

## **A New South African Broadband Infrastructure Company**

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The South African President proclaimed the Broadband Infraco Act (Infraco Act) effective 1 February 2008, and the Electronic Communications Amendment Act (Amendment Act), promulgated simultaneously, effective 2 February 2008.

In this article, we summarise the salient provisions of the legislation, which is, in respect of the Infraco Act, intended to bring about a new state-owned broadband infrastructure company Broadband Infraco (Pty) Ltd (Infraco), and in respect of the Amendment Act, to effect the licensing of Infraco. We then identify the remaining major obstacle to be overcome if Infraco is to become operational.

### **Background**

In 2001, the then Telecommunications Act was amended to provide for the licensing of a second national operator (SNO) to compete with Telkom, the then monopoly provider of basic telecommunication services. It was anticipated that Eskom and Transnet, state-owned electricity and transportation companies respectively, would receive an equity interest in the SNO, based on the value of contributions made in the form of, inter alia, assets. In anticipation, Eskom and Transnet built out certain network infrastructure, which came to be known as the full services network (FSN) assets.

In 2005, with the SNO still not licensed by the Department of Communications (DoC) and the Independent Communications Authority of South Africa (Icasa), the Department of Public Enterprises (DPE) sought to establish a state-owned entity that would own and operate the FSN assets. It was anticipated at the time that the new company would lease assets to the SNO for its exclusive use for a limited period of time.

The SNO was finally licensed by Icasa in December 2005.

In July 2006, the Electronic Communications Act (EC Act) came into force, replacing the Telecommunications Act and changing the regulatory framework.

In the meantime, the DPE had not yet established Infraco as a state-owned entity, which required enabling legislation. However, the FSN assets were transferred to a subsidiary of Eskom known as Broadband Infraco (Pty) Ltd.

## **Infraco Act**

The Infraco Act was passed by Parliament and assented to by the President on 8 January 2008. The objects of Act, according to section 2, are to provide for the –

- transfer of Infraco shares and interests from Eskom to the State,
- objects and powers of Infraco, including borrowing powers,
- servitudes and other rights in favour of Infraco, and expropriation of land on behalf of Infraco, and
- potential conversion of Infraco into a public company.

The main objects of Infraco are, in terms of section 4(1), to expand the availability and affordability of access to electronic communications through the provision of electronic communications network services and electronic communications services.

Section 3 of the Infraco Act provides that the Minister of Public Enterprises and Eskom must, in concurrence with the Minister of Finance, determine which claims, assets, liabilities, rights and obligations of Eskom in connection with Infraco constitute Infraco interests, and the consideration payable for transferring the Infraco interests to the State.

According to section 5, Infraco may, subject to the Public Finance Management Act (PFMA), borrow money and issue guarantees, indemnities and security in order to achieve its objects. In respect of the PFMA, Infraco has been classified under schedule 2, which means that it is classified as a major public entity and may raise its own funds.

Section 6 of the Infraco Act provides that all servitudes in favour of Eskom and Transnet which existed prior to the commencement of the Act are extended to include the additional right to enter and use the land by Infraco. Infraco, Transnet and Eskom will agree on terms and conditions failing which, they will be determined by the Minister of Public Enterprises. The Act also makes provision for compensation to be paid in respect of the additional rights contemplated.

Section 7 of the Infraco Act provides that the Minister of Public Enterprises may expropriate land on behalf of Infraco, subject to compensation and certain provisions of the Expropriation Act.

Section 8 provides for the eventual conversion of Infraco into a public company, to be known as Broadband Infraco Ltd.

### **Electronic Communications Amendment Act**

When the DPE first contemplated Infraco, the Telecommunications Act permitted Infraco to provide infrastructure to telecommunication service licensees without itself needing to obtain a licence. This changed, however, with the promulgation of the EC Act. The EC Act requires Infraco to obtain an electronic communications network service (ECNS) licence to provide infrastructure. An electronic communications service (ECS) licence is required to provide services.

In an earlier version of the Infraco Act, there was a provision that would have deemed Infraco to be a licensee under the EC Act. This provision however was objected to by Icasa and the DoC. The compromise was an amendment to the EC Act allowing the Minister of Communications to provide for the licensing of Infraco. The Amendment Act amends the EC Act by adding the following subsection –

- The Minister may, after having obtained Cabinet approval, issue a policy direction in order to –
- (a) initiate and facilitate intervention by Government to ensure strategic ICT infrastructure investment; and
- (b) provide for a framework for the licensing of a public entity by the Authority in terms of Chapter 3.

### **Conclusion**

In conclusion, the one remaining major obstacle in order for Infraco to become operational and begin realising its objects, is its licensing in terms of the Electronic Communications Act. Although the Amendment Act came into force in early February, the Minister of Communications has not yet issued a policy direction in order to initiate and facilitate the licensing of Infraco.