

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Meeting: 8 April 2016

CASE NUMBER 156/2015

IN RE: XUMA TECHNOLOGIES (PTY) LTD

PANEL: Prof JCW van Rooyen SC
Councillor Nomvuyiso Batyi
Prof Kasturi Moodaliyar
Mr Jack Tlokana
Ms Mapato Ramokgopa

In attendance from the Office of the Coordinator: Adv. Lwazi Myeza

Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

[1] On 17 June 2010 Xuma Technologies (Pty) Ltd (“XUMA”) was issued with a Class Electronic Communications Service Licence and a Class Electronic Communications Network Service Licence² by the Independent Communications Authority of South Africa (“ICASA”). ICASA’s Compliance Division (ECS and ECNS

¹ An Independent Administrative Tribunal set up in terms of the Independent Communications Authority Act 13 of 2000. The CCC was recognised as an independent tribunal by the Constitutional Court in 2008. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such a decision is, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the compliance division or inspectors at ICASA) which it receives against licensees in terms of the Electronic Communications Act 2005 or the Postal Services Act 1998 (where registered postal services are included) are justified. Where a complaint or reference is dismissed the matter is final and only subject to review by a Court of Law. Where a complaint or reference concerning non-compliance is upheld, the matter is referred to the Council of ICASA with a recommendation as to sanction against the licensee. Council then considers a sanction in the light of the recommendation by the CCC. Once Council has decided, the final judgment is issued by the Complaints and Compliance Committee’s Coordinator. A licensee, which is affected by the sanction imposed, has a right to be afforded reasons for the Council’s imposition of a sanction. In the normal course, where Council is satisfied with the reasons put forward to it by the Complaints and Compliance Committee, further reasons are not issued. The final judgment is, on application, subject to review by a Court of Law.

² The two sets of Regulations are reproduced in the Addendum to this judgment.

licences), which has a delegated monitoring function, referred this matter to the Complaints and Compliance Committee (“CCC”), alleging that Xuma had not filed financial statements for the years 2011, 2012 and 2013. This should have been done in accordance with General Notices published in the *Government Gazette* in terms of the September 2011 Licence Fees Regulations.³ Furthermore, that no contribution had been made in terms of the Universal Service and Access Fund (“USAF”) and no licence fees paid in terms of the ICASA General Licence Fees Regulations 2012.

[2] The September 2011 Regulations, in accordance with which Government Notices were issued requiring licensees to file financial statements, do not have retroactive effect and, accordingly, the year-end February 2011 financial statement cannot be part of the contraventions before the CCC. The earlier Regulations were substituted by the September 2011 Regulations. The Constitution of the Republic of South Africa⁴ does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.⁵ The allegation of omissions was sent to the licensee by the CCC Coordinator in October 2015. Thus, only omissions to file financial statements for the years ending February 2012 and 2013 are before the CCC.

NON-ACTIVITY

[3] The defence of XUMA is that it was unaware of the duty to file financial statements. However, Xuma had also not been active under any one of the two licences for the financial years 2011, 2012, 2013 and 2014. This was confirmed by Bonani Chartered Accountants in a letter dated 13 November 2015. The Accountants also confirmed that no income had been generated from the two licences. It is also clear from the documentation as a whole that they have not been active for the 2015 financial year.

³ Individual Electronic Communications Service Licence Regulations and the Individual Electronic Communications Network Service Licence Regulations 2011. See Regulation 9 of each.

⁴ See section 35(3) (l). Cf. *Masiya v DPP, Pretoria (Centre for Applied Legal Studies, Amici Curiae)* 2007 (5) SA 30 (CC) at para [54]; *Savoi v NDPP* 2014 (5) SA 317 (CC) at para [73].

⁵ And it is constitutionally acceptable. Thus, the death penalty could not be imposed for murder committed even before the interim Constitution of the Republic became effective in April 1994.

[4] Clause 5 of the Standard Terms and Conditions for Class Electronic Communications Network Services Regulations 2010 provides as follows:

A Licensee must commence operation of the ECNS specified in the Licence within twenty-four (24) months from the date of issue, unless the Authority grants, on good cause shown, an extended commencement period on written application, prior to the expiry of the twenty-four (24) months period.

An identical provision appears in the Regulations for class licences which do not fall in the category of network licences. An omission to abide by the regulations may lead to a minimum fine of R2500 and a maximum fine of R100 000. It is common cause that no application was filed with the Authority to commence operations at a later stage. If a literal interpretation is attached to the regulations, then the licences have simply come to an end. However, this would not seem to be the approach of Compliance in this regard. In the Government Gazette Notice of 26 April 2013 licensees are informed that “if a licensee has not commenced operation, the licensee is requested to submit a formal letter stating that they have not commenced operation.” There is no reference to a fine and, since the time the CCC has been dealing with cases referred to it by Compliance, not in one case has there been an alleged contravention based on not having become operational. And, of course, the CCC cannot add to the alleged contraventions itself.⁶

[5] However, Xuma included a document in its defence in which it and Cell C had reached a stage in their negotiations where a letter of intent for the provision of network coverage by Xuma was included. Mention was also made in an affidavit of a potential contract with Telkom. It is not necessary to go into details, since it is clear that Xuma is involved in seemingly viable potential contracts.

FINANCIAL STATEMENTS

[6] In so far as the filing of financial statements, the payment of USAF fees and licence fees are concerned we accept that Xuma was *bona fide* of the belief that there was no obligation to have filed the statements. However, in the absence of a notification that Xuma was not active under its licences, it should, at least, have taken legal advice as to its duties towards ICASA. It should have notified

⁶ *Roux v Health Professions Council of SA & Another* [2012] 1 All South Africa Law Reports 49 (SCA). See the CCC judgment in *Integrat* (112/2015) where this principle was applied.

ICASA that it was not active under its licences and that, accordingly, no financial statements would be lodged. ICASA published two Notices (dated 16 September 2011 and 26 April 2013) in the *Government Gazette* reminding licensees of their obligation to file financial statements, pay Universal Service and Access Fund⁷ contributions and licence fees. These notices were also published on the ICASA website. These obligations arise from Regulations which are set out in the Annexure to this judgment. The Standard Regulations authorise ICASA to obtain information from licensees in regard to the exercise of ICASA's responsibilities. The said two *Government Gazette* Notices, indeed, sought to remind and obtain information from licensees – in this case, requiring licensees to file financial statements or let ICASA know if it was not active under its licences,

USAF CONTRIBUTIONS AND LICENCE FEES

[7] In the light of the above mentioned inactivity by Xuma for the years 2011, 2012, 2013 and 2014 and 2015 these fees were not payable.

FINDING ON THE MERITS

[8] No financial statements for end of year 2012 and 2013 were filed. As appears from the above, ICASA should at least have been notified that there were no financial statements to file or fees to be paid in the light of Xuma's inactivity under the licences. The necessary confirmation by its Accountant should also have been filed. We have, however, noted the November 2015 confirmation by the Accountant referred to above.

ADVICE TO THE ICASA COUNCIL AS TO SANCTION

[9] In the light of the explanation given and the confirmation by the Accountant, it is not necessary to issue more than the following order:

The order by Council should, it is recommended, read as follows:

Xuma Technologies (Pty) Ltd is ordered to inform ICASA within 30 days after the end of its financial year 2017 whether it has become active in terms of one or both of its licences.

⁷ The origin of which is to be found in section 89 of the Electronic Communications Act 2005.

Alternatively, if it has not become active at the above date under one or both of the licences, it must notify ICASA and add the confirmation by its Accountant or Auditor and comply with any formal requirement from ICASA in this regard.

The above order is legally enforceable.⁸



25 May 2016

PROF JCW VAN ROOYEN SC

CHAIRPERSON

The Members of the CCC agreed with the finding on the merits and the advice to Council on the sanction.

ADDENDA: RELEVANT REGULATIONS

STANDARD TERMS AND CONDITIONS FOR CLASS ELECTRONIC COMMUNICATIONS NETWORK SERVICES REGULATIONS 2010; Commencement of GN R525: 12 September 2011

1. Definitions

In these regulations unless the context indicated otherwise:

“**Act**” means the Electronic Communications Act, 2005 (Act No. 36 of 2005);

“**Authority**” means the Independent Communications Authority of South Africa established by section 3 of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000);

“**ECNS**” means an Electronic Communications Network Service as defined in the Electronic Communications Act; 2005 (Act No. 36 of 2005);

“**ECN**” means an Electronic Communications Network as defined in the Electronic

⁸ See section 17H(1)(f) of the ICASA Act 2000.

Communications Act; 2005 (Act No. 36 of 2005);

“Effective date” means the date on which the Licence is issued;

“Licence” means the class Electronic Communications Network Service Licence issued to the Licensee in the form contained in Annexure B of these regulations;

“Licensee” means the person named in Licence and issued with a licence to provide services in terms of Chapter 3 of the Act.

2. Notification of change in licensee details and information

(1) A Licensee must submit written notice to the Authority within seven (7) days of the occurrence of the following changes:

- (a) the name of the Licensee;
- (b) contact details including the contact person;
- (c) shareholding;
- (d) physical address; and
- (e) financial year end.

[Subr. (1) substituted by Gen N 155/2016]

(2) Any change or transfers of shares undertaken in terms of 2(1) (c) above must comply with all licence terms and conditions and the ECA.

3. Licence area

(1) The licence area is a district or local Municipality as defined in the Local Government Municipal Structures Act, No 117 of 1998.

(2) All electronic communications equipment and facilities, as well as radio apparatus are to be situated entirely within the licence area.

(3) The specific licence will be as defined by the licence issued to a licensee.

(4) A licensee must provide services within its licence area.

[Subr. (4) added by Gen N 155/2016]

4. Duration of the licence

The Licence is valid for ten (10) years from the effective date.

5. Commencement of operations

A Licensee must commence operation of the ECNS specified in the Licence within twenty-four (24) months from the date of issue, unless the Authority grants, on good

cause shown, an extended commencement period on written application, prior to the expiry of the twenty-four (24) months period.

[Reg. 5 substituted by Gen N 155/2016]

6. Hours of operations

- (1) A Licensee must provide electronic communication network services for twenty four (24) hours per day unless the Authority has been notified of a shorter schedule of daily broadcast operations.
- (2) Where a Licensee cannot provide the licensed service due to circumstances beyond its control, for a continuous period of twelve (12) hours or longer, the licensee must notify the Authority in writing of such circumstances within twenty four (24) hours.

7. Services to be provided by the licensee

The licensee must construct, operate and maintain an ECN as well as provide ECNS in the licensed service area.

8. Safety measures

The Licensee must, in respect of all apparatus, equipment and installations that it owns, leases or uses, take reasonable and necessary safety measures to safeguard life or property, and to limit exposure to electromagnetic emission, radiation and related risks.

9. Provision of information

- (1) *The Authority may, in the course of carrying out its obligations under the Act, require a Licensee to provide any information including documents or books not ordinarily required, so as to enable it to:*
 - (a) *monitor and enforce consumer protection, quality of service, competition, compliance with licence conditions and other requirements of the Act and related legislation;*
 - (b) *allow for the assessment and allocation of applicable fees and related requirements;*
 - (c) *facilitate the efficient use of radio frequency spectrum; and*
 - (d) *collect and compile information to be used for research purposes, planning, reporting and conducting inquiries.*
- (2) *In respect of each information request referred to in subregulation (1), except where otherwise addressed in applicable regulations, the Authority will provide, among other things, detailed specifications of its information request, applicable response times and a contact person to whom queries may be addressed.*

- (3) *A Licensee must submit all the required information as required by the Authority in terms of subsection (1).*
- (4) *In the event where a Licensee or its representative refuse or fail to provide the Authority with requested information in terms of subregulation (1), the Authority may, after reasonable attempts, refer the matter to the Complaints and Compliance Committee.*

10. Publication of tariffs and fees

A Licensee must provide to the Authority on a bi-annual basis, a record of the actual services provided and the actual tariffs charged thereof during the previous six months.

11. Metering and billing arrangements

- (1) A Licensee must install and operate metering and billing systems which accurately record the extent of the service(s) provided to any end-user.
- (2) A Licensee must provide an accurate invoice with a detailed statement of services rendered to any end-user at no charge, except where the end-user obtains services exclusively on a prepaid basis and the prices and terms of such prepaid service have been disclosed at the time of purchase.
- (3) The invoice must include information for the entire period covered by such invoice as follows:
 - (a) details of services rendered to the end-user; and
 - (b) breakdown of charges associated with such services.
- (4) Upon request by an end-user, the Licensee must provide an itemised bill, meaning an invoice which contains a sufficient level of detail to allow verification of charges incurred in using the services provided by the licensee. Each detailed itemised bill shall contain at least the following information in relation to each individual transaction (voice or data call) charge incurred by the subscriber during the relevant billing period: destination, dialed number, date, time, duration and charge for each individual transaction:
 - (a) via post or in an electronic format; and
 - (b) at such a price that takes into account the difference in the mode of delivery.

12. Contraventions and penalties

Any person that contravenes these Regulations is liable to a fine not less than R2 500, 00 (Two thousand, five hundred Rand) but not exceeding R100 000, 00 (One hundred thousand Rand).

[Reg. 12 substituted by Gen N 155/2016]

13. Short title and commencement

The regulations are called the standard terms and conditions for Class Electronic Communications Network Services Regulations 2010, and will come into operation by notice in the Gazette.

STANDARD TERMS AND CONDITIONS FOR CLASS ELECTRONIC COMMUNICATIONS SERVICES 2010

Commencement of GN R525: 12 September 2011

1. Definitions

In these regulations unless the context indicated otherwise:

“**Act**” means the Electronic Communications Act, 2005 (Act No. 36 of 2005);

“**Authority**” means the Independent Communications Authority of South Africa established by section 3 of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000);

“**ECS**” means an Electronic Communications Services as defined in the Electronic Communications Act; 2005 (Act No. 36 of 2005);

“**ECN**” means an Electronic Communications Network as defined in the Electronic Communications Act; 2005 (Act No. 36 of 2005);

“**ECNS**” means an Electronic Communications Network Service as defined in the Electronic Communications Act; 2005 (Act No. 36 of 2005);

“**Effective date**” means the date on which the Licence is issued;

“**Licence**” means the Class Electronic Communications Network Service Licence issued to the Licensee in the form contained in Annexure C of these regulations;

“**Licensee**” means the person named in the Licence and issued with a licence to provide services in terms of Chapter 3 of the Act.

2. Notification of change in licensee details and information

- (1) A Licensee must submit written notice to the Authority within seven (7) days of the occurrence of the following changes:
 - (a) the name of the Licensee;
 - (b) contact details including the contact person;
 - (c) shareholding;
 - (d) physical address; and
 - (e) financial year end.

[Subr. (1) substituted by Gen N 155/2016]

3. Licence area

- (1) The licence area is a district or local Municipality as defined in the Local Government Municipal Structures Act, No 117 of 1998.
- (2) A Licensee must provide services within its licence area.

[Reg. 3 substituted by Gen N 155/2016]

4. Duration of the licence

The Licence is valid for ten (10) years from the effective date.

5. Commencement of operations

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

[Reg. 5 substituted by Gen N 155/2016]

6. Hours of operations

- (1) A Licensee must provide electronic communication services for twenty four (24) hours per day unless the Authority has been notified of a shorter schedule of daily broadcast operations.
- (2) Where a Licensee cannot provide the licensed service due to circumstances beyond its control, for a continuous period of twelve (12) hours or longer, the licensee must notify the Authority in writing of such circumstances within twenty four (24) hours.

7. Services to be provided by the licensee

The licensee must provide ECS by means of an ECN operated by an ECNS licensee.

8. Safety measures

The Licensee must, in respect of all apparatus, equipment and installations that it owns, leases or uses, take reasonable and necessary safety measures to safeguard life or property, and limit exposure to electromagnetic emission, radiation and related risks.

9. Provision of information

- (1) *The Authority may, in the course of carrying out its obligations under the Act, require a Licensee to provide any information including documents or books not ordinarily required, so as to enable it to:*
 - (a) *monitor and enforce consumer protection, quality of service, competition, compliance with licence conditions and other requirements of the Act and related legislation;*
 - (b) *allow for the assessment and allocation of applicable fees and related requirements;*
 - (c) *facilitate the efficient use of radio frequency spectrum; and*
 - (d) *collect and compile information to be used for research purposes, planning, reporting and conducting inquiries.*
- (2) *In respect of each information request referred to in subregulation (1), except where otherwise addressed in applicable regulations, the Authority will provide, among other things, detailed specifications of its information request, applicable response times and a contact person to whom queries may be addressed.*
- (3) *A licensee must provide the information in accordance with such format as may be prescribed by the Authority.*
- (4) *In the event where a Licensee or its representative refuse or fail to provide the Authority with requested information in terms of subregulation (1), the Authority may, after reasonable attempts, refer the matter to the Complaints and Compliance Committee.*

[Reg. 9 substituted by Gen N 155/2016]

10. Publication of tariffs and fees

- (1) A Licensee may not provide any service for a charge, fee or other compensation, unless the price(s) for the service and other terms and conditions of the provision of such service.
 - (a) have been made known by:
 - (i) making such prices and terms and conditions available for inspection at its offices during business hours; and

- (ii) providing such details to anyone who requests same at no charge.
 - (b) have been filed with the Authority at least seven(7) days prior to the provision of the said service. In making such a filing, a Licensee must utilise a format approved by the Authority in writing.
- (2) A Licensee must provide to the Authority on a bi-annual basis, a record of the actual services provided and the actual tariffs charged thereof during the previous six months.

11. Metering and billing arrangements

- (1) A Licensee must install and operate metering and billing systems which accurately record the extent of the service(s) provided to any end-user.
- (2) A Licensee must provide an accurate invoice with a detailed statement of services rendered to any end-user at no charge, except where the end-user obtains services exclusively on a prepaid basis and the prices and terms of such prepaid service have been disclosed at the time of purchase.
- (3) The invoice must include information for the entire period covered by such invoice as follows:
 - (a) details of services rendered to the end-user; and
 - (b) breakdown of charges associated with such services.
- (4) Upon request by an end-user, the Licensee must provide an itemised bill, which contains a sufficient level of detail to allow verification of charges incurred in using the services provided by the licensee.
 - (a) Each detailed itemised bill shall contain at least the following information in relation to each individual transaction (voice or data call) charge incurred by the subscriber during the relevant billing period:
 - (1) destination,
 - (2) dialed number,
 - (3) date,
 - (4) time,
 - (5) duration; and
 - (6) charge for each individual transaction.
 - (b) The detailed itemised bill must be provided:

- (i) via post or in an electronic format; and
- (a)(ii) at such a price that takes into account the difference in the mode of delivery.

12. Contraventions and penalties

Any person that contravenes these Regulations is liable to a fine not less than R2 500, 00 (Two thousand, five hundred Rand) but not exceeding R100 000, 00 (One hundred thousand Rand).

[Reg. 12 substituted by Gen N 155/2016]

13. Short title and commencement

These regulations are called the Standard Terms and Conditions for Class Electronic Communications Services 2010, and will come into operation by notice in the Gazette.

14. Repeal of regulations

These regulations repeal Government Gazette No. 30530 containing the Standard Terms and Conditions for Class licences published in Notice 1138 of 30 November 2007 in its entirety

USAF REGULATIONS 2011

Applicable from 10 February 2011 (Regulations published in Government Notice 1270 of Government Gazette No. 31499 dated 10 October 2008 repealed)

1. Definitions

In these regulations, unless the context otherwise indicates, a word or expression to which a meaning has been assigned in the Act has the meaning so assigned.

“Act” means the Electronic Communications Act, 2005 (Act No. 36 of 2005, as amended)

“Agency fees” means the percentage of fixed fees due to the agent;

“Annual Turnover” means total revenue generated from Licensed Activity per annum less service provider discounts, agency fees, interconnection and facilities leasing charges, government grants and subsidies;

“Applicable Interest Rate” means the uniform interest rate set by the Minister of Finance in terms of section 80(1)(b) of the Public Finance Management Act 1 of 1999;

“BS Licensee” means broadcasting service licensee;

“ECNS Licensee” means Electronic Communications Network Service Licensee;

“ECS Licensee” means Electronic Communications Service Licensee;

“Fund” means the Universal Service and Access Fund established in terms of section 87(1) of the Act;

“Licensed Services” means ECS, ECNS and BS provided pursuant to a licence issued to a Licensee in terms of Chapters 3, 4 and 9 of the Act.

“the MDDA” means the Agency established in terms of the Media Development and Diversity Agency Act No. 14 of 2002;

“Service provider discounts” means financial incentives offered to service providers by licensees for the purpose of subscriber base improvement;

“USAF Contribution” means the payment due to the Fund in terms of these regulations.

2. Object of the regulations

- (1) These regulations seek to:
 - (a) prescribe the annual contributions to be paid to the Universal Service and Access Fund (“the Fund”) by persons issued with licences in terms of chapters 3 and 9 of the Act;
 - (b) specify the date when such contributions to the Fund become payable and the manner in which they must be paid.

3. Contributions to the universal service and access fund

- (1) Every holder of a licence granted in terms of Chapters 3, 4 and/or 9 or converted in terms of Chapter 15 of the Act, must pay an annual contribution of 0.2% of its Annual Turnover to the Fund.
- (2) A BS licensee who has paid an annual contribution to the MDDA must set off that contribution against its USAF Contribution, provided that the MDDA contribution and the USAF contribution against which it is set off are for the same financial year.

4. Payment of contributions

- (1) Where a legal entity holds any combination of a BS Licence, ECS Licence and/or ECNS Licence, such entity may calculate the USAF contribution based on the Annual Turnover from aggregated revenue generated from the combined licences.
- (2) Payments in respect of contributions to the Fund:
 - (a) are due annually based on the licensee’s financial year;
 - (b) are payable within 6 months from the end of the licensee’s financial year; and
 - (c) May only be paid by way of an electronic transfer or via a direct deposit into the Authority’s bank account, and
 - (d) must be based on the:
 - (i) Audited annual financial statement of the licensee; or

- (ii) Financial statements signed and sworn to by the accounting officer of the licensee where the licensee is not legally obliged to provide audited financial statements.

5. Interest

Interest on all late payments in respect of contributions to the Fund is payable at the Applicable Interest Rate and in accordance with the manner prescribed in regulation 4 where payment is overdue.

6. Amendment or repeal

Government Notice 1270 of Government Gazette No. 31499 dated 10 October 2008 is hereby repealed.

7. Contraventions and penalties

- (1) Upon a determination of non-compliance by the Complaints and Compliance Committee in terms of the ICASA Act, the Authority may impose a fine not exceeding:
 - (a) One Hundred Thousand Rands (R100, 000. 00) for contravention of regulations 3, 4(2) and 5.
 - (b) Fifty Thousand Rands (R50, 000. 00) for contravention of all the regulations not specified in regulation 7(1)(a), and
 - (c) Additional One Hundred Thousand Rands (R100, 000. 00) for repeated contravention of the regulations.

8. Short title and commencement

- (1) These regulations will be effective from the date of publication in the Government Gazette.
- (2) These regulations will be called the USAF Regulations, 2011.

Section 7(1): Contraventions and penalties

(1) Failure to pay the annual licence fees will result in the suspension of the licence issued by the Authority in terms of Chapter 3 of the Act until such time that the annual licence fees, plus interest, are paid in full.

(2) Failure to comply with any other provision in these regulations will result in a fine not exceeding one million rands (R1 000 000.00).