

Licensing

Seena Yacoob and Kameshni Pillay¹



¹ The authors would like to thank Lisa Thornton, who reviewed previous drafts of this chapter and assisted in finding information and Yasmin Carrim and Christa Heynecke who provided information.

Introduction

With the advent of a new political dispensation in 1994, South Africa has steadily embarked on a process of liberalising its telecommunications industry. This process has been based on the government's policy of managed liberalisation, which consists of the gradual privatisation of segments of the telecommunications market and the opening up of the telecommunications market to competition.² The process has been a phased one initiated and overseen by the Ministry of Communications, the Department of Communications, Parliament, the Independent Communications Authority of South Africa (Icasa) and, in a primarily advisory role, the Universal Service Agency (USA).

The concept of managed liberalisation is underpinned by a policy objective of creating a new market structure that will 'orientate the sector towards accelerated development and universal service as well as take into account technological and international trends'.³ The primary aim is affordable and accessible universal service, which is intended to enhance social and economic activities in historically disadvantaged communities and to generate employment in the telecommunications sector itself.⁴

The policy of managed liberalisation provides a background for the legislative framework for telecommunications licensing and the processes followed by the Minister of Communications (the Minister) and Icasa in the award of licences for the various types of telecommunication services.

This chapter will examine the concept of licensing and the specific objectives behind the licensing. This chapter will go on to examine the provisions of the Telecommunications Act, 103 of 1996 in relation to licensing; the specific types of licences provided for in the Telecommunications Act and, in particular, the processes followed by Icasa and the Minister in awarding the licences specified in the Telecommunications Act. All information contained in this chapter is correct as at July 2004.

1. LICENSING

1.1 What is a licence?

A licence is a document that permits or authorises an act for which a licence is required, such as driving a motor vehicle, owning a gun, developing a natural resource or selling intoxicants.⁵ The legal requirement of a licence necessarily limits the occurrence of the licensed act, since the act can only be performed with a licence, which may have conditions attached to it.

In the context of the regulation of the telecommunications industry, a 'licence' granted by the relevant authority defines the rights and duties of a particular telecommunications service provider, radio frequency user, or equipment supplier.⁶

² 'White Paper on Telecommunications Policy' GN 291/1996 GG 16995 dated 13 March 1996 (White Paper on Telecommunications), chapter 2.

³ White Paper on Telecommunications (note 2 above) Executive Summary, para 2.

⁴ White Paper on Telecommunications (note 2 above) Executive Summary, para 2.

⁵ R Allen and C Schwartz (eds) *The Chambers Dictionary* (1998) 927.

⁶ H Intven, J Oliver and Sepúlveda *Telecommunications Regulation Handbook* (2000) Module 2 para 2.1.1.

A telecommunication service licence serves primarily two purposes: it authorises a telecommunications service provider to provide a specified service or operate telecommunication facilities, and it defines the scope and ambit of that authority.⁷ In South Africa, a licence issued under the Telecommunications Act serves to confer privileges and impose obligations on a licence-holder, which are contained in the Act and in the licence.⁸

For example, section 32 of the Telecommunications Act prohibits the provision of telecommunication services unless it is in accordance with a licence issued under the Act. The telecommunication service licence is therefore not just an authority to provide a service, but a regulatory tool that is used by the relevant authorities to control the nature of and manner in which telecommunication services are provided.

Similarly, section 30 of the Telecommunications Act prohibits the transmission or receipt of signal by radio except under a licence, certificate or authority in terms of section 30. Section 54 of the Telecommunications Act also prohibits the use, supply, sale or offer for sale, lease or hire of any telecommunication equipment or facility unless it has been approved by Icasa or prescribed as equipment that does not require approval.

1.2 What are the objectives of licensing?

Licensing is a fundamental tool of regulation in the telecommunications regulatory framework that exists in South Africa. The main objective of licensing in South Africa must therefore be regulation in terms of the Telecommunication Act with a view to facilitating the achievement of the objects of that Act. The primary object of the Telecommunications Act, as stated in section 2 of the Act, is to regulate telecommunications in the public interest. Section 2 goes on to identify 19 component factors of this primary object, which inform the content of the public interest, which in turn informs the regulation of telecommunications in South Africa.

The component objects listed in the Telecommunications Act are to:

- (a) promote the universal and affordable provision of telecommunication services;
- (b) promote the provision of a wide range of telecommunication services in the interest of the economic growth and development of the Republic;
- (c) make progress towards the universal provision of telecommunication services;
- (d) encourage investment and innovation in the telecommunications industry;
- (e) encourage the development of a competitive and effective telecommunications manufacturing and supply sector;
- (f) promote the development of telecommunication services which are responsive to the needs of users and consumers;
- (g) ensure that, in relation to the provision of telecommunication services, the

⁷ H Intven, J Oliver and Sepúlveda (note 6 above) para 2-1.

⁸ s 32(2) of the Telecommunications Act, 103 of 1996.

- needs of the local communities and areas are duly taken into account;
- (h) ensure that the needs of disabled persons are taken into account in the provision of telecommunication services;
- (i) ensure compliance with accepted technical standards in the provision and development of telecommunication services;
- (j) ensure fair competition within the telecommunications industry;
- (k) promote the stability of the telecommunications industry;
- (l) encourage ownership and control of telecommunication services by persons from historically disadvantaged groups;
- (m) protect the interests of telecommunications users and consumers;
- (n) encourage the development of human resources in the telecommunications industry;
- (o) promote small, medium and micro-enterprises within the telecommunications industry;
- (p) ensure efficient use of the radio frequency spectrum;
- (q) promote the empowerment and advancement of women in the telecommunications industry;
- (r) promote and facilitate convergence of telecommunication, broadcasting and information technology; and
- (s) develop the Information, Communication and Technology (ICT) strategy for the Republic, in order to bridge the digital divide.

It is clear from the above that telecommunication services in South Africa are considered by the legislature to be services that are essential to the public and must be provided in a manner that is in the public interest. It is also clear that a competitive and stable telecommunication industry is desirable. In addition, there is an implicit acknowledgement that the radio frequency spectrum is a valuable and finite resource that must be used efficiently. Development of the industry is also clearly considered to be important.

Since licensing is a primary tool of regulation of telecommunication services in South Africa, it is also clear that the objectives of licensing include the achievement of the objects listed above. This attempt is made both by means of licence conditions and the manner in which licences are issued.

2. TELECOMMUNICATION LICENSING IN SOUTH AFRICA

2.1 International obligations

One of the important components of the licensing framework in South Africa is the country's international obligations. These obligations not only impact on the formulation of policy on telecommunications, but also provide a benchmark against which to measure licensing processes determined by Icasa and the Minister in terms of the Telecommunications Act.

As a member of the World Trade Organisation (WTO), South Africa is bound by the obligations contained in the General Agreement on Trade in Services (Gats).⁹ Gats is an annex to the Agreement Establishing the WTO.¹⁰ Gats itself contains annexes dealing with specific sectors, one of which is the

Telecommunications Annex.¹¹ In addition to the annexes, Gats also contains schedules of individual countries' specific commitments to provide access to their markets.¹² South Africa has submitted a schedule of commitments dealing with telecommunications, which deals with value-added services and regulatory principles,¹³ as well as a schedule of commitments to the Fourth Protocol on Basic Telecommunications dealing with market access to basic telecommunications.¹⁴ South Africa submitted to a supplement to the schedule of commitments, which sets out further regulatory principles, in April 1997.¹⁵ Gats, together with the Telecommunications Annex, the Fourth Protocol on Basic Telecommunications and the Schedules of Commitments made by South Africa, contain trade rules relating to telecommunications licensing.¹⁶ South Africa is obliged to ensure that its regulatory policies, laws and practices comply with these WTO rules and its own commitments. One of the key commitments in South Africa's supplement is that Telkom's monopoly was to have ended on 31 December 2003.¹⁷

The three principles of Gats itself that relate directly to licensing:¹⁸

- Most Favoured Nation Treatment¹⁹ (MFN)
- Transparency²⁰
- Barriers to trade²¹

In the context of telecommunications, this principle requires that access to telecommunication services be granted to operators from WTO member states on terms 'no less favourable' to those granted to service providers from South Africa or other states, unless there are exemptions in a particular country's schedule of commitments.²²

Article III of Gats requires all laws and rules affecting trade in services to be published. Article 4 of the Telecommunications Annex specifically requires that information be published on:

- tariffs and other terms and conditions of service;
- specifications of technical interfaces with networks and services;
- information on bodies responsible for the preparation and adoption of standards affecting access and use; and
- conditions applying to attachment of terminal or other equipment; and notifications, registration or licensing requirements, if any.²³

⁹ WTO 'Understanding the WTO – Overview: a navigational guide'; available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm.

¹⁰ WTO 'Understanding the WTO – Overview' (note 9 above).

¹¹ WTO 'Understanding the WTO – Overview' (note 9 above); General Agreement on Trade in Services (Gats), 1995, WTO.

¹² WTO 'Understanding the WTO – Overview' (note 9 above).

¹³ WTO 'South Africa – schedule of specific commitments', 1994, GATS/SC/78.

¹⁴ General Agreement on Trade in Services Fourth Protocol on Basic Telecommunications, 1996, S/L/20, WTO.

¹⁵ WTO 'South Africa – schedule of specific commitments – supplement 2', 1997, GATS/SC/78/Suppl2.

¹⁶ Intven, Oliver & Sepúlveda (note 6 above) para 2.1.4; WTO 'Understanding the WTO – Services: rules for growth and investment'; available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm.

¹⁷ 'South Africa – schedule of specific commitments – supplement 2' (note 15 above).

¹⁸ Intven, Oliver & Sepúlveda (note 6 above) para 2.1.4.

¹⁹ Gats (note 11 above) article II.

²⁰ Gats (note 11 above) article III.

²¹ Gats (note 11 above) article VI.

²² WTO (note 16 above) 'Understanding the WTO – Services: rules for growth and investment'.

This means that all information that a potential service provider would require must be readily available to that potential service provider. For example, there must be ready access to information regarding what regulations have been made under the Act. The requirement in the Telecommunications Act that regulations must be published in the Government Gazette means that they are available to the public and therefore to a potential service provider.²⁴

Licensing conditions may not operate as unnecessary barriers to trade.²⁵ This means that a licence may only restrict trade in telecommunication services where there are valid and justifiable reasons for doing so.

2.2 The Legislative Framework in South Africa – an Introduction

In relation to the licensing of telecommunication services, the Telecommunications Act makes provision for the licensing of frequency use, telecommunication service providers and the licensing or approval of equipment, in Chapters IV, V and VI respectively.

3. TELECOMMUNICATION SERVICE LICENCES: CHAPTER V OF THE TELECOMMUNICATIONS ACT

3.1 The Legislative Requirement

Section 32 of the Telecommunications Act is couched in prohibitive terms and states that:

- (1) Subject to the provisions of this Act, no person shall provide a telecommunication service except under and in accordance with a telecommunication service licence issued to that person in terms of this Chapter.
- (2) A licence shall confer on the holder the privileges and subject him or her to the obligations provided in this Act or specified in the licence.

A ‘telecommunication service’ is defined in the Act as ‘any service provided by means of a telecommunication system’.²⁶

A ‘telecommunication system’ is defined as

any system or series of telecommunication facilities or radio, optical or other electromagnetic apparatus or any similar technical system used for the purpose of telecommunication, whether or not such telecommunication is subject to rearrangement, composition or other processes by any means in the course of their transmission or emission or reception.²⁷

²⁴ Gats (note 11 above) Telecommunications Annex.

²⁵ s 96 of the Telecommunications Act.

²⁶ Gats (note 11 above) article VI para 4.

²⁷ s 1 of the Telecommunications Act.

²⁷ s 1 of the Telecommunications Act.

A ‘telecommunication facility’ is defined as including ‘any wire, cable, antenna, mast or other thing which is or may be used for or in connection with telecommunication.’²⁸

‘Telecommunication’ is defined as

the emission, transmission or reception of a signal from one point to another by means of electricity, magnetism, radio or other electromagnetic waves, or any agency of a like nature, whether with or without the aid of tangible conductors.²⁹

A telecommunication service is therefore a service involving the emission, transmission or reception of a signal from one point to another.

3.1.1 Call-back operations

Satra, then the telecommunications regulator (now Icasa) made a ruling on 12 August 1997 that international callback operations are a contravention of section 32(1).³⁰ In a call-back operation, a subscriber within South Africa makes a call which is not answered. Instead, the call is returned by a telecommunication service provider outside South Africa. The call back thus originates outside South Africa, which enables charges for international calls initiated by a South African subscriber to be allocated mainly to a service provider outside South Africa, resulting in access to international call rates not otherwise available in South Africa. The South African Call-Back Association (Sacba) instituted review proceedings in the High Court in response to this ruling.³¹ These proceedings were postponed indefinitely by agreement, in terms of which Satra undertook not to prosecute providers of callback operations.³²

In October 2003, Icasa issued a statement, in response to reports that it had granted a licence to provide callback services, that Satra’s ruling is still valid.³³

3.1.2 Wireless Local Area Networks

A wireless local area network (WLAN) uses technology and equipment to create a local area network (LAN) without physical lines. It uses radio waves rather than fixed lines to transmit signals. This enables the easy and speedy creation of or access to ad hoc networks which can be used at events (like conferences) where copper wire infrastructure is not available. The WLAN is sometimes itself connected to another wired network to provide connection to a network, such as the Internet or a PTN, outside the WLAN itself.

In March 2003, Icasa indicated that it was investigating how WLANs fitted into the regulatory framework.³⁴ One of the main concerns expressed by Icasa was that these services often operate in the industrial, scientific and medical (ISM) radio

²⁸ s 1 of the Telecommunications Act.

²⁹ s 1 of the Telecommunications Act.

³⁰ ‘Prohibition of call-back operations in South Africa’ GN 1200/1997 GG 18214 dated 15 August 1997.

³¹ *South African Callback Association and Others v South African Telecommunications Regulatory Authority* (WLD, case no 23975/1997).

³² For more information, see the Sacba website: <http://www.sacba.org.za>.

³³ Icasa ‘Incorrect News Reports about ICASA Issuing a Call-Back Service Licence’ press release 30 October 2000.

³⁴ A written version the announcement, made in a speech to stakeholders, is available at <http://www.icasa.org.za/Repository/resources/Events&percent20Publications/Speeches/Stakeholder percent20Speech percent20180303 percent20final.pdf>.

band. For this reason it is vital that, if allowed, WLANs should not cause interference to other users of frequency.

Icasa held an enquiry under section 27 of the Telecommunications Act with regard to the provision of wireless Internet access using ISM frequencies.³⁵ One of the issues the enquiry looked at was whether or not to prescribe a service category for the provision of WLANs in terms of section 33(1)(b) of the Telecommunications Act.³⁶ According to Icasa, this entailed addressing two questions:

Is a WLAN a 'telecommunications service' for the purpose of the Telecommunications Act? If so, should the service be licensed?

In the notice announcing the enquiry, Icasa expressed its initial view that a person providing a public WLAN was providing a telecommunications service to third parties. This was largely due to the conveyance of signals to third parties by WLAN operators. However Icasa also pointed out that, as it is used on customer premises, the WLAN had the same characteristics as a wired Internet café.³⁷

In its published findings, Icasa stated that it would view a WLAN as a LAN provided through a different medium, rather than a different telecommunications service altogether.³⁸ It also found that, as long as the WLAN equipment was situated on the premises owned or occupied by the owner of the WLAN, and the WLAN did not extend beyond these premises, WLANs were CPE, were not part of the PSTN and therefore not part of the local access telecommunications service. The existing provision in a declaration made by Icasa under the Radio Act, that LANs may only be provided between an owner's computer systems, would have to be amended because it was too restrictive.³⁹ Icasa also stated that it would exempt all commercial services provided on customer premises, such as wireless hot spots, from the requirement of a telecommunication service licence, in terms of section 33(2) of the Telecommunications Act, although this is still outstanding.

3.1.3 Least Cost Routers

The meaning to be ascribed to section 32 formed a subject of debate in the matter of *Telkom SA Ltd v Nedtel Cellular (Pty) Ltd and 11 Others*⁴⁰ (Nedtel case). In this matter, Telkom approached the High Court for an interdict restraining Mobile Cellular Telecommunications Service (MCTS) licensees Mobile Telephone Networks (Pty) Ltd (MTN), Vodacom Group (Pty) Ltd (Vodacom) and their contracted service providers from providing a service to the public which made use of a device connected to a PABX which enabled the user of a PABX to connect or link directly with the telecommunication networks of MTN or Vodacom, without first connecting with Telkom's PSTN (a least cost routing device). Telkom alleged that

³⁵ 'Notice in terms of s 27' GN 1757/2003 GG 25120 dated 19 June 2003.

³⁶ 'Notice in terms of s 27' (note 35 above) clause 5.

³⁷ 'Notice in terms of s 27' (note 35 above).

³⁸ 'Findings and conclusions in terms of s 27(8)(a) on the s 27 enquiry on the provisioning of wireless internet access using ISM frequencies' GN 2610/2003 GG 25594 dated 16 October 2003.

³⁹ 'Declaration of certain apparatus to be and not to be radio apparatus for the purposes of Act no 3 of 1952', GN 1790/1995 GG 16820 dated 17 November 1995, para 2(d).

⁴⁰ *Telkom SA Ltd v Nedtel Cellular (Pty) Ltd and 11 Others* (TPD, case no 20836/2000, 22 October 2003, unreported).

the licences of Vodacom and MTN did not allow for the device to be connected directly to their networks unless the device constituted ‘terminal equipment’ as defined in their licences, and argued that the device did not constitute ‘terminal equipment’, but rather ‘customer premises equipment’ which only Telkom’s licence allowed it to connect directly.

The Court found that Telkom’s entitlement to connect customer premises equipment does not prohibit MCTS licensees and their service providers from connecting customer premises equipment to their own networks. Such a prohibition would have to be found in the Telecommunications Act itself, and Telkom’s licence could not be used to interpret the statute in that way.⁴¹

One of the primary issues facing the Court was whether on a correct interpretation of section 32(1), the terms of licences were restrictive or permissive. Telkom argued that, on a proper construction of section 32(1), the licences issued under the Telecommunications Act were permissive, and allowed licensees only to do things expressly or by necessary implication authorized by their licences.⁴²

The Court found that the provisions of section 37(3) of the Telecommunications Act, which provides that MCTS licensees would not require licences in terms of sections 34(2)(a)(i),⁴³ 39⁴⁴ or 40⁴⁵ to provide their services, clearly envisage MCTS licensees doing things which would otherwise have required such licences. The Court therefore found that section 32 does not limit MCTS licensees to only those actions expressly or by necessary implication authorised by their licences.⁴⁶

The Court also found that the device was not being ‘used’ by the MCTS licensees, but by their customers.⁴⁷ All that the MCTS licensees were doing was providing a service within the scope of their licences read with the Telecommunications Act. The means used by the customer to access this service is not governed by section 32, nor is there any provision which requires an MCTS licensee to prevent installation of customer premises equipment by its service provider or a customer.⁴⁸

The Court found that the use of the devices by the customers of MCTS licensees did not violate the terms of the respondents’ licences nor the Telecommunications Act and did not infringe any of Telkom’s rights.⁴⁹

3.2 Categories of Telecommunication Service Licences

According to section 33 of the Telecommunications Act the categories of licences that may be granted for the provision of telecommunication services are the following:

- public switched telecommunication services (PSTS);
- mobile cellular telecommunication services (MCTS);

⁴¹ The Nedtel case (note 40 above) para 10.2.

⁴² The Nedtel case (note 40 above) para 10.4.

⁴³ A public switched telecommunications service licence, such as that held by Telkom.

⁴⁴ A licence to provide local access and public pay-telephone services.

⁴⁵ A licence to provide value-added network services.

⁴⁶ The Nedtel case (note 40 above) para 10.5.

⁴⁷ The Nedtel case (note 40 above) para 9.7.

⁴⁸ The Nedtel case (note 40 above) paras 10.8–10.11.

⁴⁹ The Nedtel case (note 40 above) paras 10.12, 10.15, 11.9 and 12.

- national long-distance telecommunication services;
- international telecommunication services;
- multi-media services;
- local access telecommunication services;
- public pay-telephone services;
- value-added network services (Vans);
- under-serviced area licences (USAL); and
- private telecommunication networks (PTN)

Section 32C(1)(a) also provides for a licence to be granted to Sentech to enable it to operate as a carrier of carriers. This licence was granted on 6 May 2002.

Section 33(1)(b) makes provision for further categories of licences to be prescribed by Icasa. On 8 January 2002, Icasa published a notice indicating that Icasa may, on application, grant and issue Global Mobile Personal Communication by Satellite (GMPCS) service licences and GMPCS earth gateway service licences.⁵⁰

Icasa published proposed regulations which would prescribe new telecommunications services in terms of section 33(1)(b) of the Telecommunications Act, including commercial paging and asset tracking.⁵¹ The regulations also proposed to prescribe private paging, private communal repeaters and private trunk services as services and activities that do not require a licence, in terms of section 33(2) of the Telecommunications Act.⁵² However, no final regulations in this regard have yet been promulgated.

Section 33(2) states that Icasa may prescribe telecommunication services and activities, other than those referred to in section 33(1)(a), which may be provided or conducted without a licence. Icasa made draft regulations in terms of this section, which provide for a distinction to be made between an Internet access provider, which would provide direct access to the Internet and would require a licence, and an Internet service provider, which would provide indirect access to the Internet, via an Internet access provider, and would not require a licence.⁵³ However this proposal was abandoned due to representations from the industry that the differentiation would be difficult to make.⁵⁴

Icasa conducted an enquiry in terms of section 27 of the Telecommunications Act to determine guidelines for the trial and launch of new services. However, this enquiry did not deal with new services as envisaged in section 33 of the Telecommunications Act, but rather with extensions and variations of services under existing licences, such as pre-paid MCTS. The enquiry found that it was necessary to encourage new services by placing as few restrictions as possible on their trial, and that existing licences would govern the trial of new services with regard to anti-competitive conduct. The document also set out guidelines for dealing with anti-competitive conduct with regard to the trial and launch of new services.⁵⁵

⁵⁰ 'Categories of Licences Regulations' GN 27/2002 GG 217, *Regulation Gazette* 7250 dated 8 January 2002.

⁵¹ 'Notice of intention to prescribe new Telecommunication service Licence Categories in terms of ss 33 and 34 of the Telecommunications Act, 103 of 1996' GN 357/2002 GG 23235 dated 15 March 2002 para 2.

⁵² 'Notice of intention to prescribe new Telecommunication service Licence Categories in terms of s 33 and 34 of the Telecommunications Act 103 of 1996' (note 51 above) para 2.

⁵³ 'Notice of intention to make regulations in terms of s 96 read with s 33(2) of the Telecommunications Act, 103 of 1996 ('the Act') relating to certain types of telecommunications services or activities which may be conducted without licence.' GN 4040/2000 GG 21642 dated 11 October 2000.

⁵⁴ Icasa 'Vans/PTN Regulatory Framework: Explanatory Memorandum' 19 September 2001.

⁵⁵ 'Findings and conclusions in terms of s 27(8)(A) of the Telecommunications Act (103 of 1996) on the s 27 enquiry on the guidelines for trial and launch of new services' GN 3165/2003 GG 25659 dated 3 November 2003.

In addition to the categories of licences dealt with above, section 42 of the Telecommunications Act provides that licences which predate the Telecommunications Act, those licences which were issued under section 78(2) of the Post Office Act, are deemed to be licences issued in terms of the Telecommunications Act.

3.3 Applications and Consideration of Applications

The Telecommunications Act provides for two classes of licences to be granted with different application procedures.

Section 34(1) deals with the manner of application for a licence for a service not listed in section 34(2)(a). Section 34(1) provides that any person may apply for a licence to provide telecommunication services 'in the manner prescribed'.

Applications for licences not listed in section 34(2)(a), such as licences for public pay-telephone services, but excluding Vans and PTN licences, are to be made in terms of section 34(1) in the manner detailed in regulations published by Icasa on 29 July 2002.⁵⁶ Icasa may in specific instances prescribe licensing conditions for licences that do not fall under section 34(2)(a).⁵⁷

The manner of application for Vans and PTN licences was prescribed in regulations published on 1 October 2003.⁵⁸

Applications for licences which fall under section 34(2)(a) can only be made once the Minister publishes an Invitation to Apply (ITA) in the Government Gazette. The Minister therefore has ultimate control over the initiation of a licensing process for any of the following telecommunication services:

- (i) a public switched telecommunication service;
- (ii) a mobile cellular telecommunication service;
- (iii) a national long-distance telecommunication service;
- (iv) an international telecommunication service;
- (v) a multimedia service; or
- (vi) any other telecommunication service prescribed for the purposes of the subsection.

In December 2001 GMPCS were prescribed as a telecommunication service under section 34(2)(a)(vi).⁵⁹ In December 2002 USAL applications were prescribed as applications in terms of section 34(2)(a)(vi) of the Telecommunications Act.⁶⁰ Icasa also proposed in draft regulations that mobile data and trunk mobile services be prescribed in terms of section 34(2)(a)(vi) of the Telecommunications Act, but final regulations have not been issued in this regard.⁶¹

Applications under section 34(2) must be dealt with in terms of the procedure

⁵⁶ 'Regulations relating to the manner in which applications for certain telecommunication service licences are to be made' GN 1334/2002 GG 23685 dated 29 July 2002.

⁵⁷ s 35A(1)(b) of the Telecommunications Act.

⁵⁸ 'Regulations relating to the manner in which applications for Value Added Network Service (Vans) licences are to be made' GN 1384/2003 GG 25519, Regulation Gazette 7783 dated 1 October 2003; 'Regulations relating to the manner in which applications for Private Telecommunication Network (PTN) licences are to be made' GN 1385/2003 GG 25519, Regulation Gazette 7783 dated 1 October 2003.

⁵⁹ 'Regulations approved' GN 2394/2001 GG 22971 dated 20 December 2001. This regulation was published again as 'Categories of Licences Regulations' (note 50 above).

⁶⁰ 'Under-serviced area telecommunications service category' GN 3465/2002 GG 24225 dated 27 December 2002.

⁶¹ 'Notice of intention to prescribe new Telecommunication service Licence Categories in terms of ss 33 and 34 of the Telecommunications Act, 103 of 1996'.

set out in section 34(3) of the Telecommunications Act. Notice of the application and the proposed conditions of licence must be given in the Government Gazette, representations must be invited, and a hearing must be held,⁶² which shall be open to the public unless sensitive information will be protected.⁶³

In terms of section 35A of the Telecommunications Act the Minister is empowered to determine an alternative method in which applications for licences under section 34(2)(a) of the Telecommunications Act may be made.⁶⁴ Possible application procedures include auction and tender.⁶⁵ The Minister may also determine the process and conditions that will apply⁶⁶ as was the case with the bids sought for the Second National Operator (SNO) licence and USALs.

Section 34(4) of the Telecommunications Act provides that all applications and related documentation must be open to public inspection, unless the documents are commercially sensitive.

Section 35 of the Telecommunications Act sets out the procedure to be followed in deciding whether to grant an application. If the application is one in terms of section 34(2), Icasa must make a recommendation to the Minister and propose licence conditions.⁶⁷ Once a recommendation has been made to the Minister, the Minister may accept the recommendation, refer it back to Icasa, request further information from Icasa or reject the recommendation.⁶⁸ In all other applications, Icasa must inform the applicant of the decision, the reasons, and the licence conditions.⁶⁹

3.4 Ownership and Control Restrictions

Section 35(3) and (4) of the Telecommunications Act provide for due regard to be given to applications from historically disadvantaged groups and applications which empower women in the telecommunications industry,⁷⁰ and for preference to be given to applications for a licence with a proposed equity ownership of up to thirty percent by historically disadvantaged groups or women.⁷¹ The Telecommunications Act provides in section 52 for the regulation of ownership, control or holding of financial or voting interests in telecommunication services.

On 21 August 2001, the Minister issued policy directions in terms of section 5(4) of the Telecommunications Act, which dealt, in part, with the economic empowerment of persons from historically disadvantaged groups.⁷² The policy direction is intended to give effect to section 2(l) and (q) of the Telecommunications Act.

The policy direction stipulated that all new major telecommunication service licences issued will require an aggregate amounting up to thirty percent of the shareholding of a licensee to be set aside for historically disadvantaged groups. The direction defines a 'major licence' as a telecommunication service licence in terms

⁶² s 34(3) of the Telecommunications Act.

⁶³ s 34(3)(c) read with s 34(5) of the Telecommunications Act.

⁶⁴ s 35A(1) of the Telecommunications Act.

⁶⁵ s 35A(1)(a) of the Telecommunications Act.

⁶⁶ s 35A(1)(a) of the Telecommunications Act.

⁶⁷ s 35(1)(a) of the Telecommunications Act.

⁶⁸ s 35(2) of the Telecommunications Act.

⁶⁹ s 35(1)(b) of the Telecommunications Act.

⁷⁰ s 35(3) of the Telecommunications Act.

⁷¹ s 35(4) of the Telecommunications Act.

⁷² 'Policy directions issued by Minister of Communications' GN 791/2001 GG 22603 dated 21 August 2001, as amended by GN 652/2002 GG 23372 dated 26 April 2002.

of section 34(2)(a) of the Telecommunications Act.⁷³ This requirement takes further the provision in section 35(4) of the Telecommunications Act that up to thirty percent ownership by women or historically disadvantaged groups attracts a preference in the evaluation of licence applications.

Icasa was tasked to ensure the incorporation of this condition in all new major telecommunications licences.⁷⁴ The policy direction also requires Icasa, when assessing applications for licences, to give due regard to applications from persons from historically disadvantaged groups including women.⁷⁵ This is similar to the provisions of the Telecommunications Act in section 35(3).

The regulations for applications for Vans licences require Vans applicants that are juristic persons to have at least fifteen percent shareholding by historically disadvantaged individuals.⁷⁶

The policy direction also requires Icasa to make regulations for all operators, service providers, equipment suppliers and vendors regarding their contributions to the economic empowerment of persons from historically disadvantaged groups.⁷⁷ No such regulation has yet been gazetted.

Icasa is furthermore required to formulate licence conditions for all operators and service providers regarding their respective contributions towards the economic empowerment of persons from historically disadvantaged groups.⁷⁸ Icasa must also ensure that such regulations and licence conditions will provide that no reduction in the level of the shareholding of persons from historically disadvantaged groups in all major telecommunications licences shall be permitted without prior consent of the Minister.⁷⁹

Regulations were published in February 2002 which require Icasa to furnish written approval if a change in composition of ownership of licensees would result in a decrease in control by historically disadvantaged individuals, increase in foreign control or effective change in ownership or control of a licensee.⁸⁰ These regulations also require a licensee to maintain accurate records of ownership and control interests and to provide Icasa with an account of all ownership and control interests.⁸¹

Section 40A of the Telecommunications Act, which deals with under-serviced area licences, also provides for due regard to be had to applications from historically disadvantaged groups and women.⁸² Regulations limiting the ownership and control of such licences have been also made, in terms of section 52 of the Telecommunications Act.⁸³ The regulations provide that a person or affiliate of a person with a controlling interest or an ownership interest in a licence for the Second National Operator,⁸⁴ a licence issued to Sentech,⁸⁵ a licence for PSTS⁸⁶ or a

⁷³ Policy directions (note 72 above) Objectives, para 2.1.5.

⁷⁴ Policy directions (note 72 above) Economic Empowerment of Persons from Historically Disadvantaged Groups, para 1.1.

⁷⁵ Policy directions (note 72 above) Economic Empowerment of Persons from Historically Disadvantaged Groups, para 1.2.

⁷⁶ 'Regulations relating to the manner in which applications for Value Added Network Service (Vans) licences are to be made' (note 58 above).

⁷⁷ Policy directions (note 72 above) Economic Empowerment of Persons from Historically Disadvantaged Groups, para 2.1.1.

⁷⁸ Policy directions (note 72 above) Economic Empowerment of Persons from Historically Disadvantaged Groups, para 2.1.2.

⁷⁹ Policy directions (note 72 above) Economic Empowerment of Persons from Historically Disadvantaged Groups, para 2.1.3.

⁸⁰ 'Regulations in respect of the limitation of ownership and control of telecommunication services' GN 300/2002 GG 23190 dated 27 February 2002, regulation 4.

⁸¹ 'Regulations in respect of the limitation of ownership and control of telecommunication services' (note 80 above) regulation 3.

⁸² s 40A(2)(b) of the Telecommunications Act.

⁸³ 'Regulations limiting the ownership and control of s 40A licences' GN 2266/2003 GG 25386 dated 22 August 2003.

⁸⁴ s 32B of the Telecommunications Act.

⁸⁵ s 32C of the Telecommunications Act.

⁸⁶ s 36 of the Telecommunications Act.

licence for MCTS⁸⁷ may not apply for an under-serviced area licence or acquire an interest in an under-serviced area licensee.⁸⁸ In addition, no person or affiliate may own a controlling interest in more than one under-serviced area licensee⁸⁹ or an ownership interest in more than nine under-serviced area licensees.⁹⁰ Foreign persons are prohibited from directly or indirectly holding a controlling interest in an under-serviced area licensee.⁹¹

On 16 January 2003, the Minister issued a notice in terms of section 52 of the Telecommunications Act approving and publishing regulations made by Icasa relating to the restriction of ownership and control of all entities holding telecommunication licenses.⁹² The regulation states that no one who holds an ownership interest or control interest in a licensee in any telecommunication service category in a concentrated market, or is an affiliate of such a person, shall hold an ownership interest or control interest in another licensee in the same telecommunication service category.⁹³ The regulation excludes the government and its agencies,⁹⁴ and passive institutional investments from the prohibition.⁹⁵

3.5 Amendment of Licences

Section 48 of the Telecommunications Act provides that licences may be amended only in the circumstances set out in section 48(1), as follows:

- A licence to provide a Public Switched Telecommunication Network may be amended if the amendment relates to universal access or universal service obligations contemplated in section 36(2) and Icasa considers the amendment necessary as a result of changed circumstances or an amendment of the definition of universal access or universal service.
- Telkom's licence (issued in terms of section 36(1)) may be amended if the amendment is necessitated by the introduction of competition to Telkom in national long distance telecommunication services, local access telecommunication services or public pay-telephone services.
- All telecommunications service licences may be amended to make the conditions of the licence consistent with conditions being imposed generally in respect of all licences issued in the same category, for the purpose of ensuring fair competition between licensees in that category.
- All telecommunications licences may be amended to the extent necessitated by technological change.
- All telecommunications licences may be amended to the extent requested by the licensee.

This means that, while a licensee may request any amendment, the amendments

⁸⁷ s 37 of the Telecommunications Act.

⁸⁸ 'Regulations limiting the ownership and control of s 40A licences' (note 83 above) regulation 2.1.

⁸⁹ 'Regulations limiting the ownership and control of s 40A licences' (note 83 above) regulation 2.2.

⁹⁰ 'Regulations limiting the ownership and control of s 40A licences' (note 83 above) regulation 2.3.

⁹¹ 'Regulations limiting the ownership and control of s 40A licences' (note 83 above) regulation 2.4.

⁹² 'Regulations in respect of the limitation of ownership and control of telecommunication services in terms of s 52' GN R105/2003 GG 24288 dated 16 January 2003.

⁹³ 'Regulations in respect of the limitation of ownership and control of telecommunication services' (note 92 above) regulation 2(1).

⁹⁴ 'Regulations in respect of the limitation of ownership and control of telecommunication services' (note 92 above) regulation 2(2)(a).

⁹⁵ 'Regulations in respect of the limitation of ownership and control of telecommunication services' (note 92 above) regulation 2(2)(b).

that may be imposed by Icasa are limited to amendments contemplated in the circumstances listed above.

Section 48(2) provides that prior to a licence being amended on any basis other than the licensee's request, the regulator has to give the licensee written notification of the intended amendment and afford the licensee an opportunity to be heard.

Section 48(3)(a) makes sections 34(3), (4) and (5) applicable to requests by a licensee for amendment of his or her licence. The effect of this is that Icasa has to publish the application for amendment,⁹⁶ invite representations from the public⁹⁷ and make all documentation available for inspection by the public.⁹⁸ If necessary, Icasa is empowered to hold a hearing on the proposed amendment.⁹⁹ While section 48(3)(a) does not specifically limit the application of these sections, sections 34(3), (4) and (5) are clearly only meant to apply to applications for amendment to the extent to which these sections would have applied when the original application for a licence was made.

Section 48(3)(b) provides that section 35 applies to any application for an amendment in terms of section 48. After following the required procedures, Icasa must therefore make its recommendation to the Minister in respect of the proposed licence amendments for a licence that falls under section 34(2)(a). The Minister may accept Icasa's recommendation, request further information from Icasa, refer the application back to Icasa for consideration or reject the recommendation.¹⁰⁰ For a licence not listed under section 34(2)(a), Icasa must inform the applicant of its decision and the reasons, after following the prescribed procedures.

3.6 Renewal of Telecommunication Service Licences

A licensee may apply to the regulator to have its licence renewed.¹⁰¹ The provisions of sections 34 and 35 apply to such an application.¹⁰²

Additional conditions may not be imposed on a licence when it is renewed if the licence is an MCTS licence in terms of section 37(1) of the Telecommunications Act, or a licence that already existed at the commencement of the Telecommunications Act as provided for in section 42(1), and that licence provides for its renewal on the same conditions as already applied to it. Additional conditions may however be imposed if they are acceptable to the licensee.¹⁰³

An application for renewal may only be refused if the licensee has contravened the provisions of the licence during the term of the licence, and the regulator or the Minister is satisfied that the licence would be contravened again if renewed.¹⁰⁴ A licence continues to be valid while an application for renewal is being considered.¹⁰⁵

⁹⁶ s 34(3)(a) of the Telecommunications Act.

⁹⁷ s 34(3)(a) of the Telecommunications Act.

⁹⁸ s 34(4) of the Telecommunications Act.

⁹⁹ ss 34(3)(d) and 34(5) of the Telecommunications Act.

¹⁰⁰ s 35(2) of the Telecommunications Act.

¹⁰¹ s 49(1) of the Telecommunications Act.

¹⁰² s 49(2) of the Telecommunications Act.

¹⁰³ s 49(2) of the Telecommunications Act.

¹⁰⁴ s 49(3) of the Telecommunications Act.

¹⁰⁵ s 49(4) of the Telecommunications Act.

3.7 Transfer of Licences

Under section 50 of the Act a licensee may apply to transfer a telecommunications service licence from one person to another.¹⁰⁶ Sections 34 and 35 of the Telecommunications Act apply to the transfer of a licence.¹⁰⁷ In August 2003 regulations were promulgated which stipulate that the current licence holder must make the application and list the information that must be provided in such an application.¹⁰⁸ This information includes the identity of the parties, the type of licence, and whether the transferee has provided any other telecommunications service or been refused a licence in the preceding five years.

3.8 Public Switched Telecommunication Services (PSTS)

The Telecommunications Act defines PSTS as ‘the provision of telecommunication services to an end-user on a subscription basis or for a fee referred to in section 36’.¹⁰⁹ Section 36 of the Telecommunications Act deals with PSTS. Section 36A of the Telecommunications Act gives further content to the definition of PSTS.

A Public Switched Telecommunication Network (PSTN) is defined as ‘the telecommunication systems installed or otherwise provided, maintained and operated by a public switched telecommunication licensee for the purpose of providing public switched telecommunication services’.¹¹⁰ Section 36B of the Telecommunications Act gives further content to the definition of PSTN.

3.8.1 Telkom

Section 36(1)(a) of the Telecommunications Act deemed Telkom to be the holder of a licence to provide a PSTS in terms of the Post Office Act,¹¹¹ the predecessor of the Telecommunications Act. The section further provides that Telkom be deemed to have applied for a licence to provide PSTS in terms of the Telecommunications Act, and that the licence shall be granted subject to terms and conditions consistent with section 2 of the Telecommunications Act. The section provides for the conditions to be published and representations considered before the finalisation of the process.¹¹²

In terms of the Act, Telkom is afforded a period of exclusivity to provide basic PSTS.¹¹³ Telkom’s licence¹¹⁴ specifies that this period of exclusivity is five years from the date of issue of the licence, which was 7 May 1997.¹¹⁵ The period of exclusivity therefore expired on 7 May 2002. The licence itself is valid for twenty five years.¹¹⁶

Section 36(1)(b) of the Telecommunications Act specifies that the

¹⁰⁶ s 50(1) of the Telecommunications Act.

¹⁰⁷ s 50(2) of the Telecommunications Act.

¹⁰⁸ ‘Regulations on application for transfer of telecommunication service licences’ GN 1242/2003 GG 25409, *Regulation Gazette* 7755 dated 28 August 2003.

¹⁰⁹ s 1 of the Telecommunications Act.

¹¹⁰ s 1 of the Telecommunications Act.

¹¹¹ The Post Office Act, 44 of 1958.

¹¹² s 36(6), (7) and (8) of the Telecommunications Act.

¹¹³ s 36(3) of the Telecommunications Act.

¹¹⁴ ‘Licence issued to Telkom SA Limited to provide telecommunication services under s36 of the Telecommunications Act, 1996’ GN 768/1997 GG 17984 dated 7 May 1997 (Telkom PSTS licence).

¹¹⁵ Telkom PSTS licence (note 114 above) clause 3.

¹¹⁶ s 36(1)(a) of the Telecommunications Act; Telkom PSTS licence (note 114 above) clause 13.1.1.

telecommunication services licensed by virtue of the deeming provision in section 36(1)(a) are national long-distance telecommunication services, international telecommunications services, local access telecommunication services and public pay-telephone services.

According to the White Paper on Telecommunications¹¹⁷, the central goal of the period of exclusivity granted to Telkom is the rolling out of basic network services as quickly and extensively as possible.¹¹⁸ The White Paper envisaged Telkom taking the primary role in providing universal access or universal service, with the initial two cellular network companies to play a secondary role with regard to universal service.¹¹⁹ To this end, section 36(2) of the Telecommunications Act requires Telkom (and any other PSTS licensee) to comply with universal service conditions. Clause 4 of Telkom's PSTS licence imposes universal service conditions dealing with basic service provision,¹²⁰ public pay-telephone service,¹²¹ emergency services,¹²² services for users with special needs¹²³ and affordability.¹²⁴

During the period of exclusivity, Telkom could exclusively provide those PSTS services allocated to Telkom in section 36(1)(b) of the Telecommunications Act, that is national long-distance and international telecommunication services, local access telecommunication services and public pay-telephone services, as well as:

- telecommunication facilities to be used by any person for the provision of Vans;
- telecommunication facilities comprising fixed lines to be used by an MCTS provider; and
- telecommunication facilities to be used by any person for the provision of PTNs.¹²⁵

Schedule A to Telkom's licence contain targets for the provision of new lines, including lines in under-serviced areas, lines for priority customers and villages, and the replacement of lines. If Telkom did not meet the total line target and under-serviced line target in five years it had to pay a monetary penalty.¹²⁶ Telkom did not meet these targets and paid penalties of approximately R10 million.¹²⁷ Clause 3.2 of Telkom's licence provides as an incentive that the exclusivity period could have been extended for one year up to and including the sixth anniversary of the effective date, if ninety percent of the total line target and eighty percent of the under-serviced line target had been reached at the end of four years. Telkom's exclusivity rights ended on 07 May 2002.

The White Paper on Telecommunications also envisaged that market segments would gradually be opened to various degrees of competition. It envisaged a fully operational Second National Operator (SNO) six years after the process outlined

¹¹⁷ Note 1 above.

¹¹⁸ White Paper on Telecommunications (note 2 above), para 2.6.

¹¹⁹ White Paper on Telecommunications (note 2 above) para 2.9.

¹²⁰ Telkom PSTS licence (note 114 above) clause 4.1.

¹²¹ Telkom PSTS licence (note 114 above) clause 4.2.

¹²² Telkom PSTS licence (note 114 above) clause 4.3.

¹²³ Telkom PSTS licence (note 114 above) clause 4.4.

¹²⁴ Telkom PSTS licence (note 114 above) clause 4.5.

¹²⁵ Telkom PSTS licence (note 114 above) clause 3.

¹²⁶ Telkom PSTS licence (note 114 above) clause A.6.3.

¹²⁷ Telkom 'Report on licence obligations 2002' 15 July 2002 19.

in the White Paper had begun.¹²⁸ However, section 32A(1) of the Telecommunications Act provides for an SNO from 7 May 2002. The section states that Telkom and the SNO shall be the holders of PSTS licences from 7 May 2002 until 2 May 2005. The SNO is entitled to no less favourable licence terms and conditions of licence than those granted to Telkom.¹²⁹

3.8.2 Licensing process of the SNO

Applications for the provision of PSTS fall under section 34(2)(a) of the Telecommunications Act. Applications must be made according to the process outlined in paragraph 3.3 above, and must either be initiated by an invitation issued by the Minister in terms of section 34(2)(a) or proceed as determined by the Minister in terms of section 35A(1). Section 32B of the Telecommunications Act also applies to applications for the SNO licence, providing for Transnet Limited and Eskom Holdings Limited to have equity interests in the SNO determined by their contributions to it.¹³⁰ The Minister issued policy directions in August 2001, which were amended in April 2002, setting out the process in relation to the licensing of the SNO in broad terms.¹³¹

The policy directions stated that:

- An ITA for a PSTS licence for the SNO would be issued in 2001 by the Minister.
- The SNO would be permitted to use Telkom's telecommunications facilities until 7 May 2004, in accordance with an agreement between the parties, to be concluded within 60 days of the issuing of the PSTS licence.¹³² If the parties failed to agree, Icasa would determine the terms and conditions within 30 days.¹³³ The Telecommunications Act provides that the SNO may use Telkom's facilities for two years after the commencement of the SNO's PSTS licence.¹³⁴ The policy direction therefore assumed that the licence would commence by 7 May 2002.
- The SNO would develop its own facilities and infrastructures by 7 May 2004.
- Defined targets of infrastructure roll-outs, universal service obligations, universal access targets and time frames and penalties associated with failure to achieve the infrastructure roll-out would be specified in the ITA and in the licence. This is consistent with section 36(2) of the Telecommunications Act.
- The process to be followed for the licensing of the SNO would occur in the following phases:
 - The first phase would involve the allocation of 19 percent equity stake to persons from historically disadvantaged groups.
 - The second phase would be the allocation of the 51 percent equity stake to a local and or international investor.

¹²⁸ White Paper on Telecommunications (note 2 above) para 2.22.

¹²⁹ s 32B(1) of the Telecommunications Act.

¹³⁰ s 32B(2)–(5) of the Telecommunications Act.

¹³¹ 'Policy directions issued by the Minister of Communications' (note 72 above).

¹³² s 32A(2)(a) and (b) of the Telecommunications Act.

¹³³ s 32A(3) and (4) of the Telecommunications Act.

¹³⁴ s 32A(2)(a) of the Telecommunications Act.

- 30 percent equity interest would be allocated to Eskom and Transnet.¹³⁵

On 15 May 2002, the Minister published a notice in terms of section 35A(1)(a) of the Telecommunications Act, confirming and expanding upon the above process for the licensing of the SNO.¹³⁶ The notice also set out the manner and process in which applications for the equity interest in the SNO would be determined.

3.8.2.1 The 19 percent interest

On 20 December 2001, the Minister issued an ITA for the 19 percent stake to persons from historically disadvantaged groups.¹³⁷

On 15 April 2002, Icasa received ten applications in response to the ITA, of which seven complied with paragraph 3.2 of the ITA and were therefore accepted for further evaluation.

On 31 July 2002, Icasa recommended to the Minister that Nexus Connection be awarded for the 19 percent stake in the SNO licence, subject to certain terms and conditions, especially regarding the guarantee of funding, recommended by Icasa. The Minister granted the award in terms of the recommendation, on 31 October 2002.¹³⁸

3.8.2.2 The 51 percent interest

The second phase of the licensing process was the allocation of a 51 percent stake in the SNO to a strategic equity partner.

The ITA for the 51 percent in the SNO was published on 24 May 2002.¹³⁹ Two applications were formally received by Icasa on 31 October 2002, from Goldleaf Trading (Pty) Ltd and Optis Telecommunications (Pty) Ltd.¹⁴⁰ On 17 January 2003 Icasa recommended to the Minister that neither of the two applicants be awarded the 51 percent stake in the SNO. The Minister then amended the process for the licensing of the SNO, setting out a new process for applications for the 51 percent stake, which would be initiated by an invitation to express interest.¹⁴¹ The notice provided for the establishment of an SNO working committee to manage the early phases of the process.

On 31 March 2003, the Minister, acting in terms of section 35A of the Telecommunications Act, published an invitation to express interest for the allocation of 51 percent equity in the SNO, setting out a new process for the awarding of the 51 percent equity interest.¹⁴² The invitation to express interest set out a four phased process:

¹³⁵ 'Policy directions issued by the Minister of Communications' (note 72 above) para 1.4.

¹³⁶ 'Manner in which applications are to be made for equity interests in the Second National Operator and the applicable licensing process for the granting of a public switched telecommunication service licence to the Second National Operator' GN 755/2002 GG 23427 of 15 May 2002.

¹³⁷ 'Invitation to apply for nineteen percent equity interest in the Second National Operator' GN 2396/2001 GG 22971 dated 20 December 2001.

¹³⁸ Icasa 'Public switched telecommunications'; available at <http://www.icasa.org.za/Default.aspx?page=1070&moduledata=353>.

¹³⁹ 'Publication of the invitation to apply for the provision of public switched telecommunication services' GN786/2002 GG 23460 dated 24 May 2002.

¹⁴⁰ 'Notice of applications received from applicants for the 51 percent equity stake of the Second National Operator' GN 2911/2002 GG 24031 dated 5 November 2002.

¹⁴¹ 'Amendment of schedule to GN 755/2002 GG 23427 dated 15 May 2002' GN 422/2003 GG 24361 dated 4 February 2003.

¹⁴² 'Invitation to express interest for the allocation of 51 percent equity in the Second National Operator' GN 965/2003 GG 24682 dated 31 March 2003.

- Phase 1 — Submission of expression of interest to pre-qualify
- Phase 2 — One on one negotiations with SNO working committee
- Phase 3 — Icasa evaluates applications and makes recommendations
- Phase 4 — The Minister grants and Icasa issues the licence

Four applicants qualified for Phase 2 of the process, namely TWO Consortium (Pty) Ltd, WIP Investments Nine (Pty) Ltd t/a CommuniTel, Detecon International GmbH and TeleAccess Investments (S.A.) (Pty) Ltd.¹⁴³

In June 2003, Icasa announced that applications from two entities, TWO Consortium and CommuniTel, would be considered in phase 3 of the process.¹⁴⁴ After considering the two applications, Icasa announced that:

- both applications failed to sufficiently demonstrate their ability to satisfy the objects outlined in section 2 of the Act;
- both applicants failed to provide evidence of sufficiently reliable long term commitments to fund a 25 year SNO licence;
- both applicants made representations which were contingent on uncertain future events and conditions and Icasa could accordingly place no reliance on these representations.

On the basis of these findings, Icasa recommended that the 51 percent interest in the SNO be granted to neither applicant. Icasa recommended further that the 51 percent application process for the SNO licence be formally closed.¹⁴⁵

On 18 December 2003, the Minister announced that the two applicants, Two Consortium and Communitel, would share a 26 percent stake of the SNO. The remaining 25 percent of the 51 percent would be 'warehoused' by the Government. It remains for Icasa to issue the licence after an entity is formed by the various stakeholders.¹⁴⁶

3.9 Mobile Cellular Telecommunications Services

3.9.1 *The initial two MCTS providers*

The Telecommunications Act defines an MCTS as 'a telecommunication service provided by a licensed mobile cellular telecommunications operator'.¹⁴⁷

On 14 February 1993, the Minister of Posts and Telecommunications, acting under the then Radio Act, 3 of 1952 and the Post Office Act, 44 of 1958, announced the intention to grant two licences to provide national cellular telephony service. Applications were invited for licences to construct, use and maintain such a service.¹⁴⁸ On 29 October 1993, the Postmaster General announced the issue of licences to Vodacom and MTN.¹⁴⁹ The issue of these licences predated the

¹⁴³ 'Ministry of Communications short listing and commencement of one-on-one negotiations' GN 1400/2003 GG 24876 dated 23 May 2003.

¹⁴⁴ 'Applications received for the 51 percent equity stake in the Second National Operator' GN 1852/2003 GG 25160 dated 30 June 2003.

¹⁴⁵ Icasa '51% Equity Interest Recommendation to the Minister of Communications' 28 August 2003.

¹⁴⁶ Press statement by the Minister of Communications, Dr Ivy Matsepe-Casaburri, on the Second National Operator (SNO); available at <http://www.gov.za/speeches/index.html>; Icasa media release on 19 December 2003; available at

<http://www.icasa.org.za/Repository/resources/Events&%20Publications/Media%20Releases/media%20release%20sno%20191203.doc>.

¹⁴⁷ s 1 of the Telecommunications Act.

¹⁴⁸ Minister of Posts and Telecommunications 'Invitation to Apply for a Licence to Provide a National Cellular Radio Telephony Service'.

¹⁴⁹ 'Issue of licences to provide national cellular telecommunication services' GN 1078/1993 GG 15232 (MCTS licence).

Telecommunications Act. However, section 37(1)(a) of the Telecommunications Act deems Vodacom and MTN to be the holders of licences to provide MCTS. The section provides that Vodacom and MTN must apply for licences in terms of the Telecommunications Act, which incorporate the terms and conditions of the existing licences, within six months or an extended period allowed. The deadline for these applications was extended to 30 April 1998.¹⁵⁰

The licences are identical in all material respects. They provide that:

The licensee is authorised to construct, maintain and use a Public Land Mobile Network (PLMN) to

- Provide a Global System for Mobile communications (GSM) national mobile radio telephony service operating in the 890 MHz to 960 MHz frequency band, and
- Connect fixed and mobile terminal equipment using GSM cellular radio telephony technology for the provision of service and community service telephones, and
- Interconnect with the Telkom network and with the PLMN of a similarly licensed person.¹⁵¹

These provisions are subject to clause 3 of each licence,¹⁵² which sets out the detail of what the licensee is entitled and obliged to do. This clause stipulates that leased lines must be used for all connections between the elements of its own PLMN, for interconnections between its PLMN and the PLMN of other licensed entities, and for interconnection between its PLMN and the PSTN of Telkom. At the time, the lines could only be leased from Telkom. If, however, Telkom was unwilling or unable to provide the said leased lines, the licensee could apply to the Postmaster General to procure, construct or use its own.

In terms of clause 2.2 of each licence, the licensee may exercise its rights under the licence partially through agents or service providers. However, the licensee retains ultimate responsibility for the acts of the service providers where such acts constitute a contravention of the conditions of the licence. In accordance with this provision, Vodacom and MTN may enter into contracts with service providers. The service providers do not hold licences to provide MCTS services but derive their rights and obligations from contracts entered into with MTN and Vodacom.

The licences are valid for 15 years from 1 June 1994, after which the licences provide for automatic renewal on the same terms unless five years notice of termination is given or new terms are agreed in writing.¹⁵³

On 19 August 2002, Icasa issued new national MCTS licences in terms of section 37(1) of the Telecommunications Act to Vodacom¹⁵⁴ and MTN.¹⁵⁵

These licences incorporate the terms of the original licences as required by section 37(1) of the Telecommunications Act. The commercial date of operation remains 1 June 1994 and the licences will still expire on 31 May 2009. The licences

¹⁵⁰ 'Notification with respect to the period during which applications may be lodged' GN 1701/1997 GG 18415 dated 6 November 1997.

¹⁵¹ MCTS licence (note 149 above) clause 2.1.

¹⁵² MCTS licence (note 149 above) clause 2.1.

¹⁵³ MCTS licence (note 149 above) clauses 5.4 and 5.5.

¹⁵⁴ 'Licence to provide a national mobile cellular telecommunication service issued to Vodacom (Pty) Ltd in terms of s 37(1) of the Telecommunications Act, No 103 of 1996' GN 1483/2002 GG 23760 dated 19 August 2002 (Vodacom's MCTS licence).

¹⁵⁵ 'Licence to provide a national mobile cellular telecommunication service issued to Mobile Telephone Networks (Pty) Ltd in terms of s 37(1) of the Telecommunications Act, No 103 of 1996' GN 1484/2002 GG 23760 dated 19 August 2002 (MTN's MCTS licence).

have been amended by:

- The substitution of references to Telkom with references to PSTS licensees.
- The addition of clause 3A, which requires the construction of licensed lines according to a timetable set out in Schedule 1. Licensed lines are defined as telecommunication lines which the licensee is authorised by the licence to construct. Licensed lines were originally dealt with in the multiparty implementation agreement that formed part of the original MCTS licence.¹⁵⁶
- The substitution of Icasa for the Postmaster General as a supervising authority.
- The addition of clause 4A, requiring the provision of community service telephones. Community service telephones were originally dealt with in the multiparty implementation agreement that formed part of the original MCTS licence.¹⁵⁷
- The addition of a dispute resolution clause in clause 4B.
- The addition of clause 8A detailing the provision of operator-assisted emergency services.
- The addition of clause 10A detailing the provision of a directory information service, including the requirement to make customer details available to PSTS licensees for inclusion in the PSTS licensees' directories, at the request of the customer.
- The addition of clause 10B detailing operator assisted services to assist customers in using the licensee's services.
- The addition of clause 12B regarding the preparation of accounting records.
- The addition of clause 13A regarding metering and billing.
- The addition of clause 13B regarding the connection of customer equipment to a licensed line.
- The addition of clause 13C dealing with arrangements in areas where only one MCTS licensee has constructed licensed lines, to allow the other licensee to make use of such lines. The clause in each licence makes specific reference to either MTN or Vodacom. No mention is made of the third MCTS licensee, Cell C, with regard to the use of licensed lines.
- The addition of clause 14A dealing with numbering. The clause allocates an access code to the licensee and provides that allocation of numbers to customers is at the licensee's discretion.
- The addition of clause 16A dealing with radio frequencies. This clause includes a provision that Icasa will renew the licensee's radio frequency licence annually.

3.9.2 The licensing process for the third MCTS provider

In terms of the original section 37(2)(b) of the Telecommunications Act, the regulatory authority (at the time Satra) had two years from the date of commencement of the Act,¹⁵⁸ to conduct an enquiry into matters relating to

¹⁵⁶ 'Multiparty Implementation Agreement' clause 4, in MCTS licence (note 149 above).

¹⁵⁷ 'Multiparty Implementation Agreement' clause 5, in MCTS licence (note 149 above).

¹⁵⁸ The Telecommunications Act provides that the commencement date was 1 July 1997.

additional licences to provide MCTS. The inquiry found the establishment of two additional MCTS operators to be financially viable.¹⁵⁹ On 26 February 1999, acting in terms of section 34(2)(a)(ii) of the Telecommunications Act, the then Minister for Posts, Telecommunications and Broadcasting issued an ITA for one MCTS licence.¹⁶⁰ The same Minister then approved and published Satra's regulation that the application fee for an application for the additional mobile cellular telecommunication service licence would be R75 000.¹⁶¹

Satra announced that the criteria according to which each application would be evaluated would be:¹⁶²

- the quality of its business plan and investment strategy;
- its empowerment strategy;
- the impact that its proposal would have on the communications industry and on the consumer;
- its technical plan; and
- its universal service potential.

The applicants were notified on 29 February 2000 that Satra intended to recommend Cell C's application to the Minister, and invited to submit comments on this intention.¹⁶³ The applicants were then invited to submit comments on an expert report which analysed the applications.¹⁶⁴

On 7 April 2000, believing that a final recommendation had already been made by Satra and that the Minister was about to award the licence to Cell C, Nextcom approached the Transvaal Provincial Division of the High Court by way of an urgent application to prevent the award of the licence or, if the licence had been awarded, to suspend the licence pending a review of the process followed up to that stage. Nextcom alleged that the process to determine the successful applicant had been beset by a number of serious irregularities that had materially infringed its fundamental right to fair and just administrative action.¹⁶⁵

Nextcom based its allegations on an affidavit deposed to by the then chairperson of Satra, Dr Nape Maepe, who alleged that, immediately prior to the internal deliberations which were to be held by Satra to identify the successful applicant which would receive its intended recommendation, he was forced by the Minister of Communications and the office of the President to withdraw from the proceedings. Dr Maepe also alleged that there were material procedural irregularities and a failure to give proper consideration to the advice provided by experts employed by Satra.¹⁶⁶

During the course of the litigation, it became clear that Satra had not yet given

¹⁵⁹ 'Notice in respect of the inquiry into the economic feasibility of the provision of more than two mobile cellular telecommunication services' GN 1526/1998 GG 19115 dated 31 July 1998.

¹⁶⁰ 'Invitation to apply for one mobile cellular telecommunication service licence' GN 314/1999 GG 19806 dated 16 February 1999.

¹⁶¹ 'Approval of regulation regarding the application fee for application for more than one mobile cellular telecommunication service licence' GN 299/1999 GG 19827 of 5 March 1999.

¹⁶² 'Information document with regard to the third mobile cellular telecommunication service licence applications' GN 956/1999 GG 20090 dated 14 May 1999.

¹⁶³ *Nextcom (Pty) Ltd v Funde NO & Others 2000 (4) SA 491 (T)* at 500F; s 35(1) of the Telecommunications Act prior to amendment by Act 64 of 2001.

¹⁶⁴ *Nextcom case* (note 163 above) at 501B–D.

¹⁶⁵ *Nextcom case* (note 163 above).

¹⁶⁶ *Nextcom case* (note 163 above) at 499H–500D.

its final recommendation to the Minister. Nextcom accordingly sought an order compelling the immediate disclosure of Satra's final recommendation to the Minister, once such final recommendation had been prepared, to all the applicants for the award of the third cellular licence.¹⁶⁷

The Court found that the applicants for the licence were entitled to be informed of the final recommendation as soon as it had been made. This decision was based on the Court's finding that:

The granting of the licence represents a huge public procurement, requiring very substantial investments by all the bidders and in particular by the contender who eventually emerges as the successful applicant for whom it also promises substantial returns. It is therefore important that the public be reassured that the process of choosing the successful bidder has remained unblemished throughout. Publication of the final recommendation may in itself contribute significantly to the reassurance of all the parties involved and the public at large that Satra's process has been fair, objective, unbiased and just.¹⁶⁸

The Court found that the disclosure of the final recommendation is in accordance with the values and principles governing public administration in terms of section 195 of the Constitution.¹⁶⁹ The disclosure would contribute to ensuring accountability and transparency on the part of Satra while reassuring those who are concerned that the process may have been compromised.¹⁷⁰ The Court found further that the applicants were entitled to the information on the basis of the right to freedom of information and the right to just administrative action.¹⁷¹

In exploring what relief would be appropriate in the circumstances, the Court expressed concern about the effectiveness of any order compelling Satra to inform the applicants of the final recommendation made to the Minister if the Minister could immediately act on such a recommendation, thereby nullifying the purpose for which the information was sought. According to the judge, the information was sought in order to assess whether there existed grounds to prevent the Minister from acting on Satra's recommendation.¹⁷² In the circumstances, the judge ordered that Satra must inform the applicants of the final recommendation at the same time that it was transmitted to the Minister, and that the Minister would be prohibited from acting on that recommendation for five days after receiving it.¹⁷³

On 30 June 2000, Satra advised the contenders that it had notified the Minister that Satra's recommendation was that the third MCTS licence be granted to Cell C and that certain specified conditions be imposed. Satra advised that the reasons for the recommendation would be made available on 4 July 2000.¹⁷⁴

Satra was disbanded on 1 July 2000.¹⁷⁵ On 4 July 2000, Icasa, Satra's successor in law,

¹⁶⁷ *Nextcom case* (note 163 above) at 501I–J.

¹⁶⁸ *Nextcom case* (note 163 above) at 510C.

¹⁶⁹ The Constitution of the Republic of South Africa, Act 108 of 1996.

¹⁷⁰ *Nextcom case* (note 163 above) at 510H.

¹⁷¹ *Nextcom case* (note 163 above) at 504F–G, 505A.

¹⁷² *Nextcom case* (note 163 above) at 510I–511B.

¹⁷³ *Nextcom case* (note 163 above) at 496B–E.

¹⁷⁴ *Nextcom (Pty) Ltd v Funde NO & Others* (TPD, case no 8734/2000, 28 July 2000, unreported) at 6 (unreported *Nextcom case*).

¹⁷⁵ s 18 of the Icasa Act, 13 of 2000.

made the reasons for Satra's decision available to the applicants.¹⁷⁶

On 7 July 2000, Nextcom made an interim application to the High Court to suspend Icasa's recommendation pending a review of the recommendation and interdict the Minister from acting on the recommendation pending the final determination of the review application.¹⁷⁷

Argument in the interim application was concluded on 21 July 2000. The decision of the Court was handed down on 28 July 2000. The Court found that:

- there was a reasonable prospect that a review court would find that the executive interference in the adjudication process compromised Icasa's impartiality which is required by the Constitution and by section 5(3) of the Telecommunications Act;
- Nextcom had failed to establish any irregularity based on conflicts of interest in the adjudication process;
- at the time that the public hearings were held, the public was entitled to access to all the information relating to the applications, which had not been provided and that the lack of access to this information amounted prima facie to a procedural irregularity;
- there was evidence to suggest that Icasa ignored or did not give proper weight to the opinions of its experts, and that this may indicate that Icasa did not adequately apply its mind to the matter in question and that such a failure amounted to an irregularity which vitiated the proceedings and the outcome thereof.¹⁷⁸

The court ultimately found that Nextcom had fulfilled the requirements of the interim interdict sought, and granted it.¹⁷⁹

The question of final relief was never finalised in the Nextcom matter since Nextcom and Cell C reached an out of court settlement, the terms of which were never made public,¹⁸⁰ which resulted in Nextcom withdrawing its opposition to the process of awarding the third MCTS licence, which was ultimately awarded to Cell-C.¹⁸¹ Cell-C's licence was issued on 22 June 2001.¹⁸²

3.10 Value Added Network Services (Vans)

A 'value-added network service' is defined in the Telecommunications Act as a telecommunication service provided by a person over a telecommunication facility, which facility has been obtained by that person in accordance with the provisions of section 40(2) of the Act to one or more customers of that person concurrently, during which value is added for the benefit of the customers, which may consist of:

¹⁷⁶ Unreported *Nextcom* case (note 174 above) at 6.

¹⁷⁷ Unreported *Nextcom* case (note 174 above).

¹⁷⁸ Unreported *Nextcom* case (note 174 above) at 32.

¹⁷⁹ Unreported *Nextcom* case (note 174 above) at 51.

¹⁸⁰ Icasa Annual Report 2001/2002 13.

¹⁸¹ 'Decision of Minister of Communications, Dr Ivy Matsepe-Casaburri, on the third mobile cellular telecommunication licence'; available at <http://www.gov.za/speeches/index.html>.

¹⁸² 'Mobile Cellular Telecommunication Service Licence issued to Cell C (Pty) Limited' GN 1601/2001 GG 22429 dated 29 June 2001 (Cell C's MCTS Licence).

- any kind of technological intervention that would act on the content, format or protocol or similar aspects of the signals transmitted or received by the customer in order to provide those customers with additional, different or restructured information;
- the provision of authorised access to, and interaction with, processes for storing and retrieval of text and data;
- managed data network services.

Examples of Vans include:

- Electronic data interchange;
- Electronic mail;
- Access to a database or a managed data network service;
- Voice mail;
- Store-and-forward fax;
- Video conferencing;
- Telecommunications related publishing and advertising services, whether electronic or print;
- Electronic information services, including internet service provision.¹⁸³

Satra published a schedule setting out interim guidelines for applications for licences to provide Vans.¹⁸⁴ These guidelines were repealed on 1 October 2003, when the Minister published regulations relating to the manner in which applications for Vans licences should be made.¹⁸⁵

According to the regulations, if the applicant has turnover exceeding R1 million, the application is required to set out employment strategies relating to historically disadvantaged individuals. In addition, if the applicant is a juristic person, it is required to have a minimum of 15 percent shareholding by historically disadvantaged individuals. Deemed Vans operators¹⁸⁶ with an annual turnover of R1 million and above, have 24 months effective from 1 October 2003 to have a minimum 15 percent shareholding of historically disadvantaged individuals.

3.10.1 Internet as Vans

Satra held an inquiry to decide the question whether provision of Internet service falls under a PSTN licence or a Vans licence.¹⁸⁷ Satra concluded that Internet service provision was a Vans and could be provided under a Vans licence.¹⁸⁸

¹⁸³ Licence issued to Telkom SA Limited to provide Telecommunication Services under s 40 of the Telecommunications Act 103 of 1996' GN 769/1997 GG 17984 of 7 May 1997 (Telkom's Vans licence).

¹⁸⁴ 'Interim Guidelines relating to the manner in which applications shall be made in respect of licences for Vans' GN 1701/1997 GG 18415 dated 6 November 1997.

¹⁸⁵ 'Regulations relating to the manner in which applications for Value Added Network Service (Vans) licences are to be made' (note 58 above).

¹⁸⁶ In terms of s 40(1)(b) of the Telecommunications Act, which provides that providers of Vans who provided such services immediately before the 20 May 1996 in terms of the Post Office Act, 44 of 1958, are deemed to be Vans licensees, but must apply for licences six months after the commencement of the Act or within any extended period allowed by Icasa.

¹⁸⁷ *Pronouncement – P0001* 14 October 1997 para 3.

¹⁸⁸ *Pronouncement – P0001* (note 187 above) para 4.

3.10.2 The section 27 enquiry into VPNs

Icasa held an enquiry in terms of section 27 of the Telecommunications Act,¹⁸⁹ into whether VPNs are a Managed Data Network Service (MDNS). Icasa noted, in a document published on 14 May 2001, that a Vans licensee is entitled to use any technical resources and managerial skills to meet its customers' requirements of availability, reliability and security, and that the use of such resources and skills is part of the value-adding process.¹⁹⁰ Icasa also noted that VPN techniques could be used in a PTN.¹⁹¹

Icasa found that a VPN is

neither a MDNS nor a PTN but is manifested as desirable service characteristics resulting from software based on technological intervention in the management, configuration and operation of a Vans, which is a legal service in terms of section 40 of the Act, particularly section 40(4)(b).¹⁹²

A licence to provide Vans would therefore include the authority to provide VPNs.

3.10.3 The AT&T matter

In the matter of Telkom SA Ltd v AT&T Global Network Services South Africa (Pty) Ltd (the AT&T matter), Telkom lodged a complaint with Icasa in terms of section 100 of the Telecommunications Act against AT&T, a Vans licensee, to the effect that the services provided by AT&T were not authorised by its Vans licence issued under section 40 of the Telecommunications Act.¹⁹³ The crux of the complaint was that AT&T was providing VPNs (virtual private networks) to its clients, which in Telkom's view VPNs constituted Private Telecommunication Networks (PTNs) for which AT&T did not have a licence, and which were not included in AT&T's Vans licence. Telkom also was of the view that the provision of VPNs infringed on Telkom's rights to provide PSTS, amounted to subletting of facilities in contravention of section 40(4) of the Telecommunications Act and was a violation of AT&T's contract with Telkom for telecommunication facilities.

AT&T lodged a counter complaint that Telkom was refusing to provide telecommunication facilities to AT&T, with the effect that Telkom's Vans operations were given an undue preference, in violation of section 53 of the Telecommunications Act.

Icasa found that a VPN is not a PTN but an MDNS, which falls into the definition of Vans in section 40(2) of the Telecommunications Act. Icasa also found that AT&T was not providing a PSTS nor was it subletting

¹⁸⁹ "Notice of intention to hold an enquiry into whether a Virtual Private Network (VPN) constitutes a Managed Data Network Service (MDNS)" GN 4043/2000 GG 21642 dated 11 October 2000.

¹⁹⁰ Icasa's "Findings and conclusions on the s27 Enquiry whether a Virtual Private Network (VPN) constitutes a Managed Data Network (MDNS) or not" at <http://www.icasa.org.za/Repository/resources/Events&%20Publications/Publications/Government%20gazzettes/Finding%20on%20VPN%20%20MDNS%202...pdf>

¹⁹¹ Icasa's finding (note 190 above) para 3.7.

¹⁹² Icasa's finding (note 190 above) para 3.9.

¹⁹³ Icasa's ruling in *Telkom SA Ltd v AT&T Global Network Services South Africa (Pty) Ltd*, 21 June 2002; available at <http://www.icasa.org.za/Default.aspx?page=1018&moduledata=193>.

telecommunications facilities obtained from Telkom. Icasa found also that Telkom was giving its own Vans provider an undue preference by unlawfully withholding telecommunication facilities from AT&T.¹⁹⁴

Telkom has taken Icasa's decision on review in the High Court.¹⁹⁵

3.10.4 *The Internet Solutions matter*

In the matter of *Telkom SA Ltd v Internet Solutions (Pty) Ltd* (Internet Solutions matter),¹⁹⁶ Telkom lodged a complaint with Icasa in terms of section 100 of the Telecommunications Act that Internet Solutions is making its telecommunications facilities available to its customers through a facility known as IP-Net for the purpose of data communication between two points thus constituting a PTN. Telkom also alleged that Internet Solutions was providing a private international link from the United Kingdom to a company, KWV Ltd. According to Telkom Internet Solutions was unlawfully re-selling the bandwidth it leases from Telkom providing KWV with data communications facilities.

Icasa found that section 40(2) of the Telecommunications Act, which lists a number of Vans activities, is not exhaustive. It includes data communication, conveyance of data by means of protocols, access to databases and the use of any technology to add value to a service. Icasa found that Internet Solutions, by using protocols to encode and convey data, was not violating section 32 or section 36 of the Telecommunications Act, operating a PTN, but was providing a legitimate Vans to its client in terms of its licence under section 40 of the Telecommunications Act.¹⁹⁷

3.11 Private Telecommunication Network Services

The Telecommunications Act defines a PTN as

a telecommunication system provided by a person for purposes principally or integrally related to the operations of that person and which is installed onto two or more separate, non-contiguous premises and where the switching systems (nodes) of at least two of these premises are interconnected to the public switched telecommunication network as contemplated in section 41.¹⁹⁸

A PTN is accordingly a network constructed for a person's own use. According to section 41(1)(b) of the Act, a licence is only required for a PTN where such a network is interconnected to the PSTN, since the definition of a PTN states that a PTN must be interconnected with the PSTN at two or more premises.

The Telecommunications Act distinguishes between a Vans and a PTN. The principal difference between the two is that a Vans is a commercial service. A PTN is for own use. The services are not of a commercial nature. In the AT&T matter referred to above, Icasa described a PTN as a network provided in-house and

¹⁹⁴ Icasa's ruling (note 193 above) para 9.

¹⁹⁵ *Telkom South Africa Limited v William Currie NO and Others* (TPD, case no 24870/2002, unreported).

¹⁹⁶ Icasa's ruling in *Telkom SA Ltd v Internet Solutions (Pty) Ltd*, 14 June 2002; available at <http://www.icasa.org.za/Default.aspx?page=1018&moduledata=193>.

¹⁹⁷ Icasa's ruling (note 196 above) para 6.

¹⁹⁸ s 1 of the Telecommunications Act.

licensed to the in-house provider for the purpose of enhancing the operations of the business. One of the other key differences between a Vans and a PTN is that a Vans may not carry a voice signal until a date yet to be fixed by the Minister. On the other hand, a PTN may convey both voice and non-voice signals that are principally and integrally related to the activities of the PTN user.

On 1 October 2003, the Minister published Icasa's regulations relating to the manner in which applications for PTN licences are to be made.¹⁹⁹ These regulations replaced the interim guidelines on the manner in which applications for PTN licences must be made.²⁰⁰

Section 41(1)(c) provides that providers of PTNs, which must be licensed in terms of section 41(1)(b), who provided such services before the commencement of the Telecommunications Act in terms of the Post Office Act, 44 of 1958, are deemed to be PTN licensees, but must apply for licences six months after the commencement of the Act or within any extended period allowed by Icasa. Icasa has announced that all deemed and interim PTN licensees would have to apply for a new PTN licence within 60 days after the promulgation of the final terms and conditions for PTN licences.²⁰¹

3.12 Under-serviced Area Licences

Section 40A of the Telecommunications Act provides that the Minister shall determine those geographic areas where there is a teledensity of less than five percent and in respect of which small businesses²⁰² may apply to provide services. These licences are referred to as Under Serviced Area Licences or USALs.

USAL holders may provide any telecommunication services in the area specified, including voice over Internet protocol, fixed-mobile and public pay-telephone services,²⁰³ and may obtain interconnection with PSTS and MCTS licensees.²⁰⁴ All USALs shall have materially the same terms and conditions.²⁰⁵ Woman applicants and applicants from historically disadvantaged groups will be given 'due regard' in the consideration of applications.²⁰⁶ A policy direction issued by the Minister on 21 August 2001 set out the above requirements in more detail.²⁰⁷

On 19 December 2002, the Minister issued an ITA for USALs in 10 municipal districts situated in the Northern Province (Limpopo), Kwa-Zulu Natal, Eastern Cape, Free State and North West Province.²⁰⁸ Icasa published a new draft licence in August 2003 to replace the draft licence which originally appeared in the ITA.²⁰⁹

Notice of applications received in response to the ITA was published in September 2003.²¹⁰ At least one application was received in every municipal district

¹⁹⁹ 'Regulations relating to the manner in which applications for Private Telecommunication Network (PTN) licences are to be made' (note 58 above).

²⁰⁰ Notification with respect to the period within which applications may be lodged' (note 150 above).

²⁰¹ 'Notice of extension of 27 February 2004 deadline for deemed and interim Value-Added Network Service licensees and Private Telecommunications Network licensees' GN 311/2004 GG 26 105 dated 27 February 2004.

²⁰² Defined as a 'small business' in terms of s 1 of the National Small Business Act, 102 of 1996.

²⁰³ s 40A(3) of the Telecommunications Act.

²⁰⁴ s 40A(6) of the Telecommunications Act.

²⁰⁵ s 40A(5) of the Telecommunications Act.

²⁰⁶ s 40A(2)(b) of the Telecommunications Act.

²⁰⁷ Policy directions (note above).

²⁰⁸ 'Invitation to Apply (ITA) for licences to provide telecommunication services in under-serviced areas' GN 3458/2002 GG 24204 dated 19 December 2002.

²⁰⁹ 'Correction to draft licence published for under-serviced area licences' GN 2193/2003 GG 25343 dated 8 August 2003.

²¹⁰ 'Notice in terms of s 34(2)' GN 2503/2003 GG 25498 dated 23 September 2003.

in which applications were invited, save one municipal district in the Northern Province (Limpopo), which did not attract any applications.²¹¹ Icasa held oral hearings regarding the applications in January and February 2004 and made recommendations to the Minister of Communications on those bidders who should be awarded licences, in July 2004.²¹²

3.13 Sentech

3.13.1 Multimedia services

The Act defines a 'multimedia service' as

a telecommunication service that integrates and synchronises various forms of media to communicate information or content in an interactive format, including services such as-

- (a) internet through television;
- (b) pay-per-view;
- (c) video on demand;
- (d) electronic transactions (including e-commerce);
- (e) text;
- (f) data;
- (g) graphics;
- (h) animation;
- (i) audio;
- (j) visual content,

but shall not include mobile cellular telecommunication services and public switched telecommunication services.

Differences between a multimedia service licence and a Vans licence include:

- Vans is not necessarily interactive although there is nothing in the definition of Vans which precludes this;
- Vans does not necessarily integrate and synchronise various forms of media, although there is nothing in the definition of Vans which precludes this;
- A multimedia licensee is not limited to using facilities provided by a PSTS licensee.

The Telecommunications Act provides in section 32C that:

(1) With effect from 7 May 2002, Sentech Limited referred to in section 4 of the Sentech Act, 1996 (Act 63 of 1996), shall be granted a licence to provide multimedia services to any person who requests such service.

(2) Sentech shall provide the multimedia service as a common carrier on a

²¹¹ Bushbuckridge/Lowveld Municipality.

²¹² 'Notice of hearings regarding the application received for under-served area licences' GN 39/2004 GG 25918 dated 14 January 2004; 'Notice of amendment of hearing schedule regarding the applications received for under-served area licences in DC-39, Bophirima District' GN 264/2004 GG 26063 dated 14 February 2004.

reasonable, equitable and non-discriminatory basis.

- (3) In respect of the granting of other multimedia services licences-
- (a) the Minister shall invite applications on a date to be fixed by the Minister by notice in the Gazette; and
 - (b) section 34(2)(b) and (c) apply with the necessary changes.

A Multimedia Service licence was issued to Sentech Ltd on 6 May 2002.²¹³ Sentech is a state-owned company established under the Sentech Act, 63 of 1996. The licence is issued for a period of 15 years effective from 7 May 2002.²¹⁴

A condition of the licence is that Sentech is required to create and maintain 500 school Internet laboratories in 500 rural schools over five years.²¹⁵

No invitations to apply for other multimedia services licences in terms of section 32C(3) of the Telecommunications Act have yet been issued.

3.13.2 *Carrier of carriers*

The Telecommunications Act defines a ‘carrier of carriers’ as a telecommunication service (including any signal conveyed by means of the telecommunication system of that service) which-

- originates on the telecommunication system of a public switched telecommunication service licensee or mobile cellular telecommunication service licensee or an under-serviced area licensee in the Republic and terminates in a telecommunication system in another country or vice versa; or
- originates and terminates in a telecommunication system of an operator licensed in another country to provide international services, but is conveyed via a telecommunication system in the Republic on a wholesale basis, but which specifically excludes the termination of international telecommunication services to end-users directly in the Republic.

On 8 May 2002 Icasa issued a licence to Sentech to provide an international telecommunication gateway service enabling it to operate as a carrier of carriers in terms of section 32C(1)(a) and 32C(6) of the Act.²¹⁶

3.13.3 *Sentech’s application to amend its licences*

Sentech applied in April 2003 to amend its licences.²¹⁷ Sentech wished to amend its carrier of carriers licence by adding the word ‘lease’ in clause 3.1, allowing it to lease facilities for its service.²¹⁸ Sentech wished to amend its multimedia licence by

- deleting clause 3.6 of the multimedia licence, to allow it to provide facilities to

²¹³ ‘Licence issued to Sentech Limited to provide Multimedia Services: Terms and conditions’ GN 686/2002 GG 23405 dated 8 May 2002 (Sentech’s multimedia services licence).

²¹⁴ Sentech’s multimedia services licence clause 2.

²¹⁵ Sentech’s multimedia services licence clause 5.2.

²¹⁶ ‘Licence issued to Sentech Limited to provide an International Telecommunications gateway Service: Terms and conditions’ GN 684/2002 GG 23405 dated 8 May 2002 (Sentech’s carrier of carriers licence).

²¹⁷ ‘Notice of intention to amend the telecommunications service licences issued to Sentech Limited in terms of section 32C(6)’ GN 984/2003 GG 24708 dated 3 April 2003.

²¹⁸ ‘Notice of intention to amend the telecommunications service licences issued to Sentech Limited in terms of section 32C(6)’ (note 217 above) para 2.

Vans licensees;²¹⁹

- deleting clause 1.2.18, which restricts Sentech's sharing of infrastructure, co-location and interconnection;²²⁰ and
- deleting clause 5.2 and annexure A, which deal with community service obligations.²²¹

Written representations were received and oral hearings were held regarding the proposed amendments.²²² At the oral hearing, Sentech made a new proposal regarding the community service obligations in its multimedia licence. As a result, Icasa invited comments on the new proposed amendments.²²³ Sentech's multimedia services licence was amended in April 2004 although the licence has as of July 2004 not yet been published in the Gazette.

3.14 Global Mobile Personal Communications by Satellite Services

On 20 December 2001, the Minister issued a policy direction in terms of section 5 of the Telecommunications Act on global mobile personal communications by satellite services in South Africa.²²⁴ In the policy direction, a 'GMPCS system' is defined as

any satellite system, whether fixed or mobile, broadband and/or narrowband, global or regional, geostationary or non-geostationary, existing or planned, providing telecommunication services directly to end users from a satellite or network or constellation of satellites, other than and excluding those elements of the Public Switched Telecommunication Network (PSTN) by means of which, inter alia, satellite telecommunication services are provided. Such elements include, but are not limited to V-Sat and satellite newsgathering network infrastructure.

In December 2001, the Minister approved and published regulations issued by Icasa, firstly prescribing GMPCS as a service in respect of which an ITA must be issued in terms of section 34(2)(vi) of the Telecommunications Act and authorising Icasa to issue such licences;²²⁵ and secondly determining the application fee and licence fees for licences to provide a GMPCS service or GMPCS earth gateway service.²²⁶ On the same date, the Minister published an ITA for a telecommunications service licence by means of a GMPCS service.²²⁷

²¹⁹ 'Notice of intention to amend the telecommunications service licences issued to Sentech Limited in terms of section 32C(6)' (note 217 above) para 6.

²²⁰ 'Notice of intention to amend the telecommunications service licences issued to Sentech Limited in terms of section 32C(6)' (note 217 above) para 7.

²²¹ 'Notice of intention to amend the telecommunications service licences issued to Sentech Limited in terms of section 32C(6)' (note 217 above) para 8.

²²² 'Notice of intention to amend the telecommunications service licences issued to Sentech Limited in terms of section 32C(6) of the Telecommunications Act, 103 of 1996, as amended' GN 2348/2003 GG 25447 dated 9 September 2003.

²²³ 'Notice of intention to amend the telecommunications service licences issued to Sentech Limited in terms of section 32C(6) of the Telecommunications Act, 103 of 1996, as amended' (note 223 above) introduction.

²²⁴ 'Policy direction in terms of s 5 of the Telecommunications Act on Global Mobile Personal Communications by Satellite in South Africa' GN 2392/2001 GG 22971 dated 20 December 2001.

²²⁵ 'Regulations approved' (note 59 above).

²²⁶ 'Regulations approved' GN 2393/2001 GG 22971 dated 20 December 2001.

²²⁷ 'Invitation to apply for a telecommunications service licence by means of Global Personal Telecommunications by Satellite (GMPCS) service' GN 2395/2001 GG 22971 of 20 December 2001.

On 10 December 2002, the Minister issued an amended policy direction on GMPCS.²²⁸ One difference from the previous policy direction was that the new policy direction allowed a single entity to hold more than one licence, including both a GMPCS service licence and a GMPCS gateway licence simultaneously.²²⁹

The regulation authorising Icasa to issue GMPCS licences was replaced by a new, similar regulation in December 2002, also in terms of section 34(2)(vi), which simply authorised Icasa to issue a GMPCS service licence subject to section 35 of the Telecommunications Act, with no reference to GMPCS gateway licences, and made reference to the definitions contained in the new policy direction.²³⁰

Proposed licence terms and conditions for a GMPCS service licence were published for comment in December 2002²³¹ but no applications for GMPCS have been gazetted to date and this process seems to have been abandoned.

3.15 Mobile Data Services

Wireless Business Solutions (WBS) is the holder of a national mobile data telecommunication licence to provide a mobile data telecommunications service.²³² The licence was issued in terms of section 78(2) of the Post Office Act²³³ and is deemed to be a licence under the Telecommunications Act in terms of section 42 of the Telecommunications Act.

WBS has applied to amend its licence.²³⁴ Most of the proposed amendments are superficial. The only substantial amendment is that WBS wishes to remove the limitation on the number and type of frequency channels, and on the band in which the channels may be allocated.²³⁵ The amendments were published for comment and public hearings were held on 2 February 2004.²³⁶ The amendments have not yet been gazetted, although the licence was amended in April 2004.

4. FREQUENCY LICENSING: CHAPTER IV OF THE TELECOMMUNICATIONS ACT

The radio frequency spectrum is universally acknowledged as a scarce public resource.²³⁷ Because of the continual increase in the number of telecommunication services available, demand for radio frequency exceeds availability. For this reason it is necessary to establish a policy framework for the control and the assignment of spectrum.

Chapter IV of the Telecommunications Act deals with radio frequency spectrum. According to section 28(1), Icasa is vested with the control, planning,

²²⁸ 'Policy directions on Global Personal Telecommunications by Satellite in the Republic of South Africa' GN 3425/2002 GG 24170 dated 10 December 2002 (Policy directions on GMPCS).

²²⁹ Policy directions on GMPCS (note 228 above) para 4.

²³⁰ 'Regulations approved' GN 3426/2002 GG 24171 dated 10 December 2002.

²³¹ 'Proposed licence terms and conditions under which a GMPCS service shall be licensed' GN 3444/2002 GG 24185 of 13 December 2002.

²³² National Mobile Data Telecommunications Licence issued to Vula Mobile Data (Pty) Ltd trading as Wireless Business Solutions.

²³³ The Post Office Act (note 111 above).

²³⁴ 'Notice of intention to amend the National Mobile Data Telecommunications Licence issued to Wireless Business Solutions (Pty) Ltd in terms of section 78 of the Post Office Act No 44 of 1958' GN 3396 GG 25825 dated 12 August 2003.

²³⁵ 'Notice of intention to amend the National Mobile Data Telecommunications Licence issued to Wireless Business Solutions (Pty) Ltd in terms of section 78 of the Post Office Act No 44 of 1958' (note 234 above) clause 12 read with clause 12 of the existing licence.

²³⁶ 'Notice of public hearings in terms of section 34 of the Telecommunications Act regarding the application by Wireless Business Solutions (Pty) Ltd [WBS] to amend their National Mobile Data Telecommunications Licence [NMDTL] issued in terms of Section 78 of the Post Office Act, No. 44 of 1958' GN 94/2004 GG 25937 dated 21 January 2004.

²³⁷ Intven, Oliver and Sepúlveda (note 6 above) para 2.3.4; White Paper on Telecommunications (note 2 above) para 5.5.

administration, management and licensing of the radio frequency spectrum. In doing so, Icasa is required to comply with applicable standards and requirements of the International Telecommunications Union and its radio regulations.²³⁸

Section 30(1) prohibits anyone from transmitting or receiving any signal by radio without a licence, certificate or authority from Icasa. A licence confers on a person, or any person in his or her employ, or under his or her control, the right to use radio frequency or a group of radio frequencies, or a station, for prescribed purposes.²³⁹ A certificate of proficiency is required in order to use or maintain a station. Such a certificate issued to a person who qualifies to operate a station, either under the radio regulations²⁴⁰ or section 30(4) of the Telecommunications Act.²⁴¹ An authority to operate equipment is issued only to a person holding of a certificate of proficiency and may be required by a licence.²⁴²

4.1 Frequency Use Licences

Many telecommunication services rely on the use of radio frequency. Such services would accordingly require not only a telecommunication service licence (for example a licence to provide a mobile cellular telecommunication service) but also a spectrum licence.²⁴³

Section 30(1)(a) of the Telecommunications Act provides that no person shall transmit a signal by radio except in accordance with a licence 'to use any radio frequency or group of radio frequencies for any purpose and in the manner prescribed'. Section 30(3)(b) provides that a frequency use licence will be required in addition to any telecommunication service licence, other than Telkom's, in terms of chapter V of the Telecommunications Act, which uses radio in the provision of the service. Section 30(3)(d) provides for an applicant for a telecommunication service licence, excluding Telkom, to apply for a frequency spectrum licence in terms of section 30(1)(a).

Section 30(3)(a) provides that Telkom is deemed to have applied for a frequency spectrum licence and that the application shall be granted when Telkom's PSTS licence in terms of section 36(1) is granted. Telkom's frequency use licence was duly granted.²⁴⁴

MCTS licensees have licences to use frequency spectrum in the 900 MHz bands.²⁴⁵ Sentech has been issued with a carrier of carriers spectrum licence²⁴⁶ and a multimedia spectrum licence.²⁴⁷

²³⁸ s 28(2) of the Telecommunications Act.

²³⁹ s 30(1)(a) of the Telecommunications Act.

²⁴⁰ s 95 of the Telecommunications Act read with the Radio Act, 3 of 1952, 'Radio Regulations' GN R2862/1979 GG 6794 dated 28 December 1979 as amended.

²⁴¹ s 30(1)(b) of the Telecommunications Act.

²⁴² s 30(1)(c) of the Telecommunications Act.

²⁴³ Intven, Oliver and Sepúlveda (note 6 above) para 2.3.4; White Paper on Telecommunications (note 2 above) para 5.5; s 30(3)(b) of the Telecommunications Act.

²⁴⁴ 'Licence issued to Telkom SA Limited to use Radio frequency Spectrum and Radio Stations under s30 of the Telecommunications Act, 1996 The Licence' GN 768/1997 GG 17984 dated 7 May 1997.

²⁴⁵ See the MCTS licences of Vodacom (note 154 above) and MTN (note 155 above) clauses 16 and 16A, and Cell C's MCTS licence (note 182 above) at clause 2.1.

²⁴⁶ 'Radio Frequency Spectrum and Radio Station Licence issued to Sentech Limited on Monday, 6 May 2002 in terms of Section 30 of the Telecommunications Act 103 of 1996 as amended and pursuant to the Carrier of Carriers Service Licence Radio Frequency Spectrum and Radio Station Licence' GN 685/2002 GG 23405 dated 8 May 2002.

²⁴⁷ 'Radio Frequency Spectrum and Radio Station Licence issued to Sentech Limited on Monday, 6 May 2002 in terms of Section 30 of the Telecommunications Act 103 of 1996 as amended and pursuant to the Multimedia Services Licence Radio Frequency Spectrum and Radio Station Licence' GN 687/2002 GG 23405 dated 8 May 2002.

4.2 Certificates of Proficiency

A certificate of proficiency is issued by Icasa to a person who has passed the requisite examination that qualifies him or her to operate specific equipment, if the certificate is required by the radio regulations,²⁴⁸ or prescribed by any other regulations.²⁴⁹ According to Icasa,²⁵⁰ the prescribed purposes for which certificates are required are:

- The operation of an amateur radio;
- The operation of a radio onboard an aircraft with a maximum certified mass of 2720 kg;
- The operation of a radio onboard an aircraft as a Commercial, Senior Commercial and Airline transport pilot;
- The operation of a radio onboard a vessel of which the carrier-wave power of the transmitter does not exceed 50 W;
- For holders of Foreign Certificates, for the operation of a radio onboard an aircraft in South Africa.

4.3 Authority to Operate

Section 30(1)(c) of the Telecommunications Act provides that an authority to use a station may be required by a frequency or station licence, the radio regulations or any other law. Such an authority may only be issued to the holder of a certificate of proficiency under section 30(1)(b). Regulations prescribe the procedure for application for authority to operate radio apparatus.²⁵¹

4.4 Guidelines for Licences

Icasa has issued licence application guidelines for applications for radio frequency spectrum, station licences, certificates and authorities.²⁵² The guidelines are based on a published document entitled 'Revision of South African Frequency Allocation Plans (Band Plans) and Migration Strategies'.²⁵³

4.5 Procedure for Application of Licenses

Section 30(2)(b) provides for application procedures to be prescribed. Section 30(3)(e) provides that the process for considering applications outlined in section 35(2), (3) and (4) of the Telecommunications Act applies to the consideration of applications for frequency use licences. Section 30(7) provides for procedures for amendment, renewal and transfer of frequency use licences to be prescribed.

²⁴⁸ s 30(1)(c) of the Telecommunications Act.

²⁴⁹ Such as the Civil Aviation Regulations in terms of the Aviation Act, 64 of 1962, originally published in GN R1219/1997 GG 18286 dated 26 September 1997 as amended.

²⁵⁰ Icasa 'Rules & Certificates of Proficiency'; available at <http://www.icasa.org.za/Default.aspx?page=1451&moduledata=864>.

²⁵¹ 'Regulations in respect of applications for radio frequency spectrum licences, station licences, certificates and authorities' GN R291/2002 GG 23212 of 6 March 2002 read with the Radio Regulations (note 240 above) chapter 6, para 5.

²⁵² Icasa 'Licence application guidelines'; available at <http://www.icasa.org.za/Repository/Resources/Telecoms/LICENCEpercent20APPLICATIONpercent20GUIDELINES.doc>.

²⁵³ 'Revision of South African frequency allocation plans (band plans) and migration strategies' GN 759/1997 GG 17983 dated 6 May 1997, as amended.

Procedures for applications for radio frequency spectrum, station licences, certificates and authorities have been published.²⁵⁴ According to these regulations, application forms for the various licenses are obtainable from Icasa. The categories of licences and certificates which may be applied for are:²⁵⁵

- Aeronautical, for example
 - Applications for General Certificate of Competency in Radio Telephony (Aeronautical)
 - Restricted Radio Operator's Certificate (Aeronautical)
- Amateur including four classes of licence for purposes such as
 - Communication between amateur radio stations
 - Transmitting and receiving Morse code
 - Weather satellite reception and re-transmission
- Maritime, for example
 - General Operator's Certificate (Maritime);
 - Restricted Radio Certificate (Maritime);
 - Global Maritime Distress and Safety Systems (GMDSS);
- Mobile and Fixed Services, including
 - Alarm system
 - Cellular
 - Paging System
 - Satellite News Gathering
 - Vehicle Tracking
 - Asset tracking
 - Mobile Data Telecommunication Services

This list is not exhaustive.

4.6 Radio frequency spectrum licences in the 1800 MHz frequency band and Third Generation radio frequency spectrum licences

The Telecommunications Act provides in section 30A that MCTS licensees may apply for access to the 1800 MHz radio frequency band within six months of the commencement of the introduction of the new paragraph, or within such extended date as the Minister may determine, and that Icasa shall assign a radio frequency spectrum to the applicants on payment of fees and subject to prescribed conditions.²⁵⁶ The section also provides that Telkom and the SNO shall be deemed to hold radio frequency licences in the 1800 MHz band and provides for Telkom to make application for such a licence six months after the SNO is licensed.²⁵⁷

The MCTS licensees have all been granted temporary 1800 MHz licences. However, Icasa has not yet prescribed final conditions for 1800 MHz spectrum licences. Permanent licences have therefore not been issued.

Section 30B of the Telecommunications Act provides for third generation

²⁵⁴ 'Regulations in respect of applications for radio frequency spectrum licences, station licences, certificates and authorities' (note 251 above).

²⁵⁵ Icasa 'Categories of licences'; available at <http://www.icasa.org.za/default.aspx?page=1452>, read with the Radio Regulations (note 240 above).

²⁵⁶ This was inserted by the Telecommunications Amendment Act, 64 of 2001, which came into effect on 30 November 2001.

²⁵⁷ s 30A(2) of the Telecommunications Act.

telecommunication radio frequency licences (3G licences). The section makes identical provisions with regard to 3G licences as section 30A does with regard to 1800 MHz licences.

Icasa has not yet prescribed conditions for 3G licences. The date for applications for 3G licences by MCTS licensees has been extended twice, the latest extension date was 31 May 2003.²⁵⁸

5. EQUIPMENT LICENSING: CHAPTER VI OF THE TELECOMMUNICATIONS ACT

5.1 Equipment Type Approval

Section 54(1) of the Telecommunications Act prohibits any person from using, supplying, selling, offering for sale, lease or hire, any type of telecommunication equipment or facility in connection with telecommunication unless that type has been approved by Icasa. The Telecommunications Act provides that Icasa may prescribe the types of equipment that do not need approval²⁵⁹ and the circumstances in which the use of certain equipment does not need approval.²⁶⁰

5.1.1 Mobile telephone blocking devices

On 28 November 2002, Icasa published its findings in a section 27 enquiry held into the use of mobile telephone blocking devices.²⁶¹ Icasa found that there was no legitimate radio communications use for cellular jamming devices. Accordingly, Icasa decided that the use of these devices would not be authorized.

5.1.2 Labelling of telecommunications equipment

Icasa has published regulations relating to the labelling of telecommunications equipment.²⁶² In terms of these regulations, all type-approved telecommunication equipment, facility or radio apparatus is required to have a legible label permanently affixed to the outside of such equipment, facility or radio apparatus, bearing-

- the Icasa logo; and
- the Icasa issued licence number.

5.2 Equipment Standards

Icasa is also empowered by the Telecommunications Act to prescribe standards for the operation and performance of any telecommunication equipment.²⁶³ The Telecommunications Act requires that the standards be aimed at:

²⁵⁸ Notice in terms of s 30B(1)(a) GN 929/2002 GG 23489 dated 6 June 2002.

²⁵⁹ s 54(2)(a) of the Telecommunications Act (note 8 above).

²⁶⁰ s 54(2)(b) of the Telecommunications Act.

²⁶¹ Findings and conclusions on mobile telephone blocking devices enquiry GN 3266/2002 GG 24123 dated 28 November 2002.

²⁶² Regulations in respect of the labelling of telecommunication equipment GN 289/2002 GG 23212, *Regulation Gazette* 7304 dated 6 March 2002.

²⁶³ s 55(1) of the Telecommunications Act.

- Protecting the integrity of the telecommunication service network;
- Ensuring the proper functioning of the connected equipment;
- Avoiding radio or other interference with telecommunication.²⁶⁴

Icasa has made the following regulations in this regard.

5.2.1 Asymmetric Digital Subscriber Line Customer Premises Equipment

Icasa has prescribed standards for Asymmetric Digital Subscriber Line (ADSL) Customer Premises Equipment (CPE) to comply with in order to be type approved by Icasa.²⁶⁵

5.2.2 Integrated Services Digital Network Customer Premises Equipment

Icasa has published regulations prescribing standards for type approval of Integrated Services Digital Network (ISDN) CPE.²⁶⁶

5.2.3 Calling Line Identification

Regulations have been published which require Analogue Calling Line Identification (CLI), Customer Premises Equipment (CPE) to comply with the Icasa standard TE-010 in order to be type approved by Icasa.²⁶⁷

5.3 Registration as a Supplier

According to section 56 of the Telecommunications Act, no person can supply telecommunication equipment or facilities unless he or she has been registered with Icasa. On 6 March 2002, regulations setting out the procedure for registration as a supplier were published.²⁶⁸ A radio dealer's registration certificate may be applied for in terms of the radio regulations.²⁶⁹

6. Licence fees

Section 88 of the Telecommunications Act provides for licence application fees and annual licence fees. Applications for licences, approvals, certifications and registrations made in terms of the Telecommunications Act must be accompanied by a prescribed application fee.²⁷⁰ In addition, every holder of a frequency use

²⁶⁴ s 55(2) of the Telecommunications Act.

²⁶⁵ 'Regulations in respect of the standards applicable to Asymmetrical Digital Subscriber Line (ADSL) Customer Premises Equipment' GN 1488/2002 GG 23766 dated 20 August 2002.

²⁶⁶ 'Regulations in respect of the standards applicable to Integrated Services Digital Network Customer Premises Equipment' GN 1285/2003 GG 24758 dated 16 April 2003.

²⁶⁷ 'Regulations in respect of the standards applicable to Analogue Calling Line Identification' GN 1489/2002 GG 23767 dated 20 August 2002.

²⁶⁸ 'Regulations in respect of the procedure for the registration of suppliers of telecommunication facilities and equipment' GN 290/2002 GG 23212, Regulation Gazette 7304 dated 6 March 2002.

²⁶⁹ 'Icasa 'Categories of licences' available: <http://www.icasa.org.za/default.aspx?page=1452>, read with the Radio Regulations (note 240 above).

²⁷⁰ s 88(1) of the Telecommunications Act.

licence or telecommunication service licence must pay to Icasa, at the prescribed time, the licence fee specified in the licence or, where no such fee is so specified, the prescribed licence fee.²⁷¹ It is a statutory offence for a licensee not to pay the annual licence fee at the specified time.²⁷² All fees and revenue received in terms of section 88 must be paid into the National Revenue Fund.²⁷³

One of the legal issues arising from the imposition of licence fees in terms of section 88 is whether or not these fees amount to ‘national taxes, levies or duties’ as contemplated in section 77(1)(b) of the final Constitution. If the fees do amount to such taxes, levies or duties, the Telecommunications Act should have been subject to the procedures that apply to Money Bills when being considered by Parliament.²⁷⁴ Although the White Paper on Telecommunications suggests that the funds from licence fees are intended to contribute to funding for the expenditure of the DoC, Icasa and the USA,²⁷⁵ the Telecommunications Act does not include any such provision. The ambiguity of the status of the fees received is emphasised by the requirement that they be paid into the National Revenue Fund.²⁷⁶

However, the fact that the Telecommunications Act does not deal only with the raising of taxes, levies or duties, or a subordinate matter²⁷⁷ and the fact that it was not subject to special procedures in Parliament suggests that the licence fees were not intended to be ‘national taxes, levies or duties’ as contemplated by section 77 of the Constitution.

While there are no South African cases on this issue, the Supreme Court of the United States of America had cause to consider it in *National Cable Television Association v U.S.*²⁷⁸ The court found that a public agency may impose a fee when the fee is exacted in return for a grant which bestows a benefit on the person. The court found that one of the determining factors of the magnitude of the fee was the value of the benefit to the recipient. There should therefore be an element of proportionality between the value of the service the licensee is licensed to provide, and the licence fee payable. Other factors include the costs incurred by the regulatory authority in regulating the industry in the public interest.²⁷⁹ These may be factors that a South African Court would consider should the matter come before it.

Regulations have been promulgated which determine licence fees for Vans and PTN, MCTS,²⁸⁰ PSTS²⁸¹ and GMPCS.²⁸² Licence application fees for radio frequency spectrum licences, approvals, certificates or registrations, authorities and station licences are included in chapter 6 of the Radio Regulations.²⁸³

²⁷¹ s 88(2) of the Telecommunications Act.

²⁷² s 88(3) of the Telecommunications Act.

²⁷³ s 88(4) of the Telecommunications Act. The equivalent in the Constitution (note 169 above) of s 185 of the Constitution of the Republic of South Africa Act, 200 of 1993 (‘the interim Constitution’) is s 213.

²⁷⁴ s 77(3) of the Constitution ((note 169 above).

²⁷⁵ White Paper on Telecommunications (note 2 above) para 5.15.

²⁷⁶ Note 273 above.

²⁷⁷ s 77(2) of the final Constitution.

²⁷⁸ *National Cable Television Association v US* 415 US 336 (1974).

²⁷⁹ *National Cable Television Association v US* 415 US 336 (1974).

²⁸⁰ ‘Regulation’ GN 314/1999 GG 19833 dated 8 March 1999.

²⁸¹ ‘Regulations’ GN 1333/2002 GG 23685 dated 29 July 2002.

²⁸² ‘Licence Fees Regulations’ GN 26/2002 GG 23012, *Regulation Gazette* 7250 dated 8 January 2002.

²⁸³ The Radio Regulations (note 240 above).

CONCLUSION

Telecommunications licensing is a useful tool with which the state can control the allocation of valuable state telecommunications resources, and prevent confusion in the industry. However, lengthy or complex licensing procedures and onerous conditions also can be an unnecessary obstacle in the growth of the telecommunications industry. This is especially the case when the licensing process is not carried out efficiently, consistently and timeously.

The Telecommunications Act has set out the legislative framework within which telecommunications licensing is to take place. However, the Telecommunications Act has stopped short of prescribing a licensing process and has enabled the regulator, Icasa, and, in certain circumstances the Minister of Communications, to prescribe the process for Telecommunications licensing. Icasa is often left with the task of crafting licensing processes in order to accommodate the dictates of policy. While this allows for a measure of flexibility and responsiveness in the licensing processes, it also engenders a lack of certainty in the regulation of the industry. The framework that has been provided thus far is not adequate for the objects it is intended to achieve.