LOCAL LOOP UNBUNDLING: THE BATTLE LINES ARE BEING DRAWN

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written by Lucien Pierce | June 10, 2008

Introduction

While everyone is focused on the contentious value added network services ("VANS") licence con process, currently taking place, the lines are quietly being drawn for the next big battlefront – the local loop.

This article focuses on the period after the smoke of the current battle has cleared and the successful VANS warriors have been awarded their prizes…the coveted Electronic Communications Network Services ("ECNS") and Electronic Communications Services ("ECS") licences.

Given that the VANS warriors will want to rapidly get their services into their customers' living rooms or boardrooms, the article gives a foretaste of the likely weapons that will be used against them to prevent or delay them from getting into those living rooms or boardrooms. It also gives the customers' "regulatory knight in shining armour" a "heads up" on how to avoid the local loop becoming its Waterloo.

It's important to remember that, between the ECNS and ECS licensees, those who are fortunate enough to have the "Network" word as part of their licence, will be able to build their own infrastructure to take the services that they are offering, from their networks, to the nearest exchange, up to the customer's premises and through, over or under the customer's wall.

This article will show that the last part of the network running from the exchange to the customer's premises, the sought after "last mile", is the next frontier where electronic communications battles will be fought.

A bit of background on the battlefield

The last mile, or "local loop" as it is also known, is basically a pair of twisted metal wires (usually copper) running from Telkom's nearest exchange to the plug in the wall of a customer's premises. This pair of twisted copper wires permits voice and electronic data signals to be carried to and from the customer's premises. In recent years, the local loop has increasingly become a crucial means of allowing customers to have high speed internet access, such as ADSL, widely known as "broadband".[1]

So, it is clear that whoever owns and controls the local loop, effectively controls the provision of voice and broadband services to customers. In most cases, it is usually a state owned company such as Telkom which owns or has control over the local loop. This ownership of the local loop came about as a result of the fact that at some stage in the past, Telkom would have been the only entity permitted to set up a communications network, of which the local loop formed part. It would also most certainly have been able to finance this infrastructure using funds received from the state: also known as tax payers' money.

The current local loop state of affairs, can therefore be demonstrated using an analogy. Imagine the

local loop as being the N3 toll road between Johannesburg and Durban and that this is the only way to travel between the two cities. Imagine further, that you have an exclusive concession to control the toll road and the prices which are charged for using it. In this situation, and being a toll road baron, you would want to hold onto that exclusive concession for as long as possible so you can charge as much as possible…wouldn't you?

Imagine if suddenly you are no longer the only toll road baron and you are told that someone else will also be appointed as a rival who will operate on two of your four lanes. You would probably feel slighted that someone else is being allowed to share your hard won toll road. You would probably even want to make it difficult for the competing toll road baron to get to use the toll road…most people certainly would!

You would probably try to prevent or delay your rival from setting up his till in your toll booth, you may try to charge him an excessive rental for the space in your booth, you may even insist that there is no space and that he build another booth, you would probably refuse to give your rival's staff the keys to the booth for "security reasons", you would probably ensure that your obligations to maintain his two lanes are a little unclear, so that travellers on the competing toll road baron's section of the road are discouraged from using his lanes, and move to yours.

Local loop unbundling is not too different from trying to run competing toll road operations on the same piece of road. As you read through the rest of this article, when you see the word "incumbent" think "toll road baron", for "new entrant" think "challenging toll road baron", when you see the word "exchange" think "toll booth", when you read about "co-location" think of deciding where the rival's till will be set up in the tiny booth, when you see the word "access" think of whether the rival gets keys to the booth, and when you see the words "service levels" or "maintenance" think of the toll road baron's duty to maintain all four lanes on the road and not just two.

The rules of engagement

Before setting out the strategies that toll road barons commonly use to delay access to their toll booths and roads, it is important to understand the history of events that have brought us to this point.

The battle scene was set in 2006, with the commencement of the Electronic Communications Act ("the Act").[2] Section 43(1) of the Act provides as follows: "…an electronic communications network service licensee must, on request, lease electronic communications facilities to any other person licensed in terms of this Act…".

The Act is quite clear with regard to what electronic communications facilities it regards as being "essential facilities". It defines them as including "electronic communications facilities, including without limitation local loops, sub-loops and associated electronic communications facilities for accessing subscribers and provisioning services."[3] So basically, the Act permits any properly licensed people to request that the local loop be leased to them.

The problem is that even though the Act provides for the leasing of essential facilities, such as the local loop, there is not much a properly licensed person can do to gain access to the local loop until a number of regulatory hurdles and processes have been overcome.

These processes started with the Department of Communications' report entitled Local Loop Unbundling: A Way Forward for South Africa ("the LLU Report"). The LLU Report was commissioned by the Minister of Communications with the mandate to recommend how Telkom's local loop network

could be unbundled.[4] The LLU Report was completed on 23 May 2007, and made its recommendations.

Even though the LLU Report has made its recommendations, the Independent Communications Authority of South Africa ("ICASA"), the regulatory authority which in terms of the Act is tasked with enabling the leasing of the local loop, is however dependent on the Minister of Communications to give her "go ahead" before it can begin the process of making the local loop available to other properly licensed people.[5]

Section 3(2)(b) is one of the "go ahead" sections of the Act and allows the Minister of Communications to issue policy directions to ICASA in relation to "the determination of priorities for the development of electronic communications networks and electronic communications services." The Minister of Communications gave her "go ahead" in September 2007 when she issued a policy direction stating the following:
"I have also taken the policy decision that, given the complexity of local loop unbundling process [sic] on the one hand and the urgency for South Africa to enable all operators appropriately licensed to have access to the local loop on the other hand, the unbundling process in South Africa should be urgently completed by 2011. In addition, the Authority should urgently and as appropriate, take advantage of the report of the Local loop unbundling committee and its recommendations on the proposed unbundling models and ensure that we achieve the 2011 deadline."[6]

So, in terms of the regulatory requirements, ICASA has received permission and as far as LLU is concerned, "it's all systems are go".

The tactics to expect

Given the huge profits that come with being the sole owner of the local loop, when LLU is implemented, incumbents often embark on strategies that allow them to hold onto the local loop for as long as possible. When LLU is implemented, incumbents are expected to provide a number of services to new entrants in order to promote competition. According to an Organisation for Economic Co-operation and Development ("OECD") report, some of these services include:

- The supply of preliminary information necessary for implementation of LLU;
- Completely unbundled access to the local loop, which includes delivery and maintenance of the copper pair and service guarantees;
- Collocation to allow new entrants to install their equipment on the incumbent's premises; and
- Connection of collocated equipment to the networks of the new entrants.[7]

It is in these areas where most of the battles have been fought and where uncooperative incumbents have made life difficult for new entrants by applying the infamous 3D strategy: Deny, Defer, Deter.

Pierre-Andre Buigues, of the European Union's Directorate General for Competition summarises incumbents' tactics succinctly when he states:
"Once pure denial is clearly made impossible by the virtue of competition law or regulation, a long series of methods remains available for incumbents to dissuade entry onto the market. They relate to the conditions of unbundling, and prove that the devil is in the detail."[8]

OFTEL, the United Kingdom's regulator during their LLU process had first hand experience of methods that can be used to delay and dissuade entry into the local loop market when it and new entrants fought skirmish after skirmish with British Telecom ("BT"). Disagreement on a number of issues resulted in substantial delays in implementing LLU, with OFTEL admitting that LLU could have been

handled better. OFTEL summarised the reason for delays in the process when its spokesman said: “BT could have moved faster with local loop unbundling, but it has basically behaved like any incumbent operator.”[9]

True to form and in keeping with the 3D strategy, BT hampered the LLU process by delaying in the provision of each of the usual services highlighted in the OECD report. In this regard, BT forced OFTEL to intervene in each case and make determinations to resolve the delays that were occurring. BT was able to delay the process by amongst others:

- Delaying and denying the provision of preliminary information that new entrants required to, for example, determine whether providing services through certain exchanges presented feasible business cases. In this regard, BT refused or delayed to provide information on the location of BT exchange sites, staff access, inspection facilities and plans of its exchange buildings.
- Avoiding agreement on clear service levels regarding specific time scales and commitments regarding: making sites available, construction work; repair and maintenance of the local loop; and quality of service.
- Taking advantage of a lack of clarity on how co-location was to occur. The confusion on how co-location was to occur and which new entrants were to be provided with space in BT exchanges, forced OFTEL to initiate a consultation process resulting in what it termed the “Bow Wave” mechanism for allocating space.[10]
- Denying new entrants’ representatives access to its exchanges unless they were escorted, and insisting that on each occasion that access to an exchange was required, the new entrant be required to pay a substantial fee.
- Discriminating between new entrants and its affiliates with regard to the prices it charged for LLU related products and services.

From the time that OFTEL commenced LLU in early 2000 to late 2003, OFTEL was still adjudicating disputes and making determinations on issues which could have been dealt with much earlier in the LLU process.

What is of concern though, is that it appears that incumbents consistently appear to follow the same strategies when LLU is implemented. A legal study on LLU, commissioned by the European Commission states that new entrants across the European Economic Area report that “a wide range of proceedings have been initiated before the national competition and regulatory authorities concerning issues related to local loop unbundling.”[11]

Unsurprisingly, the legal study reports that at issue in the various proceedings are allegations of excessive pricing; predatory pricing and margin squeezes; delays in provisioning; co-location delivery terms the absence or scarcity of information relating to networks or services; the technical conditions of unbundling; refusal to offer shared access; and quality of service. Even when new entrants receive favourable rulings in these proceedings, most if not all of these rulings are followed by review and appeal applications, with the result that a climate of legal and business uncertainty is created.

A number of authors have taken the view that the strategies implemented by incumbents and the concomitant problems experienced by new entrants are as a result of regulation which is too “light touch”. Given that hindsight always offers twenty-twenty vision, even OFTEL took this view when it assessed the British process. It said:

“LLU implementation has included formal and self-regulation but mostly co-regulation…Looking into the near future, one lesson from an over-ambitious approach in local loop unbundling is that it would be optimistic to expect much self-regulation where there are too many competing interests. Another lesson from the early difficulties with LLU is that good co-regulation needs to be driven, whether by

OFTEL or industry leadership, with the right people present and adequate resource commitments from all sides, and the respective roles defined at an early stage."[12]

Victory or surrender

The view taken by new entrants in the European Economic Area was that regulators had to be "aggressive and active" in implementing regulations if local loop unbundling is to succeed. Even the European Commission took the view that regulators need to take a more active role in speeding up LLU through "hands on" monitoring; imposing binding deadlines on incumbent operators; imposing credible financial penalties on incumbents not complying with requirements; and acting to ensure that wholesale DSL is offered to entrants on non-discriminatory terms.[13]

If new entrants to the South African local loop market are to avoid tariff and cost related problems or behavioural obstacles set up by Telkom, and if the 2011 deadline is to be achieved, it is suggested that ICASA not re-invent the wheel or tip-toe around the issues which are sure to arise, but learn from the mistakes of other battle scarred regulators, by being both firm and decisive.

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[1] Broadband Internet Access – Wikipedia
[2] Act 36 of 2005
[3] Section 43(8)(a)
[4] LLU Report page viii
[5] Sections 8 and 9 of the Act set out ICASA's role in this regard.
[6] Government Gazette No. 30308 dated 17 September 2007.
[7] Organisation for Economic Co-Operation and Development, Working Party on Telecommunications and Information Services Policies – Developments in Local Loop Unbundling, 10 September 2003
[8] European Policy on Local Loop Unbundling – Competition Law Landscape and Implementation Issues
[9] ZDNet.co.uk, BT faces EC wrath over local-loop unbundling – 18 September 2001.
[10] OFTEL: Local Loop Unbundling – Proposed Determination of the Terms of an Access Network Facilities Agreement
[11] Legal Study on Part II of the Local Loop Sectoral Inquiry
[12] OFTEL – The benefits of self and co-regulation to consumers and industry, July 2001
[13] Legal Study on Part II of the Local Loop Sectoral Inquiry at page 59