



Policy and Legislative Developments in the South African Electronic Communications Sector

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Several months ago, this author initiated a series of articles published in this journal suggesting amendments to the South African Electronic Communications Act (EC Act) in regard to key issues, namely licensing, interconnection and facilities leasing, competition matters, and universal service and access.

Although the EC Act came into force only in 2006, in these few years it has become apparent that the legislation does not in all instances allow for the effective regulation of the industry. In the first article on the subject in May 2009, it was anticipated that in the aftermath of the South African elections, a number of proceedings would be initiated that might lead to the required legislative amendments.

This article discusses a number of proceedings initiated in the past several months, including a call for an Assessment of the Effectiveness of the EC Act, a draft Broadband Policy, and a draft Spectrum Policy. It is anticipated that these proceedings will lead to changes to existing legislation that will allow for more effective regulation of the industry.

ASSESSMENT OF EC ACT

The Department of Communications (DoC) recently put out a call for bids to conduct a study to assess the effectiveness of the EC Act and Independent Communications Authority of South Africa Act (ICASA Act), with a view to determining whether the legislation has achieved its objectives, and if not, identifying gaps and recommending necessary interventions to address weaknesses in the legislation.

The due date for bidders was 2 October 2009. Although it is not clear when the contract for conducting the study will be awarded, it is anticipated that the study will last only two months.

In the introduction to the bid document, three important benchmarks were mentioned, namely, price, choice (competition) and quality (standards).

Numerous studies over the past few years have revealed that in terms of price, South Africa falls short of standards set by other countries. It is widely known that the costs of electronic communications in South Africa far exceed the ability of the majority of South Africans to be able to take advantage of services that are available.

It is also clear that, although the Independent Communications Authority of South Africa (ICASA) was forced by a recent court order (*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) to licence many competitors in the network and services sectors, competition has not emerged because other critical regulatory issues, such as interconnection and facilities leasing, have not been adequately addressed. Anti-competitive conduct must be checked by either the Competition Commission or ICASA or both, which up until now, has not happened. The regulators both claim the problem lies in unclear legislative mandates.

With regard to standards, several about-turns by ICASA over the past year have revealed not only the relative strength of the licensees as compared to consumers, but also a lack of clarity on ICASA's legislative obligations to ensure quality services.

Thus, the DoC is right to focus on the areas of price, competition and quality of service. Furthermore, it is right to ensure that the study is completed timeously. If the conclusion of this process is timeous and results in timeous changes to existing legislation, it will go a long way to helping South Africa create a regulatory environment conducive to achieving affordable universal access to electronic communications services.

BROADBAND POLICY

On September 18, 2009, the DoC published a Notice of Intention to Make South African Broadband Policy, for public comment due 19 October 2009 (Notice 1276 of 2009).

Not unlike the call for an assessment of the effectiveness of the EC Act, the issue of high costs is a centre piece in the draft policy document. The other main areas where focus is appropriately placed are the roll out of infrastructure (supply), and the stimulation of demand. The policy does not make the mistake of speaking only of demand, furthering the flawed thinking of 'we will build it and they will come'.

The draft Policy is a broad stroke document, intending to lead to further documents, such as a strategy document and perhaps also policy directions issued by the Minister to ICASA. Broadband is not defined in the document, leaving definitions to be set out in the "national strategy on Broadband" which according to the policy will be amended from time to time.

Supply

In regard to supply, three key points are made, two of which intersect with the currently pending processes to define universal service, universal access and needy persons. The first point is that the definition of universal service must include broadband. The second point, which also intersects with the issue of costs, is that needy persons must be assisted in gaining access to broadband infrastructure and services. The third point is that government institutions must have access to broadband, which will in turn stimulate demand. The issue of effective spectrum allocation was also mentioned as important to the success of providing access to broadband in South Africa.

On the issue of costs, the draft policy indicates that the government will promote competition (network and services) first and foremost, but that it will intervene and provide networks and services where necessary. Facilities sharing was mentioned as a key component in ensuring affordable broadband infrastructure and services.

Demand

On the demand side, the draft policy indicates that the government must develop its own content to ensure government services are available, especially in the areas of health and education. The DoC has also recently published a Notice Inviting Comments on Local and Digital Content Development Strategy (Notice 1218 of 2009).

The draft Policy indicates that a Broadband steering committee will be established, reporting to the Minister. In conclusion, the draft policy is movement in the right direction, however, the real impact will be made by further interventions, such as specific requirements placed on the regulator, licensees and other role players.

SPECTRUM POLICY

On 18 September 2009, the DoC published a Notice of Intention to make South African National Radio Frequency Spectrum Policy (Notice 1275 of 2009). Comments from the public were due 19 October 2009.

The draft Policy points out that until now, there has not been a policy of spectrum in South Africa, resulting in *ad hoc* decisions being taken. Although the document itself is quite vague in many respects, it is anticipated that policy directions to ICASA will follow, resulting in an articulated policy driven approach to spectrum issues.

Key Policy Points

The key policy points flowing from the document include the following.

- Spectrum sharing - the draft policy places emphasis on the importance of sharing of spectrum and spectrum reuse.
- Use it or lose it - this policy stems from the current situation where incumbents, who obtained spectrum allocations in a time of protected tenures, warehouse significant portions of that spectrum. The draft policy recognizes the need to allocate spectrum to those who are going to actually use it to provide services, rather than use it to keep others from providing services.
- National Interest - The draft policy recognizes the importance of international and regional cooperation, but also emphasizes the protection of the national interest, including government policies, such as the Accelerated Shared Growth Initiative for South Africa (ASGI-SA). The draft policy indicates that South Africa will not follow the international trend toward economic-based spectrum management stating that this will lead to negative impacts on small, medium and micro enterprises and new entrants.
- Technology neutrality - mention is also made of technology neutrality.

Spectrum Fees

On the issue of spectrum fees, the draft policy grapples with the dual goals of raising revenue for the fiscus and at the same time trying not to discourage the use of spectrum. ICASA is called to enunciate the method used in determining fees and to review it every three years to coincide with the Medium Term Expenditure Framework process.

Spectrum fees, according to the draft policy, will be used to encourage users out of or into certain bands based on demand, and to encourage efficient use and reuse. Market approaches will be allowed where there is competition for frequencies. Presumably this will allow for auctions and other commercial methods of allocating spectrum.

Safety, Security and Scientific Research

In addition to detailing the “national interest” the draft policy emphasizes the use of spectrum for public safety, security services, and scientific research.

CONCLUSION

Although the ECA come into force less than five years ago promising to substantially alter the regulatory framework leading to increased competition and universal service, it has become apparent that in addition to the huge amount of regulatory work that needs to be completed by ICASA, *inter alia*, the ECA must be amended if it is to be

successfully implemented. The proceedings initiated by the DoC discussed herein it is anticipated, will lead to the required legislative amendments.

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