



PRESENTATION TO PORTFOLIO COMMITTEE ON PUBLIC ENTERPRISES ON BROADBAND INFRACO LICENCE

**15 May 2012
Cape Town**

DoC Team



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Department:
Communications
REPUBLIC OF SOUTH AFRICA

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-) The main object and powers of Infraco from the Broadband Infraco Bill as introduced

“4. (1) The main object of Infraco is to provide affordable broadband access.”

-) During the Parliamentary process the Portfolio Committee on Public Enterprises (National Assembly) changed the wording in clause 4(1) of the Bill (Bill 26B-2007) to expand the mandate and scope of Infraco to include the provision of electronic communications services.

-) In the Objects Memorandum of the Bill –

-) it is stated that the Minister of Public Enterprises intends expanding the availability of broadband access to underdeveloped areas and ensuring that the bandwidth requirements for specific projects of national interest are met.

-) It explains that 80% of costs comprise costs attributable to Tier 1 national backbone connectivity and Tier 3 international connectivity. Therefore the logical conclusion was to intervene to

address the national backbone and international connectivity cost structures and hence establish Infraco

Electronic Communications Amendment Act, 2007



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-) The Department of Communications introduced the Electronic Communications Amendment Bill (Bill 38-2007) to cater for the licensing of Infraco and other public entities.

-) It is clear from the Preamble of this Act that the intention was always strategic intervention to expand the availability of ICT infrastructure and to amend the ECA to cater for licensing in this regard.
 -) Licensing of an operator to provide ICT infrastructure contemplated the issuing of an electronic communications network service (ECNS) license and not an electronic communications service (ECS) license.

-) It was further explained in the Objects Memorandum that the Bill seeks to provide an opportunity for Government to make strategic interventions on infrastructure investments whenever it deems necessary. It also says *“In amending the EC Act Government will be able to address some of the significant challenges such as... — reducing the cost to communicate by providing infrastructure at a wholesale rate to other operators”*.

Policy Direction



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-) A policy direction was issued to ICASA on the licensing framework of Broadband Infraco (Proprietary) Limited in Government Gazette No. 31869 on 06 February 2009, in terms of the Electronic Communications Act, 2005 (Act No. 36 of 2005).

-) This policy direction was done in accordance with the provisions of section 4(1) of the Broadband Infraco Act instead of the initial Government intention and directed ICASA to accept and consider applications from Infraco for electronic communications network service (ECNS) and electronic communications service (ECS) licenses.

-) One of the objects of the EC Act, in section 2 (d), is to “encourage investment, including strategic infrastructure investment, and innovation in the communications sector”. In relation to Infraco the backbone infrastructure is the strategic investment in question. The backbone network infrastructure is the most required intervention in the Republic.



-) In terms of section 5 of the EC Act, ICASA is the licensing authority for all licenses as prescribed in the same Act;

-) Section 3 (1A) (a) and (b) of the EC Act makes no prescription on the type of license that the Minister of Communications must proclaim in a policy direction;
 -) The fact that the Broadband Infraco Act specifies the type of services Infraco should render does not automatically entitle it to corresponding licences under the EC Act, as that would be contrary to good regulatory practise.

-) Ultimately the Minister of Communications is responsible for determining the licences and licensing framework required and to direct ICASA to consider applications for it.



-) Electronic Communications Network Service:
 -) means a service whereby a person makes available an electronic communication network, whether by sale, lease or otherwise
 -) for that person's own use for the provision of an electronic communications service or broadcasting service;
 -) to another person for that other person's use in the provision of an electronic communications service or broadcasting service; or
 -) for resale to an electronic communications service licensee, broadcasting service licensee or any other service contemplated by the Act,

-) Electronic Communications Service:
 -) means any service provided to the public, sections of the public, the State, or the subscribers to such service, which consists wholly or mainly of the conveyance by any means of electronic communications over an electronic communications network, but excludes broadcasting services;

Service Definitions



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) Wholesale

-) means the sale, lease or otherwise making available an electronic communications network service or an electronic communications service by an electronic communications network service licensee or an electronic communications service licensee, to another licensee or person providing a service pursuant to a licence exemption.

As an ECNS, Broadband Infracore will be able to sell, lease or make available its network on a wholesale basis..

) Retail

-) means the sale, lease or otherwise making available of services offered by licensees to subscribers;

Technical Definitions



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-) Electronic Communications Network Service:
 -) Operation and management of an electronic communications network

Broadband Infraco's business.

NB: ECS licensee are able to purchase services in bulk from an ECNS and also resell back to end users.

-) Electronic Communications Service:
 -) Provisioning of services **beyond** an electronic communication network's point of presence;

Broadband Infraco has confirmed that this is not part of their business.

NB: This relates to the provisioning of the last mile.



-) Following discussions between the Minister and the Minister of Public Enterprises and in view of Government's objectives with the establishment of Infraco, the question was asked whether Infraco requires only an ECNS license or whether it requires both an ECNS and ECS license.
-) Eversheds Attorneys' opinion dated 28 August 2009 obtained by DoC: *"The provision of managed network services up to POPs is included in the services which an ECNS provider may undertake pursuant to an ECNS license."*
-) White & Case, opinion dated 20 August 2009 obtained by the DPE: *"If Infraco intends to conduct activities solely relating to (i) the provision of wholesale broadband network services and (ii) coordination with international broadband infrastructure, then it will be able to conduct these activities under the terms of an ECNS license issued by ICASA"*.

Conclusion



-) In our view the legal opinions agree on the fact that only an ECNS license is required.

-) The intention of Government has always been that Infraco should be established to provide national backbone and international connectivity i.e. electronic communications network services on a wholesale basis to other licensees. This was necessary due to the incumbent operator's entrenched position resulting in very high costs of access to national backbone and international connectivity and in turn the cost of communications.

-) Semantics in the technical description of Infraco's mandate and legal opinions on the current state of affairs should not be the determining factor; instead the question to be answered is, what was Government's intention at the time of establishing Infraco?

Conclusion cont.



-) When Infraco was conceptualised the intention was not to create another fully-fledged competitor but rather an enabler that will reduce the cost to communicate. This was possible in view of the existing national backbone fibre optic network that could be acquired from Eskom Enterprises (Pty) Ltd and Transnet Limited. The intention of Infraco was to make the national backbone fibre optic network available to other operators as an alternative to Telkom. Again quoting the DPE from the Memorandum on the Objects of the Broadband Infraco Bill-

“if these costs are addressed, Tier 2 (the Local Metropolitan Area network and last mile) connectivity providers would quickly pass this on to the market as a result of competitive pressure” and result in a reduction in the cost of communication.

-) The Minister of Communications has commenced with key policy interventions that seeks to address fragmentation that has been identified within Government on ICT investment, that is, development of an integrated national ICT framework.

Way forward



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-) The Executive's intention with the establishment of Infraco is to provide infrastructure at a wholesale rate to other operators, and therefore only an ECNS license is necessary.

-) ICASA only issued an ECNS license to Broadband Infraco on 17 November 2009. This was in accordance with the amended policy direction issued by the Minister of Communications on 17 May 2010. ICASA publicly provided reasons for its decision on 07 April 2010.

-) The Department is currently embarking on a full review of the ICT policy landscape that will culminate in a National ICT Policy. A successful colloquium was held in April 2012 that will lead to a Green Paper issued in 2012 and a White Paper in 2013. The Policy will address amongst others;
 -) Broadband roll-out;
 -) Future ICT infrastructure harmonization;
 -) Optimal utilization of SOE's resources (Financial & Infrastructure);
 -) An integrated and harmonised approach to the reduction of the cost to communicate;
 -) Maximize shareholder value of SOEs in ICTs as a collective.

Way Forward cont.



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-) The role of state-owned enterprises that are electronic communications providers is a critical matter for discussion during the development of the National ICT Policy. For this purpose it is necessary to clarify the mandates, synergies etc. required to avoid fragmentation and ensure streamlining of Government investment in ICT infrastructure, especially in the context of achieving 100% broadband penetration by 2020 as promised;
-) **Creation of a number of state-owned competitors defeats the integration plan; instead, focus should be more on creating an enabling environment for competition (part of the SMME development of all the recently issued ECNS licenses).**

The intervention is a build up towards CONSOLIDATION and HARMONISATION of State Owned ICT entities in order to realise and maximise SHAREHOLDER VALUE from a co-ordinated manner.



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THANK YOU