

OPINION

for

ECN TELECOMMUNICATIONS (PTY) LTD

on

ICASA'S ABILITY TO REGULATE INTERCONNECTION RATES

INTRODUCTION

1. ECN Telecommunications (Pty) Ltd ("ECN") is a licensee under the Electronic Communications Act 36 of 2005 ("the Act").
2. ECN seeks advice on whether the Independent Communications Authority of South Africa ("ICASA") has the power under the Act to regulate an interconnection rate. In particular, it seeks our opinion on:
 - 2.1. whether ICASA can introduce interconnection price regulation in the draft Interconnection Regulations under section 38;
 - 2.2. whether ICASA can prescribe regulations in terms of section 41 of the Act before it has completed its market study under Chapter 10 and promulgated regulations on competition matters; and
 - 2.3. whether there are any other avenues available to expedite the lowering of interconnection rates.

ICASA'S POWER TO REGULATE INTERCONNECTION RATES

3. ICASA has broad powers to regulate under the Act:
 - 3.1. In terms of section 4(1), ICASA has the authority to make regulations on *"any matter which in terms of this Act or the related legislation must or may be prescribed, governed or determined by regulation"*.

- 3.2. ICASA is empowered by section 38(3) to regulate interconnection, including interconnection pricing principles "*subject to and in accordance with section 41*".
4. Section 38(4) clearly limits ICASA's power to regulate interconnection pricing to that set out in section 41.
5. Section 41 expressly deals with interconnection rates. It states:

"Interconnection pricing principles.—The Authority may prescribe regulations establishing a framework of wholesale interconnection rates to be charged for interconnection services or for specified types of interconnection and associated interconnection services taking into account the provisions of Chapter 10."

6. Chapter 10 deals with competition matters, and requires ICASA to monitor and prevent measures that reduce competition or that unduly discriminate between licensees. In terms of Chapter 10, ICASA must, *inter alia*, define markets and market segments which have ineffective competition and within which procompetitive measures may be imposed on licensees with significant market power.

Section 67(4) of the Act

7. We are instructed that ICASA has interpreted section 41 to mean that it cannot regulate interconnection rates until it has completed a Chapter 10 market study. It appears that ICASA is of the view that it can only regulate interconnection rates as a procompetitive measure imposed in an inefficient market segment.

8. In our view, this interpretation is incorrect. It is trite that statutory provisions must be interpreted to give general powers, unless they are specifically circumscribed.
9. On its face, section 41 authorises ICASA to impose interconnection rates without adhering to the stricter regime imposed by Chapter 10.¹ The requirement that ICASA "*take into account*" the provisions of Chapter 10 means only that it must have regard to those provisions and not regulate in a manner that contravenes or undermines them. It does not place the operation of section 41 subject to those provisions.
10. We are accordingly of the view that ICASA can regulate wholesale interconnection rates prior to defining markets and market segments.
11. If it adopts a framework for interconnection pricing or imposes interconnection rates, ICASA must comply with the requirements laid out in section 4(5) of the Act, and must adhere to the standards imposed by the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). A benchmarking study may be a useful tool for ensuring that the rates or framework adopted is rational and reasonable.

See *Zondi v MEC, Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at para 101-102

¹ While not a decisive factor, this approach is supported by the inclusion of section 41 in a separate chapter of the Act.

OTHER AVENUES FOR LOWERING INTERCONNECTION RATES

12. Section 3(2) of the Act empowers the Minister of Communications (“the Minister”) to issue policy directions to ICASA to:

12.1. undertake an inquiry into, *inter alia*, interconnection rates regulation or the lowering of interconnection rates to improve universal access, and to submit reports to the Minister; and

Section 3(2)(a) of the Act, read with section 4B of the Independent Communications Authority of South Africa Act 13 of 2000

12.2. place a matter before ICASA for urgent consideration.²

Section 3(2)(c) of the Act

13. ICASA must have regard to such policy directions.

Section 3(4) of the Act

14. The Minister is entitled to issue a policy direction calling on ICASA to undertake an inquiry into regulations regarding interconnection rates, or urgently to consider interconnection rates or an interconnection pricing framework. In either event, ICASA could have regard to international benchmarking or conduct its own study on interconnection rates in foreign jurisdictions.

15. However, before issuing a policy direction, the Minister must:

15.1. consult with ICASA on the proposed policy direction; and

15.2. publish the draft policy direction for comment within no less than 30 days.

² Except in regard to licencing, where the Minister is not permitted to intervene.

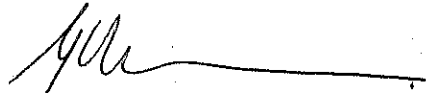
CONCLUSION

16. The Act provides avenues for ICASA and/or the Minister to intervene in the regulation of the telecommunications industry, in order to lower interconnection rates:

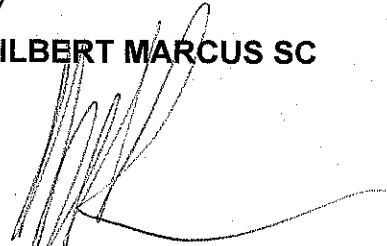
16.1. ICASA can prescribe regulations setting interconnection rates or establishing a framework for interconnection rates in terms of section 41. In determining the regulations, ICASA would be required to have regard to all relevant factors, which could potentially include international practice and benchmarking standards.

16.2. The Minister can issue a policy direction calling on ICASA to undertake an inquiry into lowering interconnection rates and to report to the Minister, or to consider urgently the issue of interconnection pricing. In either event, ICASA could conduct its own benchmarking study or have regard to foreign interconnection rates.

17. In our view, either of these steps could be taken immediately. They are not contingent upon ICASA completing a market study under Chapter 10 of the Act.



GILBERT MARCUS SC



ISABEL GOODMAN

Chambers,
Sandton
11 August 2009