

DISPUTES

Is Government Moving in the Same Direction: Will Rapid Deployment of Electronic Communications Networks Facilities Be Realised Soon?

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Over a decade ago, the national department of communications recognised that the lack of always-available, high speed and high quality bandwidth required by businesses, public institutions and citizens, negatively impacts upon South Africa's development and global competitiveness. The South Africa Connect: Creating Opportunities, Ensuring Inclusion, South Africa's Broadband Policy ("the SA Connect"), was *gazetted*, with the aim, amongst others, to ensure that all public institutions at the national, provincial and municipal level including, the communities which they serve, benefit from broadband connectivity. The SA Connect was aligned with the National Development Plan, which provided for the vision of an ICT sector and which would underpin the development of a dynamic and connected information society.

On 11 April 2006, the Electronic Communications Act ("ECA") was promulgated. In accordance with section 22 of the ECA, all electronic communications network service licensees ("ECNS licensees") are empowered to enter upon any land, construct and maintain electronic communications networks or facilities and to alter or remove its electronic communications facilities, and to do so with due regard to applicable law and the environmental policy of the Republic.

Section 24 of the ECA in turn requires of ECNS licensees, in giving effect to their section 22 rights, to give 30 working days' notice, in the manner specified, of any construction and maintenance contemplated to any local authority or person owning or responsible for the care and maintenance of any street, road or foot path.

The scope of the right conferred upon ECNS licences in terms of section 22 was interpreted by the Constitutional Court in the landmark decision of the *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* [2015] ZACC 29, as a right which entitles ECNS licensees to select and access premises for purposes of constructing, maintaining, altering or removing their electronic communications networks or facilities. The selection of such property must be done in a civilised and reasonable manner which includes, giving reasonable notice to the owner of property where the licensee intends locating their works and that the proposed access must be determined in consultation with the owner.

Most importantly, the Constitutional Court determined that the 'applicable law' referred to in section 22 of the ECA, includes the common law and the Constitution. Accordingly, all ECNS licensees are bound, in exercising their section 22 rights, by laws made with the authority of national, provincial and local government.

On 21 May 2014, the Electronic Communications Amendment Act 1 of 2014 was promulgated, which revised the wording of section 21 of the ECA obliging the Ministers of Cooperative Governance and Traditional Affairs, Rural Development and Land Reform, Water and Environmental Affairs, the Independent Communications Authority of South Africa ("ICASA") and other relevant institutions, to develop a policy and policy directions for the rapid deployment and provisioning of electronic communications facilities, following which ICASA must prescribe regulations.

Following this, on 24 February 2023, the then Minister of Cooperative Governance and Traditional Affairs, Dr Nkosazana Dlamini Zuma, gazetted the Standard Draft By-Laws for Deployment of Electronic Communications Facilities ("Standard Draft

By-Laws"). Although these Standard Draft By-Laws are merely a guide to municipalities, they reinforce national government's commitment to the policy on the rapid deployment of infrastructure and electronic communications infrastructure.

Despite national government's commitment to the rapid deployment policy, these Standard Draft By-Laws are flawed in a number of respects:

Firstly, the Standard Draft By-Laws suggest that they are applicable to all persons seeking to deploy or operate electronic communications facilities. However, section 7 of the ECA contains a prohibition on the provision of any service without a licence. "Persons" is also not defined in the Standard Draft By-Laws, which creates confusion regarding whom the Standard Draft By-Laws are applicable to.

Secondly, the Standard Draft By-Laws provide for the processing of wayleave applications within 30 working days, allowing a municipality that requires additional time an opportunity to notify the applicant of an extension of the period for a further 15 working days. The ECA specifically provides for a licensee providing the local authority with a 30 working day notice period. This period of time is further exacerbated by the requirement that ECNS licensees must obtain any necessary approval from all relevant authorities and providers affected by the deployment of the infrastructure prior to submitting the application. Practically, this would mean that all ECNS licensees must plan in excess of a 90 working day period for the approval of wayleave applications.

Thirdly, ECNS licensees will be required to enter into Municipal Land Use Agreements containing at a minimum the provisions of Schedule A to the Standard Draft By-Laws. Schedule A, amongst others, provides for the payment of ongoing charges and escalations. Considering the policy to ensure the rapid deployment of electronic communications facilities and the need to bridge the digital divide, it is unclear what these payments and ongoing charges refer to. Moreover, in accordance with the ECA, licensees are only obligated to pay the reasonable expenses incurred as a consequence of the construction, alteration or removal of electronic communications facilities and networks.

Despite a year a few months having passed since the Standard Draft By-Laws were gazetted, it appears only three municipalities have incorporated the provisions of the Standard Draft By-Laws into their wayleave bylaws. Bearing in mind that the Standard Draft By-Laws were presumably only published after the Minister consulted with organised government representing local government nationally or the Member of the Executive Council for local government and organised government, it is unclear why other municipalities have failed to adopt the Standard Draft By-Laws.

Notwithstanding the disconnect between national and local government on the Standard By-Laws, on 31 March 2023, the National Policy on the Rapid Deployment of Electronic Networks and Facilities ("the National Policy") and the Policy Direction on Rapid Deployment of Electronic Communications Networks and Facilities ("the Policy Direction") were published. The National Policy details the process to be followed by licensees to access property for the deployment of electronic communications networks and facilities and the rights of property owners and any other persons whose rights or legitimate expectations may be materially and adversely affected by the deployment of electronic communications facilities and networks.

In contrast to the Standard Draft By-Laws, the National Policy makes it clear that licensees are only required to give 30 days' notice of their intention to deploy infrastructure and emphasises that the compensation charged by property owners to licensees for the deployment of property ought to be reasonable in that it must be proportionate to the disadvantage suffered and may not enrich the property owner or exploit the licensee.

The Policy Direction has directed ICASA to prescribe regulations in accordance with the ECA for the deployment of electronic communications and facilities with particular reference to the manner, costs of and time within which a decision for access must be made, the implementation and publication of decisions made in terms of a dispute resolution procedure and how reasonable compensation must be determined.

ICASA has since published an invitation to bid for the appointment of a service provider to assist in determining the reasonable compensation and fees for the deployment of electronic communications networks and facilities.

It remains to be seen whether these regulations will provide much needed certainty for ECNS licensees and the industry as a whole on the rapid deployment of electronic communications networks and facilities including, whether there will be cohesion

between national and local government on the processes and compensation for deployment, for the benefit of the Republic as a whole.



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