



## **The Minister's May 2007 Draft Policies and Policy Directions under the South African Electronic Communications Act**

**3 September 2007**

On 25 May 2007 the Minister of Communications (Minister) published draft policies and policy directions to the Independent Communications Authority of South Africa (Icasa) in terms of the Electronic Communications Act (EC Act). In this article, we set out the nature of the Minister's powers in relation to policies and policy directions as well as Icasa's obligations. We then examine the draft policies and policy directions and their possible implications for the sector.

### **The Minister's Powers and Icasa's Obligations**

In terms of section 3(1) of the EC Act, the Minister may make policies applicable to the ICT sector that are consistent with the Act. Section 3(2) of the EC Act provides that the Minister may issue policy directions to Icasa that are consistent with the Act. Section 3(3) provides that no policy or policy direction may be made regarding the granting, amendment, transfer, renewal, suspension or revocation of a licence, except as otherwise permitted in the EC Act.

When issuing a policy direction, the Minister must consult Icasa, publish the policy direction in the Government Gazette inviting comment (which is what it did on 25 May 2007), and publish the final policy direction in the Gazette.

Icasa must consider (but does not necessarily have to follow) policies and policy directions when exercising its powers and duties. This is set out in section 3(4) of the EC Act.

### **The Draft Policies and Policy Directions**

The Minister published her draft policies and policy directions as No 469 published in Government Gazette No 29923 dated 25 May 2007.

The policies proposed to be made by the Minister are the following.

\* 1 November 2007 is the proposed date when the contractual exclusivity provisions in relation to SAT-3, negotiated by Telkom, will fall away

- \* Prioritising, in the roll out of Sentech's wireless broadband network, access to electronic communications to educational and health institutions, the Post Office, government offices and ICT community centres
- \* Post Offices will be turned into ICT community centres
- \* Mobile Broadcasting Services will be provided on a single network using the DVB-H standard, and the network will be operated on an open access basis

The policy directions proposed include the following.

- \* Essential facilities – Icasa must urgently prescribe a list of essential facilities, which must include the SAT-3 international cable
- \* Licence conversions – Icasa must urgently determine whether some or all current value added network services licences will be converted to electronic communications network services licences in addition to electronic communications services licences
- \* Emergency service numbers – Icasa must prescribe a list of emergency service numbers to which the public will have continued access even during periods of discontinuation of service
- \* Spectrum – Icasa must take account of WARC 2007 in preparing a new radio frequency band plan; Icasa must allocate spectrum for a single mobile broadcasting services network; Icasa must prescribe regulations for licensees to follow in coordinating radio frequency spectrum use; and Icasa must urgently prescribe procedures and criteria for awarding licences for competing applications where there is insufficient spectrum available to accommodate demand
- \* Underserved area licences – Icasa must merge existing underserved area licences into provincial underserved area network licences
- \* Local loop unbundling – Icasa must make sure that local loop unbundling is completely implemented by 2011
- \* Worldspace – This foreign owned company must be allowed to continue to operate in South Africa without a licence 'pending a long term solution' and Icasa must conduct an inquiry into the issue

### **Possible Implications for the ICT Sector**

Generally, the draft policies and policy directions appear to have the potential to have a positive impact on the sector. There are several issues of concern, however, about the implementation of the policies and policy directions that might delay or negate the intended positive benefits.

Mobile Broadcasting Services – The decision that mobile broadcasting services will be provided on a single network is not clear, but if it means that no other network may allow mobile broadcasting services, this will likely fall afoul of the EC Act and other licensees' rights that have been grandfathered in terms of the EC Act, which might raise constitutional issues.

Licence conversions – It will be difficult if not impossible for Icasa to distinguish between existing Vans licensees in terms of the transitional provisions of the EC Act, as directed by the Minister. If a Vans licensee is entitled to an electronic communications network service licence, then every other Vans licensee is also so entitled.

Underserviced area licences – As this policy direction affects existing licence rights, it will likely not be able to be implemented by Icasa unless all of the relevant parties agree.

Worldspace – If Worldspace does not have the authority to provide a broadcasting or network service, then neither the Minister nor Icasa has the authority to sanction its operations, as this would be a violation of the EC Act. Further, there is an existing process for the licensing of satellite subscription broadcasting services, which has provided many entities standing to challenge Worldspace's unlicensed operations.

## **Conclusion**

The draft policies and policy directions concern important matters in almost all cases, the implications of which for the sector cannot be over-emphasized. It is positive that the regulatory authorities are dealing with the issues. We urge them to consider the issues raised herein in finalising them.