



ESWATINI COMMUNICATIONS COMMISSION

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6 February 2019

The Managing Director

Eswatini Post & Telecommunications Corporation

P.O. Box 125

Mbabane

Dear Sir,

INVESTIGATION IN TERMS OF SECTION 36(1)(A) OF THE SWAZILAND COMMUNICATIONS COMMISSION ACT 2013: COMPLAINT BY ESWATINI POST AND TELECOMMUNICATIONS CORPORATION AGAINST TOUCH IT – DECISION OF THE COMMISSION

The above matter refers .

Pursuant to the complaint laid by EPTC against Touch IT for an alleged contravention of Section 53 of the Eswatini Electronic Communications Act, 2013, the Commission wishes to advise that it has concluded its investigation.

In light of the foregoing, find enclosed herewith a report containing the Commission's Decision on the matter. Kindly be advised that Touch IT has also been served with the Decision.

We trust that you will find this to be in order.

Yours Sincerely,

Mvilawemphi Dlamini

Chief Executive

Company Stamp

Directors: Sipho Shongwe (Chairperson), Polycarp Dlamini (Vice Chairperson), Mvilawemphi Dlamini (Chief Executive), Bongiwe Dlamini, December Mavimbela, Zodwa Ginindza, Bheki Ndzinisa.

Company Secretary: Ozzie Thakatha.



REPORT AND DECISION OF THE COMMISSION ON INVESTIGATION OF TOUCH IT INVESTMENT (PTY) LIMITED IN TERMS OF SECTION 36(1)(a) OF ESWATINI COMMUNICATIONS COMMISSION ACT, 2013.

Prepared by	ESWATINI COMMUNICATIONS COMMISSION
Date	24 January 2019

TOUCH IT LICENSEE DETAILS

Name	Date of Licence issue	Type of licence	Scope of licence
Touch IT Investment (PTY) Limited	22 May 2017	General Licence Number <u>GECS/005/17/TOUCHIT</u>	<ul style="list-style-type: none"> ▪ Internet services ▪ Value added services ▪ Any other services as may be authorised by the Commission from time to time

INVESTIGATION IN TERMS OF SECTION 36(1)(A) OF THE ESWATINI COMMUNICATIONS COMMISSION ACT 2013 : COMPLAINT BY ESWATINI POST AND TELECOMMUNICATIONS CORPORATION AGAINST TOUCH IT – DECISION OF THE COMMISSION.

- 1.1. In July 2018, the Commission received a complaint from Eswatini Post and Telecommunications Corporation (hereinafter referred to as the Complainant) against Touch IT, a licensed internet service provider in the country.
- 1.2. The complaint received related to an alleged conduct by Touch IT which is perceived to be in contravention of Section 53(1) of the Electronic Communications Act, 2013. The Complainant averred that in terms of Section 53(1) the Complainant is entrusted with the exclusive right of establishing, constructing, maintaining and operating the national telecommunications backbone infrastructure within Eswatini and that the Complainant is licensed to provide international gateway services.

2. SUMMARY OF EPTC COMPLAINT.

- 2.1. EPTC submitted that:
- 2.2. In terms of section 53 of the Electronic Communications Act No. 9 of 2013 the Corporation is entrusted the exclusive right of establishing, constructing, maintaining and operating the national telecommunications backbone infrastructure within Eswatini. Further, and in terms of Clause 1.1.4 of its licence, (Individual Electronic Communications Licence), to provide international gateway services.
- 2.3. The import of the above provisions is that all international traffic must go through its backbone network utilizing an IP address in the Complainant's range thus any international internet traffic that does not go through this gateway is bypassing the gateway and constitutes a breach of the Act and Licence and therefore liable to censure by the Regulator.
- 2.4. The breach by Touch IT is detrimental to the business of the Complainant in one or more of the following ways:

- 2.4.1. Financial losses as a result of the bypass;
- 2.4.2. Discriminatory in effect since other service providers are mandated to comply and non-compliance by any one market player disrupts the market;
- 2.4.3. There was likelihood of end user complaints if service provided by the offending party is disrupted through no fault of the complainant.

3. INVESTIGATION INSTITUTED BY THE COMPLAINANT.

- 3.1. The Complainant submitted that it carried out an investigation (tracing a route from a client on the Touch IT network to Google in the United States of America) and determined that Touch IT breached the Act and/or Licence. The Complainant submitted that the tests conducted, categorically reflects that Touch IT has alternative routes for its internet provision and therefore is not compliant with the provisions of the law and Licence.

4. EFFORTS BY COMPLAINANT TO ADDRESS THE COMPLAINT WITH TOUCH IT.

- 4.1. The Complainant submitted that it addressed a letter to Touch IT informing them on the alleged violation of the Act, however, despite the lapse of the period given to Touch IT to respond to the allegations, no response was received and the letter not acknowledged.

5. CONTRAVENED PROVISIONS OF THE LAW ON WHICH COMPLAINT IS BASED – SECTION 53(1) OF THE ESWATINI ELECTRONIC COMMUNICATIONS ACT, 2013.

- 5.1. Section 53 on the Electronic Communications Act provides;
The Swaziland Post and Telecommunications Act, 1983, is amended by –

(a) Substituting for section 59 the following new section –

- (1) *"From the date of coming into force of the Swaziland Communications Commission Act, 2013, the Corporation shall have the exclusive right of establishing, constructing, maintaining and operating the national telecommunications back bone infrastructure within Swaziland.*

From the date of coming into force of the Swaziland Communications Commission Act, 2013, all other licensed operators and services shall have the right to establish the last mile interconnection to the national back bone infrastructure at interconnection rates that are subject to the regulatory control of the Commission.

- (2) *For a period of three years from the date of coming into force of the Swaziland Communications Act, 2013, the Corporation shall continue to provide the last mile services like all other licensed operator."*

6. INVESTIGATIONS BY THE COMMISSION IN TERMS OF SECTION 36 OF THE ESWATINI COMMUNICATIONS ACT, 2013.

- 6.1. The Commission conducted an investigation in terms of section 36(1)(a) of the Eswatini Communications Commission Act on the allegations made against Touch IT. Touch IT was afforded an opportunity by the Commission to make submissions in response to EPTC's complaint, which submissions were received in a form of written representations.

The submissions may be summarized as follows:

- 6.1.1. Touch IT conceded that they were bringing internet bandwidth directly into Eswatini without utilizing EPTC international gateway infrastructure but denied that they were in breach of Section 53 in that the said provision does not confer upon EPTC in monopoly on infrastructure but only gives exclusive right on the national backbone infrastructure which does not mean that operators cannot self-provide.

- 6.1.2. Section 53 does not confer on EPTC to distribute IP address ranges to operators as they are not in charge of distribution or management in the African region.
- 6.1.3. Touch IT uses wireless connection which does not in any way breach Section 53 and that the wireless connection to the internet does not in any manner disrupt the physical connection of EPTC to the internet.
- 6.1.4. That EPTC is engaging in unfair competition in terms of Section 53 because they should not be competing at retail level.
- 6.1.5. Touch IT is within their right to conduct its business in the manner they are doing.
- 6.1.6. Touch IT is not in breach of any licence and especially EPTC licence as it does not apply to them.
- 6.1.7. Touch IT further submitted their network diagram and client network provision.

7. TECHNICAL ANALYSIS OF TOUCH IT NETWORK INFRASTRUCTURE.

- 7.1. The network diagram presented by Touch IT to the Commission depicts the following:
 - 7.1.1. That Touch IT does not in any way source Internet bandwidth from EPTC or at any point link with EPTC's network;
 - 7.1.2. That Touch IT's upstream provider is Teraco in Johannesburg with links from South Africa and Mozambique;
 - 7.1.3. That Touch IT's network's in country nodes are riding on Eswatini Mobile's infrastructure.

8. FINDINGS OF THE COMMISSION.

- 8.1. Section 53(1) of the Electronic Communications Act, 2013 confers upon EPTC "...the exclusive right of establishing, constructing, maintaining and operating the national telecommunications backbone infrastructure within Swaziland". Section 53(2) of the same Act provides that "...all other licensed operators and services shall have the right to establish

the last mile interconnection to the national backbone infrastructure at interconnection rates that are subject to the regulatory control of the Commission”.

- 8.2. In providing its services Touch IT does not utilize the national backbone infrastructure as contemplated by Section 53 (1) and (2) of the Electronic Communications Act. This is amplified by Touch IT admission that they are not using any EPTC infrastructure nor its national backbone. Touch IT is sourcing bandwidth directly from Teraco into their network and bypasses the national backbone infrastructure thus in contravention of the Act.
- 8.3. Section 53(1) does not preclude service providers from sourcing bandwidth outside of Eswatini but only precludes service providers from providing same in the country without using the EPTC backbone infrastructure exclusively maintained by EPTC – which is declared an essential facility by the Electronic Communications Facilities Sharing Regulations 5(4), 2016.
- 8.4. Section 53(2) allows other licensees to establish the last mile interconnection to the national backbone infrastructure.
- 8.5. Clause 2.2 of the licence provides “In providing its services, the licensee shall use the services of a duly licenced electronic communications network service provider”. From the network architectural designs submitted by Touch IT, it is clear that they are riding on Eswatini Mobile’s network locally and thus are compliant with clause 2.2 of the licence since Eswatini Mobile is a duly licensed network operator.

9. DECISION OF THE COMMISSION.

- 9.1. The Commission has determined that there is *prima facie* evidence that Touch IT is in contravention of Section 53(1) and (2) of the Electronic Communications Act in that it bypasses the national backbone

infrastructure by transmitting bandwidth directly from Teraco to their network thus bypassing the national backbone infrastructure upon entering the borders of the Kingdom and that the contravention creates serious economic and operational problems for other licensees in the market.

- 9.2. With regards to the Contravention stated in 8.2 above, the Commission imposed an administrative fine on Touch IT.
- 9.3. Touch IT is directed to arrange with EPTC to utilize the national backbone infrastructure in accordance with Section 53 (1) and (2) of the Swaziland Electronic Communications Act, 2013 by or before 30 April 2019 from date of this Decision.
- 9.4. Touch IT may source bandwidth from a source of their choice. However, in bringing the bandwidth into their point of connection (or operational premises) and the borders of the Kingdom, they shall utilize the national backbone infrastructure established and maintained by EPTC in terms of Section 53(1) of the Electronic Communications Act.
- 9.5. Touch IT is directed to provide the Commission with a written progress report on the above by 30 April 2019.
- 9.6. The three (3) months period given above take into account the necessary technical measures that Touch IT may need to embark on to remedy the non-compliance findings and should not be construed as a condonation for Touch IT to continue providing services in contravention to the law and licence conditions.
- 9.7. The Commission does not make any order with regards to the prayer by EPTC to determine punitive damages suffered by the complainant. The Commission is of the view that the administrative fine imposed on Touch IT is sufficient and as such no order as to damages is made.

Commission is of the view that the administrative fine imposed on Touch IT is sufficient and as such no order as to damages is made.

9.8. The Decision is with effect from 24th January 2019.



Chief Executive