

ENSafrica telecoms and media in brief

Below, please find issue 17 of ENSafrica's telecoms and media in brief, a snapshot of the latest telecommunications and broadcasting developments in South Africa.

telecommunications

- **GG43767 NN664: Composite Invitation to Apply for an Individual Electronic Communications Network Service Licence and Radio Frequency Spectrum Licence for the Wireless Open Access Network**
 - On 2 October 2020, the Independent Communications Authority of South Africa ("ICASA") published a composite invitation to apply for an individual electronic communications network services (I-ECNS) and Radio Frequency Spectrum Licences for the purpose of operating a Wireless Open Access Network (WOAN).
 - An application must be addressed for the attention of the General Manager: Licensing and must be submitted electronically to the following email address: woan.applications@icasa.org.za. Notification will be provided confirming that the application has been successfully delivered.
 - The closing date for the submission of applications is 11:00am South African time, on 30 March 2021.
 - For details, please see the invitation to apply accessible [here](#).
- **GG43768 NN535: Invitation to apply notice on the licensing process for international mobile telecommunications in respect of the provision of mobile broadband wireless access services for urban and rural areas**
 - On 2 October 2020, ICASA issued an invitation to apply notice to invite applications for the radio frequency spectrum licences for International Mobile Telecommunication ("IMT") Spectrum bands in the ranges of 703 – 790 MHz ("IMT700"), 790 – 862 MHz ("IMT800"), 2500 – 2690MHz ("IMT2600"), and 3400 – 3600 MHz ("IMT3500") for the purposes of providing national broadband wireless access services.
 - Interested persons are invited to submit applications, including an electronic version of the application in Microsoft Word and signed PDF versions, by no later than 16h00 on Monday, 28 December 2020.
 - For details, please see the invitation to apply accessible [here](#).
- For more information or assistance in submitting the above applications, contact:
Wilmari Strachan
Technology, Media and Telecommunications | Executive

wstrachan@ENSafrica.com

+27 82 926 8751

broadcasting

- **GG43766 NN533: Notice to extend the closing date and an erratum in respect of invitation to pre-register for digital community television broadcasting service and radio frequency spectrum licences on multiplex 1 (MUX1) frequencies**
 - On 2 October, ICASA issues a notice to extend the closing date and an erratum in respect of invitation to pre-register for digital community television broadcasting service and radio frequency spectrum licences on multiplex 1 (MUX1) frequencies
 - ICASA extends the closing date for receipt of applications to 15 January 2021 at 16h00. Applicants must submit one soft copy of its application via email on PDF or Microsoft Word format – clearly marked as such in the subject line.
 - The erratum is in respect of *Government Gazette* No: 43088 published on 12 March 2020 and is on Schedules J to include the other omitted frequencies.

broadcasting and telecommunications

- **GG43730 NN513: National digital and future skills strategy South Africa**
 - On 23 September 2020, ICASA published the National Digital and Future Skills Strategy in terms of Chapter 12 of the National Integrated ICT Policy White Paper of 2016.
 - The full document is accessible [here](#).

in the news

- **Facilities Leasing: *Telkom v ICASA***
 - On 15 August 2020, the High Court in Pretoria handed down an interesting judgment on electronic communications facilities leasing. Chapter 8 of the Electronic Communications Act, 2005 ("**ECA**") read with the Electronic Communications Facilities Regulations, 2010 obliges an electronic communications network services licensee ("**ECNS licensee**") to lease an electronic communications network services facility to another ECNS licensee/licence-exempt person on request subject to that request being reasonable. The ECA provides that a request to lease a facility is reasonable if:
 - it is technically and financially feasible, and

- it will promote the efficient use of electronic communication networks and services.
- Vodacom's request for access to Telkom's ducts was a "facilities leasing" request, the reasonableness of which Telkom disputed on multiple grounds. Vodacom had initiated this request in August 2015. In terms of section 43 of the ECA, ICASA had determined that Vodacom's request that Telkom lease space to it in its duct systems in certain townships in the Western Cape was reasonable. Telkom, dissatisfied with ICASA's conclusion of reasonableness, approached the court to review its decision.
- The court approached the review by first considering whether, factually, ICASA may have erred (while recognising that this is not the court's primary function in review proceedings) and secondly, whether ICASA has erred in some procedural respect in coming to the conclusion of reasonableness.
- In considering the meaning of technical and economic feasibility and efficient use (ie, whether the reasonableness finding on the facts was sound) the court reasoned as follows:
 - "in the first place, the enquiry is not whether the requested lease is optimal, only whether it is feasible; secondly, each case must be decided on its own facts. A feasibility analysis applicable to case A may not necessarily resolve a dispute in case B. Technical feasibility means, on the facts of this case: given the state of the art, can what Vodacom proposes be put into operation? In other words, will it work? Economic feasibility means: Do Vodacom and Telkom have sufficient economic resources to make the proposal work? Will the consuming public buy the product proposed or will it be a white elephant?"
 - "As to the efficient use requirement in s 43(4)(b): here the question is, in the present case: Is there anything in the proposal that will lead to inefficient or wasteful uses of networks or resources? Again, to demand that the proposal will achieve the optimal use of networks or resources is not what the measure requires. The measure does not demand perfection, merely efficiency. This in turn will require a cost/benefit analysis."
- The court then considered these principles in light of the facts and reasoned Telkom's argument that Vodacom's proposal was not technically and economically feasible failed in light of Telkom's stated plans to do the very same thing (although with added complexity); reasoning that if Telkom wanted to integrate this new cabling with its existing system, questions of compatibility would arise. And further, as to efficient use, the court reasoned that "once Telkom asserts that it, Telkom, wants to lay cabling where Vodacom wants to lay cabling, Telkom admits, by implication, that what Vodacom wants to do is both technically and economically feasible and would promote the efficient use of networks and services." Furthermore, the court agreed with ICASA's finding that when it came to efficient use, it would instead be a duplication of resources to require Vodacom to lay its own ducts rather make use of subducts within Telkom's ducts.
- The court also found that Telkom had failed to prove any irregularity on the part of ICASA. In this regard, Telkom had advanced numerous arguments,

one of which being that Vodacom should instead purchase data from one of Telkom's associated companies and sell it on to the retail market. In this regard, the court agreed with ICASA's finding that it was entirely understandable that "Vodacom did not want to become one of Telkom's (associate's) customers. That would have put Vodacom in the position of competing with its own supplier, which would then enable Telkom to set the price for and exercise measures of control over both quality and quantity of product. It was in my view entirely reasonable for ICASA to determine, in effect, that Vodacom should be empowered to enter the market upstream of Telkom's wholesale supply arm. That route was more competition enhancing, and thus more advantageous to consumers, than the alternative."

- The High Court's judgment is worth reading in its entirety for a cogent description of the reasoning, objectives and purpose of the ECA generally and section 43 of the ECA in particular.
- **Draft Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code**
 - ICASA has said it plans to introduce new B-BBEE regulations for the information and communications technology (ICT) sector before the end of the 2020/2021 financial year.
 - On 14 February 2020, ICASA published its Draft Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code ("**Draft Regulations**"). In developing these Draft Regulations, ICASA took into account the Findings Document and Position Paper on the Inquiry into Equity Ownership by Historically Disadvantaged Groups and the application of the ICT Sector Code in the ICT Sector published on 15 February 2019. The Draft Regulations can be accessed [here](#).
 - We previously discussed the Draft Regulations in our Telecoms in Brief, which is accessible [here](#).

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