



21 October 2016

SPECTRUM AUCTION AND LABOUR DISPUTES: INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA (ICASA)

1. INTRODUCTION

Chapter 9 of the Constitution of the Republic, particularly Section 192; and the Independent Communications Authority of South Africa Act, No. 13 of 2000 ("the ICASA Act") set the foundation for the establishment of an independent effective regulator. The Independent Communications Authority of South Africa (ICASA) makes regulations and issues communication licences. In addition, it enforces compliance with rules and regulation; protects consumers from unfair business practices and poor quality services; hears and decides on disputes and complaints brought against licences; and controls and manages the frequency spectrum. Other legislative mandates include:

- **The Broadcasting Act 4 of 1999**
- **The Electronic Communications Act, No 36 of 2005 (ECA)**
- **The Competition Act 89 of 1998**
- **The Promotion of Administration Justice Act, No 3 of 2000 (PAJA)**
- **The Postal Services Act, No 124 of 1998**

2. THE NATIONAL DEVELOPMENT PLAN

The National Development Plan (NDP) sees Information Communications Technology (ICT) by 2030 underpinning a dynamic, inclusive and prosperous information society and knowledge economy, in which seamless information infrastructure will meet the needs of citizens, business and the public sector, providing access to a wide range of services required for effective economic and social participation at a cost and quality at least equal to South Africa's competitors.¹ The NDP explicitly states the need to strengthen ICASA's mandate for nation building, thereby contributing to outcome 14 of government's 2014-2019 medium term strategic framework (nation building and social cohesion). This is in addition to ICASA's indirect contribution to outcome 6 (an efficient, competitive and responsive economic infrastructure network).

Government has set the foundation to overcome the existing digital divide and improve South Africa's infrastructure with the finalisation of the South Africa Broadband Policy - South Africa Connect. The ICASA's Strategic Plan and its activities during the 2015-19 period is to facilitate the achievement of the South Africa Broadband Policy and Vision 2020 of 'Broadband for All' by passing regulations that will support the ever-increasing consumer demand for low cost, high-speed access to broadband services. Strengthening ICASA will afford the country to leverage the economic benefits that come with ICTs thereby contributing to the NDP's aim of eliminating poverty and reducing inequality by 2030.

¹ National development Plan (2014)



Information and communication technologies have contributed to carving out an alternative path to development. Connectivity; whether the Internet or mobile phones is increasingly bringing market information, financial services, health services to remote areas, and is helping to change people's lives in unprecedented ways. New information and communications technologies, in particular high-speed internet, are changing the way companies do business, transforming public service delivery and democratizing innovation. A study of 27 developed and 66 developing countries conducted by Clarke and Wallsten; found that a 1 percentage point increase in the number of internet users is correlated with a boost in exports of 4, 3 percentage points². With 10 percent increase in high speed Internet connections, economic growth increases by 1.3 percent³.

ICASA therefore plays a critical role in ensuring that there is efficient rollout of modern communications technology that would enable the country to be competitive. The ICT market in South Africa has been expanding quickly and is likely to continue at an exponential rate in the years ahead, driven by rapid growth in mobile telephony, Internet economy- e-commerce, and the advent of broadband.

3. PROGRAMMES AND NOTABLE ACHIEVEMENTS AS IN MARCH 2016

In the past financial year, ICASA's strategic outcomes oriented goals (SOOGs) identified the areas of institutional performance that are critical to the achievement of its mandate. Some of the notable things at ICASA in the recent past:

- The final Radio Frequency Spectrum Regulations were gazetted in March 2015. One of the main purposes of these Regulations were to establish the framework through which the Authority may allocate and assign radio frequency spectrum under the South African National Radio Frequency Plan.
- Local Content regulations for sound and TV were gazetted. The Regulations on South African Music will apply to sound broadcasting services i.e. all public, commercial and community radio services, whereas, the South African TV Local Content regulations will apply to programming on television such as drama, documentaries, soap operas etc.
- A Graduate Development Programme has been launched to give young South Africans an opportunity to acquire work experience and get them ready for the workplace;
- 1 799 inspections were completed to protect audiences and consumers;
- Amended Regulations on equitable treatment of political parties during municipal elections.
- Audited 60 licensee retail outlets to assess compliance with consumer protection regulations.

However, the timely authorisation of new equipment could not be done due to the lack of an online type approval system and a timely allocation of a broadcasting spectrum could not be done as planned. At the moment ICASA has 5 programmes as outlined below.

² Khalsi, M. Dongier, P. and Zhen-Wei Qiang, C. 2009. The World Bank. Information and Communication for Development: Extending Reach Increasing Impact. P.26 Accessed from the World Wide Web: <https://issuu.com/world.bank.publications/docs/9780821376058>

³ Ibid



3.1 Programme: Licensing

The Licensing Division is responsible for service licensing; spectrum licensing and numbering and type approval. During the reporting year; the Division was required to also consider:

- Numbering applications within 21 working days;
- Spectrum licence applications within 60 working days;
- Applications for authorisation certificates and type approval for line equipment within 15 working days;
- Amendment and transfers of Individual licences within 180 working days; and
- Class service licence applications, postal service certificates, licences exemptions and channel authorisations within 30 working days

3.2 Programme 2: Regions Division

The mandate of the regions divisions is to enforce compliance applicable regulations. In particular, Regions undertake the following activities in executing their mandate;

- Conducting compliance inspections
- Investigating all reported cases of interference
- Conduction consumer education and awareness workshops The Strategic Objective for the Regional Offices falls under SOOG3, 'which is to Improve Stakeholder and Consumer Experience'. Activities within the regions are mainly focused on Strategic Objectives 3.3: 'Protect consumers from harmful practices'.

3.3 Programme 3: Policy, Research and Analysis

The PRA Division focuses on qualitative and quantitative research to inform regulation making processes that are conducted through Council Committees. The Division is also tasked with conducting market reviews to establish the level of competition in identified markets. Furthermore, the Division provides support in the investigation and analysis of disputes such as facilities leasing disputes between licensees. The Division comprises of three units, namely Market Regulation Unit, Social Policy Unit and Sector Forecasting.

3.4 Programme 4: Engineering and Technology Division

The E&T Division comprises of the following sub-units: Network Systems and Research and Engineering Facilities and Research. The functions of the Division amongst others include assisting Council in planning the use of the radio frequency spectrum, especially with regards to emerging new technologies and including updating, from time to time, the national radio frequency plan and developing the necessary migration plans.

3.5 Programme 5: Compliance and Consumer Affairs Division

The Compliance and Consumer Affairs (CCA) Division comprises of two units with the following functions:



Consumer Affairs Unit: the unit is responsible for ensuring that the interests of consumers are protected and complaints are resolved speedily. This includes a specific focus on engagement and protection of the needs of persons with disabilities.

Compliance Unit: the unit is responsible for ensuring compliance with legislation, regulations, licence terms and conditions. Collectively, the two departments carry out enforcement actions as and when necessary.

4. ICASA SPECTRUM LICENCE AUCTION

In July 2016, ICASA invited applicants to apply for 700MHz, 800MHz and 2.6GHz spectrum licences, which will supposedly boost the rollout of faster LTE broadband across the country. The auction for the licences was expected to occur in January 2017 and the reserve price to bid on lots of spectrum would have been at R3bn. ICASA recently pushed the deadline for bids to March 2017. According to ICASA, the main aim of the licensing is to ensure nationwide broadband access for all citizens by 2020. A precondition for prospective bidders, is that a “licensee must provide data services across the country with an average uplink of 15Mbit/s and the downlink user experience throughput of at least 30 Mbit/s to 100% of the population of South Africa by 2020”. ICASA further stipulated that “a licence is valid for only 15 years from the date of issue” and that it is “renewable on an annual basis upon payment of the prescribed annual licence fee”. Furthermore, ICASA has open access requirements for licensees which include that networks must provide open access to a minimum of three Mobile Virtual Network Operators (MVNOs). MVNOs ride on top of existing mobile networks but they have their own brands and niche markets, such as FNB Connect which taps the Cell C network. Successful bidders were to have a maximum of three years to provide these MVNO services.

The urgency which necessitated this sale is that, as data demand in South Africa escalates, operators are under pressure to make more efficient use of existing spectrum. However, the country faces a data crunch if spectrum in the key 800MHz band is not allocated soon. The rapid adoption of smart devices, which compliments government’s vision of bridging the digital divide and universal access to broadband services, has increased traffic on networks substantially, and has rendered access to spectrum more urgent. It is estimated that 98% of South African mobile network subscribers are served by 40% of the allocated spectrum. Therefore, the availability of high-demand radio spectrum will allow deployment of networks for the digital age that permits higher data speeds, which increase network capacity and enhance customer experience. Furthermore, it will enable operators to make provision for greater broadband access, reducing prices for data.

However, this issue has been dragging on for over a long time now, due to various reasons. Amongst them is that the SABC has not yet completed its migration to digital terrestrial television, and also the fact that the Universal Services and Access Agency of South Africa (Usaasa) lacks a budget to accelerate the roll-out of broadband in the country to meet the 2020 deadline of universal access. But mostly importantly, it is set to drag even longer because the Minister of Telecommunications and Postal Services filed a case to block the sale by ICASA. In filing the case, the Ministry cited ICASA, and mobile carriers MTN, Vodacom, Telkom and Cell C as respondents. The Minister viewed this action by ICASA as a usurping of the DTSP’s prerogative to decide how the valuable resource is assigned



among operators. On the other hand, ICASA has also consistently asserted its right and entitlement to execute such a sale. As it stands now, the Minister succeeded in getting the process interdicted in late September. However, one of the Mobile operators, Cell C got a parallel interdict against the auction, after also having argued that the auction will result in its better resourced competitors, i.e. MTN, Telkom and Vodacom getting the best spectrum, thereby entrenching their dominance in the local industry.

5. ICASA LABOUR DISPUTES

At the end of reporting period, ICASA had a total of 353 staff members, with 36 vacancies. In mid-August 2016, the Independent Communications Authority (ICASA) announced that it had reached an agreement with employees to bring a six-week stay-away to an end. This was after weeks in which over 100 ICASA workers were on strike demanding a 7% salary increase backdated to 2015 and bonus pay from 2014. Other demands included the reversal of human resources policies and restructuring that took place in the 2014/15 fiscal year. According to ICASA, before the strike it had previously decided on an agreement with the Communication Workers Union (CWU) on revised employment conditions, but workers said the union failed to represent their mandate. The disgruntled workers then discontinued their CWU memberships, and they went on strike at the beginning of July 2016 without union representation, and with claims that ICASA management is not willing to negotiate. The striking workers, later signed up to the National Trade Union Congress of South Africa (NTUC) early in August in a bid to resolve their issues with ICASA.

6. AUDITOR GENERAL'S REPORT

For 3 consecutive years, the Auditor General's opinion on ICASA has been one of "financially unqualified, with findings". The basis of the audit opinion in 2015-2016 was that:

- The Auditor General raised concern with regard to significant uncertainties. ICASA was often a defendant in a number of lawsuits. The ultimate outcome of these matters cannot currently be determined and no provision for any liability that may result has been made in the financial statements.⁴ This matter was recurring as at formed part of the Auditor General's Report in 2014/15.
- Effective steps were not taken to prevent irregular expenditure as required by section 38(1)(c)(ii) of the PFMA and TR 9.1.1. One of the root causes was that there was a lack of adequate oversight by management to ensure that procurement processes comply with supply chain management regulations and instructions
- The Auditor General was unable to obtain sufficient appropriate audit evidence to support the reasons provided for the variance between planned targets and actual achievements. Furthermore performance indicators were not well defined and targets were not SMART for the following programmes; Programme 1: Policy

⁴ See note 28 in the Annual Report



Research and Analysis; Programme 2: Regions and Programme 3: Licensing. The Auditor General further raised that management did not ensure that proper records are maintained to support the reasons for non-achievements. Management did not implement adequate controls to ensure that supporting information submitted by the division heads were sufficient and appropriate.

- As disclosed in note 14 of the financial statements, ICASA has materially underspent on the conditional grant to the amount of R60 661 162 (2014/15: R85 858 047).

7. ISSUES FOR THE COMMITTEE

- The Committee should request ICASA to provide a plan of action to address the issues contained in the AG's report since some of these findings are recurring.
- Nine days after the strike began, workers accused ICASA of refusing to start negotiations. ICASA needs to explain to the committee if this is true, and if indeed it's true, then explain why this was the case.
- ICASA needs to explain to the Committee how they plan to proceed, now that the Minister of Telecommunications and Postal services successfully interdicted them with regards to the auction.
- ICASA needs to update the Committee about all other pending and recently concluded cases against and by them.



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