

**Advisory on Licence Conversion – 1 December 2008**

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Introduction .....	1
All VANS? .....	2
What is licence conversion? .....	2
What does licence conversion cost? .....	2
What are the new licence(s) which I can get in place of my VANS licence? .....	2
Networks and Services .....	2
<i>Example #1:</i> .....	3
Electronic Communications Network Service licences (ECNS licences) .....	3
Electronic Communications Service licences (ECS licences) .....	3
What are the options for converting your VANS licence? .....	5
Which licence(s) to choose? .....	5
How do I go about getting my licence converted? .....	7
ICASA's request for information .....	7
Does all of this information have to be supplied? .....	8
Obligation to commence rolling out your network within 12 months .....	8
Voluntary obligations .....	9
Licence Fees .....	9
Summary .....	10

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**Introduction**

The end of the licence conversion process has arrived and it is time for all holders of VANS licences to make some important decisions.

The information presented here is intended to help you make an informed decision with respect to your own business interests and is not intended to prescribe any approach.

There are still many uncertainties about the whole licence conversion process which makes it extremely difficult to advise you properly. These are being cleared up and this Advisory will be updated accordingly.

It is also difficult to understand – so please bear in mind that there are many simplifications below. If you are not sure about something: ask.

## **All VANS?**

*Note that ICASA has stated in the Government Gazette that it has resolved that VANS licences issued after 19 July 2006 will also be converted. This is, however, still subject to comments which may be received from industry and cannot be regarded as an absolutely final position.*

## **What is licence conversion?**

Your VANS licence was issued under the Telecommunications Act of 1996, which has now been repealed. It has been replaced by the Electronic Communications Act of 2005 (“the ECA”) which introduces a completely different licensing system.

Licence conversion is the process under which ICASA will cancel your VANS licence and simultaneously issue you with one or more licences granted under the ECA.

## **What does licence conversion cost?**

Nothing. There is no application or conversion or other fee payable for the conversion of your VANS licence to new licences deemed to have been issued under the ECA.

## **What are the new licence(s) which I can get in place of my VANS licence?**

It is very important that all VANS licence holders take the time to understand the new licensing system.

## **Networks and Services**

The basic licensing distinction is between licences which allow the holder to self-provide an electronic communications network (whether fibre, radio frequency, copper, etc) and licences which allow the holder to provide value added or electronic communications services over a network.

You can operate in three different ways

- As a provider of electronic communications network services under an electronic communications network service licence (“an ECNS licence”). This is where you operate a physical network and make it available to others for use and/or use it yourself.
- As a provider of electronic communications services under an electronic communications service licence (“an ECS licence”). This is where you lease space on someone else’s physical network (or use your own if you have one) in order to provide value added services to consumers.
- Under a licence exemption. It would get too complicated to go into this here but it is strongly recommended that you read the advisory at <http://www.ellipsis.co.za/?p=296> so that you have the full picture

### Example #1:

Think of an ADSL installation to a home. The twisted copper pair connected from the local exchange or distribution box to the modem in the home is the physical network. The operator of this network must hold an ECNS licence. In this case this will be Telkom acting as an ECNS licensee.

Now consider the actual ADSL service provided over the twisted copper pair. This is an electronic communications service, let's say provided by ABC ISP which is the holder of an ECS licence and has entered into a commercial agreement with Telkom in terms of which it can provide its ADSL service over Telkom's electronic communications network (the twisted copper pair and all the upstream network elements).

Also remember that resale of electronic communications services is licence exempt. So if you got to ABC ISP or SAIX (i.e. Telkom acting under its ECS licence) and enter into a commercial reseller agreement to resell ADSL accounts then you do not require an ECS licence to continue to provide this service.

### Electronic Communications Network Service licences (ECNS licences)

There are two types of ECNS licences:

- **Individual ECNS licences ("IECNS licences")** allow the holder to roll out and operate a network of national (or provincial) scope;
- **Class ECNS licences ("CECNS licences")** allow the holder to roll out and operate a network no bigger than a municipal area;

### Electronic Communications Service licences (ECS licences)

There are two types of ECS licences:

- **Individual ECS licences ("IECS licences")** allow the holder to obtain numbers from the national numbering plan. These could be 087 numbers or any other number range including geographic numbers (e.g. 011 1234 567). If you want to provide an inbound VoIP service which allows your customers to receive calls you will need to allocate them numbers and you would accordingly need to hold an IECS licence.
- **Class ECS licences ("CECS licences")** allow the holder to provide an electronic communications service which does not require numbers from the national numbering plan<sup>1</sup>.

Both of these licences allow the holder to provide electronic communications services anywhere in South Africa.

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<sup>1</sup> although it may receive a sub-allocation of numbers by commercial arrangement with an IECS licensee

**Example #2:**

XYZ Internet has signed an agreement with IS and joined its reseller programme. XYZ also operates a small wireless network operating on licence-exempt frequency in the 5.4 GHz range over which it provides Internet connectivity and e-mail services to its corporate and household consumers. What are XYZ's licensing requirements?

- As noted above the resale of electronic communications services is licence exempt so no licence is required for the resale activities.
- The wireless network is a physical network consisting of masts, radios, co-location, repeaters etc. The operator of this network therefore requires an ECNS licence.
- Assuming the network falls within a single municipal district then a CECNS licence will be sufficient.
- Note that if XYZ wants to expand its network into another municipality it would need another class ECNS licence for that other municipality. It is not, however, clear that it will be possible to hold more than one licence (see below for more on this).
- Because XYZ provides value added services over its own network to its customers it will require an ECS licence. It does not provide VoIP services which require numbers from the national numbering plan so will need to have a CECS licence.

There is a more detailed explanation on the new licensing framework in the attached Advisory - [Guide\\_to\\_Licensing\\_under\\_ECA\\_072008](#).

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WE HAVE NOW DEALT WITH THE NEW LICENSING FRAMEWORK AND WHAT LICENCES ARE  
REQUIRED FOR WHAT ACTIVITIES.

IT IS IMPORTANT TO REALISE THAT UNDER LICENCE CONVERSION YOU DO NOT HAVE TO OBTAIN  
NEW LICENSING WHICH REFLECTS YOUR CURRENT SCOPE OF OPERATION.

**AS A RESULT OF THE HIGH COURT DECISION IN THE ALTECH AUTOPAGE MATTER YOU HAVE A  
CHOICE OF LICENSING TO REFLECT YOUR FUTURE STRATEGY IN THE INDUSTRY.**

THE NEXT SECTION OF THIS ADVISORY DEALS WITH INFORMATION NECESSARY TO MAKE THIS  
CHOICE.

**What are the options for converting your VANS licence?**

A	B
Individual Electronic Communications Network Service licence (“ <b>IECNS licence</b> ”)	Individual Electronic Communications Service licence (“ <b>IECS licence</b> ”)
Class Electronic Communications Network Service licence (“ <b>CECNS licence</b> ”)	Class Electronic Communications Service licence (“ <b>CECS licence</b> ”)

You may choose to convert your VANS licence to

- One licence from column A + one licence from column B; or
- One licence only from either column.

In other words you may convert your VANS as follows:

- IECNS + IECS
- IECNS + CECS
- CECNS + IECS
- CECNS + CECS
- IECNS
- CECNS
- IECS
- CECS

**Which licence(s) to choose?**

We believe that VANS licencees are entitled to obtain an IECNS licence and an IECS licence from the licence conversion process if that is what they wish to have. This is the most powerful (in the sense of rights given) combination of licensing that can be obtained.

There may, however, be reasons that you do not wish to do this. These could include:

- You use your VANS to operate as a reseller and have no intention of ever laying down any kind of physical network. In this case you would have no need of an IECNS or CECNS licence and may choose to only obtain an IECS or CECS licence.
- You have no intention of ever offering a voice service which requires numbers from the national numbering plan. In this case you may wish to get a CECS licence rather than an IECS licence (+ either an IECNS or CECNS licence as required).

- You wish to self-provide a small network which is never likely to extend beyond a municipality. In this case you may want to opt for a CECNS licence rather than an IECNS.

When exercising this right please bear in mind:

- If you choose to take a class licence from the licence conversion process it is highly unlikely that you will be able to obtain an individual licence at a later stage.
- It is likely the annual licence fees payable in respect of individual licences will be higher than that for class licences (see below for further information on licence fees).
- If you opt for individual licences and then subsequently decide that these are not worth having given higher licence fees and other factors then you will be able to either downgrade to a class licence or surrender your individual licence and register for a class licence.
- You will generally be required to commence providing services under your licence within 12 months after the date on which it is granted although this may be extended by application to ICASA.
- You will only get one CECNS licence out of the licence conversion process. So if you already have a network in more than one municipal district you should obtain an IECNS licence.
- It is still not certain if you will be able to hold more than one CECNS licence. So if you foresee that you will have networks in more than one municipality in the short to medium (to long) term you should obtain an IECNS licence.
- If you believe that you will offer a voice service using numbers from the national numbering plan in the next ten years you would be advised to opt for an IECS licence rather than a CECS licence.

#### **Example #3:**

DEF Internet Services (“DEF”) is a WISP which has a small network in Cape Town, Bloemfontein and Pretoria. How should it convert its licence?

- Because DEF has a network in more than one municipal district it should opt for an IECNS licence. This is because (a) it will only receive one CECNS licence out of the licence conversion process & (b) it is not certain whether it will later be able to obtain another CECNS licence. Unless it obtains an IECNS, two of its networks will be unlicensed and therefore unlawful.
- DEF is providing services over its own network so will have to decide on which class of ECS it requires.

#### **Example #4:**

PTY Internet currently operates as a reseller and does not have its own network in place. How should it convert its licence?

- The first thing to note is that currently PTY does not need a licence as the only service which it provides is licence exempt. BUT ...

- As a licence exempt reseller PTY will not be able to access wholesale rates from upstream providers, i.e. it will work within tighter profit margins than if it had an ECS licence and could deal directly with ECNS licensees.
- Therefore it should, at the very least, obtain an ECS licence.

#### **Example #5:**

CCC Internet holds a VANS and obtains services from Telkom on a wholesale basis. It leases lines from Telkom that run between its premises and the nearest Telkom exchange. CCC specialises in providing ADSL services and thinks that it may wish to offer unbundled services when the local loop is unbundled. How should it convert its licence?

- CCC will require an ECS licence – either class or individual – to continue to deal with Telkom wholesale (i.e. Telkom acting as an ECNS licensee).
- CCC does not currently require an ECNS licence BUT ...
- An ECNS (most likely an IECNS) will be required if it want to co-locate equipment at Telkom's exchanges and other network points, i.e. if it wants to offer an unbundled ADSL service over the local loop.
- CCC should also look forward to its ability to self-provide its own links from its premises to the nearest Telkom exchange, considering the amount of money it can save by doing so. For this it will require an ECNS licence. It may not even be necessary to self-provide the link – if you have the licence (which gives you the right to do this) then you are in a far stronger position to negotiate pricing with Telkom.

#### **How do I go about getting my licence converted?**

ICASA will in due course publish a notice calling on VANS licensees to come and collect their new licence certificates.

As most will be aware ICASA have also requested that those VANS licencees wishing to convert their licence to an ECNS licence (either alone or with an ECS licence) submit certain information to them by 12h00 on Friday 5 December 2008.

#### **ICASA's request for information**

[For the full ICASA Notice please see <http://www.ellipsis.co.za/?p=414>]

ICASA has requested that the following information be provided by all VANS licensees:

- “(i) Full name of the Licensee;
- (ii) Shareholding details of the Licensee expressed in percentages

- (iii) Details of ownership by historically disadvantaged individuals expressed in percentages;
- (iv) Full names, telephone and cell phone numbers of the contact persons;
- (v) Postal and Physical addresses of the licensee;
- (vi) Whether the Licensee prefers to be converted to Class or Individual ECNS;
- (vii) The Licensees are required to indicate proposed Geographic Coverage Area, whether they intend providing electronic communications network services of national or provincial scope and specify areas to be covered;
- (viii) Proposed obligations in terms of section 93 (4) (b) of the Act:
  - (a) Licensees should undertake to commence with the rollout of network within 12 months of the licence being issued.
  - (b) Licensees must submit a comprehensive technical plan, including propagation analysis, for the purpose of Authority's monitoring and information.
  - (c) Licensees are required to indicate voluntary obligations on how they intend to contribute to social and economic development of the Republic of South Africa.”

#### **Does all of this information have to be supplied?**

How much information you provide is up to you. In assessing this please note that:

- We believe that a VANS licensee has the right to choose the licensing it wishes to have. This choice is not conditional on providing any kind of information or undertaking any voluntary obligations.
- In other words the information requested by ICASA under paragraphs (vii) and (viii) of the General Notice (set out above) must be submitted in order for your VANS licence to be converted.
- We accordingly believes that it will be sufficient for licensees to provide the information requested in paragraphs (i) – (vi) of the ICASA Notice.
- We do not, in any event, believe that VANS licensees have had enough time to provide the information requested.
- ICASA will have the right to ask for this information at a later stage so it will have to be provided in the future. If you are happy and able to provide it now then by all means do so but make sure that you use the template provided or specify that it is provided on a non-binding basis.
- Clarity has been requested from ICASA as to what a “propagation analysis” is.

#### **Obligation to commence rolling out your network within 12 months**

Under paragraph 3.2.(viii)(a) ICASA requires you to undertake to “commence with the rollout of [your] network within 12 months of the licence being issued”.

We do not believe that this undertaking needs to be made or that this obligation should be set out in your licence certificate. This is simply because a similar obligation is already included in the standard terms and

conditions which will apply to your ECNS licence. Clause 6 of the standard terms and conditions states:

## **6. COMMENCEMENT AND OPERATION OF SERVICE**

(1) A Licensee must commence operation of the ECNS specified in the Licence within twelve (12) months from the effective date, unless the Authority grants, on good cause shown, an extended commencement period on written application, prior to the expiry of the twelve (12) months.

(2) Where a Licensee cannot provide the licensed service due to circumstances beyond a Licensee's reasonable control, for a continuous period of twelve (12) hours or longer, a Licensee must notify the Authority in writing of such circumstances within twenty four (24) hours of the occurrence thereof.

Please note that this obligation will also apply to the ECS licence which you obtain through the licence conversion process.

### **Voluntary obligations**

Paragraph (viii)(c) requires licensees to indicate "voluntary obligations on how they intend to contribute to social and economic development of the Republic of South Africa".

By this ICASA means any corporate social investment initiatives which a licensee is prepared to promise to support during the term of its licence.

VANS licensees will need to decide whether they wish to make such promises of performance. In doing so bear in mind:

- We do not believe that it is the correct approach for ICASA to be asking licensees to indicate these obligations. This process has been tried before without success. We believe rather that there are other processes which need to take place to assess the needs of the country and to create policy to meet these needs.
- It is very difficult to know whether you are over-burdening your licence. Remember that you are required to contribute to the Universal Service and Access Fund and that it is likely that further universal service obligations may be imposed on your licence. The e-Rate (obligation to provide a 50% discount to schools) is also likely to be more widely applied in future.
- Nevertheless we in no way wish to stand in the way of any licensee wanting to make such a promise and have this recorded as a licence condition.

### **Licence Fees**

There has been a lot of news coverage of the draft licence fee regulations published by ICASA for comment.

These propose that

- holders of individual licences (IECNS and/or IECS) will pay an annual licence fee equal to 3% of their annual revenue derived from licensed activities less certain specified deductions; and
- holders of class licences (CECNS and/or CECS) will pay an annual licence fee equal to 1.5% of their annual revenue derived from licensed activities less certain specified deductions;

In both cases this is obviously a huge increase from the 0.1% of annual turnover derived from licensed services which VANS licensees currently pay.

But at this stage we do not believe that you should take the draft licence fees into account for the simple reason that they are only a draft, and final regulations are more often than not markedly different from draft regulations. Moreover it is obvious that the proposed fee regulations are highly controversial and will be strongly opposed by most licensees.

As noted above, once these fees are finalised licensees can determine whether they wish to downgrade individual licence(s) to class licence(s).

## Summary

In summary: VANS licence holders should keep all their options open.

This means that: -

- 1 Consider choosing an IECNS licence for your network. This gives you the maximum flexibility. Even if you don't have a network now, you might one day. You may just want to self-provide certain links in different municipalities.
- 2 Choose an IECS license for your services, which allows you the option of providing numbers in the future, even if you don't use them yet.
- 3 Only choose a class licence if you are positive that you will not require an individual one at any time in the next 10 to 15 years.

In responding to the ICASA request for information, remember that you are not required to provide any information under (vii) and (viii). You can choose to provide information or alternatively reply to these questions as per the template.

Don't look at the proposed licence fees as a determining factor. Not only are these likely to change – and even be challenged in court – but there are lots of ways of minimising your exposure to higher fees under an array of licences.

The decisions that you take now are likely to bind you for the next ten years or longer, which is the main reason that we feel that you should not limit yourself by choosing the lesser licences.

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