Electronic Communications Regulatory Review; - Proposed Amendments to the Electronic Communications Act

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Preface

The Edge Institute received funding from the Shuttleworth Foundation on the basis of a proposal for it to support the ICT policy and regulatory processes more actively by making independent, public interested interventions in the public processes of the Independent Communications Authority of South Africa (ICASA) and the Department of Communications. Following the delays to a number of regulatory process in the last few years due to contradictions in or the onerous nature of certain aspects of the Electronic Communications Act (EC Act), particularly around Chapter 10, it was decided that a practical and encompassing place to start would be with identifying the legal bottlenecks to the implementation of policy in the electronic communications sector.

The following people are thanked for their input and advice on this document, which they have done in their personal capacities and which do represent the views of their organisations and institutions. Any errors remain those of the Edge Institute:

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Background

The electronic communications sector currently finds itself in an interregnum following a series of interventions intended to open up the sector and enable competition. In 2006 the EC Act, which started as the Convergence Bill, was finally enacted, with the intention of preparing the sector for a converged and competitive environment. Specifically, it sought to ensure a non-discriminatory access regime, an effective competition framework and efficient and equitable spectrum assignment and use in a technologically neutral licensing framework.

In line with the provisions of the EC Act the sector regulator, ICASA, has instituted a number of processes that have either stalled or not reached conclusion within the statutory period prescribed due to complexity or contradictions within the law. Several of the areas in which ICASA is required to act, now, as a result of the competition framework set out in the EC Act, arguably are dependent on the definitions required from the regulator in Chapter 10 of the EC Act. ICASA has set in motion a process to prescribe the competition framework anticipated by Chapter 10 in order to implement the pro-competitive remedies anticipated by the EC Act. Draft regulations were gazetted for public comment in March 2008 and public hearings held in June 2008. However, this framework has not yet been finalised.

In 2006 in line with its mandate to improve consumer welfare, ICASA sought to regulate the termination prices of mobile phone calls which had risen by over 500 percent in five years and currently are more than 100 percent higher than termination rates in Botswana, Kenya, Uganda, and Tanzania. A public inquiry was held which included the publication of Discussion Documents in January 2007 on the termination market and the leased lines market in May 2007. Public hearings were held on both in the course of 2007. A Findings document on termination was published by ICASA in November 2007, which primarily concluded that that the competition framework envisaged in Chapter 10 would require implementation before any meaningful intervention could follow. The leased line market enquiry did not yield a findings document within the statutory 180-day period, but it is anticipated that a similar finding would have ensued.

Similarly, enquiries into spectrum allocation, particularly high demand WiMax spectrum, which started in 2006 have not been concluded following public hearings and the publication of a Findings document in June 2008. It is unclear what the delay in this process is attributable to, but the licence conversion process and the proposed recent approach of pricing spectrum to international benchmarks may have had some effect.

The failure to introduce these pro-competitive measures has had a chilling effect on new and aspirant entrants to the market and is unquestionably a major contributor to the much-lamented high cost of communications in the country. President Jacob Zuma in his first State of the Nation address on 3 June 2009, emphasised the reduction of the costs of communications as a priority of the new administration.

These regulatory delays were further compounded by the licensing delays. In 2006, as required by the EC Act, ICASA set about converting Value Added Network Services (VANS) licences into electronic communications networks services (ECNS) and electronic communications services (ECS) licences in terms of the new technology neutral, horizontal licensing framework as set

out in Chapter 3. This process was required to be completed within 24 months of the enactment of the EC Act, with an allowable six month extension if required. ICASA initially announced its decision to licence only a select list of the existing VANS licensees as ECNS licensees, which resulted in legal action pursued by Altech, when it was excluded from the list. Altech brought a court action challenging the decision to limit the number of converted ECNS licences against ICASA and the Minister of Communications (Minister) on whose directive ICASA had acted. It also sought relief from a contested prohibition on VANS being able to provide their own network facilities without having to obtain these from incumbent licensed telecommunications network operators such as Telkom and Neotel.

The matter hinged on Ministerial policy directions issued to ICASA instructing the regulator to determine which, if any, VANS should be granted ECNS licences. This direction related to the contested Ministerial determinations of 2005, which were at the time interpreted by the regulator to mean that VANS could self-provide telecommunication facilities. The day before they were to become operational, the Ministry issued a press release rejecting this interpretation resulting in a string of stranded investments, abandoned business plans and “pirate” operators.

In the process of selectively converting licences to the new EC Act licensing regime, ICASA overturned its own previous ruling, confirming the Ministry’s view that former VANS could not self-provide. In terms of the licensing conversion process, ICASA envisaged that only those listed VANS who received the new licences from the regulator following the 2007 policy direction, with no clear criteria for their award, would be entitled to self provide.

But the court, in granting the relief sought by Altech, declared that the prohibition on self-provisioning is in direct conflict with the then enabling legislation and the 2005 Ministerial determinations of 2005 and ordered that all VANS licences be allowed to ‘self-provide’.

While the industry celebrated this ruling and the anticipated proliferation of competitors, the regulatory framework necessary to ensure competitive entry, such as a non-discriminatory access regime and equitable spectrum allocation remain unresolved. Without the bottlenecks that exist in the current regulation being removed, the rights secured through the courts for service providers may be hollow and continue to constrain the institutional responsiveness of the regulator.

Introduction

The EC Act is the primary legislation regulating the electronic communications industry in South Africa. It sets out specific rules for the industry and then provides the independent regulator, ICASA, the Minister, and the Universal Service and Access Agency of South Africa (USAASA) with the requisite authority to regulate the industry by implementing the various provisions of the EC Act.

The EC Act has been in force for more than two years. In that time, it has become apparent that many of its provisions are not efficient or effective. Some, for example, the licensing provisions, have been overtaken by events, such as the *Altech* judgment. and the continued convergence of networks, services and companies, the continued digitisation of electronic communications and the resultant changes in technologies, services and the market place. Some are simply not compatible with the Constitution or the objects of the EC Act, for example, those interconnection provisions entrenching favourable treatment in respect of the former monopoly provider and dominant players. And some are simply not implementable as written, for example, those found in chapter 10 concerning competition matters. These instances are specifically highlighted in the discussion of the provisions of the EC Act.

This paper is intended to highlight provisions in the EC Act that, as written, do not facilitate the effective and efficient regulation of the electronic communications industry, and then to suggest amendments. The suggested amendments are set out with supporting reasons in the final section of this paper.

Although there is no policy document that preceded the adoption of the EC Act, such as the White Paper on Telecommunications Policy that preceded the Telecommunications Act, there are objects set out in the EC Act. Therefore, in addition to judging the provisions for workability, the provisions will be measured against the objects of the EC Act, as well as, of course, the Constitution. We have also have been mindful of best practice principles for electronic communications regulation when making recommendations.

We begin by looking at the history of the regulation of electronic communications in South Africa, the objects of the EC Act, the Constitution, and best practice regulatory principles.

Before proceeding, however, it is important to state that there is other relevant legislation, such as the Independent Communications Authority of South Africa Act and the Electronic Communications and Transactions Act, and although mention might be made of that other legislation herein, the focus of this paper is the EC Act.

The Context of this Review

History of the Regulation of Electronic Communications

Prior to 1994, the year that South Africa held its first democratic elections, the broadcasting and telecommunication industries were regulated primarily by the provisions of the Radio Act of 1952 and the Broadcasting Act of 1976, which facilitated government-owned and controlled monopolies for both industries.

During the political negotiations, known as the Multi-Party Negotiating Process (MNMP), through which there was a successful negotiated transition to democracy in South Africa, it was decided that in addition to an interim Constitution, Transitional Executive Committee, and Independent Electoral Commission, there was a need for an Independent Media Commission for the purpose of regulating media during the first democratic elections, and an Independent Broadcasting Authority (IBA) to regulate the industry moving forward. The IBA regulated primarily in respect of licensing, ownership and programming. As the media in South Africa had historically been used as a political tool, the regulation of the industry going forward in South Africa's nascent democracy was seen as crucial for almost everyone.

During the past fifteen years, over 100 community radio stations have been licensed, six former SABC radio stations have been privatized, eight new commercial radio stations and one commercial TV station and five subscription broadcasting stations were licensed.

The White Paper on Telecommunications Policy articulated South Africa's policy telecommunications post 1994. The White Paper maintained the then existing market structure for the telecommunications industry. It perpetuated a monopoly for Telkom in the fixed line basic services market segment for a certain period of time in exchange for the promise of providing universal access to basic telecommunication services, and a duopoly in the provision of mobile services by the two licensees awarded licences on the eve of democracy. The White Paper led to the passing of the Telecommunications Act, 1996.

In 1999, the Broadcasting Act was passed. Most of the provisions of that legislation concern the restructuring of the South African Broadcasting Corporation (SABC), the state owned and controlled broadcaster, into separate public broadcasting and commercial broadcasting arms.

In 2001, the Minister issued policy directions. The passing of amendments to the Telecommunications Act followed this. These amendments provided for the eventual licensing of a competitor to Telkom, Neotel, for the licensing of Sentech in the international carrier of carriers space and for a new multi-media service, and for the expansion of Telkom's rights, such as to provide fixed-mobile services and to have automatic access (along with the cellular licensees) to 1800 MHz and 3G spectrum.

In the first step toward liberalisation of the market in 2005, the Minister acted in terms of the Telecommunications Act to lift various restrictions on licensees. The restriction on value added network services (VANS) licensees of providing voice was lifted, as was the obligation of VANS and cellular licensees to obtain their fixed lines from Telkom. In addition, the restriction that VANS

and private telecommunications network (PTN) licensees could not resell excess capacity was lifted. The Minister attempted to reverse the decision in regard to Vans licensees, however, the Court in *Altech Autopage Cellular (Pty) Ltd v the Chairperson of the Council of the Independent Communications Authority of South Africa and Others* (Case No 20002/089, unreported judgment of 31 October 2008) (*Altech* judgment) held that once the determination was made, it could not be reversed.

Convergence of networks, services and technologies was dealt with on a procedural level with the passing of the Independent Communications Authority of South Africa Act (ICASA Act). That Act consolidated the then South African Telecommunications Regulatory Authority, tasked to regulate the telecommunications industry and the IBA.

Convergence was confronted substantively with the passing of the Electronic Communications Act in 2005. The EC Act came into force in July 2006. The transitional phase of the EC Act was scheduled to be complete by 19 January 2009, however, certain converted licences remain to be issued by ICASA.

Since the passage of the EC Act, it is becoming increasingly apparent that the rollout of broadband electronic communications networks is important to economic, social and political development in South Africa. The Department of Public Enterprises (DPE) recognized this and embarked on a process to establish Broadband InfraCo (InfraCo), a state-owned company that will invest in national and international backbone electronic communications networks. The Broadband Infraco Act has been passed, as well as an amendment to the EC Act that will facilitate the licence of InfraCo. However, to date, Infraco has not yet been licensed.

In conclusion, the current regulatory framework, including the EC Act, is shaped by its history. One overarching aspect is that the state has had interests in a number of existing and potentially new players in the market, including the SABC, Telkom, Vodacom, Neotel, Sentech and InfraCo. Government has struggled with the dual roles of adopting policy and legislation that is enabling for the industry on the one hand and protecting state commercial interests on the other. Some of the suggestions for amendment to the EC Act are intended to help reduce this conflict.

It is also important to understand that the regulatory framework is currently uncertain in a number of respects. Many of the regulations and other subordinate legislation required to implement the EC Act are still pending or not yet proposed. Therefore, some of the suggested amendments are intended to help make the jobs of the Minister, ICASA, and USAASA easier, allowing for more effective and timeous regulation of the industry.

Constitution of the Republic of South Africa

The various provisions of the Constitution set out below are particularly relevant.

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, amongst others:

1. Freedom of expression including not only the right to freedom of the press and other media but also the right to freedom to receive or impart information or ideas, amongst others.

2. Right of access to information.

3. Right of just administrative action.

4. Right to equality, including the full and equal enjoyment of all rights and freedoms.

5. The right to language and culture.

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 192 of the Constitution provides that national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

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)).

Since 1994, South Africa is a constitutional democracy, meaning that all legislation must be consistent with the Constitution and all government action must also conform to the precepts of the Constitution. These various provisions of the Constitution prompt some of the suggestions for amendment to the EC Act.

Objects of the EC Act

Section 2 of the EC Act provides that the primary object of the Act is "to provide for the regulation of electronic communications in South Africa in the public interest and for that purpose to—

> (a) promote and facilitate the convergence of telecommunications, broadcasting, information technologies and other services contemplated in this Act;
>
> (b) promote and facilitate the development of interoperable and interconnected electronic networks, the provision of the services contemplated in the Act and to create a technologically neutral licensing framework;
>
> (c) promote the universal provision of electronic communications networks and electronic communications services and connectivity for all;
>
> (d) encourage investment and innovation in the communications sector;
>
> (e) ensure efficient use of the radio frequency spectrum;
>
> (f) promote competition within the ICT sector;
>
> (g) promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services;

(h) promote the empowerment of historically disadvantaged persons, including Black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities;

(i) encourage research and development within the ICT sector;

(j) provide a clear allocation of roles and assignment of tasks between policy formulation and regulation within the ICT sector;

(k) ensure that broadcasting services and electronic communications services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in the Republic;

(l) provide assistance and support towards human resource development within the ICT sector;

(m) ensure the provision of a variety of quality electronic communications services at reasonable prices;

(n) promote the interests of consumers with regard to the price, quality and the variety of electronic communications services;

(o) subject to the provisions of this Act, promote, facilitate and harmonise the achievement of the objects of the related legislation;

(p) develop and promote SMMEs and cooperatives;

(q) ensure information security and network reliability;

(r) promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public;

(s) ensure that broadcasting services, viewed collectively—

(i) promote the provision and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater for all language and cultural groups and provide entertainment, education and information;

(ii) provide for regular—

(aa) news services;

(bb) actuality programmes on matters of public interest;

(cc) programmes on political issues of public interest; and

(dd) programmes on matters of international, national, regional and local

significance;

(iii) cater for a broad range of services and specifically for the programming needs of children, women, the youth and the disabled;

(t) protect the integrity and viability of public broadcasting services;

(u) ensure that, in the provision of public broadcasting services—

(i) the needs of language, cultural and religious groups;

(ii) the needs of the constituent regions of the Republic and local communities; and

(iii) the need for educational programmes, are duly taken into account;

(v) ensure that commercial and community broadcasting licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in the Republic;

(w) ensure that broadcasting services are effectively controlled by South Africans;

(x) provide access to broadcasting signal distribution for broadcasting and encourage the development of multi-channel distribution systems in the broadcasting framework;

(y) refrain from undue interference in the commercial activities of licencees while taking into account the electronic communication needs of the public;

(z) promote stability in the ICT sector."

As there is no policy document that preceded the adoption of the EC Act, the delineation of the objects of the Act as set out therein should guide us in determining whether the specific provisions are consistent with the objects. Therefore, some of the suggested amendments are aimed at better conforming with the objects, which include the encouragement of new entrants into the market, investment and competition, ensuring universal access at affordable prices, facilitating convergence and the introduction of innovative services, and diversity in respect of ownership and of view points.

Best Practice Regulatory Principles

Principles

It is generally accepted that there are certain administrative principles that should be adhered to in any regulatory framework for electronic communications. These include the following

- Transparency - Transparent processes will ensure not only that regulators act in open and accountable ways, but will also serve to garner confidence in the regulatory processes.
- Fairness - Regulation must be fair to all players. It cannot be discriminatory in favour of or against any one party or group of parties.
- Clarity - Legislation and regulations must be clear so that they can be followed and enforced easily, avoiding costly and time consuming litigation.
- Flexibility - Electronic communications is a fast paced industry and the regulatory framework, although clear and certain, should allow the regulator the flexibility to move with the industry to facilitate the introduction of new and more services leading to the eventual provision of universal service for all.

Trends

There are also several trends in the electronic communications industry that one should bear in mind in reviewing any regulatory framework. The trends include the following:

- Privatisation - Over the past several decades, there has been a great deal of full or partial privatisation of former state-owned telecommunications companies. Along with privatisation came regulation, often by agencies independent of both the government and the telecommunications companies.

- Liberalisation - Many countries have succeeded in liberalising their electronic communications market places, ushering in competition. This trend has altered the way in which licences are awarded. The trend in this respect is to make it as easy as possible for new entrants to get a licence, with a big move towards general authorisations and away from individual licences.

- Convergence - The convergence of technologies, services and industries has forced regulatory frameworks to move from technology-based regulation to technology neutral and service neutral regulation.

- Universal service - where historically universal service policy focused on access to basic voice telephony, the current trend is to aspire to universal service of broadband as well as services at affordable rates - ensuring cost effective services, by regulating prices of dominant players, along with effective regulation to facilitate the entry of new competition will lead to universal, cost effective service for all.

International Law

South Africa is a member of the World Trade Organisation and is therefore bound by the General Agreement on Trade in Services (GATS), a multilateral international agreement setting out rights in respect of trade in services, including telecommunication services.

The GATS includes an Annex on Telecommunications as well as specific commitments made by member countries in terms thereof. It also includes an Annex on Negotiations on Basic Telecommunications, which led to the Fourth Protocol on Basic Telecommunications and certain additional specific commitments made in terms thereof. As part of the second round of specific commitments, South Africa and other member countries made commitments in respect of establishing an appropriate regulatory environment. These commitments included commitments to put safeguards in place to prevent anti-competitive practices, that interconnection be ensured on a non-discriminatory and timely basis and at cost based pricing, and that an independent regulator be established to regulate the industry in an impartial manner. Such international commitments are contained in a document called the Reference Paper.

Best practice principles and trends have been kept in mind when suggestions have been made for amendments.

The Electronic Communications Act (2005)

The EC Act deals with a number of issues, setting out principles (and in some cases, specific mandates) and leaving the job of regulation to either ICASA, the Minister or USAASA.

The issues dealt with in the EC Act include the following:

- The making of Regulations and Policy
- Licensing
- Rights of Way
- Interconnection and Facilities Leasing
- Broadcasting
- Competition
- Numbering
- Consumer Issues
- Universal Service

Before proceeding to the issues, an overview of the regulatory functions of ICASA, the Minister and USAASA will be useful.

Overview of Regulatory Functions

The Minister's Powers

In addition to having powers set out in the ICASA Act in respect of the appointment of ICASA councillors, the establishment of a performance management system, and ICASA's funding, the Minster has policy making powers, as well as powers to issue policy directions to ICASA, and to establish guidelines in respect of rights of way, in addition quite extensive powers related to spectrum and universal service.

ICASA's Powers and Functions

ICASA's powers generally are set out in section 4 of the ICASA Act. These include:

- Making recommendations to the Minister on policy matters, and amendments to legislation
- Monitoring the sector to ensure compliance with the legislation and licence conditions
- Managing the radio frequency spectrum
- Developing and enforcing licence conditions
- Granting, renewing, amending, transferring and revoking licences
- Approving technical parameters and characteristics
- Directing licensees to produce documents and information
- Conducting research
- Attending international conferences
- Making regulations
- Inspecting equipment
- Undertaking inquiries
- Investigating and adjudicating complaints

Regulations, possibly the most important aspect of ICASA's powers, are made under section 4 of the EC Act in relation any matter which must or may be prescribed in terms of the relevant legislation.

In addition to the notice and comment procedures that ICASA is required to carry out in making regulations, ICASA is required to notify the Minister that it intends to make a regulation and the subject matter thereof, 30 days prior to making such regulation. Notably, ICASA does not have to submit its regulations to the Minister for approval and publication, as it previously had to do in terms of the now repealed Telecommunications Act.

USAASA's functions

USAASA exists, inter alia, to administer the Universal Service and Access Fund (USAF). Section 80 of the EC Act provides for the existence of USAASA and provides that the Minister may appoint a board to oversee the functions of USAASA in accordance with policy directions issued by the Minister.

In terms of the EC Act, USAASA is not required to provide universal service and access. It is rather required to 'promote' and 'encourage, facilitate and offer guidance' in respect of universal service and access, and 'foster the adoption and use of new methods' of obtaining universal service and access.

Generally, USAASA:

- May undertake investigations into matters relating to its functions;
- Must conduct research into and keep abreast of developments on ICTs;
- Must continually survey and evaluate the extent to which universal service and access have been achieved;
- May issue information on universal service and access from time to time;
- Must, when so requested by the Minister, make recommendations to the Minister in relation to universal service and access policy;
- Must, when requested by ICASA, advise it on any matter relating to universal service and access;
- Must continually evaluate the effectiveness of the Act and things done in terms thereof towards achieving the goals of universal access and universal service;
- May liaise, consult and co-operate with any person or authority;
- May appoint experts and other consultants; and
- Manage the Universal Service and Access Fund (USAF).
- A brief summary in table form, of other specific regulatory functions in relation to which ICASA and the Minister have powers is provided below.

Table 1: Regulatory functions in relation to which ICASA and Minister have powers

Regulatory Function	ICASA	Minister	USAASA
Service licensing	· Prescribe types of licences/exemptions · Prescribe standard terms and conditions for licences/ exemptions · Prescribe procedures for licensing · Prescribe licence fees · Consider individual/class licences · Amend, renew, transfer, suspend, and revoke licences	· Issue policy directions inviting applications for individual electronic communication network service licences · Issue policy directions in respect of licence fees	
Rights of way	· Prescribe regulations	· Develop guidelines, including for obtaining government permits and resolving disputes between landowners and licensees	
Interconnection and facilities leasing	· Determine which operators do not have significant market power and exempt them from obligations · Prescribe regulations setting out principles such as pricing principles · Determine if a request is reasonable · Resolve disputes · Review agreements · Prescribe regulations regarding carrier preselection		

Spectrum	· Develop a band plan · Prescribe procedures for competing applications · Prescribe procedures for withdrawals of licences · Consider licence applications · Investigate and resolve interference issues	· Represent South Africa internationally · Approve the band plan · Allocate spectrum for security services · Approve/disapprove spectrum migration where an entity wholly or partially owned by the state is involved	
Equipment Approval and Standards	· Approve communications equipment · Prescribe circumstances where equipment approval is not necessary · Prescribe equipment standards		
Broadcasting	· Prescribe a new code of conduct and review all existing regulations · Allocate time for party election broadcasts · Identify national sporting events that may not be exclusively broadcast by subscription broadcasters · Prescribe regulations for independently produced and South African programming · Exempt persons from restrictions on cross-ownership and concentrations of ownership · Conduct inquiries and make recommendations to the Minister on cross-ownership and concentrations of ownership	· Consult with ICASA regarding national sporting events that may not be exclusively broadcast by subscription broadcasters · Table before Parliament recommendations from ICASA re cross-ownership and concentrations of ownership	

Competition	· Direct licensees to refrain from anti-competitive conduct · Prescribe regulations that define anti-competitive conduct, procedures and penalties · Prescribe regulations defining markets, significant market power and pro-competitive conditions · Resolve disputes		
Numbering	· Prescribe the numbering plan · Prescribe regulations regarding number portability		
Consumers	· Prescribe a code of conduct · Resolve disputes		
Emergency services	· Prescribe regulations for the implementation of provision of EC Act related to emergency services	· Establish emergency centres	·
Universal service	· Define and list underserviced areas · Prescribe universal service fund contributions · Consult with USAASA re competitive tenders	· Appoint board USAASA · Issue policy directions to the board · Determine what constitutes universal service and universal access · Approve income and expenditure of USAASA · Instruct USAASA in the administration of the USAF · Determine which persons constitute needy persons, which persons may apply for assistance from the USAF, and procedures in relation thereto	· Investigate · Conduct research · Survey and evaluate the extent to which universal service and access have been achieved, and the effectiveness of the EC Act in regard thereto · Make recommendations to the Minister and ICASA · Manage the USAF · Competitive tenders

The Making of Regulations and Policy

Making Policy

Section 3(1) of the EC Act provides that the Minister may make 'policies on matters of national policy' applicable to the information, communications and technology (ICT) sector, consistent with the objects of the EC Act and of the related legislation, which includes the Broadcasting Act and the ICASA Act.

The Constitution provides in section 85(2)(b) that the President exercises executive authority together with the Cabinet by, amongst other things, 'developing and implementing national policy'. Thus, the Minister may not, on his/her own, make national policy. The making of national policy constitutes the exercise of executive authority, vesting in the President together with the Cabinet.

These provisions either contradict the Constitution, or if they do not, then are redundant. It is therefore recommended that the provisions are deleted.

Making Policy Directions

Section 3(2) of the EC Act provides that the Minister may issue policy directions to ICASA that are consistent with the objects of the Act and of the related legislation. Policy directions may relate to the following.

- The undertaking of an inquiry
- The determination of priorities for the development of services and networks
- The consideration of any matter within ICASA's jurisdiction placed before it by the Minister

No policy direction may be issued regarding the granting, amendment, transfer, renewal, suspension or revocation of a licence, except as otherwise provided for in the Act. For example, section 5(6) provides that ICASA may accept and consider applications for individual electronic communications network services licences only in terms of a policy direction issued by the Minister.

Section 3(1A) was added to the EC Act in 2007 providing that the Minister may issue a policy direction to "provide for a framework for the licensing of a public entity" by ICASA. This provision was inserted to allow for the licensing on InfraCo. Although the Minister has issued a policy direction to ICASA, the licensing of InfraCo is not yet complete.

The Minister may also, in terms of section 81(1) of the EC Act, issue policy directions to the board of the Universal Service and Access Agency of South Africa (USAASA). It is not clear that the provisions of section 3(5) apply to policy directions issued to USAASA.

ICASA must consider policy directions issued by the Minister when exercising its powers or performing its duties. The board of USAASA must exercise its powers and perform its duties in accordance with policy directions issued to it.

In terms of section 3(5) of the EC Act, when issuing a policy direction, the Minister is required to consult ICASA. The Minister must also publish the text of the proposed policy direction in the Government Gazette, declaring the intention to issue a policy direction and inviting interested parties to submit written representations. The final version of the policy direction must also be published in the Government Gazette.

Making Guidelines

Section 21 of the EC Act provides that the Minister, in consultation with the Minister of Provincial and Local Government, the Minister of Land Affairs, the Minister of Environmental Affairs, ICASA and other relevant institutions, must develop guidelines for the rapid deployment and provisioning of electronic communications facilities.

The guidelines must provide procedures and processes for the following.

- Obtaining any necessary permit, authorisation, approval or other governmental authority including the criteria necessary to qualify
- Resolving disputes that may arise between an electronic communications network service licensee and any landowner

Neither the EC Act nor the ICASA Act provides clarification on the nature of guidelines or the process for making them.

Making Regulations

Regulations are made by ICASA in terms of section 4 of the EC Act in relation to any matter that must or may be prescribed, with regard to the following;

- technical matters
- any matter of procedure or form
- the payment of charges and fees; and
- control of the radio frequency spectrum

The ICASA Act extends ICASA's power to make regulations. In terms of section 4(3)(j) ICASA may make regulations on any matter that is incidental or necessary for the performance of its functions. Section 4(3)(k) specifically provides that ICASA may make regulations on empowerment requirements in terms of the Broad-Based Black Economic Empowerment Act.

The ICASA Act also provides that the power to make regulations may not be delegated.

In terms of section 4(3) of the EC Act, ICASA may declare a contravention of any regulation to be an offence, provided that the regulation specifies the penalty that may be imposed.

The procedure for making regulations is provided for in section 3(4). ICASA must publish proposed regulations in the Government Gazette, together with a notice declaring ICASA's intention to make regulations and inviting interested parties to make written representations. ICASA must also inform the Minister in writing of its intention. ICASA may conduct public hearings. The Minister's power to approve and publish regulations made by ICASA, which existed in the now repealed Telecommunications Act, has not been re-enacted in the EC Act.

In terms of section 3(7) of the EC Act, the required procedures do not apply with regard to any regulation that the public interest requires should be made without delay.

Section 95(2) of the EC Act, although not as clearly written as it could be, provides that all regulations previously made in terms of the repealed legislation, namely the Telecommunications Act and the Independent Broadcasting Authority Act, remain in force until amended or repealed by ICASA.

Licensing

In the communications regulatory framework set out in the EC Act, there are three types of licences:

- Service licences
- Radio frequency spectrum licences
- Equipment type approval

Service Licences

Section 7 of the EC Act provides that except for services exempted, no person may provide a service without a licence.

Although 'service' is not defined, it is presumably limited to the three types of services dealt with in the EC Act.

- Electronic communications network services (ECNS)
- Electronic communications services (ECS)
- Broadcasting services

'Electronic communication network service' is defined in the EC Act as:

> "a service whereby a person makes available an electronic communications network, whether by sale, lease or otherwise –
>
> (a) for that person's own use or for the provision of an electronic communications service or broadcasting service;
>
> (b) to another person for that other person's use in the provision of an electronic communications service or broadcasting service; or
>
> (c) for resale to an electronic communications service licensee, broadcasting service licensee or any other service contemplated by this Act."

'Electronic communications service' is defined as:

> "any service provided to the public, sections of the public, the State, or the subscribers to such service, which consists wholly or mainly of the conveyance by any means of electronic communications over an electronic communications network, but excludes broadcasting services."

'Broadcasting service' is defined as:

> "any service which consists of broadcasting and which service is conveyed by means of an electronic communications network, but does not include—
>
> (a) a service which provides no more than data or text, whether with or without associated still images;
>
> (b) a service in which the provision of audio-visual material or audio material is incidental to the provision of that service, or
>
> (c) a service or a class of service, which the Authority may prescribe as not falling within this definition."

In terms of the EC Act, services providers must either obtain an individual or class licence, or be exempt from licensing. The legislation sets out examples of the types of services that will fall under each of the licence categories.

Individual licences, according to the EC Act, include:

- Communications networks (ECNS) of national or provincial scale operated for profit;
- Commercial broadcasting and public broadcasting of national or provincial scale whether free-to-air or subscription;
- Voice telephony communications services (ECS) that use numbers from the national numbering plan;
- Communications network (ECNS), communications services (ECS) or broadcasting services where a state entity owns more than 25 percent; and
- Other services where the Independent Communications Authority of South Africa (ICASA) finds they have significant social or economic impact.

ICASA may consider applications for individual licences only after it has issued an invitation to apply. In respect of individual ECNS licences, ICASA may only issue an invitation in accordance with (and after) a policy direction issued by the Minister.

Class licences include:

- Communications networks (ECNS) of municipal scale operated for profit;
- Community broadcasting and low power services whether free to air or subscription; and
- Other services where ICASA finds they do not have significant social or economic impact.

Section 6(1) provides that ICASA may prescribe the:

- Type of electronic communications services (ECS) that may be provided;
- Type of electronic communications networks that may be operated;
- Type of electronic communications network services (ECNS) that may be provided; and
- Radio frequency spectrum that may be used without a licence.

Section 6(2) indicates that exemptions may include, but are not limited to:

- Communications services (ECS) provided not for profit;
- Communications services (ECS) provided by resellers;
- Private communications networks;
- Local area networks;
- Uses of radio frequency spectrum; and
- Other services as determined by ICASA.

ICASA issued regulations in 2008 exempting certain ECS and ECNS from licensing. However, it also issued regulations requiring entities that want to provide licence exempt services to nevertheless apply to ICASA for permission to do so, making the licence exempt category in essence another licence category.

The following matrix illustrates the types of licences and exemptions available in terms of the EC Act:

Table 2 : Types of Licences and Exemptions

	ECNS	**ECS**	**Broadcasting Services**
Individual	Individual ECNS Licence (for profit; national and provincial; state owns 25%+)	Individual ECS Licence (voice telephony using numbers from ICASA; state owns 25%+)	Individual Broadcasting Services Licence (commercial or public; national and provincial; state owns 25%+)
Class	Class ECNS Licence (for profit municipal, but not where state owns 25%+)	Class ECS Licence (data services, voice telephony not using numbers from ICASA)	Class Broadcasting Services Licence (community and low power)
Exempt	Provider of ECNS exempt from licensing (small ECNs such as local area networks, PTNs	Provider of ECS exempt from licensing (non-profit, resale)	

Radio Frequency Spectrum Licences

Not unlike in respect of service licensing, section 31 of the EC Act provides that except for exemptions, no person may use radio frequency spectrum without a licence.

The EC Act also provides that if a person has a service licence, or is exempt from such licensing, and requires the use of a frequency to provide that service, then that person must also obtain a radio frequency spectrum licence.

The EC Act provides that ICASA may prescribe procedures for awarding competing radio frequency spectrum licences, where there is more demand for frequencies than there are frequencies available.

There is currently a proceeding pending before ICASA where it has requested input on the licensing of the WiMAX frequencies in the 2.6 and 3.5 GHz radio frequency spectrum bands. This proceeding was initiated in Notice 1530 of 2006 in Government Gazette 29351 dated 2 November 2006. Regulations have not yet been published by ICASA.

The EC Act also provides that ICASA may exempt certain uses of the radio frequency spectrum from licensing. ICASA has done so in regulations published in July 2008 and amended in August 2008.

Equipment Type Approval

According to section 35 of the EC Act, no person may use, supply, sell, offer for sale or lease or hire any type of electronic communications equipment or facility unless that equipment has been approved by ICASA. In practice, the equipment manufacturer or the person importing the equipment into South Africa usually obtains equipment type approval.

ICASA may also prescribe exemptions from the requirement of type approval. None have been prescribed to date.

ICASA may prescribe equipment standards if aimed at:

- Protecting the integrity of ECNs;
- Ensuring proper functioning of equipment;
- Ensuring interoperability, interconnectability and harmonisation; and
- Avoiding harmful interference.

Rights of Way

The term 'right of way' is not used in the EC Act. It is, however, dealt with in Chapter 4. Chapter 4 is entitled Electronic Communications Networks and Electronic Communications Facilities. It deals with the rights of ECNS licensees in respect of the building of electronic communications networks and facilities.

Who Statutory Rights Regarding Rights-of-Way Rules Apply To

The provisions in the Telecommunications Act regarding rights of way applied to fixed line operators only, for example, Telkom. This excluded cellular licensees and other mobile licensees, such as mobile data telecommunication services licensees, but not

necessarily VANS or PTN licensees, which were in most instances fixed-line network operators. In practice, however, only Telkom utilised the provisions for various reasons.

In terms of section 20(1) of the EC Act, the rights granted to fixed-line operators in the Telecommunications Act were extended to all ECNS licensees, whether individual or class. The current ECNS licensees, following licence conversion, includes the two former PSTS licensees, three MCTS licensees, the two Mobile Data Telecommunication Services licensees, the broadcasting signal distributors, and numerous VANS, and potentially some PTNs, satellite broadcasting contribution (sometimes known as SNG), paging, and asset tracking licensees.

The Rights Granted to ECNS Licensees in the EC Act

The importance of discussing to whom the chapter applies is that those to whom it applies may exercise some extraordinary rights in respect of rights of way over both public and private property. In summary the extraordinary rights include:

- The right to enter upon any land and construct and maintain facilities, subject to environmental regulations, inter alia (S 22);
- With agreement of a local authority, the right to use underground conduit pipes (cost of pipes payable to local authority) (s 23);
- The right to construct and maintain facilities under streets, roads and footpaths (expenses of local authority payable) (s 24);
- If construction causes ECNS licensee to move facilities, cost borne by person constructing (s 25);
- Right to place gates on property owners' fences to allow access (s 26);
- Right to cause trees or vegetation to be cut at the cost of the property owner, subject to environmental regulations, inter alia (s 27);
- Right to control the height and depth of facilities on private land (where ICASA must prescribe height and depth for public land) (s 28); and
- Right to cause alteration to the construction of railways and works for electricity (s 29).

Regulations and Guidelines for the Implementation of Chapter 4

Not unlike under the EC Act, under the Telecommunications Act, ICASA was meant to make regulations for the implementation of the Chapter. Section 69(2) provided that ICASA must prescribe:

- the manner, form and period of notice to be given by an operator to any person or authority in connection with the performance by the operator of functions contemplated in the chapter; and
- the procedure to be followed and consultations to be held between an operator and any affected person or authority.

Despite the mandatory nature of section 69(2), no regulations were made by ICASA. Telkom acted as the *de facto* regulator in this regard.

Section 20(2) of the EC Act provides that ECNS licensees must perform their obligations in accordance with the regulations prescribed by ICASA. There is no further indication as to what the regulations must or may deal with.

Completely new in the EC Act is section 21 - Guidelines for rapid deployment of electronic communications facilities. According to subsection 1, the Minister must, in consultation with the Ministers of Provincial and Local Government, Land Affairs, Environmental Affairs, ICASA, and other relevant institutions, "develop guidelines for the rapid deployment and provisioning of electronic communications facilities". In accordance with section 21(2), the guidelines must provide procedures and processes for:

- Obtaining any necessary permit, authorisation, approval or other governmental authority, including the criteria necessary to qualify for such permit etc.
- Resolving disputes that may arise between an ECNS licensee and any landowner, in order to satisfy the public interest in the rapid rollout of ECNs and ECFs.

Interconnection and Facilities Leasing

Interconnection and facilities leasing involves the linking of two or more electronic communications networks or services. The purpose is to allow the customers of one network or service provider to have access to the customers or services of another network or service provider. Some of the forms of interconnection and facilities leasing include the following:

- Geographically adjacent networks interconnect so that customers on one network are able to have access to customers on the other network;
- Technologically different networks (such as wired and wireless) interconnect so that customers on one network are able to have access to customers on the other network;
- Downstream services providers obtain access to the facilities of an upstream network provider over which the services provider will provide services;
- New entrants interconnect with and obtain access to the facilities of incumbents in order to compete effectively; and
- New services providers offering VoIP interconnect with traditional services providers to complete voice telephony calls.

In South Africa, interconnection and facilities leasing are dealt with separately yet similarly. Thus, here they are dealt with together. The EC Act sets out the principle of open access in a number of provisions. It leaves much of the procedure to be regulated by ICASA. Generally, the process should follow a basic outline.

- ICASA makes rules and principles;
- The parties negotiate a commercial agreement in line with the rules and principles; and
- ICASA then reviews agreements to ensure compliance with the rules and principles.

Open Access Rules

Obligation to Interconnect and Lease Facilities

Section 37(1) of the EC Act provides that every licensee must interconnect on request, on terms negotiated, unless the request is unreasonable. Section 43(1) provides that all ECNS licensees must provide facilities on request, on terms negotiated, unless the request is unreasonable.

Exemption from the Obligation to Interconnect and Lease Facilities

ICASA may exempt licensees from the obligation to interconnect and ECNS licensees from the obligation to provide facilities, but only if ICASA has not found such licensees to have 'significant market power' in the relevant market. ICASA may exempt ECNS licensees even if they have significant market power from the obligation to lease fibre loops and sub-loops serving residential premises if constructed after the coming into force of the EC Act. ICASA has not exempted any licensee from their obligations to interconnect and lease facilities.

Essential Facilities

Section 43(8) of the EC Act provides that ICASA must prescribe a list of essential facilities that must be provided in terms of section 43(1), and ICASA must review that list at least every 36 months.

It is unlikely that a request for an essential facility could be challenged on the ground that the request is unreasonable, although this is not patently clear from the wording of the EC Act. If a facility is listed as essential, it should attract heightened regulatory scrutiny by ICASA. This, however, is also not clear. These issues need to be clarified in order for ICASA to be able to effectively regulate facilities leasing.

The Minister issued a policy direction to ICASA by Government Notice No 876 to the effect that ICASA should consider prioritising and urgently prescribing a list of essential facilities to include facilities connected to the SAT-3/WASC/SAFE marine cable.

To date, ICASA has not regulated essential facilities. Public hearings scheduled for early 2008, did not take place.

International Facilities

Sections 43(10) and (11) of the EC Act provide that an ECNS licensee may not enter into agreements for access to or use of international facilities, which agreements contain exclusivity provisions, provisions that create undue barriers for accessing or using such facilities, or otherwise restricts any party from leasing, selling, or otherwise providing such facilities to other services providers.

Any existing contractual provision indicating as much will become invalid from a date set by the Minister of Communications. In a draft policy, the Minister indicated that the date will be 1 November 2007, however when the Minister issued her policy directions in Government Notice No 876, there was no mention of this policy decision.

Process Regulations

Principles

ICASA must in terms of the EC Act prescribe regulations to facilitate the conclusion of interconnection and facilities leasing agreements by stipulating agreement principles, with regard to, for example:

- Quality, performance and levels of service;
- Pricing;
- Points of interconnection;
- Disclosure of technical and planning information;
- Contractual dispute resolution procedures;
- Billing and settlement procedures;
- Support systems;
- Calling line identification;
- Signaling services;
- Fault reporting;
- Cooperation in the event of faults;
- Co-location;
- Access and security arrangements; and
- Unbundling.

Procedures for Negotiating Agreements

ICASA must provide by regulation for a framework for concluding interconnection and facilities leasing agreements, which might include:

- Reference offers, which are standard terms and conditions for interconnection or facilities leasing offered by a licensee;
- Time frames for negotiations, the conclusion and implementation of agreements;
- The framework for determining technical and financial feasibility and the promotion of efficient use of networks and services (the reasonableness test); and
- The requirement that a licensee enter into negotiations with a licence applicant.

Disputes

Reasonableness Disputes

ICASA will determine whether a request for interconnection or facilities leasing is reasonable if there is a dispute, within 14 days of notification of a dispute by the party requesting interconnection. The test to be used by ICASA is whether the request is technically and financially feasible, and will promote the efficient use of communications networks and services.

Unwillingness or Inability to Negotiate or Agree

In the case of an inability or unwillingness for the parties to agree on terms and conditions of interconnection or facilities leasing, either party may notify ICASA of a dispute. Also, if the parties fail to agree within three months of the date of a request, they are deemed unable or unwilling to agree.

If the parties are unable to agree and the dispute is referred to ICASA, ICASA may do one of three things:

- Impose the terms and conditions of interconnection or facilities leasing;
- Propose terms and conditions of interconnection or facilities leasing and instruct the parties to renegotiate; or
- Refer the matter to the Complaints and Compliance Committee (CCC).

The CCC must hear the matter and then make a recommendation to ICASA as to the appropriate action, which could include, if the licensee has repeatedly been found guilty of violations, suspension or revocation of its licence. ICASA must decide what action to take within 60 days of a recommendation by the CCC.

Implementation Disputes

Either party to an agreement that has been filed with ICASA may notify the CCC of a dispute in respect of the implementation of interconnection or the provision of facilities. The CCC must hear and decide the dispute on an expedited basis in accordance with regulations prescribed by ICASA.

Submission and Review of Agreements by ICASA

All interconnection and facilities leasing agreements must be submitted in writing to ICASA. Agreements become effective and enforceable only upon submission and remain so unless a court orders otherwise or ICASA decides inconsistency with its regulations.

ICASA must review all agreements to determine whether an agreement is consistent with its regulations, except those agreements between parties that have been exempted from the obligation to interconnect. If an agreement is not consistent with the regulations, the parties will be required to renegotiate.

ICASA must provide copies of all interconnection agreements to anyone who requests them, except those between parties that have been exempted from the obligation to interconnect or provide facilities.

Existing and Proposed New Regulations

There are existing regulations made by ICASA in terms of the Telecommunications Act, setting out agreement principles and a framework for concluding agreements. There are several problems with the existing regulations. First, they have been

ineffectively implemented in the past, due to amongst other things, the fact that they are not clear in many respects, and thus open to abuse. Second, they only apply in respect of interconnection with those entities that had an obligation to interconnect in terms of the Telecommunications Act, namely PSTS licensees. ICASA tried to extend the reach of the regulations to, for example, MCTS licensees, but was delayed in doing so by a series of court and other actions by MCTS licensees. Third, the regulations must be amended to take account of the new regulatory framework set out in the EC Act.

ICASA published draft interconnection and facilities leasing regulations in terms of sections 38 and 44 of the EC Act, published in Notices 898 and 899 in Government Gazette 30091 dated 24 July 2007. The new regulations appear to go some way to eliminating the inherent problems of the existing regulations. ICASA published on 24 December 2007, a second iteration of the interconnection and facilities leasing regulations in -

- Notice 1794 of 2007 in Government Gazette 30605 of 24 December 2007, Facilities Leasing Regulations; and
- Notice 1795 of 2007 in Government Gazette 30611 of 24 December 2007, Interconnection Regulations

The new draft regulations deal with the issue of pricing in much greater detail. There are, however, aspects of interconnection and facilities leasing that have not been adequately catered for in the new draft regulations, in particular adequate process, which will avoid unnecessary and costly delays caused by incumbents' unwillingness to negotiate timeously. Another matter that should also be dealt with in the regulations is whether the regulations are retrospectively applicable, as many interconnection and facilities leasing agreements will have been concluded by the time the regulations are in force.

In Government Notice 1800 of 2007, published in Government Gazette 30610 of 24 December 2007, ICASA published a draft list of essential facilities and regulations pertaining thereto. ICASA proposes to declare as essential facilities a list of electronic communications facilities including co-location space, land-based fibre optic cables, backhaul circuits, cable landing stations, earth station, main distribution frame, and international gateways.

No regulations in terms of the EC Act have, however, actually been made by ICASA.

Carrier Pre-Selection

'Carrier pre-selection' is defined as -

> the ability of a subscriber of an electronic communications service to access and use the electronic communications services of another electronic communications service licensee or person exempted as provided for in section 6.

Section 42(1) of the EC Act provides that ICASA must make regulations defining the ECS subject to carrier pre-selection, and establishing a framework in terms of which ECS subscribers are able to access the ECS of another ECS licensee, and ECNS licensees are obligated to make the necessary electronic communications facilities available for the implementation and proper functioning of carrier pre-selection.

According to section 42(2), the framework described in section 42(1) must be in force not later than 1 July 2006. It also provides that carrier pre-selection must be nondiscriminatory in addition to efficient and timely.

The regulations called for in section 42 have not been prescribed yet. There are existing carrier pre-selection regulations made by ICASA and published by the Minister of Communications as General Notice 975 of 2005 in Government Gazette 27717 dated 24 June 2005. However, as they were promulgated under the Telecommunications Act, which provided for a far different market structure, including a duopoly for fixed line services, they are no longer appropriate. Although it is almost certain that all individual ECS licensees will have non-discriminatory rights in respect of carrier pre-selection in new carrier pre-selection regulations made by ICASA in terms of section 42 of the EC Act, no such regulations have been made as yet by ICASA.

Broadcasting

Although the IBA Act has been repealed and replaced by the EC Act, the EC Act continues to treat broadcasting, a subcategory of ECS, differently than ECS.

In the EC Act, a distinction is still made between broadcasting and broadcasting signal distribution. The latter is defined as –

> process whereby the output signal of a broadcasting service is taken from the point of origin, being the point where such signal is made available in its final content format, from where it is conveyed, to any broadcast target area, by means of electronic communications and include multi-channel distribution.

The EC Act defines broadcasting as –

> any form of unidirectional electronic communications intended for reception by the public, sections of the public or subscribers to any broadcasting service, whether conveyed by means of radio frequency spectrum or any electronic communications network or any combination thereof.

Broadcasters will be required to obtain a broadcasting licence in terms of chapters 3 and 9. If broadcasters want to provide their own signal distribution, they will also need to obtain an ECNS licence.

Limitations on Ownership and Control

Chapter 9 of the EC Act contains various provisions concerning the limitation of ownership and control. Section 64 indicates that a foreigner may not exercise more than 20 percent control over commercial broadcaster. Sections 65 and 66 concern limitations on how many broadcasting licences one entity may control and limitations on cross-media control.

Ownership of broadcasting licences is restricted so that no person is allowed to exercise control or be in a position exercise control over more than one commercial broadcasting television licence. In AM and FM sound broadcasting services, no person may control or be in a position to control more than two broadcasting service licences in each of those categories, or control two licences which either have the same licence areas or substantially overlapping licence areas.

A person who owns a newspaper is not allowed to acquire or have financial control of a commercial broadcasting service licence, either in television or sound. A person who is in a position to control a newspaper may not be in a position to control a television or sound broadcasting service in an area where the newspaper has an average circulation of 20 percent and where the licence area of the commercial broadcasting service overlaps by more than 50 percent with the circulation area of the newspaper.

The Authority may make exemptions to the above on good cause. Further, the limitations under section 66 do not apply to subscription television broadcasters by virtue of the previous section 31 of the Broadcasting Act which has been grandfathered by section 92(7) of the EC Act.

The provisions of sections 64, 65, and 66 of the EC Act substantially mirror sections 48 to 50 of the now repealed IBA Act. The IBA Act provisions, however, were given content to by Schedule 2 to the IBA Act, which contained three sections setting out:

instances of de facto control of a private broadcasting licensee;

instances of de facto control of a newspaper; and

provisions regarding the deemed control of a company.

In an apparent oversight, the provisions of Schedule 2 to the IBA Act did not find their way into the EC Act with the consequence that there is no content given to what is meant by "control" in sections 64, 65, and 66.

Political Broadcasting

Section 52 provides that no broadcasting service licence may be granted to any party-political entity.

Section 56 provides that party election broadcasts and political advertisements must not be broadcast on any broadcasting services except during an election period subject to the provisions of sections 57 and 58. Section 57 mainly regulates the broadcasting of party election broadcasts on public broadcasting services, namely the SABC. A broadcasting service licensee who elects to broadcast party election broadcasts must afford all other political parties a similar opportunity in terms of section 57(8).

Advertising

Section 55 provides that all broadcasting service licensees must adhere to the Code of Advertising Practice as determined and administered by the Advertising Standards Authority of South Africa. The Complaints and Compliance Committee of ICASA receives and considers complaints concerning alleged breaches of the Code by licensees who are not members of the Advertising Standards Authority of South Africa. Political advertising is regulated by section 58 of the EC Act.

Local Content

The EC Act contains several provisions applicable to radio and television broadcasting, concerning the preservation of local content.

'Local television content' is defined as –

> a television programme excluding transmission of sporting events and compilations thereof, advertisements, teletext and continuity announcements which is produced, inter alia –
>
> - by a broadcasting service licensee
> - by a person who is a citizen of, and permanently resident in, the Republic

- by a juristic person, the majority of the directors, shareholders or members of whom are citizens of, and permanently resident in, the Republic.

'Independent television production' is defined as –

production of local television content –

- by a person not directly or indirectly employed by any broadcasting service licensee; or
- by a person who is not controlled by or is not in control of any broadcasting service licensee.

The EC Act has empowered ICASA to include in any licence, any of the following conditions requiring the television broadcast licensee –

- to annually expend a specified sum of money or a specified percentage of its gross revenue on the production of television programmes with local content
- to allocate a specified minimum percentage of its broadcasting time to television programmes with local content
- in the case where a licence has a regional or local licence area, to allocate a specified minimum percentage of its broadcasting time to programmes which have been produced in the relevant locality
- to allocate a specified minimum portion or percentage of broadcasting time or revenue to a prescribed diversity of television programmes which are independent television productions.

ICASA also may prescribe, in relation to sound broadcasting licensees, conditions in terms of which the broadcasting service licensee is required to broadcast a specified minimum percentage of musical works that qualify as South African music. A musical work will qualify as South African music if two or more of the following criteria are met.

- the lyrics were written by South African citizens
- the music was written by South African citizens
- the music or lyrics were principally performed by South African citizens
- a live performance was recorded in South Africa or performed and broadcast live in South Africa.

Broadcasting Signal Distribution

Section 62 of the EC Act reflects the obligations of an ECNS licensee who provides broadcasting signal distribution or multi-channel distribution services. Such a licensee must give priority to the carriage of South African broadcasting channels, provide universal access to broadcasting services, and provide a diversity of service.

The section also provides for a common carrier to provide broadcasting signal distribution to broadcasting licensees, at their request, on an 'equitable, reasonable, non-preferential and non-discriminatory basis'. When determining tariffs the common carrier must also take into account the different categories of broadcasting services and the nature and technical parameters

provided to each broadcasting licensee with a view to ensuring that tariffs are in line with the various broadcasting services to which they relate.

Competition

The EC Act attempts to deal with competition matter in terms of ex post and ex ante regulation.

Ex Post

Section 67(1) of the EC Act provides that ICASA may direct a licensee or exempt service provider to cease or refrain from engaging in an anti-competitive act, if such person has engaged in an act or intends to engage in any act that is likely to substantially prevent or lessen competition by, among other things, (a) giving an undue preference to, or (b) causing undue discrimination against.

Ex Ante

Determining Anti-competitive Acts and Complaint Procedures

Section 67(2) provides that ICASA must prescribe regulations:

- Setting out what actions will be to give an undue preference or cause undue discrimination against;
- Detailing procedures for complaints, and for monitoring and investigations; and
- Indicating penalties that may be imposed for failure to comply with an order to cease or refrain from taking an anti-competitive action.

Section 67(3) of the EC Act provides that the regulations also must specify that ICASA may refrain from exercising powers in terms of subsection (1) if to do so would be consistent with the objects of the Act. However, no ruling to refrain may be made unless the service is or will be subject to competition sufficient to protect consumer interests, or if it would likely impair the establishment or continuance of a competitive market for that service.

Defining Markets, Significant Market Power and Ineffective Competition

Section 67(4) provides that ICASA must prescribe regulations defining relevant markets and market segments where there is ineffective competition, and must determine which service providers have significant market power in those markets and market segments, after which it may impose pro-competitive licence conditions on those licensees.

The determinations are also relevant to the efficient and effective regulation of interconnection and facilities leasing.

Section 67(5) provides how ICASA will determine significant market power. A licensee has significant market power in the relevant market or market segment where ICASA finds that the particular individual licensee or class licensee:

- Is dominant;
- Has control of essential facilities; or

- Has a vertical relationship that it determines could harm competition in the market or market segments applicable to the particular category of licence.

'Dominant' is defined with reference to section 7 of the Competition Act. Section 7 of the Competition Act indicates that a firm is dominant if it:

- Has at least 45% of that market;
- Has between 35 and 45 percent of that market, unless it can show that it does not have market power; or
- Has less than 35% of that market, but has market power.

'Market power' (as opposed to significant market power) is defined with reference to the Competition Act as:

> "the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers."

'Essential facility' is defined in the EC Act as:

> "an electronic communications facility or combination of electronic communications or other facilities that is exclusively or predominantly provided by a single or limited number of licensees and cannot feasibly (whether economically, environmentally or technically) be substituted or duplicated in order to provide a service in terms of this Act."

'Vertical relationship' is defined in the Competition Act as "the relationship between a firm and its suppliers, its customers, or both."

With respect to defining markets and market segments, section 67(6) of the EC Act provides that ICASA must consider the non-transitory (structural, legal, or regulatory) entry barriers to the applicable markets or market segments and the dynamic character and functioning of the subject markets or market segments.

When determining the effectiveness of competition in the relevant market or market segment, ICASA must take the following factors, among others, into account:

- An assessment of relative market share of the various licensees in the defined markets or market segments; and
- A forward looking assessment of the market power of each of the market participants over a reasonable period in terms of, amongst others:
- actual and potential existence of competitors;
- the level, trends of concentration, and history of collusion, in the market;
- the overall size of each of the market participants;
- control of essential facilities;
- technological advantages or superiority of a given market participant;

- the degree of countervailing power in the market;
- easy or privileged access to capital markets and financial resources;
- the dynamic characteristics of the market, including growth, innovation, and products and services diversification;
- economies of scale and scope;
- the nature and extent of vertical integration; and
- the ease of entry into the market, including market and regulatory barriers to entry.

ICASA has not made any of the determinations required by chapter 10 as yet.

Pro-competitive Licence Conditions, Including Pricing

Section 67(7) of the EC Act provides that pro-competitive licence terms and conditions to be imposed by ICASA may include but are not limited to terms and conditions relating to:

- Interconnection and facilities leasing (subsections (a), (c))
- Penalties for failure to abide by terms and conditions (subsection (b))
- Obligations to publish information (subsections (d) and (e))
- Obligations requiring separate accounting and accounting methods (subsections (f), (g), and (i))
- Pricing (subsection (h))
- South African broadcasting content (subsection (i))

Section 67(8) deals with the review of pro-competitive conditions, inter alia. It provides that, where ICASA undertakes a review of the pro-competitive terms and conditions, it must also review the market determinations and decide whether to modify the pro-competitive conditions set by reference to a market determination. If ICASA determines that a licensee to whom any pro-competitive condition applies is no longer a licensee possessing significant market power in that market or market segment, ICASA must revoke the applicable pro-competitive conditions. If ICASA determines that the licensee to whom pro-competitive conditions apply continues to possess significant market power in that market or market segment, but due to changes in the competitive nature of such market or market segment, the pro-competitive conditions are no longer proportional ICASA must modify the applicable pro-competitive conditions applied to that licensee to ensure proportionality.

Numbering

Numbering Plan

Chapter 11, section 68 of the EC Act, concerns numbering. Section 68(1) provides that ICASA must prescribe a numbering plan for the efficient use and allocation of numbers, and to accommodate the various protocols used and services provided by licensees. In terms of section 68(2), the numbering plan must consist of a scheme of identification to ensure that electronic

communications are correctly and efficiently directed to the point of reception for which they are intended. And in terms of section 68(4), the numbering plan must be non-discriminatory.

Looking to the future, section 68(7) of the EC Act enjoins ICASA to prescribe matters relating to a framework, including a schedule, for transforming the numbering plan to a non-geographic numbering system and implementing electronic numbering allowing the interoperation between telephone numbers and the Internet domain name system.

ICASA has not prescribed numbering plan regulations in terms of section 68(1) of the EC Act. However, there are numbering regulations that ICASA made in terms of the Telecommunications Act, which are still in force and effect, published by the Minister of Communications as No R 455 in Government Gazette 28839 dated 15 May 2006. However, as these regulations were promulgated under the Telecommunications Act, which provided for a far different market structure, including licences for PSTS and MCTS specifically mentioned in the regulations, the regulations need to be amended.

Number Portability

The EC Act defines number portability as -

> the ability of subscribers to an electronic communications service or persons providing a service pursuant to a licence exemption, to retain their existing numbers without impairment of quality, reliability, or convenience when switching from one electronic communications service licensee to another electronic communications service licensee.

Section 68 of the EC Act, which concerns numbering plans, also concerns number portability. Section 68 provides that ICASA was required to prescribe measures to ensure that number portability was introduced in 2005 or soon thereafter, as far as is practicably possible. The Telecommunications Act also required number portability to be introduced in 2005.

The regulations are supposed to inter alia, allocate responsibility between ECNS and ECS licensees for the implementation of number portability to ensure effective functionality, ensure access and routing within electronic communications networks, and allow licensees to assign numbers to subscribers and transfer numbers when subscribers change services in an efficient manner.

ICASA has not prescribed number portability regulations in terms of section 68 of the EC Act. However, there are number portability regulations that ICASA made in terms of the Texecommucnaitions Act, which are still in force and effect, published by the Minister of Communications as No R 963 in Government Gazette 28091 dated 30 September 2005. The functional specification for geographic number portability was published in Notice 889 of 2007 in Government Gazette 30089 dated 13 July 2007.

Those regulations, as they were made in terms of the Telecommunications Act, distinguish between geographic and non-geographic (but mobile only) numbers.

In terms of the Telecommunications Act, number portability was defined as -

> a capability whereby a subscriber to a telecommunication service who so requests can retain his or her telephone number when changing service from one public switched telecommunication service licensee to another public switched telecommunication service licensee or one mobile cellular telecommunication service licensee to another mobile cellular telecommunication service licensee.

In contrast, the EC Act defines number portability so that any to any number portability may be effected.

The implementation of number portability is dependent on ordering system specifications to be negotiated between operators and published by ICASA for public comment. This process has not been completed in respect of geographic number portability.

Mobile number portability has been implemented in terms of the number portability regulations, which include functional specifications for mobile number portability, and ordering system specifications for mobile number portability.

It is almost certain that individual ECS licensees will have non-discriminatory rights in respect of number portability in respect of any new number portability regulations made by ICASA in terms of section 68 of the EC Act. This is a requirement of section 68. However, whether such licensees have rights under the existing number portability regulations made in terms of the Telecommunications Act, however, is not an easy question to answer. Therefore there is an urgent need for ICASA to promulgate new regulations.

Emergency Numbers

Sections 76 – 79 of the EC Act deal with emergency numbers. The provisions provide that the Minister may establish public emergency communications centres (to be known as 112 Emergency Centres). A subscriber should be able to connect to the emergency centre by dialing 112 in order to connect to an emergency centre. In this regard, all ECNS and ECS licensees are obligated to carry, free of charge, communications to 112 Emergency Centres and from 112 Emergency Centres to emergency organizations, and make, free of charge, automatic number identity, such as caller line identity, and automatic location identity available to 112 Emergency Centres.

In this regard, ICASA must make regulations. ICASA proposed certain regulations published in Notice 1298 of 2007 published in Government Gazette 30385 dated 18 October 2007, detailing the requirements of licensees and 112 Emergency Centres. The proposed regulations also require service providers to always provide access to emergency numbers even where a subscriber's service has been disconnected or suspended. This is in line with the Minister's policy direction set out in Government Notice No 876, to ICASA that ICASA prescribe a list of emergency numbers to which the public would always have access.

Consumer Issues

Sections 69-71 of the EC Act provide that ICASA must make regulations related to consumer issues. ICASA must

- make regulations setting out a code of conduct applicable to all licensees, but may develop different codes of conduct applicable to different services;
- make regulations setting out the minimum standards for end-user and subscriber service charters; and
- Prescribe a code of conduct on people with disabilities

In terms of section 71, ICASA must establish a consumer advisory panel to advise it on matters relating to consumer issues.

Codes of Conduct for Licensees

The Code of Conduct for Licensees (Code) is intended to form the basis of individual codes of practice in the industry. ICASA published the Code of Conduct for Licensees in Notice 1740 of 2007 in Government Gazette 30553 dated 7 December 2007.

Code of Conduct on People with Disabilities

By Notice 1613 of 2007 published in Government Gazette 30441 dated 7 November 2007, ICASA published Regulations on a Code of Conduct on People with Disabilities applicable to all Licensees in terms of the EC Act.

The regulations relate to the accessibility of the services to people with disabilities, setting out the various options to licensees to increase accessibility.

End-user and Subscriber Service Charters

The Regulations in respect of End-user and Subscriber Service Charters for Postal, Broadcasting, ECNS and ECS Licensees, published in Notice __ of 2008 in Government Gazette 31556 dated 31 October 2008, set out the minimum standards for end-user and subscriber service charters.

An ECS licensee is required to ensure that:

- Services are available within 90% of the area specified in its licence for 95% of the time; and
- Service provision is at 95% reliability and 95% efficiency.

The regulations also set targets for meeting customer demands, for reducing call failure rates, in respect of operator response times for emergency services, for fault clearance and for customer confidentiality and privacy.

Licensees are also required to inform customers of the terms and conditions for service provision as well as billing features of statements.

The complaints procedure is dealt with in some detail in the regulations. The regulations provide for consumers who are not satisfied with the handling of a complaint by a service provider, to escalate their complaints to ICASA consumer affairs division for consideration.

The regulations also introduce monitoring requirements and procedures. In terms of these provisions, licensees will be assigned a Monitoring Inspector to assist the licensee in complying with its licence conditions. Further, ICASA may request the following information in order to monitor compliance: programme recordings, programming logs, financial statements, minutes of meetings and technical requirements. Monitoring Inspectors are required to compile an annual compliance report on all the activities of the licensee.

ICASA has recently asked the public to assist ICASA in determining whether the regulations should be repealed or amended, presumably under pressure from the industry. This was published in Notice 73 of 2009 in Government Gazette 31807 dated 19 January 2009.

Consumer Advisory Panel

ICASA has, in terms of section 71 of the EC Act, established a Consumer Advisory Panel.

Universal Service

The EC Act defines 'universal service' as:

> "the universal provision of electronic communications services and broadcasting services as determined from time to time in terms of Chapter 14."

'Universal access' is defined as:

> "universal access to electronic communications network services, electronic communications services and broadcasting services, as determined from time to time in terms of Chapter 14."

The determinations are to be made by the Minister on the recommendation of USAASA.

Universal Service and Access Fund

The USAF was established so that subsidies could be paid out in order to further the goals of universal service and access. Section 87 of the EC Act provides for the continued existence of the USAF.

Although USAASA is required to administer the USAF, it must do so in accordance with the instructions of the Minister in terms of section 87(4) of the EC Act. Money paid into the fund is transferred to the national revenue fund in terms of section 87(2), and subsidies are paid out only if Parliament appropriates money for that purpose in terms of section 87(3).

Section 89 of the EC Act requires every holder of a licence to make a prescribed annual contribution to the USAF. ICASA published regulations in this respect by Notice 1270 of 2008 in Government Gazette 31499 dated 10 October 2008. The regulations indicate that all licensees pay an annual contribution to the USAF of 0.2 percent of annual turnover.

Section 88 of the EC Act provides that the money in the USAF be exclusively utilized for the payment of subsidies to:

- Assist 'needy persons';
- Broadcasting and ECNS licensees for the construction of infrastructure in under-serviced areas;
- Schools and universities for the procurement of services; and
- Establish and operate broadcasting services and community access centres.

In terms of section 88(2) of the EC Act, under-serviced areas are to be determined by ICASA. ICASA has not made that determination.

In terms of section 88(4), the Minister must determine types of needy persons to whom assistance may be given, the types of persons who may apply for assistance and the application manner, and the manner in which subsidies will be paid. The Minister has not yet made those determinations.

USAASA however has embarked on a consultative process that will eventually lead to recommendations to be made by USAASA to ICASA and the Minster in respect of the definitions.

Competitive Tender for Universal Service Projects

In terms of section 90 of the EC Act, USAASA may award project grants to ECNS licensees in under-serviced areas by competitive tender.

E-rate

In 2001, the Telecommunications Act was amended, by the addition of section 45(3), to provide for a 50 percent discount to public schools and universities with regard to Internet access services. The Minister was required to set a date on which the provisions came into force. The Minister set the date 18 January 2005. To date, however, no services providers have yet implemented these provisions.

These provisions were re-enacted in section 73 of the EC Act, with some amendments. The two amendments that are noteworthy are:

- A requirement that ICASA regulate the implementation of the provisions in section 73(4).
- A discretion for the Minister to extend the discount to private schools in section 73(5).

ICASA published E-Rate Regulations in Government Notice No R 246 in Government Gazette 31979 dated 3 March 2009.

Proposed Amendments to the Electronic Communications Act

For ease of reading, the proposed amendments to the EC Act are set out in table form. The first column indicates the section number, the second a suggested amendment and the third, the reasons for the suggested amendment.

Section	Proposed Amendment	Reasons
1 - definitions - end user; radio frequency spectrum; and radio station	Amend the definition of end user so that is defined in relation to not only licensees, but also those exempt from licensing. Similarly, the terms, "radio frequency spectrum" and "radio station" should be amended to be defined in relation to BS, as well as ECS.	"End-user" is currently defined in relation only to licensees, but there are end users in respect of those using licence exempt services as well, so the definition should be amended. "Radio frequency spectrum" and "radio station" are defined in relation only to ECS and not also BS, which is not consistent with the reality that BS licensees use spectrum.
3(1A)	Delete.	This provision, like sections 5(6) and 9(1), has been made redundant by the recent *Altech* judgement, which has resulted in hundreds of individual ECNS licences in the licence conversion process, and therefore, it, like sections 5(6) and 9(1), should be deleted.
3(2)	Amend to state, "The Minister may, subject to subsections (3) and (5), issue to the Authority or the Agency policy directions consistent with the objects of this Act and of the related legislation".	This proposed amendment brings policy directions issued to USAASA under the direction of section 3. As written, there are many uncertainties in respect of policy directions issued to USAASA.
3(4)	Amend to state, "The Authority or the Agency, as the case may be, in exercising its powers and performing its duties in terms of this Act and the related legislation must consider policies made by the Minister in terms of subsection (1) and policy directions issued by the Minister in terms of subsection (2)".	Like the proposed amendment to section 3(2), this proposed amendment brings policy directions issued to USAASA under the direction of section 3.

Section	Proposed Amendment	Reasons
3(5)(a)	Amend to state, "must consult the Authority or the Agency as the case may be".	Like the proposed amendment to section 3(2), this proposed amendment brings policy directions issued to USAASA under the direction of section 3.
5(3)(d)	Delete.	There is no reason that entities in which the state holds an interest, as competitors in the electronic communications market, should be treated any differently than other competitors. Therefore, this provision is unlikely to pass constitutional scrutiny.
5(6)	Delete.	This provision has been made redundant by the recent *Altech* judgement, which has resulted in hundreds of individual ECNS licences in the licence conversion process, negating the need to limit the number of new entrants.
6(1) and 6(2)	Amend to state that the following services are exempt from licensing - ECS, BS and ECNS provided on a non-profit basis; resale of ECS, BS and ECNS; private ECS, BS and ECNS; and such other services prescribed by ICASA from time to time.	The current provision does not exempt any services from licensing; it requires ICASA to do that. However, when Icasa did so, it simultaneously required persons wanting to provide licence exempt services to apply to ICASA for permission to do so - creating a quasi licensing requirement. For the sake of certainty and in line with the current liberalised industry (especially after the *Altech* judgment), licence exempt services should be set out in the EC Act, negating the need for persons wanting to provide them from having to apply to ICASA to do so. The issue of spectrum licence exemptions is dealt with in section 31(6) of the EC Act, in chapter 5, dealing with spectrum, so it is recommended that any reference to spectrum in chapter 3 to spectrum licence exemptions is deleted.
6(3)	Amend (and renumber 6(2)) to state, "ICASA may prescribe regulations setting terms and conditions applicable to exempted ECS, BS and ECNS, and may declare a contravention of the regulations an offence".	This amendment is necessary if the suggested amendments to section 6(1) and 6(2) set out above are effected. The amendments retain the purpose of the existing provisions in section 6(3).
8(2)	Amend to state, "Such standard terms and conditions may concern matters concerning, inter alia, - "	As written, the provision is not clear - it states that standard terms in licences may take into account certain listed matters, when what it should say is that standard terms may concern the listed matters.

Section	Proposed Amendment	Reasons
8(3)	Amend to state, "The Authority may impose additional terms and conditions on any individual licensees in terms of chapter 10".	As written, the provision confuses the imposition of individual licence terms and conditions and the prescription of regulations. This proposed amendment simply brings clarity.
8(4)	Amend to add, "and may impose additional terms and conditions on individual licensees in respect of universal access and universal service obligations".	This amendment makes it clear the ICASA may impose licence terms and conditions on individual licensees relating to universal access and universal service.
9(1)	Amend to read, "Any person may, subject to the provisions of this Act, apply for an individual electronic communications network or electronic communications service licence in the prescribed manner."	The existing requirement that ICASA has to issue an invitation to apply for ECS and ECNS licenses, thereby limiting the number of new entrants, has been made redundant by the recent *Altech* judgement, which has resulted in hundreds of individual ECS and ECNS licences being issued in the licence conversion process.
9(2)	Amend subsection 9(2) to read as follows: "Any person may, upon invitation by the Authority, subject to the provisions of this Act, apply for an individual broadcasting service licence in the prescribed manner. The Authority must give notice of the application in the Gazette and— (a) invite interested persons to apply and submit written representations in relation to the application within the period mentioned in the notice; (c) set out the proposed licence conditions that will apply to the licence; (d) give interested persons an opportunity to submit written responses to any representations submitted in terms of paragraph (a); and (e) may conduct a public hearing in relation to any application for an individual broadcasting service licence."	The existing requirement that ICASA has to issue an invitation to apply, thereby limiting the number of new entrants, has been made redundant by the recent *Altech* judgement, which has resulted in hundreds of individual ECS and ECNS licences being issued in the licence conversion process. Therefore, the procedure should apply only to BS.
9(6)(b)	Amend to state, "may impose such additional terms and conditions referred to in sections 8(3) and 8(4).	This amendment makes this provision consistent with the amendment proposed for section 8(4), which clarifies that ICASA may impose licence conditions relating to universal access and service.

Section	Proposed Amendment	Reasons
10(1)(h)	Amend to state, "if the amendment is in accordance with chapter 10".	As written, the provision confuses the imposition of individual licence terms and conditions and the prescription of regulations. This amendment provides clarity.
13(1)	Amend to state, "An individual licence may not be assigned, ceded or in any way transfered, and the control of an individual licence may not be assigned, ceded or in any way transferred, without the prior written permission of the authority".	This amendment and the one to section 13(2) are necessary to indicate that transfers of control of individual licences require the prior approval of ICASA.
13(2)	Amend to state, "An application for permission to assign, cede or in any way transfered an individual licence, or transfer control of an individual licence may be made to the Authority in the prescribed manner".	This amendment and the one to section 13(1) are necessary to indicate that transfers of control of individual licences require the prior approval of ICASA.
13(3), (4) and 5)	These sections should be renumbered sections 13A(1), (2) and (3).	This amendment will make clear that ICASA may impose limitations on ownership and control even outside the context of a transfer application. As the provisions are currently subsections of the section on transfers, it could be argued that they only apply in that context.
16(1)	Amend to state, "The Authority may, upon receipt of a written registration in the manner prescribed, issue a class licence".	In line with the current liberalised industry (especially after the *Altech* judgment), it should be unnecessary for ICASA to actually grant a class licence; it should be sufficient for the registrants to simply register with ICASA.
16(6)	Amend to state, "A person who intends to transfer a class licence shall notify ICASA in advance in writing".	Given that class licences are awarded to anyone who meets the criteria of the class, it should be unnecessary for ICASA to give approval for transfers; it should be sufficient for the registrants to give written notice to ICASA.
New - 16(7)	Add a subsection to indicate that the term of a class registration is perpetual.	This is necessary if the proposed deletion of section 19 is effected.

Section	Proposed Amendment	Reasons
17(3)	Amend to state, "The Authority shall, within ten (10) days after receipt of a registration notice, issue a class licence and update its register of all class licences".	In line with the current liberalised industry (especially after the *Altech* judgment), it should be unnecessary for ICASA to actually grant a class licence; it should be sufficient for the registrants to simply register with ICASA. Furthermore, the process should not take as long as 60 days; it should able to be completed immediately but in any event within five working days, after which a registration is deemed.
17(4)	Amend to substitute "ten (10) day" for "sixty (60) day".	This amendment is necessary if the suggested amendment to section 17(3) is effected.
17(5)	Amend to substitute "issue" for "grant", "ten (10) days" for "sixty (60) days", and "6th day" for "61st day".	These amendments are necessary if the suggested amendment to section 17(3) is effected.
19	Delete.	Given the nature of a class licence, it should be unnecessary to require renewals of such licences; their terms should be perpetual.
21	Add section 21(3) - "Once developed, the guidelines must form the basis of a policy direction to be issued to the Authority within three (3) years of the coming into force of this Act". Add section 21(4) - "The Authority must prescribe regulations imposing obligations on licensees in the exercise of the rights granted in this chapter within three (3) months of the issuance of policy directions by the Minister, and if the Minister fails to issue policy directions in terms of section 21(3), the Authority must nevertheless prescribe regulations within 45 months of the coming into force of this Act".	This amendment clarifies the nature of the guidelines, and imposes deadlines on the Minister and ICASA. As written, the provisions, which provide wide ranging rights to all ECNS licensees, are likely to cause much chaos given the recent issuance of hundreds of ECNS licences in the licence conversion process.

Section	Proposed Amendment	Reasons
31(2)	Amend to add, "and a service licence is required in addition to any radio frequency spectrum licence where the provision of such service entails the use of radio frequency spectrum.	There are some service providers providing service without a service licence, as they historically (pre the Telecommunications Act) were only licensed in respect of spectrum use. Examples include paging, radio trunking and satellite news gathering licences. This amendment is necessary to unequivocally bring all service providers historically licensed only with spectrum use licences into the regulatory framework of the EC Act, which requires a service licence to provide a service and a spectrum licence to use spectrum. ICASA did not issue service licences to such spectrum licence holders in the licence conversion process due to this apparent lacunae.
31(3)	Amend to state, "The Authority may, taking into account the objects of this Act, prescribe procedures and criteria for - (a) radio frequency spectrum licences in instances where there is sufficient spectrum available to accommodate demand; (a) radio frequency spectrum licences in instances where there is insufficient spectrum available to accommodate demand; and (b) the amendment, transfer, transfer of control, renewal, suspension, cancellation, and withdrawal of radio frequency spectrum licences.	As written, it is specifically stated that ICASA may make regulations for competing applications. This amendment clarifies that ICASA must make regulations for all applications. Currently, Icasa's procedures with regard to spectrum applications are rather ad hoc, not officially published in the government gazette and have not been the subject of a public process.
34(2)	Amend to allow the Minister to approve the frequency plan only in respect of the allocations to the security services.	This amendment makes it clear that Icasa is able to promulgate and amend from time to time the frequency band plan, with the exception that the Minister must approve any amendments in respect of security services.
34(16)	Amend to allow the Minister to intervene only in spectrum migration when spectrum used by the security services is involved.	As written, the provision allows the Minister to intervene in respect of spectrum migration whenever the government has an interest in the entity using the spectrum. As the government still hold interests in a number of competitive licensees, this creates an unconstitutional discriminatory regime for spectrum re-allocations. The amendment makes it clear that the Minister is able to intervene when the security services are involved, but not when competitive licensees are involved.

Section	Proposed Amendment	Reasons
37(6) and 43(7)	Add the phrase, "or in any other way discriminatory compared to the comparable network services provided by such licensees to itself or an affiliate", at the end of both sections.	These provisions, as currently written, allow a licensee to discriminate in favour of itself or its affiliates except in respect of technical standards and quality (eg, in respect of price). It should be clear that licensees may not discriminate in favour of their own selves or affiliates in any respect.
38(5) and 44(5); and 41 and 47	Amend to clarify that ICASA must regulate interconnection and facilities leasing regardless of what it does or does not do in terms of chapter 10 of the EC Act.	These provisions, as written, it has been stated, link ICASA's right to regulate interconnection and facilities leasing to chapter 10, and have resulted in in-action by ICASA on interconnection and facilities leasing regulation. This was not intended in the passage of the EC Act and would be unprecedented worldwide (with the exception of New Zealand). The result of the confusion has been a regulatory framework that strongly favours incumbents over new entrants. This is not consistent with the objects of the EC Act or with the clear mandate to all licensees to interconnect and provide facilities on request as is set out in sections 37 and 43 of the EC Act.
43(8)	Amend to include the following as section 43(8A) - "Requests for essential facilities are deemed to be reasonable and all electronic communications network services licensees receiving such requests are required to agree on non-discriminatory terms and conditions of a facilities leasing agreement within ten days of receiving the request, failing which the Authority will impose terms and conditions consistent with this Chapter within five days of receiving notification that the licensee has failed to conclude an agreement."	This provision as written provides that ICASA may make a list of essential facilities. However, it is not clear how the facilities listed are to be treated differently than facilities not listed. Clarity is required to enable ICASA to act swiftly in terms of this provision, which is essential to the implementation of a non-discriminatory access regime. The amendment will clearly distinguish facilities, which must be provided upon request unless the request is unreasonable, and essential facilities, which must always be provided regardless of the provider's opinion whether the request is reasonable. The amendment will also ensure that a dispute about terms and conditions of providing essential facilities do not result in unacceptable delays.
43(11)	Amend to state that any "exclusivity provision contained in any agreement or other arrangement that is prohibited under subsection (10) is invalid from a date equal to three years after the coming into force of this Act".	This will eliminate the statutory preferential treatment in favour of Telkom as the former monopoly provider of international facilities, which is unconstitutional. This will accord with the removal of all of Telkom's monopoly rights in the EC Act.

Section	Proposed Amendment	Reasons
64(1)(b) and (2); and 66(5)	Amend to define what is meant by "control".	Schedule 2 to the IBA Act (which was repealed by the EC Act) defined what was meant by "control". In an apparent oversight, although the provisions of the IBA Act regarding control were incorporated into the EC Act, the schedule 2 provisions were not. In order to avoid disputes about the definition of control and possible costly litigation, it is recommended that a definition of deemed control set out in schedule 2 of the now repealed IBA Act, be included in the EC Act. Also, Icasa had made recommendations for alterations to the schedule 2 provisions. It is also recommended that the proposed alterations to schedule 2, made by ICASA in its Final Recommendations to the Minister (dated 13 January 2004), fist be made and that then the schedule be incorporated into the EC Act.
65 and 66	Amend the ownership and cross-ownership limitations in line with the recommendations made by ICASA in 2004.	ICASA conducted a review of the limitations on ownership and cross-ownership and in 2004 made recommendations to the Minister, in its Final Recommendations to the Minister dated 13 January 2004). However, the EC Act was adopted, apparently inadvertently, without considering the recommendations made by Icasa. It is recommended that Icasa's 2004 recommendations regarding the limitations on ownership and cross-ownership be included in the EC Act.

Section	Proposed Amendment	Reasons
67(4), (5), (6) and (7)	Amend to state: "(4) The Authority must prescribe regulations determining relevant markets or market segments where there is ineffective competition, and whether any licensee has significant market power in such markets or market segments, and if so, imposing appropriate and sufficient pro-competitive licence conditions on such licensees. The regulations must, amongst other things - (a) determine relevant wholesale and retail markets or market segments; (b) determine whether there is effective competition in those relevant markets and market segments; (c) determine which, if any, licensees have significant market power in those markets and market segments where there is ineffective competition; and (d) impose appropriate pro-competitive licence conditions on those licensees having significant market power to sufficiently remedy the market failure. (5) When determining whether there is effective competition in markets and market segments, the Authority must consider, among other things, the non-transitory (structural, legal, and regulatory) entry barriers to the applicable markets or market segments and the dynamic character and functioning of the markets or market segments, including an assessment of relative market share of the various licensees or providers of exempt services, in the markets or market segments, and a forward looking assessment of the relative market power of the licensees in the markets or market segments.	These provisions of chapter 10 require determinations to be made by the Authority in respect of defining and identifying markets, whether there is effective competition in those markets, determining whether any person has significant market power in those markets, and setting pro-competitive licence conditions on those determined to have SMP in markets where there is ineffective competition. As written, the provisions are not clear and this has resulted in delayed regulatory action by ICASA. These clarifications should assist ICASA in implementing the competition matters regulatory regime set out in chapter 10.

Section	Proposed Amendment	Reasons
67(4), (5), (6) and (7) cont'd	(6) Licensees must provide to the Authority any information specified by the Authority in order that the Authority may carry out its duties in terms of this section. (7) A licensee has significant market power in a market or market segment if that licensee - (a) is dominant; (b) has control of an essential facility; or (c) has a vertical relationship that the Authority determines could harm competition. (8)Pro-competitive licence conditions may include, but are not limited to - (a) obligations in respect of interconnection and facilities leasing in addition to those imposed by chapters 7 and 8 and any regulations made in terms thereof; (b) penalties for failure to abide by the pro-competitive licence conditions; (c) obligations to publish any information specified by the Authority; (d) obligations to maintain separate accounting for any services specified by the Authority; (e) obligations to maintain structural separation for the provision of any services specified by the Authority; (f) price regulation as determined by the Authority, in addition to that imposed by chapters 7 and 8 and any regulations made in terms thereof, including matters relating to the recovery of costs; and (g) obligations relating to accounts, records and other documents to be kept, provided to the Authority, and published.	

Section	Proposed Amendment	Reasons
82(3)(a)(i)	Amend to indicate that the Minister must "determine what constitutes universal access by all areas and communities to ECNS, ECS and BS".	This amendment is necessary to make the provisions regarding universal access workable. 'Universal access' is defined in the EC Act as "universal access to electronic communications network services, electronic communications services and broadcasting services, as determined from time to time in terms of Chapter 14". Section 82(3)(a)(i) provides that the Minister must determine what constitutes universal access by all areas and communities to ECS and ECNS. There is no mention of BS, like there is in the definition of universal access itself. This inconsistency should be corrected.
82(3)(a)(ii)	Amend to indicate that the Minister must "determine what constitutes the universal provision to all persons of ECNS, ECS and BS".	This amendment is necessary to make the provisions regarding universal access workable. The EC Act defines 'universal service' as "the universal provision of electronic communications services and broadcasting services as determined from time to time in terms of Chapter 14". Section 82(3)(a)(ii) provides that the Minister must determine what constitutes the universal provision for all persons to ECS. BS are not mentioned although they are mentioned in the definition. Section 82(3)(a)(ii) provides that the Minister must also determine what constitutes access to ECN including elements or attributes thereof. In the definitions, the concept of access to ECN is found in the definition of universal access, where in section 82(3)(a) it is found in the discussion of universal service. In reality, ECNS is relevant to universal access as well as universal service.

Section	Proposed Amendment	Reasons
88(1)	Amend section 88(1)(a) to include reference to ECNS; section 88(1)(b) to include reference only to ECNS; and section 88(1)(e) to state "for the establishment and operation of community access centres, including for training and allowances for personnel, in order that communities may gain access to ECNS, ECS and BS".	Section 88(1) provides that subsidies may be paid out of the Universal Service and Access Fund for certain things. However, there are inconsistent reference to ECNS, ECS and BS, which the proposed amendments will clear up.
88(3)	Amend to replace the word "bi-annually" with "every two years".	Section 88(3) requires ICASA to bi-annually review the definition and designation of under-serviced areas, which is unworkable.
88(4)	Amend section 88(4) to provide that USAASA, after consultation with ICASA and the Minister, must determine the meaning of "needy persons" for the purposes of the EC Act and must review such determination every two years. It is also suggested that the remaining provisions of section 88(4) are amended to indicate that USAASA must create application procedures for persons to apply for subsidies from the USAF for all of the purposes for which funds may be distributed, not just those in respect of needy persons.	Section 88(4) provides the Minister with the authority to make determinations for the payment of subsidies out of the USAF in respect of needy persons, provisions which were also included in the now repealed Telecommunications Act. The Minster has failed to date to make any such determinations. It is suggested that this task be transferred to USAASA, that USAASA be required to do it at least every two years, and that USAASA be required to establish application procedures for distribution of funds out of the USAF. To date, no such procedures have been promulgated or implemented resulting in millions of rands sitting in the USAF undistributed.
95(1)	Amend to state, "ICASA is encouraged to, within 24 months of the coming into force of this Act, amend the regulations made under ...".	As written, the provisions indicated that ICASA must amend the regulations within 24-months only, but fails to state what happens after the 24-month period if ICASA fails to meet it (which ICASA has failed to do). This amendment makes it clear that after the 24-month period, the old regulations remain until repealed or amended.