information. A more comprehensive survey or study might be useful in highlighting best practices.

RECOMMENDATIONS

The first part of this section suggests some things that Icasa can do to be more open and transparent and is based on the requirements of the legislation. The second part suggests how it can be done. Important in this respect is the need to seize the potential of the Internet. This section concludes with a listing of priorities.

WHAT

Access to Icasa Council, Staff, and Icasa-appointed Experts

Although Icasa acts through its Council in terms of its empowering legislation, it can delegate many powers and duties (except for rule making powers) both to Committees and to the CEO (except for licensing). The CEO may, in turn, delegate powers and duties to any staff member.

It is, therefore, important for Icasa to communicate to its constituents on how it works. Icasa should publish detailed organisational charts, setting out not only its various departments, but also its sub-departments. These charts should be accompanied by descriptions of the powers and duties delegated to those departments and sub-departments.

Along with this organizational information, Icasa should make known the persons in charge of the various departments and sub-departments, and provide contact details for those persons and their respective staffs. The website of the Federal Communications Commission (FCC) is particularly good at setting out this information in accessible ways.

Delegation is an important power given to Icasa. Icasa Council controls who does what in that organisation, not the legislature (although the legislature has prohibited Icasa from delegating the regulation making power). Therefore, it is important that delegations of power be made known to the public. Icasa should create a database of delegations made by it (and those made by the CEO), both of those delegations that are general - eg, for the processing of class registrations to the licensing department; and once off delegations, eg, to a Committee to handle the licensing of Broadband Infraco (Pty) Ltd.

Icasa should also make it known when it appoints experts in terms of section 14A of the Icasa Act, and provide the contact details of those persons. In the past, Icasa-appointed experts have often consulted the industry on an ad hoc, selective basis. A recent example of this was the consultation with selected members of the industry concerning local loop unbundling. This selective consultation damages the credibility of the Icasa decision making process. If recommendations are made to Icasa that are one-sided because only one segment of Icasa's constituency has been consulted, then the integrity of decisions that Icasa might make in consequence of the advice is compromised. Therefore, Icasa should also make sure that its appointed experts (and its staff) consult in an open and transparent manner.

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Minutes of Council Meetings / Publication of Decisions

Council should publish minutes of its meetings. Similarly, if decision making has been delegated to a Councilor, Committee or the CEO, then those decisions should also be made public. This should be done in a consistent manner and not on an ad hoc basis.

The FCC is particularly good about making its decisions known. All of its meetings are open to the public. Notice to the public of such meetings as well as an agenda is provided. After the fact, transcripts of the meetings are published and all decisions taken are set out in, amongst other places, the daily digest of decisions made at the FCC.

Although in the long run, Icasa should aspire to this open decision making manner of conducting its business, in the immediate term, it should publish the minutes of its meetings. At the very least, it should publish all decisions made. Although many of Icasa's decisions are made public, such as those relating to regulations, inquiries, and some licensing, there are many more that either are not communicated or not communicated rather selectively. The presumption should be that everyone has a right to know all of Icasa's decisions unless there are compelling reasons to withhold such information. Those compelling reasons can only be reasons that are consistent with the Constitutional right to access information.

Icasa should also ensure that if decision making powers are delegated, then decisions made by Committee or the CEO as the case may be are also published.

Regulations

The regulation making process is succinctly described in the EC Act, which requires that Icasa invite public participation by publication of draft regulations in the Government Gazette. There is a minimum period of 30 business days for comment (which is often extended after the fact by Icasa). Final regulations are also published in the Government Gazette.

Icasa has a good record in publishing its proposed as well as final regulations not only in the Government Gazette but also on its website. With the launch recently of its new website, Icasa should ensure that it is accurately and continuously updated to include all regulations not only going forward, but those already made, as well.

Inquiries

Not unlike the regulation making process, the inquiry process is succinctly described in the Icasa Act, which requires that Icasa invite public participation by notice of an inquiry in the Government Gazette. Notice of findings are also published in the Government Gazette.

Icasa has a good record in publishing inquiry notices, as well as inquiry findings on its website. Icasa should ensure that its recently launched new website accurately details all findings in respect of concluded inquiries and notices in respect of inquiries in progress, and continuously updates its website in this respect as well.

Licensing

The licence conversion process is scheduled, in terms of the EC Act, to be concluded by 19 January 2009.

Thereafter, Icasa should make all individual licences available online. It should publish a list of class licence registrations, which is specifically required by the legislation. It should also publish a list of those that have been awarded the right to provide a service

without a licence. Icasa has recently made regulations requiring any person wanting to provide a service without a licence to first obtain permission from Icasa.

Icasa should also create and place online, the registration forms for new class licences, as well as the request forms for those that desire to be awarded the right to provide a service without a licence.

Spectrum

In line with the requirements of the EC Act, Icasa should publish the radio frequency band plan on its website.

Technical Specifications

In line with the requirements of the EC Act, Icasa should publish all technical specifications, including those from other organisations that it relies on, on its website.

Interconnection

In line with the requirements of the EC Act, Icasa should publish interconnection and facilities leasing agreements on its website.

Complaints

There is some information about the submission of complaints on the Icasa website. It appears that a complainant must first submit a complaint to the licensee involved, then to the Consumer Affairs Department (CAD) of Icasa, and only if the complaint is still not resolved, the complaint is referred to the CCC. According to the Icasa Act, the CCC makes a recommendation to Icasa who must decide the complaint. It is not clear whether or how the CAD resolves a complaint. It is suggested, however, that complaint procedures be drafted as regulations and published for public comment. Final regulations would then be published in the Government Gazette and on Icasa's website.

The Icasa Act requires Icasa to keep records of all complaint proceedings and make these records available to the public on request. Therefore, it is suggested that Icasa establish on its website a database of complaints. One should be able to extract from the database, when a complaint was submitted and whether it is pending (eg, before the Consumer Affairs Department or the CCC). Lists of documents submitted in a complaint proceeding should be provided, with information on how a person may request a copy of any such documents. Alternatively, all documents can be placed on the Icasa website. Hearings should be recorded and transcribed and made available on the website. The database should also include a copy of all findings and recommendations made by the CCC and decisions made by Icasa (and any decisions made by the CAD, if applicable).

It is also recommended that Icasa devise a system of providing notice of complaints filed and decisions made, if not in the Government Gazette, then at least on its website.

Requests for Confidentiality

Icasa should devise a system for providing notice whenever a party requests confidentiality. Icasa should also make the fact of confidentiality decisions public and ideally should publish all such decisions.

Icasa should also establish and implement a policy that whenever a decision is made using confidential information, specific reasons for using that information and how it affected the decision must be explained. This is true whether the proceeding is one involving regulations, inquiries, complaints or otherwise.

The issue here is one of transparency rather than openness. Icasa cannot always be open with the information that it considers. However, Icasa should be transparent about the fact of using confidential information to influence its decisions.

Ex Parte Communications

All ex parte communication should be placed in the public record. This is true for all proceedings, including regulation making proceedings, inquiries, and complaint proceedings. If the ex parte communication is oral it should be reduced to writing and then placed in the public file.

Again, the issue is one of transparency. There is no overall need to prohibit or avoid ex parte communications. However, the fact of and contents of ex parte communications should be public information.

Court Proceedings

Icasa should publish on its website, all court decisions wherein it was a party. In time, Icasa should make more information about litigation available, such as the papers filed in a matter.

Annual Reports / Financial Statements / Business Plans

Icasa should timeously publish its Annual Reports, including audited financial statements, on its website. It also should develop and publish annual (or multi-year) business and strategic plans.

These documents are important for several reasons. First, they give Icasa concrete ways to measure its own performance. If it develops strategic plans, it will be able to measure its delivery against those plans, avoiding the obvious pitfalls of not having them. The measurements should form part of Icasa's Annual Report. A good example of this is set out by Ofcom. Ofcom's most recent annual report, including measurement data is available at http://www.ofcom.org.uk/about/accoun/reports_plans/annrep0708/pande/.

Second, the dual tasks of developing and publishing strategic plans and Annual Reports will create public confidence in Icasa and its decisions. If Icasa's Annual Reports include performance measurements, also Parliament, to whom Icasa is politically accountable and from whom Icasa obtains funding allocations, will be able to better evaluate its successes.

Finally, open and accountable strategic planning and performance reporting will lead to a more efficient and therefore more effective Icasa.

Public consultations in general - timeliness

Public consultations are one of the key ways in which Icasa engages the public and stakeholders in the industry. Icasa should, in addition to doing so in an open and transparent manner, ensure that it completes consultations in a timely fashion. This should be one of the key performance targets.

Currently, Icasa has more than 25 outstanding proceedings, some of which date back to the days when the Telecommunications Act and former broadcasting legislation was still in force, more than two years ago. Some, quite important for the industry, such as regulations for interconnection and facilities leasing have been pending for years. Icasa has held numerous inquiries and regulation making proceedings, but no final, workable regulations have yet been published. Icasa should urgently create a workable plan to finalise these regulations.

Other proceedings, such as licence fee regulations and regulations governing carrier pre-selection have recently been published for public comment. These should be finalised rather promptly given their importance to the industry moving forward.

Still others, such as regulations regarding number portability and rights of way still have not yet been proposed by Icasa. These regulations should be published for public comment as a matter of urgency. Icasa should ensure that its strategic plans (with timelines) not only are made known to the public and consistent with the needs of the industry.

Practice Manuals

Icasa should establish practice manuals. Initially, the most basic practice manuals can be established, for example, the procedure for submitting documents to Icasa. Are submissions made at a central intake office; are copies date stamped to prove submission if the original should go missing; and can documents be submitted electronically and if so, how and how? These are the types of issues that need to be addressed in practice manuals.

Icasa has begun to do this in respect of complaint procedures. Eventually, practice manuals should be established for all of Icasa's functions, which will be useful not only for the public but for Icasa staff as well.

Practice manuals should include at a minimum, the following information:

- Contact names and details of Icasa personnel responsible for particular matters
- Time frames for Icasa responding to correspondence, requests, applications, etc - eg, 24 hours to acknowledge receipt; five working days to substantively respond to requests for information about a matter; 15 working days to respond to a request to provide an exempt service; 15 working days to respond to a request for numbers; 90 - 180 days to complete regulation making procedures depending on the complexity of the matter
- Dates and times when Icasa personnel must be available to take telephone calls, which be no less than several hours per day
- Dates and times when Icasa personnel must be available to meet with the public, which should be no less than several hours per day

This would not cost a lot to implement and keep in place, and should in addition to create a more accessible Icasa, allow Icasa to function more efficiently.

Media Liaison

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How

A Culture of Openness

Many of the suggestions made to increase openness and transparency at Icasa are not costly or very difficult. However, in order for them to be accomplished, a policy and culture of openness must be instilled in the organisation. Therefore, it is suggested that the Chairperson of Icasa issue a directive signaling Icasa's commitment to Icasa.

Funding

Awareness and training of staff is also important. This, however, costs money, as do some of the suggestions made herein. Therefore, it is also recommended that Icasa include in its budget for the next financial year, requests for allocations necessary to fund its openness campaign.

Internet

Icasa's top priority should be bringing its use of the Internet in line with best practices worldwide. This will greatly improve the connection that it has to its constituents and will also allow it to work more efficiently and therefore more effectively.

All information discussed herein, for example, government gazettes, press statements, court documents, practice manuals, licences and licence registers, should be published online, timeously, and in a manner that is accessible and searchable.

Icasa should also move to a more interactive use of electronic media. To do this, it can set up pilot projects, taking advantage of services that allow for online collaboration and dialog. Icasa should eventually allow all documents to be submitted online, for example, comments, complaints and licence applications. Experimentation in these areas should lead to better ways of doing things that none of us have yet to think about.

Icasa can use the opportunity of its recent launch of a new-look website to ensure that it is populated in a manner that is consistent with the recommendations made herein, and to launch any new interactive services. The importance of continuous daily updates cannot be overemphasised. Icasa should also reinstate its electronic mailing list (which we understand is not currently in operation) and ensure press releases, government notices and other news from Icasa is provided electronically on a daily basis.

Library / public reference room / citizen room

Given that there are still many people in South Africa that have no access to the Internet, it is important that Icasa not neglect other, more traditional ways, of keeping its operations open to the public. All information that is available online must be duplicated and secured for the public's use in a library, sometimes referred to as public reference rooms or citizen rooms.

Priorities

There are many recommendations made herein. In this section we set out what we believe to be the priorities. As the production of a PAIA manual is statutorily imposed on Icasa, Icasa should begin with that mandate. The production of the PAIA manual will also serve the benefit of informing the production and publication of other important information. The publication of the following information is the most urgent.

1. Minutes of Council meetings.
2. Listing of all Council members', staff and Icasa-appointed experts' contact details.
3. Searchable, electronic database of all regulations in force and effect, and all proposed regulations.
4. Searchable, electronic register of licences. This of course, assumes that the licence conversion process is complete, so the need to complete that process becomes the number one priority.
5. Searchable, electronic database of facilities leasing and interconnection agreements.
6. Practice manuals.