



Suggested Amendments to the South African Electronic Communications Act: Licensing

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The Electronic Communications Act (EC Act) came into force in 2006. In the few years of its existence it has become apparent that this legislation does not allow for the effective regulation of the industry by, among others, the Independent Communications Authority of South Africa (Icasa). This is the first in a series of articles suggesting amendments to the EC Act. In this article, we discuss amendments to the provisions of the EC Act relating to licensing.

LICENSING IN THE EC ACT

In terms of the EC Act, the provision of electronic communications network services (ECNS), electronic communications services (ECS) and broadcasting services (BS) requires either an individual or class licence or a licence exemption.

The licences that are individual include ECNS of national or provincial scale, voice telephony ECS that use numbers allocated by Icasa, and any licence where the state owns 25 percent or more. Licence applications for individual licences may only be made in response to an invitation, and in respect of individual ECNS licences, an invitation may be extended by Icasa only after a policy direction issued by the Minister of Communications (Minister).

Class licences include ECNS of municipal scale, data ECS and voice ECS where numbers are sub-allocated by individual licensees. Icasa must act on class registration applications within 60 days and if it fails to do so, there is a deemed registration.

Icasa has prescribed that certain services are exempt from licensing, including nonprofit ECS, resellers of ECS, and private ECNS. However, service providers must in terms of Icasa's regulations nevertheless apply to Icasa for permission to provide exempt services.

THE ALTECH COURT CASE

The recent court decision 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* (unreported judgment dated 31 October 2008) confirmed that the electronic communications industry is open to network competition and to the competitive provision of voice telephony, not only by the former public switched and mobile cellular telecommunication services licensees, but also by the former value added network services licensees. In the wake of the Altech judgment, Icasa has in the licence conversion process, issued hundreds of individual ECNS and ECS licences.

SUGGESTED AMENDMENTS TO THE EC ACT

The consequence of the *Altech* court judgment was to negate the supposed “managed liberalisation” policy articulated by the Minister in the court proceedings. As a result of the court judgment, it is no longer necessary, for any reason including any policy reason, for the Minister or Icasa to retain the power to limit new entrants into the industry. It is therefore recommended that section 5(6) of the EC Act is deleted and that section 9(2), as it relates to ECNS and ECS, also is deleted. Section 9(1) should be amended to indicate that any person may apply for an individual ECNS or ECS licence in the prescribed manner without the need to wait for an invitation.

It is also suggested that section 5(3)(d) is deleted. This provision indicates that all entities in which the state has a 25 percent interest, are issued individual licences. There is no justification to treat entities in which the state holds an interest, who are supposed to be equal competitors in an industry, differently than other competitors. It is not likely that this provision, if challenged, would pass constitutional scrutiny, in particular, the right to equal protection of the law.

It is also recommended that section 6 be amended to provide that certain services, namely, private and resale ECS and ECNS, require no approval at all from Icasa. The current wording allows Icasa to determine whether and what services may be provided without a licence. Icasa did this, but then created an obligation for such entities to obtain approval from Icasa. Arguably, this is beyond the powers of Icasa. Given this, and the recent *Altech* judgment, which affirmed a significantly liberalised market, it is suggested that the meaning of section 6 should be clarified - that no licence (or any other approval) is necessary to provide licence exempt services.

The provisions of section 8 should be amended to clarify what Icasa is required to set out in licence terms and conditions. Section 8(2) as currently written is not clear. It states that standard terms and conditions may take into account certain listed matters, when what it should say is that standard terms and conditions may concern certain listed matters. Section 8(3) as currently written confuses the imposition of licence terms and

conditions and the prescription of regulations, and therefore should be amended. Section 8(4) should be amended to make it clear that Icasa may impose licence terms and conditions on individual licensees relating to universal service.

Sections 13(3), (4) and 5) should be renumbered as a new section 13A(1), (2) and (3). This amendment will make clear that Icasa may impose limitations on ownership and control both in and outside the context of a transfer application. As the provisions are currently, namely, subsections of the provisions on transfers, it could be argued that they apply only in that context. Section 9(2)(b) as it is currently written allows Icasa to place limitations on ownership on applicants for new individual licenses, however, it is recommended that this provision, as it is part of the section regarding invitations to apply, be deleted. The proposed renumbering of sections 13(3), (4) and 5) will take care of this issue without the need to keep the provision in section 9, which by the way, only concerns individual licences (and not class licences).

Finally, sections 16, 17 and 19 relating to class licensing should be amended. Section 16(1) should be amended to indicate that Icasa may, upon receipt of a written registration, issue a class licence. Section 16(6) should be amended to state that a person who intends to transfer a class licence must simply notify Icasa in advance in writing. In line with the current liberalised industry, and 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 licences or transfers; it should be sufficient for registrants to give written notice to Icasa. Sections 17(3) should be amended to state that Icasa must, within five days after receipt of a registration notice, issue a class licence and update its register of all class licences. The process of accepting a class registration should not take as long as 60 days; it should be able to be completed immediately but in any event within five working days.

CONCLUSION

South Africa's recent elections will result, on May 9th, in the inauguration of Mr Jacob Zuma as South Africa's fourth democratically elected President. President Zuma will then proceed to appoint a new Cabinet, which will necessarily include a new Minister of Communications, due to the recent passing of the late Minister Ivy Matsepe-Casaburri.

The main election promise of the ANC was to provide services to those that had up to now, been left out, including education, health care and housing. Electronic communications is increasingly being seen as an essential service, much like water and electricity. Although South Africa has not succeeded in providing universal service to electronic communications, the opportunity is available now to change that situation.

One of the quickest ways to do this is with amendments to the EC Act, allowing Icasa to more effectively and efficiently regulate the industry. The amendments suggested herein are technical and do not require policy changes. The confluence of political events, following the recent *Altech* judgment, has created the opportunity for the new administration to make significant, speedy changes, putting South Africa on a path towards a truly competitive industry with the hopes of eventually reaching the goals of universal service.

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