
GENERAL NOTICE

NOTICE 984 OF 2003



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NOTICE OF INTENTION TO AMEND THE TELECOMMUNICATIONS SERVICE LICENCES ISSUED TO SENTECH LIMITED IN TERMS OF SECTION 32C (6)

The Independent Communications Authority of South Africa ("the Authority") hereby

- (1) gives notice of applications received from Sentech Limited (Sentech) to amend their carrier of carriers and multimedia service licences in terms of section 48(1)(e) read with sections 34(3), 34(4), 34(5) and 35 of the Telecommunications Act, No. 103 of 1996, as amended (hereinafter referred to as "the Act"). Copy of the application annexed herein;
- (2) Sentech is a holder of licences to provide an international telecommunications gateway service enabling it to operate as a carrier of carriers (the carrier of carriers licence) in terms of section 32C(1)(a) and a multimedia services licence (multimedia service licence) in terms of section 32C(1)(b) of the Act. Both licences were issued to Sentech by the Authority on 7 May 2002 in terms of section 32C(6) of the Act and were duly published in Government Gazette No. 23405 under Notice 686 dated 8 May 2002. Copies of both licences are annexed herein

- (3) The Authority hereby invites written comments from interested parties within 30 days from date hereof with regard to the proposed amendments.
- (4) The Authority further gives notice that written representations will be made publicly available except where respondents request that their responses or parts thereof be kept confidential. Respondents are requested to separate any confidential material into a clearly marked annexure Marked confidential.
- (5) Persons submitting written representations are invited to indicate in the first page of their submission whether they would like to make oral representations, which shall be limited to 1 hour.
- (6) Interested persons are hereby invited to submit written representations on the proposed amendments by Sentech. These have to be forwarded by post, hand delivery or fax **and** also in electronic format (Microsoft Word 6.0, Adobe PDF) for the attention of:

Mr Phineas Moleele – Manager: Telecommunication Licensing
ICASA Private Bag X10002,
Sandton,
2046;
Block C,
ICASA,
Pin Mill Farm,
164 Katherine Street,
Sandton;

Telephone (011)3218228,

Facsimile (011) 321 8550;

e-mail : pmoleele@icasa.org.za

BEFORE THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ("THE AUTHORITY")

In the ex parte matter of:

SENTECH LIMITED

Applicant

APPLICATION IN TERMS OF SECTION 48(1)(e) IN RESPECT OF SENTECH'S CARRIER OF CARRIERS SERVICE LICENCE

1 THE APPLICANT

- 1.1 The Applicant is Sentech Limited ("Sentech"), a company established pursuant to the Sentech Act 63 of 1996 and incorporated in accordance with the company laws of the Republic of South Africa and having its principal place of business and registered office at Octave Street, Radiokop, Honeydew, Gauteng Province, South Africa.
- 1.2 Sentech is the holder of a licence to provide an international telecommunication gateway service enabling it to operate as a carrier of carriers in terms of section 32C(1)(a) ("the carrier of carriers licence") to the Telecommunications Act 103 of 1996 ("the Act"). The carrier of carriers licence was issued to Sentech by the Independent Communications Authority of South Africa ("the Authority") in terms of section 32C(6) of the Act on 7 May 2002. The carrier of carriers licence was subsequently published under Notice 684 of 2002 in Government Gazette No. 23405, dated 8 May 2002.
- 1.3 Sentech is also the holder of a licence to provide multimedia services in terms of section 32C(1)(b) to the Act ("the multimedia services licence"). The multimedia services licence was issued to Sentech by the Authority on 7 May 2002 in terms of section 32C(6) of the Act and was also subsequently published under Notice 686 of 2002 in Government Gazette No. 23405 dated 8 May 2002.

2 THE APPLICATION

- 2.1 Sentech has brought this application in terms of section 48(1)(e) to the Act, as it requires section 3.1 to its carrier of carriers licence to be amended by the addition of the word "***lease***" and to read as follows:-

"The Licensee is authorised by this Licence to procure, own, lease, construct, maintain, operate and use an International Telecommunication Gateway Facility for the provision of a Carrier of Carriers service within and outside the Territory."

- 2.2 Throughout the public process in respect of the grant of the carrier of carrier licence, Sentech requested the Authority to include the word "***lease***" in clause 3.1. The primary reason for this request, was due to the fact that the hire of facilities and other equipment is a core activity which Sentech should be authorised to provide in respect of its international telecommunications gateway facility. In addition, Sentech should also be entitled to lease its international telecommunications gateway facility for the provision of a carrier of carrier service both within and outside the Republic.
- 2.3 The word "***lease***" is included in clause 3.1 to the multimedia services licence and there should be no reason for this omission in the carrier of carriers licence.
- 2.4 Sentech is not in law prohibited from leasing its international gateway facility for the provision of a carrier of carriers service and there is no statutory justification for the inclusion of this limitation in the licence.
- 2.5 Should section 3.1 to the carrier of carriers licence not be amended to include the word "***lease***", Sentech will be limited in a manner not intended in terms of the Act. In this regard, the activities which Sentech may undertake in providing the carrier of carriers service to public switched telecommunications service licensees, mobile cellular telecommunications licensees and under-served area licensees will be curtailed as Sentech will not be able to provide a full service offering. This in turn will detrimentally impact on Sentech's ability to compete with other providers of international telecommunication services such as Telkom SA Limited ("Telkom") and the Second Network Operator ("SNO")

and will affect the viability and profitability of its licensed activities. These prejudicial and detrimental effects could never have been the intention of the legislature in granting the carrier of carriers licence to Sentech.

3 RELIEF SOUGHT BY SENTECH

3.1 In the circumstances, Sentech requests the Authority to make an order or a determination in terms of section 48(1)(e) read with sections 34(3), 34(4), 34(5) and 35 in respect of the carrier of carriers licence in the following terms:-

3.1.1 That clause 3.1 is amended by the addition of the word "**lease**" after the word "**own**" in the first line of clause 3.1.

3.1.2 That further and/or alternative relief is granted if deemed appropriate by the Authority.

DATED at SANDTON this _____ day of AUGUST 2002.

Dr. S Mokone -Matabane

for Applicant

Octave Street

Honeydew

Tel: (011) 471-4476

Fax: (011) 471-4507

Ref: Dingane Dube/CoC/kbl/Authority

TO:

INDEPENDENT COMMUNICATIONS AUTHORITY
OF SOUTH AFRICA
Office of the Chairperson : Mandla Langa
Block B, Pinmill Farm
164 Katherine Street
Sandton

Received a copy hereof this
_____ day of AUGUST 2002

For: Independent Communications
Authority of South Africa

DRAFT

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

PROPOSED AMENDMENT TO:

**LICENCE ISSUED TO SENTECH LIMITED TO PROVIDE AN INTERNATIONAL
TELECOMMUNICATION GATEWAY SERVICE ENABLING IT TO OPERATE AS A
CARRIER OF CARRIERS IN TERMS OF SECTION 32C(1)(A) AND SECTION 32C(6) OF
THE TELECOMMUNICATIONS ACT 103 OF 1996 AS AMENDED**

INTERNATIONAL TELECOMMUNICATION GATEWAY SERVICE

TERMS AND CONDITIONS

1 DEFINITIONS

- 1.1 In this Licence and the annexes to this Licence:-
- 1.1.1 clause headings are for convenience and are not to be used in the interpretation of the Licence in which such headings appear;
- 1.1.2 unless the context indicates a contrary intention, an expression which denotes
- 1.1.2.1 any gender includes the other gender,
- 1.1.2.2 a natural person includes a juristic person and *vice versa*, and
- 1.1.2.3 the singular includes the plural and *vice versa*.
- 1.2 In this Licence, the following expressions bear the meanings assigned to them below and cognate expressions bear corresponding meanings -
- 1.2.1 "**Authority**" means the Independent Communications Authority of South Africa established in terms of section 3 of the Independent Communications Authority of South Africa Act, 2000 and its successors;
- 1.2.2 "**Applicable Interest Rate**" means the prime interest rate as published from time to time by the South African Reserve Bank, established by Section 9 of the Currency and Banking Act, No 31 of 1920, and operating in terms of the South African Reserve Bank Act, No 90 of 1989;
- 1.2.3 "**Call**" means a call (including, any Message conveyed by means of a telecommunication system) which originates in the telecommunication system of any Operator in the Territory, conveyed by the Licensee via the International Telecommunication Gateway Facility and which terminates in a telecommunication system in a country other than the Territory or vice versa or a call (including, any Message conveyed by means of a telecommunication system) which originates and terminates in a telecommunication system of an operator licensed to provide international services in a country other than the Territory which is conveyed via the International Telecommunication Gateway Facility on a wholesale basis;

- 1.2.4 **"Carrier of Carriers"** means a telecommunication service (including any signal conveyed by means of a telecommunication system of that service) which -
- 1.2.4.1 originates on the telecommunication system of a public switched telecommunication service licensee or mobile cellular telecommunication licensee or an under-served area licensee in the Republic and terminates in a telecommunication system in another country or vice versa; or;
- 1.2.4.2 originates and terminates in a telecommunication system of an operator licensed in another country to provide international services, but is conveyed via a telecommunication system in the Republic on a wholesale basis,
- but which specifically excludes the termination of international telecommunication services to end-users directly in the Republic;
- 1.2.5 **"Effective Date"** means 7 May 2002 and more particularly, the commencement of business on that day;
- 1.2.6 **"Financial Year"** means the financial year end of the Licensee ending on 31 March of each and every year;
- 1.2.7 **"Historically Disadvantaged Person"** means, in relation to natural persons, persons who are generally regarded as South African Black persons (i.e. Africans, Coloureds or Indians), women and persons with disabilities and, in relation to juristic persons, means entities that are controlled by Historically Disadvantaged Persons, and Historically Disadvantaged Group shall have a corresponding meaning
- 1.2.8 **"International Telecommunication Gateway Facility"** means the telecommunication systems and telecommunication facilities which are owned, installed, maintained, operated and used by the Licensee for the purposes of providing the Carrier of Carriers service, by whatever means, including any telecommunication facility, by means of which Calls are conveyed between all or any of:-
- 1.2.8.1 1 (one) or more network connection points outside the Territory; and
- 1.2.8.2 1 (one) or more network connection points within the Territory;
- 1.2.9 **"ITU"** means the International Telecommunication Union;

- 1.2.10 **"Licence"** means this Licence issued by the Authority to the Licensee in terms of sub-sections 32C(1)(a) and 32C(6) of the Telecommunications Act;
- 1.2.11 **"Licensee"** means Sentech Limited, registration number 1990/001791/07, a company duly registered and incorporated under the company laws of the Territory;
- 1.2.12 **"Licence Fee Income"** means the total annual invoiced revenue of the Licensee (less discounts, value-added tax and other indirect taxes) derived from Operators for the provision to them of any aspect of the Carrier of Carriers service, less net interconnect fees and charges and bad debts incurred and as provided for in terms of the Income Tax Act, No 58 of 1962;
- 1.2.13 **"Licence Period"** means the term for which this Licence, including the applicable frequency spectrum licence/s, shall be in force (including such periods in respect of which this Licence and the applicable frequency spectrum licence/s may be renewed);
- 1.2.14 **"Message"** means any sound, signal, sign or image conveyed by means of the International Telecommunication Gateway Facility;
- 1.2.15 **"Minister"** means the Minister of Communications;
- 1.2.16 **"Operators"** means any public switched telecommunication service licensee or any entity licensed to provide similar services, mobile cellular telecommunication service licensee or any entity licensed to provide similar services or any Under-Served Area Licensee, licensed to provide such services in terms of the Telecommunications Act;
- 1.2.17 **"Public Land Mobile Network"** means the telecommunication systems used by mobile cellular telecommunication service licensees to provide mobile cellular telecommunication services;
- 1.2.18 **"Public Switched Telecommunication Network"** means the telecommunication systems used by public switched telecommunication service licensees to provide public switched telecommunication services;
- 1.2.19 **"Regulations"** means regulations promulgated in terms of section 96 of the Telecommunications Act No. 103 of 1996;
- 1.2.20 **"Telecommunications Act"** means the Telecommunications Act No 103 of 1996;
- 1.2.21 **"Territory"** means the Republic of South Africa;

- 1.2.22 **"Under-Serviced Areas"** means those geographic areas as determined by the Minister by notice in the Government Gazette as having a teledensity of less than 5%;
- 1.2.23 **"Under-Serviced Area Licensee"** means any person licensed to provide telecommunication services in terms of section 40A(2) of the Telecommunications Act;
- 1.2.24 **"Universal Service Fund"** means the fund established in terms of section 65 of the Telecommunications Act.
- 1.3 Words and expressions defined in any clause shall, for the purposes of that clause, bear the meaning assigned to such words and expressions in such clause.
- 1.4 If any provision is a substantive provision conferring rights or imposing obligations on the Licensee, notwithstanding that it is only in the interpretation clause, effect will be given to it as if it were a substantive provision in the body of the Licence.
- 1.5 All terms and expressions not expressly defined herein shall have the meanings assigned to them as set out in the Telecommunications Act, as amended, and all applicable Regulations issued in terms of that Act. The Licensee is required to comply with the Telecommunications Act and all applicable Regulations.

2 LICENCE PERIOD

The initial term of the Licence shall be for a period of 25 (twenty five) years from the effective date.

3 LICENCE AUTHORITY

- 3.1 The Licensee is authorised by this Licence to procure, own, lease, (Sentech's request) construct, maintain, operate and use an International Telecommunication Gateway Facility for the provision of a Carrier of Carriers service within and outside the Territory.
- 3.2 The Licensee shall be entitled and is authorised in terms of this Licence to:-
- 3.2.1 connect or cause to be allowed to be connected, to the International Telecommunication Gateway Facility:-

- 3.2.1.1 the Public Switched Telecommunication Networks;
- 3.2.1.2 the Public Land Mobile Networks;
- 3.2.1.3 any telecommunication system operated by an Under-Serviced Area Licensee;
- 3.2.1.4 any telecommunication system situated outside the Territory and licensed in another country to provide international telecommunication services except where such connection would contravene a treaty or other agreement to which the Territory is a party;
- 3.2.1.5 any telecommunication facility required for the provision of a Carrier of Carriers service;
- 3.2.2 convey to and from any connected telecommunication system as contemplated in clause 3.2.1 any Call and to perform any switching incidental to such conveyance;
- 3.2.3 provide the Carrier of Carriers service to any Operator and to use the Carrier of Carrier service for the Licensee's own purposes or business activities; and
- 3.2.4 provide any telecommunication service that is incidental to the service referred to in clause 3.2.3;
- 3.3 In addition to the rights referred to in clause 3.1, the Licensee shall be entitled to:-
 - 3.3.1 procure, design, develop and maintain any software or hardware to be used in connection with any telecommunication system for the provision of its Carrier of Carriers service;
 - 3.3.2 use any protocol application in its provision of the Carrier of Carriers service;
 - 3.3.3 use its own telecommunications facilities in the provision of its Carrier of Carriers service and the interconnection of the same to any telecommunication system;
 - 3.3.4 use any telecommunication facility for the connection of the International Telecommunication Gateway Facility to the telecommunication system of any Operator or any operator licensed to provide international telecommunication services outside of the Territory;
 - 3.3.5 provide any service which is ancillary to the Licensee's provision of a Carrier of Carriers service, including billing and installation, maintenance and repair services;

- 3.3.6 enter into suitable arrangements with any licensed Operator for the sharing of infrastructure and facilities, for the co-location of facilities and infrastructure and to interconnect with any Operator or operator licensed to provide international telecommunication services outside of the Territory; and
- 3.3.7 use the frequency spectrum assigned by the Authority in the frequency spectrum licence for the provision of the Carrier of Carriers service.
- 3.4 The Licensee shall be entitled by virtue of this Licence to operate the International Telecommunication Gateway Facility and to provide a Carrier of Carriers service together with all or any other rights granted to the Licensee under this Licence, provided that any service which is ancillary to the Licensee's provision of Carrier of Carriers service, including billing and installation, maintenance and repair services, shall all be subject to the provisions of the Telecommunications Act, the relevant Regulations promulgated from time to time in terms of section 96 and the terms and conditions of this Licence.
- 3.5 The Licensee shall use all reasonable endeavours to ensure that its employees, agents and contractors comply with the provisions of this Licence in the exercise or performance of the Licensee's rights and obligations as set out in this Licence.

4 LICENCE FEES

4.1 Fixed Licence Fee

In consideration for the grant of the Licence, the Licensee shall pay to the Authority a fixed licence fee in respect of the initial term of the Licence, referred to in clause 2, in the amount of R25 (Twenty Five) Million Rand.

- 4.1.1 Should the Licensee fail to make payments of any amounts due in terms of clause 4.1.2 on the due date for payment thereof, then and in such event, interest at the Applicable Interest Rate shall accrue on the amount which is due in terms of clause 4.1.2., such interest to be calculated from the due date for payment thereof to the date of actual payment.
- 4.1.2 Subject to clause 4.1.3, the principal amount of the fixed licence fee referred to in clause 4.1 shall be payable by the Licensee to the Authority in 5 (five) equal annual instalments, the first instalment to be paid on the third anniversary of the Effective Date.

- 4.1.3 The Licensee may accelerate payments of the fixed licence fee referred to in clause 4.1. by making payment prior to the dates specified in 4.1.2 and, in such cases, the provisions of clause 4.1.2 shall still apply.
- 4.1.4 In addition to the fixed licence fee, the Licensee shall pay the fees stipulated in its frequency spectrum licence and such other fees as may be payable in terms of such Regulations as may apply to it from time to time.

4.2 Annual Variable Licence Fee

- 4.2.1 Subject to what is stated below, an annual variable licence fee in an amount equal to 0.5% (one half of one percent) of the audited Licence Fee Income shall be payable by the Licensee to the Authority.
 - 4.2.2 The first payment of the annual variable licence fee referred to in clause 4.2.1 shall be made within 3 (three) months of the Licensee's Financial Year in the third year of the Licence Period and shall be calculated on the basis of the Licence Fee Income generated during the third year of the Licence Period.
 - 4.2.3 After the fourth year of the Licence Period, the annual variable licence fee shall be payable within ninety (90) days after the expiry of Sentech's financial year in question.
 - 4.2.4 The annual variable licence fee payable by the Licensee shall be reviewable by the Authority after the fifth anniversary of the Effective Date, provided that, in the event of the percentage of Licence Fee Income payable by the Licensee being increased by the Authority, the percentage so increased shall not exceed the percentage of net operating income payable by similarly licensed operators in respect of the corresponding licence fees payable by them.
- 4.3 In reviewing the percentage of Licence Fee Income payable by the Licensee in terms of this clause, the Authority shall have due regard to factors such as the number of similarly licensed operators in the Territory, the spectrum allocated to such similarly licensed operators and the percentage of net operating income payable by such similarly licensed operators.
- 4.4 The provisions of clause 4.2 shall apply *mutatis mutandis* to all subsequent Licence Periods of this Licence.

5 UNIVERSAL SERVICE OBLIGATION

The Licensee shall pay annual contribution to the Universal Service Fund as prescribed by regulation in terms of section 67(2) of the Telecommunication Act.

6 PERFORMANCE SPECIFICATIONS

6.1 The Carrier of Carriers service provided by the Licensee shall conform to such Regulations as prescribed by the Authority.

6.2 The Licensee shall introduce measures and at all times use its resources to ensure that any telecommunication apparatus used in connection with the International Telecommunication Gateway Facility or in the provision of the Carrier of Carriers service, including any telecommunication facilities owned by the Licensee shall comply with:-

6.2.1 the requirements for electromagnetic compatibility; and

6.2.2 the requirements for network interoperability,

as prescribed by the Authority in accordance with international specifications and standards.

7 FAIR TRADING

The Licensee shall not demonstrate any undue preference to or exercise any undue discrimination against any Operator in respect of the provision of the Carrier of Carriers service or in respect of the construction or maintenance of any telecommunication facility or connection to the Licensee's International Gateway Telecommunication Facility.

8 ACCOUNTS

8.1 The Licensee shall maintain proper accounting records in a form, which is sufficient to show and explain its transactions and in this regard, the Licensee shall maintain such records as fairly represent the cost, revenue and financial position of the Licensee's business activities in terms of this Licence.

8.2 Within 3 (three) months of the end of each Financial Year of the Licensee, the Licensee shall present to the Authority audited annual financial statements

prepared in accordance with Generally Accepted Accounting Practice and as approved by the Licensee.

9 TRANSFER OF LICENCE AND OWNERSHIP AND CONTROL

9.1 Transfer of Licence

- 3.2 The Licensee shall not transfer the Licence without the prior written consent of the Authority having been obtained in terms of the Telecommunications Act and the applicable Regulations.

9.2 Transfer of ownership and control

- 9.2.1 Any transfer of shares of the issued share capital of the Licensee being acquired by any party which is not a shareholder of the Licensee as at the Effective Date shall require prior written approval by the Authority.
- 9.2.2 Any transaction, agreement or undertaking entered into by the Licensee with any other party that could have the effect of changing the control of the Licensee, shall require prior written approval by the Authority.

10 EMPLOYMENT EQUITY, HUMAN RESOURCE DEVELOPMENT AND TRAINING

- 10.1 The Licensee shall comply with the provisions of the Employment Equity Act, No 55 of 1998, and the Skills Development Act, No 97 of 1998, in relation to employment equity, human resource development and training. All reports submitted to the Department of Labour in this regard by the Licensee shall also be submitted to the Authority.
- 10.2 The Licensee shall participate in the development of the telecommunication industry by, *inter alia*:
- 10.2.1 supporting independent contractors from Historically Disadvantaged Groups; and
- 10.2.2 supporting industry development initiatives.

11 GENERAL

- 11.1 Should any provision of this Licence be invalid and unenforceable for any reason, the remaining provisions shall nevertheless remain of full force and effect.
- 11.2 To the extent that this Licence may be inconsistent with any provisions of the Telecommunications Act or any applicable Regulations, such provisions of the Telecommunications Act or the Regulations shall take precedence over this licence.

12 CONFIDENTIALITY OF INFORMATION

- 12.1 The Licensee shall not disclose the content of any signal transmitted or intended to be transmitted over its International Telecommunication Gateway Facility, unless required to do so by a court order or in terms of any law.
- 12.2 The Licensee shall not use any information regarding its past, current or potential customers for purposes other than those for which the information was obtained, unless the customer gives prior written consent to such other use.

13 RENEWAL OF THE LICENCE

The Licence may be renewed in terms of the Telecommunication Act.

14 CANCELLATION OF LICENCE

In the event of the liquidation of the Licensee, the Licensee shall notify the Authority in writing of the cancellation of the Licence.

15 REVOCATION OF THE LICENCE

The Licence may be revoked in accordance with the Telecommunications Act.

16 FORCE MAJEURE

- 16.1 The Licensee shall not be liable for any default or delay in the performance of its obligations under the Licence if and to the extent:-

- 16.1.1 such default or delay is caused, directly or indirectly, by fire, flood, earthquake, elements of nature or acts of God, riots, civil disorders, rebellions or revolutions in any country or any other cause beyond the reasonable control of the Licensee; and
- 16.1.2 the Licensee is without fault in causing such default or delay.

17 NOTICES

- 17.1 The Licensee selects as its *domicilia citandi et executandi* the following physical addresses:-

<u>Name</u>	<u>Physical Address</u>	<u>Telefax</u>
Sentech Limited	Sender Technology Park Octave Road Radiokop	(011) 471-4753

or such other address or telefax number as may be substituted by notice given as herein required. The Licensee shall be entitled from time to time by written notice to the Authority, to vary its *domicilium* to any other address within the Territory.

- 17.2 Any notice addressed to the Licensee at its physical address shall be delivered by hand, or sent by telefax.
- 17.3 Any notice shall be deemed to have been given:-
- 17.3.1 if hand delivered during business hours on a business day, on the day of delivery;
- 17.3.2 if sent by telefax, on the date of sending of such telefax.

18 AMENDMENT

- 18.1 Subject to the provisions of section 48 of the Telecommunications Act, the Authority shall be entitled to amend any term or condition of this Licence.
- 18.2 No amendment, alteration, addition, variation or consensual cancellation of this Licence shall be of any force or effect unless reduced to writing and signed by the Authority.

19 MISCELLANEOUS PROVISIONS**19.1 Adherence to International Standards**

- 19.1.1 The Licensee shall comply with the applicable standards and requirements of the ITU, as agreed to or adopted by the Republic.

19.2 Legal Compliance

- 19.2.1 The Licensee shall comply with all applicable laws of the Republic and with all international obligations to which the Republic is bound and, unless expressly indicated to the contrary, nothing in this Licence shall be construed or understood so as to relieve or exempt the Licensee from complying with the provisions of this Licence, the Telecommunications Act or any other law to the extent that it may be applicable.

19.3 Access to network facilities

- 19.3.1 Upon reasonable notice, the Licensee shall provide access to its network facilities for inspection by the Authority.

Issued at _____ on this ____ (day) / ____ (month) / 2002

MANDLA LANGA

CHAIRPERSON

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA (ICASA)

NKATEKO NYOKA

CHIEF EXECUTIVE OFFICER

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA (ICASA)

BEFORE THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ("THE AUTHORITY")

In the ex parte matter of:

SENTECH LIMITED

Applicant

APPLICATION IN TERMS OF SECTION 48(1)(e) IN RESPECT OF SENTECH'S MULTIMEDIA SERVICES LICENCE

4 THE APPLICANT

- 4.1 The Applicant is Sentech Limited ("Sentech"), a company established pursuant to the Sentech Act 63 of 1996 and incorporated in accordance with the company laws of the Republic of South Africa and having its principal place of business and registered office at Octave Street, Radiokop, Honeydew, Gauteng Province, South Africa.
- 4.2 Sentech is the holder of a licence to provide multimedia services in terms of section 32C (1)(b) ("the multimedia services licence") of the Telecommunications Act 103 of 1996 ("the Act"). The multimedia services licence was issued to Sentech by the Independent Communications Authority of South Africa ("the Authority") on 7 May 2002 in terms of section 32C(6) of the Act and was also subsequently published under Notice 686 of 2002 in Government Gazette No. 23405 dated 8 May 2002.
- 4.3 Sentech is also the holder of a licence to provide an international telecommunication gateway service enabling it to operate as a carrier of carriers in terms of section 32C (1) (a) ("the carrier of carriers licence") of the Act. The carrier of carriers licence was issued to Sentech by the Authority in terms of section 32C (6) of the Act on 7 May 2002 and was subsequently published under Notice 684 of 2002 in Government Gazette No. 23405 dated 8 May 2002.

5 THE APPLICATION

Sentech has brought this application in terms of section 48(1)(e) of the Act, as it has three major concerns with the provisions of its multimedia services licence. As a result of these concerns Sentech, requires the multimedia services licence to be amended by the Authority as set out in this application. The amendments, which Sentech requires to its multimedia services licence and its motivations for requiring the same are set out below.

6 CLAUSE 3.6 TO BE DELETED IN ITS ENTIRETY

6.1 Clause 3.6 to the multimedia services licence provides:-

"Nothing contained in this Licence shall authorise the Licensee to provide telecommunication facilities to anyone licensed under the Telecommunications Act to provide value added network services, in circumstances where that person, by obtaining the telecommunications facilities in question, from the Licensee, violates a term of its own telecommunication licence or otherwise acts in a manner inconsistent with that contemplated by section 40(2) of the Telecommunications Act."

6.2 By including clause 3.6 in the multimedia services licence, the Authority has in effect made Sentech subject to the provisions of section 40(2) to the Act. The Authority's conduct in making Sentech subject to the provisions of section 40(2) of the Act is entirely inappropriate and contrary to the statutory rights and entitlements conferred on Sentech in its provision of multimedia services. As such, it is submitted that the Authority has acted *ultra vires* the powers conferred on it in terms of the Act. Sentech's reasons for this contention are based on the following:-

6.2.1 Section 40(2) of the Act provides:-

"A licence to provide any value- added network services, including, but not limited to, electronic data interchange, electronic mail, protocol conversion, access to database or a managed data network service, shall contain a condition that the service in question be provided by means of telecommunication facilities until-

- (a) 7 May 2002, provided by Telkom or made available to Telkom as contemplated in section 44; and***
- (b) after 7 May 2002, provided by Telkom and the second national operator or any of them until a date fixed by the Minister by notice in the Gazette."***

- 6.2.2 Section 40(2) requires all licences issued to value added service licensees ("VANS") to contain a condition that services provided by VANS are to be provided by means of telecommunication facilities provided by Telkom SA Limited ("Telkom") and the Second Network Operator ("SNO"), once licensed. As Sentech has not been granted a licence to provide VANS, but is licensed to provide multimedia services, the provisions of section 40(2) should not apply to it and there is no statutory basis for including a provision in the multimedia services licence which purports to draw Sentech into the provisions of section 40(2). Thus, there is a concern that the Authority has acted *ultra vires* the powers conferred on it in terms of the Act by imposing this condition on Sentech under circumstances where Sentech is neither a VANS nor subject to the provisions of section 40(2).
- 6.2.3 In addition, section 40(2)(b) provides that, until a date fixed by the Minister, only Telkom and the SNO shall be entitled to provide telecommunication facilities to VANS. This provision must be viewed in the context of the various debates which took place in regard to whether a policy of service based or facilities based competition should be followed, post Telkom's exclusivity. Ultimately, it was decided by the Minister of Communications ("the Minister") to follow a policy which would give effect to the stated intention of managing the liberalisation of the telecommunications sector by first introducing service based competition to be followed by the introduction of facilities based competition at a later date. It is precisely this policy decision which is given effect to in section 40(2)(b) as the Minister will determine the date upon which other entities will be entitled to supply telecommunication facilities to VANS.
- 6.2.4 Notwithstanding the provisions of section 40(2)(b), the right granted to Telkom and the SNO does not preclude Sentech from providing a multimedia service to VANS by means of its own facilities as no similar obligation is imposed on Sentech in terms of section 32C or in any other section to the Act. This is borne out by the fact that in terms of section 40(2) to the Act, it is a VANS service and only a VANS service, which is to be provided by means of telecommunication facilities provided by Telkom or the

SNO. No similar restriction is contained in the Act in respect of a multimedia service. Thus, in terms of the Act, Sentech in providing multimedia services to a VANS, is entitled to provide its own telecommunications facilities for the provision of such services up to and including the point of interconnection. Once multimedia traffic has been passed by means of interconnection from Sentech to the network of a VANS, such traffic will then be carried by the VANS network. It is only the VANS and not Sentech's network, which is required to be comprised of telecommunication facilities provided by Telkom or the SNO.

6.2.5 The provisions of clause 3.6 to the licence are far wider in application than the condition, which in terms of section 40(2) is to be included in all VANS licences. This is due to the fact that Sentech is required in terms of clause 3.6 to ensure that in providing multimedia services to VANS, that there is no violation by a VANS of its own licence and that the provisions of section 40(2) of the Act are not contravened. In fact, the obligation imposed on Sentech in terms of clause 3.6 is so wide, that Sentech may well be liable for ensuring that all activities conducted by VANS when receiving a multimedia service from Sentech, do not violate the terms and conditions of their licence or the Act. The over broad effects of this clause are such that it will be impossible for Sentech to actually adhere to the provisions of the same. The effect of this will be severely prejudicial to Sentech in that VANS providers will probably be discouraged from obtaining multimedia services from Sentech for fear that the acquisition of such services may violate the conditions of their licences. Similarly, Sentech will bear a substantial risk in providing such services to VANS as should any VANS provider use its telecommunication facilities, contrary to the provisions of the Act, Sentech may well be in breach of its licence.

6.2.6 Insofar as clause 3.6 in effect prohibits Sentech from providing services to VANS, this is contrary to the common law where it has long been recognised that where an empowering Act authorises regulation and control, this does not include the power to prohibit [see *R v Williams* 1914 AD 460; *S v Perumal* 1977 (1) SA 526 (N); *Moekena v Commissioner of Prisoners* 1985 (1) SA 377

(A); *City of Cape Town v Ad Outpost (Pty) Ltd 2000 (2) BCLR 130 (C)*]. As there is no limitation imposed on Sentech in respect of the provision of a multimedia services to VANS, the consequences of clause 3.6, which will be to prohibit the provision by Sentech of multimedia services to VANS will be contrary to the common law.

- 6.3 Clause 3.6 was not included in the draft multimedia services licence published for public comment under Notice 2405 of 2001 in Government Gazette No. 22976 dated 20 December 2001, nor was clause 3.6 included in the final draft multimedia services licence handed to Sentech for comment by the Authority on 30 April 2002. In fact, notwithstanding the public process, clause 3.6 to the multimedia services licence only came to Sentech's attention on the publication of the final licence in the Government Gazette under Notice 686 of 2002 on 8 May 2002
- 6.4 The Promotion of Administrative Justice Act gives effect to the Constitutional right to administrative justice. Section 3(1) of this Act states "**[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair**". As to the content of the requirement to act fairly, the court in *Du Preez v Truth and Reconciliation Commission* [1997 (3) SA 204 (A)] quoted with approval the guidelines laid down in the English case of *Doody v Secretary of State for Home Development and other Appeals* [(1993) 3 All ER 92 (HL) 106], which held that "**fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both**".
- 6.5 The Act itself provides for such a process of notification and comment, and it would have been procedurally fair for Sentech to have been given an opportunity to comment on clause 3.6 prior to the insertion of the same in the final multimedia services licence as clause 3.6 clearly affects Sentech's rights under section 32C to provide multimedia services. The fact that the provisions

of 3.6 was not included in the draft licence—certainly gave rise to a legitimate expectation that Sentech would be entitled to provide facilities to VANS, which constitutes a significant market for Sentech's multimedia services. It is therefore submitted that the insertion of clause 3.6 constitutes an invalid administrative act on the part of the Authority.

- 6.6 In summation, the Authority's inclusion of clause 3.6 in the multimedia services licence is *ultra vires* the powers conferred upon the Authority in terms of the Act. Further, the inclusion of clause 3.6 constitutes conduct which is unreasonable and unjustifiable when one has regard to the requirements of section 35(5) to the Act, which obliges the Authority to ensure that licences are granted on conditions appropriate to the licence and consistent with the objects of the Act. Furthermore, the Authority's failure to allow Sentech to comment on clause 3.6 and its late inclusion in the multimedia services licence constitutes a procedural irregularity. It is for all these reasons that Sentech requires clause 3.6 to be deleted from the multimedia services licence in its entirety.

7 CLAUSE 1.2.18 TO BE DELETED IN ITS ENTIRETY

- 7.1 Clause 1.2.18 sets out the definition of an operator as this term is to be understood and used in terms of the multimedia services licence and provides as follows:-

" 'Operator' means any Public Switched Telecommunication Service Licensee or any entity licensed to provide similar services, Mobile Cellular Telecommunication Service Licensee or any entity licensed to provide similar services or any Under-Serviced Area Licensee, licensed to provide such services in terms of the Telecommunications Act. "

- 7.2 The term "**Operator**" as defined, is referred to in clause 3.3.5 to the multimedia services licence. Clause 3.3.5 entitles Sentech to enter into suitable arrangements with only those operators as defined in clause 1.2.18 for the sharing of infrastructure, the co-location of facilities and for the purposes of interconnecting with such operators. The definition of "**Operator**" when read in conjunction with the provisions of clause 3.3.5 to the licence places an unwarranted restriction on Sentech's ability to contract freely with third parties for the sharing of infrastructure, co-location and interconnection.

- 7.3 There is no statutory basis for the imposition of such a limitation on Sentech and Sentech should not be constrained in its ability to enter into suitable arrangements for infrastructure sharing and co-location. Other licensees are entitled to enter into infrastructure sharing and co-location arrangements with other telecommunication service licensees and third parties. Any attempt to limit Sentech's rights in this regard where there is no statutory justification for such a limitation amounts to no more than arbitrary and discriminatory conduct on the part of the Authority.
- 7.4 There is also a concern that the provisions of clause 1.2.18 when read with clause 3.3.5 are contrary to the provisions of section 43 to the Act. The effect of clause 3.3.5 when read with clause 1.2.18 is that Sentech is only permitted to interconnect with public switched telecommunications service licensees, mobile cellular telecommunication licensees and under-serviced area licensees. On the other hand, section 43(1)(a) to the Act places a positive obligation on public switched telecommunications service licensees to interconnect their telecommunication systems with the telecommunication system of **"any other person providing telecommunication services"** when requested to do so. One of the fundamental principles in respect of interconnection is that it will be available to any person providing telecommunications services, there only being a positive obligation on public switched telecommunications service licensees to provide interconnection. Thus, it is entirely contrary to the provisions of section 43 to limit Sentech's ability to interconnect with only those entities listed within the definition of an **"Operator"** in clause 1.2.18.
- 7.5 The exact same definition of an **"Operator"** is found in clause 1.2.16 of the carrier of carriers licence. The use of such a definition in the carrier of carriers licence is justified due to the limitation contained in the definition of **"carrier of carriers"** in the Act which obliges Sentech to only carry international traffic which originates on the telecommunication system of a public switched telecommunications service licensee, mobile cellular telecommunication service licensee or an under-serviced area licensee within the Republic. There is however no such similar limitation or obligation imposed on Sentech in respect of its provision of multimedia services and it is