National Integrated ICT Policy White Paper

Unpacking the White Paper - Part II - Open Access

Prepared for you by Lisa Thornton Consulting

      The National Integrated ICT Policy White Paper (White Paper) was published 26 September 2016. Although the White Paper deals with many issues, there appear to be three pillars upon which it rests. First, is the concept of open access. Second, is the issue of spectrum assignments. Third, is the rapid deployment policy dealing with how licensees acquire rights of ways.

In this part II of the series, we will look at the open access policy (excluding the issue of a wireless open access network, which will be looked at in the context of spectrum assignments). In particular, we will look at the policy in the context of regulating interconnection and facilities leasing dealt with in Chapters 7, 8 and 10 of the Electronic Communications Act (EC Act).

In the White Paper, the Minister correctly identifies problems with the EC Act. The policy itself, which does not amend the EC Act, will not fix the problems identified. However, the White Paper does indicate that the EC Act, inter alia, will need to be amended.

Chapters 7 and 8 of the EC Act - Interconnection and Facilities Leasing

Chapters 7 and 8 of the EC Act, appear to provide an open access regime, which obliges every licensee to interconnect upon request and every electronic communications network service (ECNS) licensee to provide access to electronic communications facilities upon request, unless the request is unreasonable.

Since the EC Act came into force in 2006, however, the Independent Communications Authority of South Africa (Icasa) has been unable to effectively regulate interconnection and facilities leasing. One of the reasons is because the provisions in chapters 7 and 8 were (arguably) linked to chapter 10, which requires market studies, inter alia, before appropriate remedies are imposed. In the 2014 amendments to the EC Act, sections 38(5) and 44(5) of the EC Act were delinked from chapter 10. However, sections 41 and 47, which go to the core issue, namely, price, were not. Icasa's Interconnection and Facilities Leasing Regulations therefore do not deal with this issue.
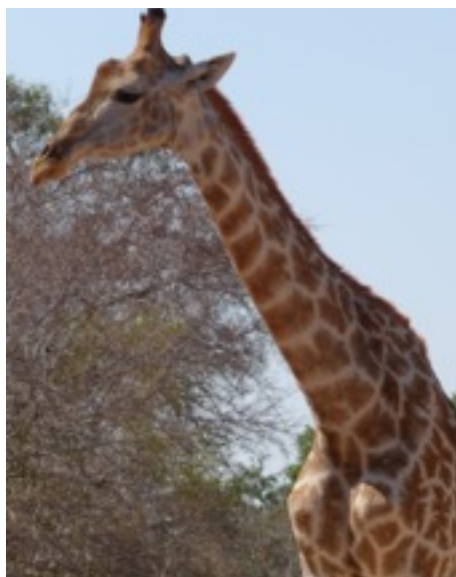
Section 43 of the EC Act - Essential Facilities

Section 43 of the EC Act deals with "essential facilities", calling upon Icasa to identify them and regulate them. However, the EC Act itself permits licensees the ability to deny or delay the provision of essential facilities on the grounds that the request is not "technically or economically feasible". Unfortunately, the 2014 amendments to the EC Act did nothing to change this situation.

In addition, Icasa has not finalized essential facilities regulations, which were published for comment as far back as 2007.

Competition provisions - section 67 of the ECA

The 2014 amendments to the EC Act made great strides in clarifying the provisions in section 67. However, there are some remaining difficulties to the effective implementation to the provisions.

First, chapter 10 requires both an inquiry process and a rule making process, both of which take considerable time and resources. In this regard, the White Paper rightly points out that Icasa has been prevented from exercising regulatory interventions without conducting cumbersome, lengthy and expensive competition inquiries. In essence, there has been no effective regulation in terms of section 67 since its enactment in 2006.

The White Paper states-

"The process outlined for addressing significant market power requires a market review on a defined relevant market, a test of whether the market is competitive and thereafter, if the market is found to be uncompetitive, an analysis of an operator's market power and its potential to behave in an anticompetitive manner, thus abusing such market power. After following these steps, regulatory interventions can be made.

"The current process is broadly aligned with global best practice, however, the manner in which the Act is drafted and the ensuing South African application of the practice has demonstrated obvious flaws.

"For example, the EC Act is overly prescriptive in the manner in which market reviews must be conducted and what information needs to be assessed. It takes what are considered 'guidelines' in other jurisdictions, including the European Union, and prescribes them in law."

Open Access Policy

In spite of these difficulties with the EC Act, the MoTaPS sets out policy regarding interconnection and facilities leasing in the White Paper. The policy divides licensees into three categories, with different rules to be applied to each of the categories. These are set out in the table below. The third column includes some comment and identifies some difficulties arising from the EC Act provisions.

Category	Rules	Comment
All network licensees	Effective access, transparency, and non-discrimination	This is basically the status quo.

Category	Rules	Comment
Vertically integrated licensees - those that provide networks and services	As above, plus accounting separation, with a threat of structural separation	This falls within the remedies mentioned in Ch 10, which may only be imposed after the inquiry and regulation making processes required therein. This will likely catch a lot of unintended small players, if they build any sort of network.
Licensees deemed by ICASA, to have - • significant market power in a market • control of an essential facility • network constituting more than 25% of the total in the market • a scarce resource, such as spectrum, assigned for exclusive use	As above, plus - • Cost based pricing • Active infrastructure sharing, defined as national roaming, Radio Access Network sharing and Mobile Virtual Network Operators • Access to the network at Layer 3 and below - Layer 0 (conduits, ducts, collocation), Layer 1 (local loop, dark fibre, traditional copper passive infrastructure), and Layers 2 and 3 (active equipment) • Specific network and population coverage targets	It is not clear that Icasa can deem licensees in respect network constituting more than 25% or exclusive scarce resources, as these are not provided for in Ch 10.

The White Paper concludes the discussion on Open Access with reference to essential facilities. The White Paper declares that Layer 2 and Layer 3 broadband infrastructure constitutes essential facilities. The White Paper calls on Icasa to, in the short term, until the EC Act is amended, attend to the identification and

regulation of essential facilities in line with the White Paper.

Icasa is also called upon to prioritize and develop wholesale open access regulations. Presumably, this entails the procedures to be carried out in terms of the existing provisions of chapter 10 of the EC Act.