



Court rulings, licence conversion, and the future of electronic communications in South Africa

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The passage of the Electronic Communications Act (EC Act) in 2005 seemed to pave the way for South Africa to join the ever growing group of nations embracing competition to ensure universal service. Traveling down that road has, however, taken far longer than anyone could have expected.

The EC Act came into force on 19 July 2006, many months after its promulgation.

As it was to substantially alter the market structure for electronic communications services - the first order of business for Icasa was the conversion of existing licences. Icasa launched that process in October 2006. It has moved forward inconsistently, with some issues still outstanding or decided in secrecy, and some still the subject of pending proceedings. The process, however, be complete by January 2009 (a little over a month from now) as mandated by EC Act.

This article is included in a series that began in September 2006 with a summary of the market structure, licensing and licence conversion provisions. An update on the licence conversion process was published in April 2006. Since then, the High Court of South Africa has issued judgment regarding the conversion of value added network services licences (Vans), and in the applications for leave to appeal and for an interdict by the Minister of Communications (Minister), causing the conversion process to reach the eleventh hour.

In this article, we discuss the implications of the recent court decision and provide some thoughts on the remaining month of the licence conversion process, as well as suggest regulatory priorities for 2009.

COURT RULINGS

In August 2008, the High Court of South Africa handed down judgement in the matter of *Altech Autopage Cellular (Pty) Ltd v the Chairperson of the Council of the Independent Communications Authority of South Africa and Others* (Case No 20002/08) ruling that Vans licensees could self provide their own network facilities and therefore were entitled to individual electronic communications network services (iECNS) licences in the licence conversion process. The judge ordered the Independent Communications Authority of South Africa (Icasa) to implement the judgment.

Soon thereafter Icasa issued a press release stating that it would abide by the court's ruling and would not seek leave to appeal. However, on the last day possible, the Minister applied for leave to appeal the judgment. A couple of days later, the Minister also requested the court to interdict Icasa from converting Vans licences to iECNS licences.

On 31 October 2008, judgment in the application for leave to appeal was handed down. In the appeal, the Minister was forced to argue that she was not attempting to have an impact on the licence conversion process at all, but rather only directing policy to Icasa for new licence applications. Thus, even if the appeal had been granted, Vans licensees would still have been entitled to iECNS licences in the licence conversion process. In the event, the court refused all grounds for appeal with costs awarded against the Minister.

Soon thereafter, the court refused the request for an interdict against Icasa issuing ECNS licenses to Vans licensees, paving the way for Icasa to complete the licence conversion processes.

Although the Minister had the option to ask the Supreme Court of Appeal to grant leave to appeal notwithstanding the ruling below, the Minister issued a press release on 21 November 2008 stating that she would not further seek leave to appeal.

LICENCE CONVERSIONS

Vans to ECNS

In the meantime, Icasa had issued on 14 November 2008 a notice of intention to make regulations for the conversion of Vans licences to ECNS licences, and in the same notice calling for all Vans licensees to submit to it certain information, including detailed

business plans, by 5 December 2008. This notice has created some confusion, which unfortunately could lead to further litigation down the line.

In the notice, Icasa also indicated, quite rightly as a matter of law, that it will convert all licences even those awarded after the coming into force of the EC Act.

The licence conversion process

It bears repeating that the licence conversion process must be complete by 19 January 2009 to avert missing a statutory imposed deadline.

In the remaining time, Icasa will have to convert all existing licences, both telecommunications and broadcasting, both service and spectrum, to those appropriate categories set out in the EC Act. With some existing categories of licences, for example, paging and SNG licences, it is still not clear what they will get in the licence conversion process.

Standard clauses for class licences have been issued as regulations. Therefore, there should be no obstacle to issuing class licences in the licence conversion process. However, although standard clauses for individual licences have been issued, individual clauses relating to both universal service obligations and pro-competitive licence conditions still have to be made. These individual licence conditions might have to wait until after the 19 January 2009 deadline, as the regulations regarding the imposition of pro-competitive licence conditions have not been finished. No proposals concerning universal service obligations have been made public by Icasa.

Some licences, such as private telecommunication network (PTN) service licences will be issued licence exemptions. Some PTNs selling excess capacity might, however, request ECS, ECNS or both licences. These issues have not been finalised.

REGULATIONS

In addition to the licence conversion process, several other regulations are critical to the success of newly converted licences. These include regulations regarding licence fees, interconnection, carrier pre-selection, numbers and number portability, and rights of way.

Licence Fees

Icasa published draft licence fees for public comment on 22 September 2008. After the closing date, it withdrew that notice, indicating that it would not consider any written comment in that proceeding, and issued new draft licence fees on 24 October 2008. The closing date for comment on the new draft is 5 December 2008.

The draft calls for administrative fees, which are actually application fees, including for requests to provide exempt services, and licence fees, being a percentage of adjusted gross revenue, for iECNS and iECS licences, 3%, for iBS, 2%, and for class ECNS and ECS, 1.5%. No licence fees are proposed for class BS.

Interconnection and Facilities Leasing

Although draft interconnection and facilities leasing regulations have been pending since before the EC Act came into force, with a new proposal published for public comment after the EC Act came into force, there still are no regulations relating the negotiation of interconnection and facilities leasing agreements, or with regard to pricing or technical matters.

Carrier Pre-selection

Icasa recently issued draft regulations for carrier pre-selection with a comment due date of 9 January 2009.

Numbering / Number Portability / Rights of Way

Although the issues of numbering, number portability and rights of way are crucial for a competitive electronic communications sector, there are no draft regulations on the table regarding these matters.

CONCLUSION

The outcome of the *Altech* matter has brought much needed impetus to the industry. In order for South Africa to capitalize on it, Icasa must ensure, in a very short time, that it

does not fail to meet Parliament's deadline of 19 January 2008 to convert all licences in line with the EC Act.

The momentum should also not be lost after the licence conversion process. Icasa's priorities should include, within the next three to six months, completing regulations relating to:

- Interconnection and facilities leasing
- Carrier pre-selection
- Numbering and number portability
- Rights of way

In addition, the issues of pro-competitive licence conditions and universal service obligations should not be unduly delayed.

Icasa has had several years to lay the groundwork for the licence conversion process and the adoption of key regulations. It must now use its momentum to complete many of these issues if the newly competitive industry is to move forward under effective regulation.

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