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## GENERAL NOTICE

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### NOTICE 297 OF 2010

#### INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

APPLICATION FOR INDIVIDUAL ELECTRONIC COMMUNICATIONS  
NETWORK SERVICE (I-ECNS) AND INDIVIDUAL ELECTRONIC  
COMMUNICATIONS SERVICE (I-ECS) LICENCES BY  
BROADBAND INFRACO (PTY) LTD

#### REASONS FOR DECISION

March 2010



## 1. INTRODUCTION

In response to a Ministerial Policy Direction regarding the Licensing Framework of Broadband Infraco Proprietary Limited (Broadband Infraco)<sup>1</sup> published on 6 February 2009, the Authority established a Committee of Council in terms of section 17 of the ICASA Act, 2000 (Act No. 13 of 2000) in order to consider licence application(s) for an individual Electronic Communications Service (ECS) and Electronic Communications Network Service (ECNS) submitted by Broadband Infraco. The committee comprised the following members:

Fungai Sibanda:	Chairperson
Robert Nkuna:	Co-Chairperson
Peter Mailula:	Project Leader-Licensing and Compliance
Aswald Nchabeleng:	Licensing and Compliance
Dewald Kuhrau:	Engineering and technology
Kanyisa Boqwana:	Markets and Competition
Gumanai Malebusha:	Consumer Protection
Mpilo Ngxingo:	Legal
Lerato Morobane:	Secretary

On 13 March 2009, the Authority published an Invitation to Apply (ITA)<sup>2</sup> inviting Broadband Infraco to submit its application(s) for an individual ECNS and ECS licence(s) in terms of section 9(1) and (2) of the Electronic Communications Act (ECA)<sup>3</sup> as well as in terms of the Ministerial policy directive published on 06 February 2009.

The closing date for the submission of application(s) was 20 April 2009. Broadband Infraco submitted its applications to the Authority on 14 April 2009 and requested that certain information on the applications be treated as confidential. The information that the applicant requested to be treated as confidential related to financial, technical and the roll-out plan, and upon consideration in terms of section 9(4) (c) of the ECA and section 4D of the ICASA Act, 2000 (Act No. 13 of 2000) the committee indeed

<sup>1</sup> Government Gazette No: 31869 of 06 February 2009.

<sup>2</sup> Government Gazette No: 32026 of 13 March 2009

<sup>3</sup> Electronic Communications Act, Act No:36 of 2005



agreed that the said information must be treated as confidential in terms of the ICASA Act, 2000. A letter dated 24 April 2009 was addressed to the applicant, within the prescribed fourteen (14) days, advising that the Authority has decided to treat ANNEXURES B1 and B2 as confidential information as contemplated in section 4D of the ICASA Act, 2000 read with section 9(4)(c) of the ECA<sup>4</sup>.

On 6 May 2009 the Authority published Broadband Infraco's application(s)<sup>5</sup> and invited interested parties to, within thirty (30) days thereof, submit written representation for the attention of the Authority...The Authority received five (5) written representations from the following licensees:

- a) CSIR Meraka Institute;
- b) Vodacom;
- c) Internet Solutions;
- d) Internet Service Providers Association; and
- e) Telkom SA Limited.

The above licensees, with the exception of Telkom, participated in the public hearings held on 29 June 2009 at the ICASA head office, in Sandton.

## **2. LEGISLATIVE AND POLICY FRAMEWORK**

The pre-ambule to the Broadband Infraco Act No. 33 of 2007 (Infraco Act) states its purpose as being to, among other things; enable the State to expand the availability and affordability of access to electronic communications networks and services and to ensure that the bandwidth requirements for specific projects of national importance are met.

Section 4(1) of the Infraco Act states the main objects of Infraco, which are:

*"to expand the availability and affordability of access to electronic communications, including but not limited to underdeveloped and underserved areas, in accordance with the Electronic Communications Act*

<sup>4</sup> See letter dated 24 April 2009 addressed to Broadband Infraco (Pty) Limited

<sup>5</sup> Government Gazette No: 32211 of 6 May 2009



*and commensurate with international best practices and pricing, through the provision of:*

- a) Electronic Communications Network Services (ECNS)*
- b) Electronic Communications Services (ECS)."*

Following the promulgation of the Infraco Act, the ECA was amended through the insertion of section 3(1A) which provides as follows:

*"The Minister may, after having obtained Cabinet approval, issue a policy direction in order to –*

- (a) Initiate and facilitate intervention by Government to ensure strategic ICT infrastructure investment; and*
- (b) Provide for a framework for the licensing of a public entity by the Authority in terms of Chapter 3."*

After the Minister had obtained approval from the Cabinet, a policy directive was issued in Government Gazette Number 31869 dated 6 February 2009. After acknowledging that Broadband Infraco (Pty) Limited has been established in terms of the Broadband Act, 2007 (Act No. 33 of 2007) to expand the availability and affordability of access to electronic communications, including but not limited to under-developed and under-serviced areas, through the provision of electronic communications network services and electronic communications services; and further acknowledging the need for a strategic policy intervention to ensure the licensing of Broadband Infraco (Pty) Limited to provide the services contemplated in the Broadband Act in the shortest possible time, paragraph 4 of the policy directive provides:

*"I, therefore in terms of section 3(2) and 3(1A) direct the Independent Communications Authority of South Africa (ICASA) to conduct the necessary processes to accept and consider applications for:*

- a. electronic communications network service; and*
- b. electronic communications services to Broadband Infraco (Pty) Limited".*

Paragraph 7 of the policy urges the Authority to:



*"In view of the need to licence Broadband Infraco (Pty) Limited urgently so as to allow it to play its role in the economy, ICASA is encouraged to consider waiving the requirement for public hearings in terms of section 9(2)(e) of the ECA".*

Chapter 3 of the ECA outlines the licensing framework for electronic communications services, electronic communications network services and broadcasting services licences. Section 5(2) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) states:

*" The Authority may, upon application and due consideration in the prescribed manner, grant individual licences for the following:*

- (a) subject to subsection (6), electronic communications network services;*
- (b) broadcasting services; and*
- (c) electronic communications services".*

Section 5(6) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) provides:

*" In consideration of the implementation of the managed liberalisation policies, the Authority may only accept and consider applications for individual electronic communications network services licences in terms of a policy direction issued by the Minister in terms of section 3".*

Section 9(1) and (2) of the ECA deals with the application and granting of individual licenses and thus provides:

*"Any person may, upon invitation by the Authority, subject to the provisions of the Act, apply for an individual licence in the prescribed manner.*

*(2)"the Authority must give notice of the application in the Gazette and-*

- (a) invite interested parties to apply and submit written representations in relation to the application within the period mentioned in the notice;*
- (b) include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such higher percentage as may be prescribed;*
- (c) set out the proposed licence conditions that will apply to the licence; and*
- (d) give interested parties an opportunity to submit written responses to any representations submitted in terms of paragraph 9a);*



*(e) may conduct a public hearing in relation to any application for an individual licence”.*

In order to discharge the above objects, the committee of council was tasked, amongst others, to accept and consider the applications of Broadband Infraco (Pty) Limited, analyse written representations received from other licensees and interested parties, hold oral hearings, develop a reasons document and make a recommendation to Council for approval.

### 3. PUBLIC HEARING(S)

The committee of council, notwithstanding an appeal from the Minister that the Authority dispenses with the public hearings due to the urgency of the licensing process<sup>6</sup>, decided that it was essential for the Authority to hold a public hearing in relation to the application for an individual licence(s). Attempts were also made by Broadband Infraco (Pty) Limited to persuade the Authority not to hold public hearings in relation to their application(s) for individual licences<sup>7</sup>.

In exercising its discretion, the committee took into consideration the existence of a regular practice of holding public hearings when considering licence applications and the reasonable expectation from interested parties and existing Individual ECNS licensees that the Authority will continue with such practice<sup>8</sup>; and that the entire licensing process of Broadband Infraco sparked an interest from existing Individual ECNS licensees who will, potentially, compete with Broadband Infraco in the broadband market, both at wholesale and retail levels, wanted to see to it that the licensing process is conducted in a fair and transparent manner. As a result of the above, the committee concluded that the objectives of transparency, openness and fairness of the process far out-weighed the need to license Broadband Infraco urgently and thereby dispense with the holding of the public hearings. The committee decided to hold a public hearing on 29 June 2009 and a notice was published in the Government Gazette No. 32347 dated 26 June 2009 advising on the date for the public

<sup>6</sup> Paragraph XX of the Policy Direction Government Gazette No. 31869 dated 06 February 2009.

<sup>7</sup> See letter dated 18 February 2009 from Broadband Infraco addressed to the Authority.

<sup>8</sup> *Administrator, Transvaal and Others v Traub and Others* 1989(40 SA 731 (a); *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) Para. 36



hearing and the interested parties who will present oral submissions on the day in question.

#### **4. ANALYSIS OF WRITTEN AND ORAL SUBMISSIONS**

In analysing the submissions, the Authority will deal with the applications of Broadband Infraco (Pty) Limited and the oral submissions made during the public hearing held on 29 June 2009 and will thereafter deal with the written responses received from the interested parties and the oral submissions presented at the public hearing. It is worth noting that Telkom, an individual Electronic Communications Network Services (ECNS) and Individual Electronic Communications Service (ECS) licensee opted out of the public hearing process for reasons unknown to the Authority.

##### **4.1 BROADBAND INFRACO (PTY) LTD**

In terms of the ITA published in the Gazette No. 32026 dated 13 March 2009, Broadband Infraco was invited to submit applications on Individual ECNS and Individual ECS to the Authority, not later than 20 April 2009. The Authority, on 14 April 2009, received the applications with annexures attached thereto from Broadband Infraco.

Annexure A of the application deals with the particulars of Broadband Infraco and in support thereof the certificate of incorporation, certificate of change of name, Memorandum of Association, Articles of Association and an extract of a resolution taken by the board meeting held on 30 March 2009, authorising the Chief Executive Officer (CEO) with the power to delegate further, to take all necessary steps to give effect to the licensing of Broadband Infraco, including the signing of any agreements, consents or other documentation necessary or related thereto.

Annexure B of the application provides a detailed market analysis on how Broadband Infraco intends to position its role in the broadband market particularly on affordable access and Universal access. The vision of Broadband Infraco in respect of affordable access is to provide affordable access to the long distance electronic communications network infrastructure and broadband electronic communications connectivity



services in South Africa. To this end, Broadband Infraco will primarily focus on two (2) key elements, namely, owning and operating a national long distance fibre optic network, that is capable of providing high capacity electronic communication services between the major national metropolitan centres that will expand to extend connectivity to identified under-serviced areas, and participating in an international connectivity initiative, comprising a submarine cable which will be deployed between South Africa and the United Kingdom along the west coast of Africa.

The strategic goals of Broadband Infraco is, amongst others, to provide access to ECNS and ECS at significantly lower but financially sustainable prices, and to provide the enabling mechanisms for the Department of Science and Technology projects of national importance ( MeerKat and SKA) from an electronic communications perspective, and to provide long distance connectivity services to other ECNS and ECS providers, large corporate, enterprise and government departments or customers.

The pricing strategy of Broadband Infraco will deliver wholesale electronic communications services on a cost plus basis to the market, with sufficient profit margin for it to be financially sustainable and self-funding for network expansion programmes in the future. Comprehensive details on how Broadband Infraco intends to meet the imperative of providing affordable access is contained in annexure B1 of this application and the contents thereof are to be treated as confidential per determination made by the Authority<sup>9</sup>; in response to a request for confidentiality in respect of specific portions of the application.

In respect of universal access, Broadband Infraco proposes that its community service obligations ( CSOs) be aligned to its business plan that positions itself as a wholesale provider of ECS and ECNS in South Africa. Broadband Infraco's community service obligations should specifically consist of the roll-out backhaul connectivity to entities to whom ICASA granted under-serviced area licences under section 40A of the now repealed Telecommunications Act, 1996 (Act No. 103 of 1996) immediately prior the conversion of their licences into ECNS and ECS licences under the Electronic Communications Act, 2005 (Act No. 36 of 2005). A detailed implementation plan

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<sup>9</sup> Letter dated 24 April 2009 addressed to Broadband Infraco (Pty) Ltd



containing the roll-out of community service obligations must be negotiated between ICASA and Broadband Infraco, and upon agreement is annexed to the Individual ECNS licence of Broadband Infraco at a later stage.

It is proposed by Broadband Infraco that the implementation plan should include details of the following:

- The names of all former USALs to whom Broadband Infraco is required to provide wholesale backhaul connectivity services;
- The corresponding geographic areas to which Broadband Infraco must roll out wholesale backhaul connectivity services;
- the commencement date for the roll out of such wholesale backhaul connectivity services, which should not be earlier than two (2) years from the date of issue of the Individual ECNS licence; and
- the time periods over which the roll-out of such wholesale backhaul connectivity services must be staggered over a number of years.

Comprehensive details on how Broadband Infraco intends to achieve its universal access objectives are contained in **ANNEXURE B2** of this application and is treated as confidential information as per request made by Broadband Infraco to the Authority, and the latter made a determination that annexure B2 must be treated as confidential information.

In the public hearings Broadband Infraco explained in detail that its intervention is particularly focused on two (2) areas, namely, the national long distance fibre optic network to provide a high capacity communications services between the main metropolitan areas that will over time be expanded into the previously under-served areas. Secondly, the participation of Broadband Infraco in the international connectivity project, most particularly the cable project that will connect South Africa to the United Kingdom along the west coast of Africa<sup>10</sup>. In between the two extremes in terms of delivering electronic communications services, Broadband still have to migrate across metropolitan and access last mile networks in the various metropolitan

<sup>10</sup> Broadband Infraco's oral submission lines 10-17 at page 134 of the public hearings transcripts dated 29 June 2009



areas. It was pointed out that Broadband Infraco is not yet in that space. The connectivity layer will be deployed over the existing optical transmission links when licensed by the Authority.

It is emphasised in the oral submission that Broadband Infraco derives its mandate from section 4(1) of the Broadband Infraco Act, 2007 (Act No. 33 of 2007) and it is argued that except to the extent that the Act is clear that it refers to both Individual ECNS and Individual ECS, its mandate should also be interpreted to include ensuring that the bandwidth requirements for projects of national importance are met. The Act does not in express terms include ensuring meeting bandwidth requirements for projects of national interests; it is not clear what is the legal basis for Broadband Infraco to make the assertion.

On the small matter whether Broadband Infraco is entitled in law to be granted both Individual ECNS as well as the Individual ECS it is argued that the intention of the Legislature is very clear in that the mandate of Broadband Infraco should include both ECNS and ECS. The argument goes that if the Authority were to prevent Broadband Infraco from obtaining both licences, it would be severely curtailing the extent to which Broadband Infraco can achieve its statutory mandate<sup>11</sup>. Internet Solutions argued and urged the Authority to grant Broadband Infraco only the Individual ECNS, and not the Individual ECS licence. The said argument is dismissed by Broadband Infraco on the basis that there is no legal basis for such an argument in light of the broad mandate given to Broadband Infraco in terms of section 4(1) of the Broadband Infraco Act, 2007 (Act No. 33 of 2007), and the express recognition of the fact that it should be doing ECNS and ECS.

The other point is the one on terms and conditions wherein Broadband Infraco expresses some difficulty with whether there is indeed a statutory power to impose additional licence terms and conditions in the present context, unless that is to be done by agreement between the Authority and Broadband.

The funding model of Broadband Infraco is comprehensively highlighted in the oral submissions presented before the committee of council. It is explained that ownership

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<sup>11</sup> Broadband Infraco's submission lines 11-22 at page 144 of the public hearings transcripts dated 29 June 2009



structure of Broadband Infraco is in two (2) parts, with the State directly holding seventy-four percent (74%) via the Department of Public Enterprise, and the remaining twenty-six percent (26%) taken up by the Industrial Development Corporation of South Africa (IDC). Broadband Infraco is characterised in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999) as a Schedule 2 entity, which means that additional funding has to be sourced via debt instruments from funding institutions in the same way as any other commercial enterprise in the country will be required to do. It is therefore not factual correct to continuously refer to the taxpayer funding Broadband Infraco on an unlimited basis or scale.

The return on investment made by the equity investors in Broadband Infraco is dealt with, though the quantum of the return required by government as a shareholder is not explicitly expressed save to state that the mandate from the shareholder is clearly not the maximisation of profits, but of ensuring a rate of return that one would expect for a typical utility type of business<sup>12</sup>. The national long distance network and international connectivity received particular attention in the oral submission. It is stated that the network currently covers 11 700 kilometres of optical fibre transmission links, over 130 long distance sites, 14 main points of presence in the main metropolitan areas and a network that is highly scalable. Broadband Infraco has established regional connectivity to five (5) neighbouring countries thus far<sup>13</sup>.

On international connectivity, Broadband Infraco has together with ten (10) other South African international operators signed up to the West African Cable System Construction and Maintenance Agreement, as well as the supply contract for the system and the contract is now in force, and the deposits are being paid for the initial down payments for the construction of that system. The system will have fifteen (15) landing stations along the west coast of Africa, as well as to Cape Verde in the Canary Islands, and will land in Portugal and then onward connect through to London. It is stated that Broadband Infraco is an anchor party investor in the system and is important to secure the necessary capacity required to deliver on the second half of its mandate. It is hastily explained in the oral submission that the principle of open

<sup>12</sup> Broadband Infraco's oral submission lines 1-15 page 136 of the public hearings transcripts dated 29 June 2009

<sup>13</sup> Broadband Infraco's oral submission lines 1-10 page 137 of the public hearings transcripts dated 29 June 2009



access at the cable landing stations has been negotiated through commercial agreements whilst other interested parties to the licensing process are urging the Authority to legislate open access into the licence of Broadband Infraco.

On the market that Broadband Infraco intends to target, it is the ECNS licence operators, both the traditional fixed and wireless mobile operators, as well as the ECNS licensees, the previous ISP or VANS licensees, and the metro networks that are developing in various metropolitan areas across the country. The ECS licence operators are also within the radar screen of Broadband Infraco and the large corporate enterprise customers, large government institutions and other multi-national operators. The services contemplated by Broadband Infraco are at the wholesale level where the minimum capacity service level is STM1 or 155 megabits per second. Broadband Infraco is therefore not looking, at this point in time, to enter the level of service available in the retail space in the country. The intended service offering to these segments are intended to be at 155 megabits per second and above, up to ten (10) gigabits per second, and this is not the typical size of service that is available in the retail space in the country.

On the pricing strategy, Broadband Infraco tackles cost plus and marginal cost models and it is argued that if one was to price purely on a marginal cost basis one would be pricing him/herself into a financial difficulty, as you would not be making a contribution at a historical cost base. The three (3) cost elements are highlighted, firstly, the cost of capital to lay down the infrastructure. Broadband Infraco has to continue to invest in the infrastructure that is being developed, and to increase the footprint of the network. Secondly, the capital expenditure obviously requires the operating costs associated with the maintenance of the network, all the support systems that go with that network, and the organizational structure to implement the mandate, thirdly, the cost of sustainability.

In dealing with the cost plus model, Broadband Infraco reverts to the return on investment debate and places on record its understanding of the rate of return on investment made by the shareholders of Infraco to be a lower rate of return on their investment, than one would expect from a company listed in the stock exchange<sup>14</sup>.

<sup>14</sup> Broadband Infraco's submission lines 18-22 of the public hearings transcripts dated 29 June 2009



According to Broadband Infraco there is no need for the Authority to impose pricing obligations in the licence conditions as it is not clear to the public entity where such powers will come from. It is argued that pricing is dealt with very specifically in Chapter ten (10) and for good reason Parliament has imposed a very rigorous careful process before such price controls are imposed<sup>15</sup>. Broadband Infraco will not have differential pricing between its different customers. The pricing will be filed with the Authority, will be transparent and will be provided on a wholesale basis. This translates to ECNS and ECS providers being able to obtain connectivity into the national and international backbone at the same price as enterprise customers.

On the subject of community service obligations, Broadband Infraco does not object to its CSO rollout target to be included in the licence but must be contained in separate and confidential implementation plan as this was the approach the Authority adopted in respect of MTN and Vodacom.

#### 4.2 TELKOM

Telkom indicated that it was generally in favour of Broadband Infraco providing long distance connectivity. Telkom, however, expressed concern at Broadband Infraco's indication that it would not participate in the retail market, while at the same time intending to utilise an ECS licence to provide services to inter alia government departments and large corporate. Telkom avers that this is in fact cherry picking since large corporate are found in serviced areas. Therefore Telkom believes that Infraco's intended strategy of limiting the provision of retail services in this manner contradicts section 4(1) of the Infraco Act.

The Authority agrees with Telkom that to the extent that Broadband Infraco intends using its ECS licence to provide retail services to large customers, including government and private entities, this would not achieve the objective of expanding access to electronic communications services at lower prices as required in terms of section 4(1) of the Infraco Act and the ITA.

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<sup>15</sup> Broadband Infraco's submission lines 10-16 of the public hearings transcripts dated 29 June 2009



### 4.3 CSIR

The Council for Scientific and Industrial Research's Meraka Institute (CSIR) indicated their desire to leverage on the capacity that Broadband Infraco will offer to government departments. The CSIR claimed that the high cost of bandwidth affected the delivery of projects that the Department of Science and Technology initiated as far back as 2004.

The CSIR referred to the SANREN project that requires a backbone network in excess of 20 gigabits per second in order to reach all research and education institutions in South Africa, including those located in rural areas.

The South African Large-Scale Telescope project situated in the remote area of Sutherland also requires capacity in excess of 1 gigabits per-second in order to be successful. Similarly, the Square Kilometre Array (SKA) also requires large amount of bandwidth capacity if South Africa is to win the rights to host the project.

CSIR stressed that all the projects referred to require masses of capacity and will only be successful if large scale broadband is unlocked in the country. Therefore Broadband Infraco needs ECS and ECNS licences in order to support such initiatives.

The Authority is mindful of Broadband Infraco's role in satisfying the bandwidth requirements of specific projects of national importance as outlined by the CSIR. The Authority is, however, also aware that entities undertaking such projects may apply to the Authority for class or individual ECS licences. The provision of bandwidth to entities undertaking projects of national interest is therefore does not justify Infraco receiving an ECS licence. Instead, Broadband Infraco's success in applying for an ECS licence depends on how well it has demonstrated fulfilling the requirements of affordable pricing and universal access as specified in the ITA.

### 4.4 INTERNET SOLUTIONS

The oral submission of Internet Solutions starts off by stating that it is not for the first time for government to intervene in the communications sector, it had done so via the





USALs that were intended to cover certain areas and to deliver on certain mandates, Sentech was originally a concept that was supposed to tackle a certain area of the market on behalf of government, and Telkom when one of their obligations was to roll out two (2) million lines into under serviced areas and to date sixty to seventy percent (60-70%) of those lines have since been switched off and standing idle, wasted and the taxpayer has paid dearly for that infrastructure<sup>16</sup>. According to Internet Solutions, all these government interventions have failed to achieve the objectives that they were established for in the communications sector.

A passionate appeal is made to the Authority that if it grants an Individual –Electronic Communications Services licence (ECS) to Broadband Infraco, it will be creating another vertically integrated company or entity and that this country does not need another Telkom and Neotel. It is emphasised that the Authority needs to grant Broadband Infraco only an Individual Electronic Communications Network Services licence (ECNS) and in doing so special conditions must be attached to it in order to ensure that it delivers on its mandate. The reasons, principally, proffered for the proposed approach is that at the retail level there is more than sufficient competition in that space of the market, at the infrastructure level however there is no competition but rather a duopoly of Telkom and Neotel. The Authority must ensure that Broadband Infraco focuses on its statutory mandate by playing at the infrastructure level and thereby create price wars in that space of the market. It is Internet Solutions' view that the biggest prohibitive factor in the market is that there is no effective infrastructure based competition in the country, at the moment. In the eyes of Internet Solutions this is a golden opportunity for the Authority to license Broadband Infraco in such a manner that effective competition is created at the infrastructure layer of the market. Any attempt on the part of the Authority to grant Broadband Infraco an ECS licence the country will continue to sit with a market that is gripped by the tenets of a duopoly. This could be avoided if Broadband Infraco is licensed in such a manner that it is able to target those areas of the market where duopoly is prevalent and it must be

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<sup>16</sup> Internet Solutions submission lines 8-22 page 38 of the public hearings transcripts dated 29 June 2009



able to effectively do away with those tendencies and is able to focus on the areas where there are prohibitive factors and therefore create price war in such areas<sup>17</sup>.

The issue of a vertically integrated entity is a prohibitive factor that took centre stage in the oral presentation of Internet Solutions. The meaning of the expression is explained in the sense that as a customer of the two fixed line operators, you have to compete with them downstream in selling services to the end users or retail users. In the South African context, you have two (2) companies that on the one hand are infrastructure providers, because they have an ECNS licence, and on the other hand they are retail providers, because they have an ECS licence<sup>18</sup>.

What effectively happens in the market is that at the infrastructure level one buys from the infrastructure providers, and the retail level one competes with the infrastructure providers in the provision of services to the end users or customers. Such a structure creates a temptation to the infrastructure providers of either using a pricing strategy or using delaying tactics. In order to ensure that the market is not saddled with another vertically integrated entity, Internet Solutions proposes three (3) special conditions that the Authority must consider in licensing Broadband Infraco. It is intimated that should the Authority not put any of the three special conditions, it would have failed in ensuring that Broadband Infraco is licensed as an entity that comes to deliver on its mandate, that comes into the market and create effective infrastructure based competition.

The first condition is that Broadband Infraco is licensed purely as an Individual ECNS licensee with a special provision that they be a carrier of carriers. A carrier of carriers is a carrier that sells only to other licensees and is prohibited from selling to enterprise customers. It is also prohibited from selling to ordinary consumers in the streets. This is not a novel or unique condition in the communications landscape of this country, a similar if not identical condition was put in place in respect of Sentech's licence. A point is made that the greatest area where there is competition at the moment is in the service layer of the market, and there is no reason for Broadband Infraco to enter that

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<sup>17</sup> Internet Solutions submission lines 13-20 page 45 of the public hearings transcripts dated 29 June 2009

<sup>18</sup> Internet Solutions submission lines 10-19 page 46 of the public hearings transcripts dated 29 June 2009



level of the market but should rather enter at an infrastructure level of the market where there is presently a prohibitive factor.

The second condition proposed by internet Solutions is that Broadband Infraco must come into the market as a wholesale provider. Once again this means that they must not be granted an Individual ECS licence. The third condition is that the services they provide must use an open access model. If licensed as an open access model, issues around pricing will be transparent and their prices and capacity provisioning will be open to all and sundry to see. There is presently no transparency on capacity provisioning from the two (2) infrastructure providers, Telkom and Neotel. If open access is enforced on Broadband Infraco most of the challenges in the infrastructure service market could be resolved<sup>19</sup>.

Internet Solutions is of the view that since Broadband Infraco is wholly government owned it should offer network services only in order to avoid the incentive for anticompetitive behaviour in the retail market. Internet Solutions drew parallels between Sentech as a career of careers in the broadcasting services market and Broadband Infraco in the electronic communications market. Internet Solutions insisted on licence conditions that would provide for open access and non-discriminatory access to Broadband Infraco's network. Internet Solutions is opposed to the provision of services to ordinary customers by Broadband Infraco. Service provision by Infraco should be restricted to network provision exclusively.

The Authority rejected Internet Solution's contention that the possible vertical integration of Broadband Infraco, if issued with both an ECNS and ECS licences would lead to anticompetitive behaviour. The Authority could not find logic in the argument that vertical integration is per se wrong. Instead, conditions on open access and non-discrimination could be used to pre-empt any incentive by a vertically integrated entity to behave anti-competitively.

#### 4.5 VODACOM

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<sup>19</sup> Internet Solutions submission lines 8-19 page 53 of the public hearings transcripts dated 29 June 2009



Vodacom believes that Infraco is a good vehicle for showcasing the co-operation that is necessary in the market between government and the market in order to yield better social policy outcomes, and such outcomes are related to universal service and access to broadband and essentially improving the competitiveness of the country with regards to the communication infrastructure and the provision of services. The main objective of licensing Broadband Infraco is to expand the availability and affordability of access to electronic communication and even though it is not limited to under-serviced or under-developed areas and what was discussed at the time was that it will not be an access provider and that it will be a wholesale provider.

It is Vodacom's primary view that given the deliberations in Parliament and the key concern that the bottleneck in the sector is primarily at an infrastructure level, Broadband Infraco needs to properly target the problems in the infrastructure level otherwise if the Authority starts adding retail services on top of what they need to do, they might end up having competing interests<sup>20</sup>..

Vodacom is of the view that Infraco should be fundamentally a wholesale provider simply because it was likely going to stimulate retail competition as there were a lot of IECNS providers who could not self provide the infrastructure mainly because of the huge capital outlays involved. Vodacom argued that there was a contradiction in Broadband Infraco's licence applications and its mandate, where the applications say Broadband Infraco will serve large corporate enterprises and government entities. Vodacom argued that this was not in line with what the initial understanding of a wholesale provider or backhaul connectivity provider was. Vodacom also argued that Broadband Infraco's pricing model was not clarified and it was not clear how Broadband Infraco will offer services at significantly lower prices.

Vodacom proposed that when the Authority negotiates universal service obligations with Broadband Infraco, there was a need to consider universal service obligations in their totality as they had been imposed on the sector as a whole.

Vodacom proposed that Broadband Infraco's licence terms and conditions, universal service obligations and network rollout plan should be published for public comment.

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<sup>20</sup> Vodacom's submission lines 10-23 page 98 of the public hearings transcripts dated 29 June 2009



According to the Authority, Vodacom's reason for suggesting that Broadband Infraco be restricted to the wholesale market only lacked depth and could not be sustained. It is regrettably that the noble objective of confining Broadband Infraco to be a wholesale provider only and not a service provider did not find expression in the law. The legislative mandate of Broadband Infraco in its current form and content is captured in section 4 of the Infraco Act, 2007 (Act No. 33 of 2007) that explicitly provides "the main objects of Infraco are to expand the availability and affordability of access to electronic communications, including but not limited to under-serviced or under-developed areas through the provision of electronic communications network services and electronic communications services". Anything to the contrary may be viewed as ultra vires by a competent court of law. The Authority did not think it necessary to publish the proposed specific terms and conditions as well as the universal service and access obligations for various reasons. Firstly, specific terms and conditions are imposed as a result of undertakings by the applicant. Secondly, universal service and access obligations are determined by the Authority in consultation with the applicant/licensee.

#### **4.6 INTERNET SERVICE PROVIDERS ASSOCIATION (ISPA)**

On the ECS debate, ISPA does not dispute that under the existing legislative mandate, Broadband Infraco is entitled to both an Individual ECNS and an Individual ECS licences. It is ISPA's view that the law is particularly clear in this regard and it will be very difficult to argue that Broadband Infraco should not be awarded an ECS when the empowering legislation says they should.

ISPA submitted that Broadband Infraco was a creature of statute which bound and shaped it, thus placing limitations beyond which Broadband Infraco could not go. It was vital therefore that the Authority should not paraphrase or restate the mandate of Broadband Infraco as contained in section 4 of the Infraco Act.

ISPA averred that it was not necessary to delve into whether Broadband Infraco deserved an ECS licence or not. Instead, focus should be on attempting to find



suitable licence conditions that would ensure the proper fulfilment of Broadband Infraco's mandate.

Furthermore, ISPA raised concerns regarding Broadband Infraco's commitment to a cost plus pricing mechanism as there was no clarity regarding how that was to be enforced in the absence of a regulatory mechanism in terms of Chapter 10 of the ECA.

The Authority concurred with ISPA's views that the critical issue needing attention related to the specific licence terms and conditions. The Authority, however, did not believe that affordable pricing was impossible in the absence of a process outlined in Chapter 10 of the ECA. The Authority ensured that the draft specific licence terms and conditions addressed concerns raised by various licensees, including the question of affordable pricing.

#### **5. LETTER AND POLICY DIRECTIVE FROM THE MINISTER**

The Authority received a letter, dated 5 August 2009, from the Minister of Communications advising of his wish to substitute the policy directive issued on 6 February 2009 with a policy directive that does not direct ICASA to issue an electronic communications service (I-ECS) license to Infraco but only an I-ECNS license. Whilst section 3(7) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) endows the Minister with powers to amend, withdraw or substitute a policy direction issued in terms of section 3(2) of the ECA, the Authority advised the Minister that exercising his powers at the penultimate end of the licensing process might expose the Authority to unintended legal challenges<sup>21</sup>.

On 13 October 2009 the Minister published, by way of Government Gazette No. 32639, for public comments, proposed amendments to paragraphs 5 and 6(b) to the policy direction of 6 February 2009. The essence of the proposed amendments is to substitute the word "applications" with the word "application". This is intended to be achieved by deleting the letter "s" in the relevant paragraphs.

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<sup>21</sup> Response to the Minister dated 14 August 2009



The draft policy direction had a direct impact to the task that the committee was delegated by council to undertake, and as result an advice was sought to ascertain whether the policy directive had the effect of putting the licensing process in suspense pending the finalisation of the policy directive. The advice sought made it crystal clear that there is no reason in law for the Authority not to take the licensing process to finality. The Authority acted on the advice and continued with the licensing process to its finalisation. The Authority will not, for the purposes of this reasons document, deal with the legality or otherwise of the policy directive issued on 13 October 2009 save to state that the ministerial policy direction cannot be relied upon by the Authority as a legally sound basis of not granting an Individual ECS to Broadband Infraco. The Authority has made written representations to the Ministry in this regard.

## 6. APPLICABLE CRITERIA

The ITA published by the Authority on 13 March 2009 contained 2 annexure that would assist the Authority in evaluating the application. Annexure A required the applicant to provide administrative information. Annexure B contained proposed specific terms and conditions to be imposed on the licensee. The Authority evaluated the individual ECNS and ECS applications against the criteria laid out in the ITA as well as the information gathered from the oral and written submissions.

The following is an extract from Annexure B of the ITA:

*In terms of section 4 of the Infraco Act, the state owned entity is supposed to contribute to the provision of universal and affordable access to electronic communications services, including but not limited to underdeveloped and under-serviced areas. It is in light of these requirements that the state owned entity is required to provide the following information as part of its application:*

*The applicant should provide a detailed market impact analysis on how it intends to position its role in the market, taking into consideration the provision of section 4 of the Infraco Act. Accordingly, the market impact analysis should include but not limited to the following information:*



### **1. Affordable access**

- 1.1 *The applicant should indicate to the Authority how it intends to provide affordable electronic communications services taking into account existing industry prices;*
- 1.2 *in dealing with 1.1 above, the applicant should clearly indicate the basis for its proposed prices and how such prices would relate to the cost of providing electronic communications services and electronic communications network services.*

### **2. Universal access**

- 2.1 *With respect to promoting the availability of services, the applicant should indicate how it intends rolling out electronic communications network services and electronic communications services to ensure access to such services.*
- 2.2 *The applicant is required to demonstrate, in detail, how its rollout plan will contribute to the provision of access to electronic communications networks and services, including but not limited to underdeveloped and under-serviced areas.*
- 2.3 *The roll-out plan should provide specific timeframes.*

*The Authority reserves the right to review the universal service obligations imposed on the licensee, subject to the finalisation of the definition of under-serviced areas in terms of section 88 (2) of the Electronic Communications Act No: 36 of 2005.*





## 5. EVALUATION OF THE ECS APPLICATION

Following the public hearings the committee evaluated the Individual ECS licence application in accordance with the criteria set out in the Invitation to Apply (ITA). The committee also considered the written as well as the oral submissions that were put before the committee. The letter dated 5 August 2009 addressed to the Authority from the Minister and the policy directions published in the Government Gazette No. 32639 dated 13 October 2009 were considered by the committee before coming to a decision.

### 5.1 LEGAL CONSIDERATIONS

A request was made to Broadband Infraco to submit additional information to the Authority. The request was informed by the robust debate that took place at the public hearings around the issuance of an Individual ECS licence to Broadband Infraco. The additional information was duly furnished to the Authority. It is common cause that the legislative mandate of Broadband Infraco is captured in section 4(1) of the Infraco Act, 2007 (Act No.33 OF 2007) that creates for the provision of both electronic communications network services and the electronic communications services. Arguments were raised during the public hearings process that original intention of Parliament was to establish Infraco as a wholesale provider as opposed to retail or service provider so that it could create competition at the infrastructure level of the market. During such public hearings it was proposed that the Authority should insert a condition in Infraco's licence that it is a carrier of carriers and that it is prohibited to play at the retail or service level of the market.

The arguments made, in the Authority's view, make perfect sense and the Authority share the sentiments expressed that there is little or no competition at the wholesale or infrastructure level of the broadband market and the intervention of Broadband Infraco will be ideal at that level. The challenge however is that the enabling legislation does not prohibit Broadband Infraco from providing services at the retail level of the market. Though the original intention, prior to the promulgation of the Infraco Act, 2007, was to establish Infraco as a wholesale provider and not a service provider, such an intention failed to find expression in the enabling legislation.



Broadband Infraco intends to sell broadband capacity (bandwidth connectivity) in units of STM-1s and above to customers, including other operators and large corporate and enterprise customers. In order to do this, Broadband Infraco needs to be able to provide connectivity over its network, which it cannot do without an Individual ECS licence. If the Authority were to refuse to grant Broadband Infraco an ECS licence, this would cause Infraco to be in default of its statutory mandate.

## 5.2 SPECIFIC TERMS AND CONDITIONS

The committee noted that whilst Broadband Infraco's application in response to the ITA did not contain sufficient information on its roll-out plan and pricing strategy, this could be dealt with through specific terms and conditions. Indeed, the two (2) issues formed the basis for the discussion on specific terms and conditions.

Subsequent to the hearings, the Authority held several meetings with Broadband Infraco to discuss specific terms and conditions to be imposed on its licence. The last meeting was held on 31 July 2009 and both parties agreed on the specific terms and conditions. The terms and conditions on pricing and roll out plan will find expression in the Individual ECS licence of Broadband Infraco. The Authority will reserve the right to impose any other terms and conditions in the licence.

## 5.3 COMMERCIAL CONSIDERATIONS

Broadband Infraco's mandate is to provide affordable access to customers generally including but not limited to under-serviced or under-developed areas. The mandate is accordingly not restricted to the provision of backhaul connectivity to carriers, and is wide enough to include the provision of backhaul connectivity to large retail customers as well.

Broadband Infraco will be providing secure and dedicated national and international Private Leased Circuits (PLC's) as well as Managed Data Network Services (MDNS). If Broadband Infraco is not granted an ECS licence, then there is the risk of third parties to whom Infraco leases its network will not pass on price reduction benefits to their own retail customers, and as a result the retail price will remain unaffordable. It is therefore necessary for Broadband Infraco to receive an ECS



licence so that they can pass on price reduction benefits to retail customers, not only to wholesale customers.

The committee made proposals to Broadband Infraco on how some of the requirements of the ITA could be adapted into licence conditions. The issue of affordable pricing and universal access thus found way into the licence as specific terms and conditions. Based on the above, the committee is satisfied that the applicant has met the requirements of the ITA for an Individual ECS licence.

## **6. EVALUATION OF THE ECNS APPLICATION**

The Authority evaluated Broadband Infraco's ECNS licence application in accordance with the requirements of the ITA, specifically Annexure B thereof.

### **6.1 AFFORDABLE ACCESS**

In its response to the ITA Broadband Infraco outlined its pricing strategy in order to realise the objective of affordable pricing. This pricing strategy was translated into a licence condition and the Authority was satisfied that it would stimulate competition and lead to the lowering of electronic communication prices in general. The Authority further imposed open access and non-discrimination conditions on Broadband Infraco's ECNS licence to ensure that its service offering would not be anticompetitive.

### **6.2 UNIVERSAL ACCESS**

On the question of universal access Broadband Infraco submitted a role out plan that included network coverage in the former underserved areas as well as timeframes for roll-out. The Authority accepted the roll-out plan as contained in Broadband Infraco's ECNS licence. An implementation plan will be submitted by Broadband Infraco no later than eight months of the effective date or such longer period as the Authority may determine. The Implementation Plan shall form schedule 3 to the ECNS licence. The Authority is satisfied that the roll-out plan meets the requirements of the ITA.



## 7. THE COMMITTEE'S DECISION

Having considered all the written submissions and the oral representations made during the public hearings, including additional information submitted after the public hearings, the committee is satisfied itself that Broadband Infraco has substantially complied with the necessary basic requirements spelt out in the ITA. The Authority is also satisfied that the specific licence terms and conditions agreed to by both parties are sufficient to ensure that Broadband Infraco meets its objectives as outlined in the Infraco Act, 2007.

It is noteworthy to state that there has been an outcry from some of the Individual ECNS and ECS licensees that the original intention for the establishment of Broadband Infraco was to be an infrastructure provider and not service provider as the Authority intends to license the utility as such. It would indeed be ideal to license Broadband Infraco as an infrastructure provider so that there is sufficient competition at the infrastructure or wholesale level, which at present is non-existent. There is merit in the argument that there is more than sufficient competition at the retail or service level of the market and therefore no need or reason for Broadband Infraco to participate at the service provider level

The unfortunate reality, however, is that there is no causal link between the intention behind the establishment of Broadband Infraco and the piece of Legislation that governs the establishment of Broadband Infraco as well as role that Broadband Infraco is intended to play in the broadband market. Simply put, the original intention that Broadband Infraco must be an infrastructure provider and not a service provider failed to find expression into the law. The committee therefore had decided to grant Broadband Infraco an I-ECNS and I-ECS licence as there was, at least to the committee, no basis in law not to grant an Individual ECS to Broadband Infraco.

## 8. RECOMMENDATION TO COUNCIL

The committee was established in terms of section 17 of the ICASA Act, 2000 (Act No. 13 of 2000) and delegated to consider and license Individual ECS and Individual ECNS to a public entity. In terms of paragraph 2.4.7 of the council resolution<sup>22</sup> the committee must submit all decisions to council as a recommendation for

<sup>22</sup> Council Resolution dated February 2009



consideration by council, before they are made known or announced to the members of the public. Pursuant to the above, the committee of council submitted its decision as a recommendation before a council meeting held on 6 October 2009, recommending that council should approve the applications for an Individual- ECNS and the Individual- ECS licences by Broadband Infraco. After an exhaustive deliberation on the matter, council decided to grant Broadband Infraco the Individual ECNS subject to the changes proposed by council, and on the Individual ECS licence decided that the legal issues surrounding the ECS licence should be addressed by seeking a legal opinion and engaging the Minister on the matter.

Pursuant to the decisions taken by council, the Legal division sought a legal advice from one of the external law firms that are on their panel of attorneys. The instructions were to secure the services of an experienced advocate who will draft an opinion on behalf of the Authority. The said opinion was received in mid-November 2009 and it, amongst others, advised as follows:

The committee of council submitted its recommendation before a council meeting held on 8 December 2009 recommending that council should approve the application for an Individual ECS by Broadband Infraco. The Legal division via the General Manager: Legal and CCC briefed and took council through the advice received from the advocate who drafted the advice or opinion. Council took a decision that the Minister must be informed of the Authority's view on the matter and how it intends to move forward. The General Manager: Legal and CCC was requested to draft a letter to the Minister for the signature of the Acting Chairperson and for onward transmission to the Office of the Minister of Communications. The Authority has not received a response from the Office of the Minister in this regard.

The committee of council submitted a recommendation before a council meeting held on 26 January 2010 recommending council to approve the application for an Individual Electronic Communications Service (ECS) Licence by Broadband Infraco (Pty) Limited. The council discussed and deliberated on the application and decided not to approve the granting of an Individual ECS to Broadband Infraco and the reasons proffered by council for its decision are stated hereunder.



## **9. REASONS FOR DECISION**

### **9.1 ECNS Licence**

The Authority evaluated Broadband Infraco's ECNS licence application in accordance with the requirements of the ITA, specifically Annexure B thereof.

#### **9.1.1 Affordable access**

In its response to the ITA Broadband Infraco outlined its pricing strategy in order to realise the objective of affordable pricing. This pricing strategy was translated into a licence condition and the Authority was satisfied that it would stimulate competition and lead to the lowering of electronic communication prices in general. The Authority further imposed open access and non-discrimination conditions on Broadband Infraco's ECNS licence to ensure that its service offering would not be anticompetitive.

#### **9.1.2 Universal access**

On the question of universal access Broadband Infraco submitted a roll-out plan that included network coverage in the former underserved areas as well as timeframes for roll-out. The Authority accepted the roll-out plan as contained in Broadband Infraco's ECNS licence. An implementation plan will be submitted by Broadband Infraco no later than eight months of the effective date or such longer period as the Authority may determine. The Implementation Plan shall form schedule 3 to the ECNS licence. The Authority is satisfied that the roll-out plan meets the requirements of the ITA.

### **9.2 ECS Licence**

The Authority evaluated Broadband Infraco's ECS licence application in accordance with the requirements of the ITA and came to the following conclusions:

#### **9.2.1 Affordable pricing**

Broadband Infraco failed to demonstrate how its strategy of targeting large entities that require capacity of STM-1 and above would lead to affordability. The Authority's view is that provision of services to large corporate and government departments is at



odds with section 4(1) of the Infraco Act and does not meet the requirements of the ITA.

### 9.2.2 Universal service

It is the Authority's submission that picking on large corporate and government departments, whilst neglecting individual consumers and small businesses would not achieve universal access.

Broadband Infraco did not submit a roll-out plan of its electronic communications services, choosing rather to link its communications services with its communications network services roll-out plan. This is not helpful in light of Broadband Infraco's target market for electronic communications services. It is clear that Broadband Infraco would not provide services in every area where it has a network point of presence. Failure to provide a detailed plan of its ECS coverage meant that Broadband Infraco failed to comply with the requirements of the ITA.

The limited wholesale provision of electronic communications services for which Broadband Infraco requires an ECS licence creates a special type of ECS licence that is not provided for in the ECA. It also unduly discriminates against similarly placed licensees who have obligations to offer services across all market segments and are not in a position to cream-skim.



PARIS MASHILE  
CHAIRPERSON, ICASA

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