THE ELECTRONIC COMMUNICATIONS BILL: WILL VALUE ADDED NETWORK SERVICE PROVIDERS BE PERMITTED TO PROVIDE THEIR OWN INFRASTRUCTURE?

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The electronic communications industry has been abuzz recently with discussions on whether or not value added network service providers[1] ("VANS") will be permitted to provide their own infrastructure[2] ("self-provide") under the current draft of the Electronic Communications Bill ("the Bill"). This article seeks to analyse the Bill in order to determine whether it permits VANS to self-provide. [3]

The licensing section of the Bill distinguishes between electronic communications network services which require an individual licence and those which require a class licence.[4]

The Bill provides that the Independent Communications Authority of South Africa ("the Authority") may, upon application and consideration, grant individual licences for a number of services which include electronic communications network services, broadcasting services and electronic communication network services.[5]

What is important though, is that applications for individual electronic communications network services licences may only be accepted and considered by the Authority after the Minister of Communications has issued certain policy directions.[6]

The Bill describes the types of electronic communications network services, broadcasting services and electronic communication network services which require individual licences at section 5(3). These services include:

(a) electronic communications networks of provincial and national scope operated for commercial purposes;

(b) commercial broadcasting and public broadcasting of national and regional scope whether provided free-to-air or by subscription;

(c) electronic communications services consisting of voice telephony utilising numbers from the national numbering plan;

(d) any electronic communications network service, broadcasting service or electronic communications service where a state entity (directly or indirectly) holds an ownership interest of greater than twenty-five (25%) percent of the share capital of the person providing such service; and

(e) such other services as may be prescribed that the Authority finds have significant impact on socio-economic development.[7]

The effect of section 5(3)(a) is that electronic communication networks which operate on a provincial or national scope, require individual licences. So any operator, wanting to provide infrastructure or self-provide over a provincial or national geographic area, would be required to wait until the Minister of Communications issued the required policy directions.

The Bill is not as strict however, as far as class licences are concerned. The Bill provides that the Authority may grant class licences for electronic communications network services, broadcasting services and electronic communication network services.[8]

The Bill describes the types of electronic communications network services, broadcasting services and electronic communication network services which require class licences at section 5(5). These include:

(a) electronic communications networks of district municipality or local municipal scope operated for commercial purposes;

(b) community broadcasting and low power services whether provided free-to-air or by subscription;
(c) such other services as may be prescribed, that the Authority finds do not have significant impact on socio-economic development.

The effect of section 5(5)(a) is that electronic communication networks which operate on a district municipality or local municipal scope, require class licences. So any operator, wanting to provide infrastructure or self-provide over a district municipality or local municipal geographic area, would simply be required to register with the Authority.

The Bill therefore appears to have carried through the internationally accepted understanding of what class licences are.[9] This understanding provides that if a person registers for a class licence, that class licence must be granted if the person fulfils all the criteria which have been stipulated by the Authority.[10] In other words the issuing of a class licence is a purely administrative process.

So essentially the current draft of the Bill states that where a person intends providing electronic communications network services (essentially that person's own infrastructure) within the confines of a district municipality or local municipality, that person simply has to register with the Authority and, if the person fulfils all of the Authority's criteria, will receive an electronic communications network services class licence.

That person, which would include a VANS, would therefore be able to self-provide.

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[1] As they are currently referred to in section 40 of the Telecommunications Act, 103 of 1996.

[2] Referred to as electronic communications networks in the definitions section of the Bill. The Telecommunications Act prohibits value added network service licensees from providing their services using their own telecommunications facilities and obliges them to use the facilities of a Telkom or the second national operator. See section 40(2) of the Telecommunications Act.

[3] This article relates to the draft of the Electronic Communications Bill, published during October 2005 under bill number [B9B-2005] and ISBN 0 621 35863 0.

[4] See sections 5(1), 5(2) and 5(3) of the Bill.

[5] See section 5(2) of the Bill.

[6] See section 5(6) regarding the requirement that policy directions first be issued. See section 3 regarding Ministerial Policies and Policy directions.

[7] See section 5(3)

[8] See section 5(4)

[9] See The Telecommunications Regulation Handbook published by the World Bank, ISBN 0-9697178-7-3 at module 2, pages 10 and 12. www.infodev.org/projects/314regulationhandbook. See also the International Telecommunications Union's – Trends in Telecommunications Reform 2004/05 – Licensing in an Era of Convergence (ISBN 92-61-10921-7) at page 39.

[10] See sections 7, 8 and 9 of the Bill regarding the criteria which the Authority will consider, and which the registrant will need to fulfil.