

Guide to ICASA's new Licence Exemption Regulations

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1. Introduction

On 29 July 2008 ICASA published final regulations relating to licence exemptions consisting of two separate documents:

- Regulations regarding Licence Exempt Electronic Communications Networks, Electronic Communications Network Services and Electronic Communication Services in terms of section 6 of the Electronic Communications Act 36 of 2005 (“**the Service Licence Exemption Regulations**”); and
- Regulations in respect of Licence Exemptions in terms of Section 6 of the Electronic Communications Act read with section 31(6) in respect of radio frequency spectrum, ECS and/or ECNS (“**the Frequency Licence Exemption Regulations**”).

Both sets of regulations came into force 30 days after publication, being 9 September 2008.

This Guide is intended to provide a reasonably detailed overview of the different types of service and network licence exemption available under the Electronic Communications Act. It also covers the requirements to be complied with in respect of a service, network or equipment usage before it will be regarded by ICASA as licence exempt.

Frequency licensing related exemptions are discussed in a separate Guide.

2. Types of Licence Exemption

Section 6 of the ECA governs licence exemptions, providing that ICASA may prescribe

- types of electronic communications services (ECS) that may be provided,
- types of electronic communications networks (ECN) that may be operated,
- types of electronic communications network services (ECNS) that may be provided
- radio frequency spectrum bands that may be used

without a licence.

ICASA has prescribed regulations with regard to all of the above categories. The circumstances under which ECS and/or ECNS may be provided & under which ECNs may be operated are set out in the Service Licence Exemption Regulations.

The types of equipment that may be used in specified frequency spectrum bands without a frequency licence and the standards and limitations on such use are set out in the Frequency Licence Exemption Regulations.

Note that entities providing a licence exempt service or operating a licence exempt ECN are not absolved from any other licensing requirements. So, for example, if you have a PECN (see below) based on wireless technology then the PECN exemption does not exempt you from frequency licensing requirements. Neither does any service or frequency licence exemption exempt an entity from obtaining type approval for apparatus used.

3. Service Licence Exemptions

3.1. Licence exemptions for Electronic Communications Services

3.1.1. Non-profit ECS

The provision of ECS on a non-profit basis is licence exempt.

ECS provided by an entity which is a

- non-profit organisation established under an Act of Parliament or
- a company registered in terms of section 21 of the Companies Act

will be licence exempt as will ECS provided free to the public free.

3.1.2. Resellers

The Service Licence Exemption Regulations specify that a reseller that provides ECS “duly obtained” from a licensee licensed in terms of Chapter 3 or a licence exempt entity is not required to hold an ECS licence.

This is likely to be a problematic area for enforcement due to the extremely wide definition of reseller set out in the ECA:

“**reseller**” means a person who—

(a) acquires, through lease or other commercial arrangement, by any electronic communications network service or electronic communications service; and

(b) makes such electronic communications network service or electronic communications service available to subscribers for a fee,

whether or not such electronic communications network services or electronic communications services made available by the reseller—

(i) are identical to the electronic communications network service or electronic communications service acquired;

- (ii) are packaged, bundled or otherwise re-grouped to form new or varied service offerings;
 - (iii) are combined, linked or used in connection with electronic communications networks or electronic communications facilities owned by the reseller; or
 - (iv) add value to such electronic communications network services or electronic communications services,
- and “resale” is construed accordingly;”

This definition clearly contemplates a situation where a reseller obtains ECS from an upstream ECS provider and repackages, bundles and/or regroups it in combination with its own network and/or facilities and offers it to consumers under its own brand and style. Moreover activities and services which serve to add value to the ECS obtained from the primary ECS licensee will also be licence exempt.

The licensing relationship envisaged involves a primary ECS licensee that has a agreement with an ECNS licensee for the use of the latter’s network. This primary ECS licensee can then enter into commercial arrangements with third parties it wishes to appoint as resellers or to which it will provide ECS so that the third party can offer its own services to consumers.

Note that the resale of ECNS is not licence exempt.

3.1.3. Ancillary services

An ancillary service is “a retail service or bundle of retail services which do not amount to an Electronic Communications Service and includes necessary but incidental elements of ECS, where such ECS elements do not constitute the major purpose, utility or value of the service, including but not limited to, tracking, alarm and similar services”.

Such services are regarded as licence exempt.

Insofar as the definition explicitly states that these services do not amount to an ECS the licence exemption seems superfluous.

3.2. Licence exemptions for Electronic Communications Networks

3.2.1. Private Electronic Communications Networks (PECNs)

A PECN is defined in the Act as meaning:

“an electronic communications network used primarily for providing electronic communications for the owner’s own use;”

Under section 6 of the Act which deals with licence exemptions in general there is a slightly different definition:

“**6.2.(c)** private electronic communications networks used principally for or integrally related to the internal operations of the network owner. Except that where the private electronic communications networks’ additional capacity is resold, the Authority may prescribe terms and conditions for such resale;”

This definition follows the definition of a Private Telecommunications Network (PTN) set out in the now repealed Telecommunications Act. It seems likely that, to the extent there is any difference between these definitions, only PECNs conforming with the section 6(2)(c) definition will be licence exempt.

An electronic communications network which complies with the above description will be regarded as licence exempt. It is likely that internal communications carried over a PECN where the owner of the PECN is also the ECS provider will also be regarded as licence exempt on the basis that these can be regarded as ECS provided on a non-profit basis.

The sale of spare capacity from a PECN is dealt with below under licence exemptions for ECNS.

3.2.2. Small Electronic Communications Networks (SECNs)

The Licence Exemption Regulations define a SECN as:

“"Small electronic communications network" means an ECN that lies within a limited spatial area, used by a specific user group, has a specific topology and is not an ECNS of national, provincial, district or local municipal scope, but may be connected to one which is licensed or licence exempt. For example Local Area Network (LAN) or wireless LAN (WLAN).”

The exemption granted to a SECNS in the Regulations is phrased as follows:

“(2) A small electronic communications network must use frequencies which are licence exempt in accordance with the radio frequency spectrum licence exemption regulations published by the Authority in terms of section 6 read with section 31 (6) and technical parameters falling within the limits prescribed therein.”

This will be the most common network exemption, covering hundreds of thousands of LANs in corporate and home environments.

3.3. Licence exemptions for Electronic Communications Network Services (ECNS)

3.3.1. Resale of network capacity

The Licence Exemption Regulations explicitly provide for those who have a PECN which is licence exempt to resell, lease or otherwise make available any spare capacity on its network to a third party.

Such resale must be provided using a cost recovery pricing model to be prescribed by the Authority.

The Licence Exemption Regulations also set out a number of terms and conditions applicable to the resale, lease or other provision of spare capacity to third parties.

One of the sets of draft regulations which preceded the Licence Exemption Regulations suggested that resale of spare capacity would be limited to 25% of the total capacity of the network. This was thought to be unworkable and therefore rejected. In the absence of any explicit limit it becomes a question of ensuring that the use of the network remains “principally for or integrally related to the internal operations of the network owner”.

4. Applications for service licence exemptions

Although the Service Licence Exemption Regulations do not explicitly state this ICASA has indicated that those wishing to provide a service or operate a network under a licence exemption must apply for one.

The appropriate form is Form M to ICASA's Process Regulations.

There are many who believe that it is impractical and unnecessary to require applications for licence exemptions, and it certainly seems that this would be the case with small ECNs such as LANs and WLANs. This has been raised with ICASA and hopefully a compromise position can be reached which recognises

ICASA's mandate to regulate those selling to consumers, as would be the case with PECNs reselling spare capacity and resellers of ECS.

5. Terms and conditions applicable to provision of ECS and ECNS under a licence exemption

5.1. Safety Measures

A person that provides ECS or ECNS in terms of a licence exemption must, in respect of all apparatus, equipment, facilities and installations that it owns, leases or uses, take "such safety measures as may be prescribed and in any event, such reasonable and necessary safety measures to safeguard life or property and limit exposure to electromagnetic emissions, radiation and related risks".

5.2. Provision of Information

ICASA reserves the right to request information from a person providing ECS and/or ECNS in terms of a licence exemption so as to enable ICASA to:

- monitor and enforce consumer protection, quality of service, competition and other requirements of the Act and related legislation;
- allow for the assessment and allocation of applicable fees and related requirements;
- facilitate the efficient use of scarce resources; and
- collect and compile aggregate information to be used for the purpose of sectoral planning and reporting.

Unless ICASA is authorised to request this information on different terms according to another regulation then it must provide, "among other things":

- detailed specifications of its information request,
- applicable response times, and
- the identity of a contact person to address queries to.

5.3. Publication of Tariffs and Fees

This term only applies to persons selling, leasing or otherwise providing spare capacity on a PECN.

Where spare capacity is so sold, leased or otherwise provided for a charge, fee or other compensation then there is an obligation on the provider to make the price(s) for the service and other terms and conditions of the provision of such service known to the public.

This can be done by:

- making such prices and terms and conditions available for inspection at its offices during business hours;
- providing such details to anyone who requests same at no charge, and
- providing such details on its website, if any.

The provider of spare capacity from a PECN in terms of a licence exemption must also provide ICASA with:

- details of the price(s) for its service(s) and other terms and conditions for the provision of such service within 30 days of commencing such service;
- on a bi-annual basis, a record of the actual services provided and the actual tariffs charged during the previous six months; and
- such other information as may be specified by the Authority from time to time.

5.4. Metering and billing arrangements

This term only applies to persons selling, leasing or otherwise providing spare capacity on a PECN.

A person selling, leasing or otherwise providing spare capacity on a PECN in terms of a licence exemption must:

- install and operate metering and billing systems which accurately record the extent of the service(s) provided to any subscriber; and
- provide a detailed and accurate invoice and/or statement of services rendered to any subscriber at no charge, except where the subscriber is a licensee or a provider of services on a licence exempt.

The invoice and/or statement of services rendered must include information for the entire period covered by such invoice or statement and provide detail of the services rendered to the subscriber a breakdown of charges associated with such services.

5.5. Notices and addresses

Standard contractual deeming provisions apply to the delivery of notices between ICASA and persons acting under a licence exemption.

Any notice or certification passing between the parties must be in writing and will, unless and until the contrary is proven, be deemed to have been received:

- At the time of delivery if delivered by hand
- On the 14th day after the date of posting if posted by pre-paid registered post.

Note that where a notice or certification is sent by facsimile/electronic mail transmission during normal business hours, proof of successful transmission will be deemed to be proof of receipt.

6. Offences and Penalties

A person who intentionally or negligently contravenes or fails to comply with the Licence Exemption Regulations may be found guilty of an offence and, on conviction, subject to a fine not exceeding R30 000.

Any person who is aggrieved by the failure of a person who provides a licence exempt service contemplated in terms of section 6 of the Act to comply with these regulations may lodge a complaint with the Authority for investigation and if appropriate, adjudication by the Complaints and Compliance Committee in terms of section 17B and C of the ICASA Act, 2000 (Act No. 13 of 2000) and the imposition of a sanction by Council in terms of section 17E of the ICASA Act, 2000 (Act No. 13 of 2000).

7. Type Approval

For the sake of completeness it must be mentioned that type approval can also be viewed as a licensing requirement and that ICASA has a discretion to exempt certain classes of equipment from this requirement. An example of such an exemption would be that extended to certain radio apparatus used in the FM II band.

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