



31 January 2012

**Deputy-Director, Frequency Spectrum
Department of Communications**

For attention: Ms Cynthia Lesufi

Email: spectrum@doc.gov.za

Dear Ms Lesufi

ISPA SUBMISSION IN RESPECT OF THE DRAFT POLICY DIRECTIONS ON ELECTRONIC
COMMUNICATION SERVICES IN HIGH DEMAND SPECTRUM & EXPLOITING THE DIGITAL
DIVIDEND

1. We refer to the Draft Policy Directions on Radio Frequency Spectrum for Electronic Communications Services in High Demand Spectrum and Exploitation of the Digital Dividend Spectrum issued by the Honourable Minister on 14 December 2011 in terms of subsection 3(2) of the Electronic Communications Act 36 of 2005, and set out below ISPA's submissions with regard thereto.
2. Please address any enquiries relating to this Submission to Mr Dominic Cull, ISPA Regulatory Advisor, c/o regulatory@ispa.org.za.
3. ISPA wishes to participate in any hearings or other further process which the Minister may elect to undertake prior to the finalisation of the draft Policy Directions.

ISPA Management Committee:

Graham Beneke, Ant Brooks*, Marc Furman, David Gentleman, Wilmari Hannie*, Rob Hunter, Jenny King,
Mike Silber, Jaap Scholten, Elaine Zinn* (*ex officio)

GENERAL COMMENTS & SUMMARY OF SUBMISSIONS

4. ISPA believes that both of the draft policy directions embody much-needed frameworks and guidance for ICASA and industry and that, should they be finalised without material changes, they will serve to create a basis for the revolution of spectrum management in South Africa to the benefit of all her people.
5. ISPA accordingly extends its congratulations to the Minister and Team DoC on the publication of the draft policy directions and hopes that they will prove to be landmark interventions in the South Africa electronic communications market.
6. ISPA primary submissions can be summarised as follows:
 - 6.1. The Minister and the Department are requested to prioritise the completion of the South African Radio Frequency Spectrum Audit (SARFSA);
 - 6.2. The Minister is requested to consider providing further guidance to ICASA in the direction relating to high-demand spectrum to the effect that the assignment of a wholesale combinatorial license in the 800MHz and 2.6GHz bands be open only to independent third party operators which do not have a direct relationship with an existing radio frequency spectrum licensee holding an assignment below 3 GHz that it has leveraged to create a significant retail base in South Africa. ISPA believes that such an approach will:
 - 6.2.1. Minimise the role played by anti-competitive conduct and pricing distortions in frustrating the attainment of the stated national policy objectives and Government's commitment to 100% broadband penetration in South Africa;
 - 6.2.2. Ensure that an excessive cost is not attached to the assignment process; and
 - 6.2.3. Minimise the chances of the process being delayed by litigation or other court process.
 - 6.3. The Minister is requested to consider providing clearer guidance to ICASA in stipulating that an auction should only be utilised as a last resort in the assignment of high demand spectrum.

THE URGENT NEED FOR THE COMPLETION OF THE SOUTH AFRICAN RADIO FREQUENCY SPECTRUM AUDIT

7. It remains a fundamental impediment to the efficient management of spectrum in South Africa that a comprehensive audit of existing assignments and the use thereof has not been completed.
8. ISPA refers in this regard to the Terms of Reference for the South African Radio Frequency Spectrum Audit (SARFSA) published by the Department in February 2011 in line with the requirement in its Strategic Plan for 2011 to 2014. In emphasising its view that an audit is absolutely critical to the success of the initiatives outlined in the draft policy directions, ISPA refers to the stated purpose of the Audit, viz.:
 - 8.1. To identify what spectrum is licensed to whom and for what purpose;
 - 8.2. To determine how much of the licensed spectrum is being actually used, by whom and where and to investigate whether these frequencies are being used as efficiently as possible; and
 - 8.3. To determine how much of the licensed spectrum is not being used, and to whom such unused spectrum is licensed.
9. Paragraph 1.7 of the Terms of Reference includes the following statement which underpins the Department's own recognition of the crucial role to be played by the planned Audit:

"If the spectrum audit is not conducted, the country will not know its actual usage of the spectrum and cannot plan for emerging technologies that will benefit the society. Consequently, this will have serious ramifications in affect negatively optimizing the use of spectrum, stimulating growth of wireless broadband, reducing prices for telecommunications services and broadening the participation in the economy as proper allocation of the spectrum will not be ensured to support national interest, development and diversity as required by the ECA and Government's commitment to accelerated economic growth.

The spectrum audit will play a pivotal role in ensuring that industry, Government and other spectrum users derive maximum benefit from the radio spectrum. Further, the spectrum audit is aimed at releasing the maximum amount of spectrum to the market and increasing opportunities for the development of innovative new services while prioritising the amount of spectrum dedicated to public use e.g. community radio and television and mobile technologies."

(our emphasis)

10. ISPA accordingly urges the Minister and the Department to make the completion of the spectrum audit – at least for the 174MHz to 3GHz range – a top priority for 2012. It is clear that the national policy objectives identified in the draft directions will not be optimally attained without SARFSA having been completed.

COMMENTS ON THE DRAFT POLICY DIRECTIONS FOR ELECTRONIC COMMUNICATIONS SERVICES IN HIGH DEMAND SPECTRUM

11. ISPA agrees with and supports the national policy objectives set out in the Background to the draft policy direction on licensing of frequency in high-demand bands.

11.1. ISPA submits, however, that, given the explicit focus of the Electronic Communications Act on Historically Disadvantaged Individual (HDI) equity ownership, the reference to broad based black economic empowerment should be to HDI equity ownership.

12. ISPA further agrees with and supports the notion of a combinatorial licensing approach as being critical to meeting the stated national policy objectives.

13. ISPA wishes, however, to urge the Minister to consider providing greater guidance to ICASA on how such a combinatorial licensing approach could be structured so as to ensure that this process is undertaken in a manner which will optimise the prospect of attaining these objectives.

14. ISPA submits that the Minister consider amending paragraph 2.1.7 of the draft direction to specify that ICASA should also explore restricting the assignment of the combinatorial award to a non-aligned neutral third party, i.e. a party which does not already have radio frequency spectrum licensing in bands between 0 and 3GHz which it has used to establish a significant retail base and which has no direct relationship with such an entity.

15. In this regard ISPA requests that the Minister take into account the following:

15.1. Paragraph 2.1.2 of the draft direction explicitly recognises “ the limited bandwidth” available in the 800MHz band as the reason for directing that licensing of available spectrum be done on a wholesale open access basis.

15.2. Paragraph 2.1.7 of the draft direction further recognises that ICASA is directed to explore a combinatorial award of the 800MHz and 2.6GHz bands “for wireless broadband access applications”.

15.3. The attainment of the national policy objectives set out in the draft direction will be facilitated by ensuring that the combinatorial award is made at the lowest possible price so as to ensure that the capital otherwise spent in an auction can be directly applied to network roll-out. Ensuring that money is not wasted in the assignment process will, in particular, ensure that funds are available to meet rural network rollout targets contemplated in paragraph 2.1.6 of the draft direction on the part of the successful bidder.

- 15.4. It is further clear that the assignment of the combinatorial award will not result in an optimal attainment of the stated national policy objectives in a situation where the combinatorial award is made to an entity which is formed as a Special Purpose Vehicle (SPV) that has been specifically created by one of the incumbent licensees.

ISPA is aware that incumbent licensees are in the process of forming such SPVs and, pursuant to the publication of the Draft Assignment Plan and Draft ITA by ICASA, such licensees have been seeking to assess whether such SPVs will be acceptable to ICASA.

The clear danger to developing a competitive industry and the achievement of the national policy objectives lies in the vertical integration which would result from making the award to such an SPV. South Africa (as well as many other jurisdictions) has compelling evidence as to how vertical integration – where one party controls an upstream resource or essential facility and simultaneously competes in the downstream market with those relying on the upstream resource or essential facility – results in anti-competitive conduct. The local loop unbundling (LLU) exercise in South Africa and the underlying need for this process to be completed is just one example of how vertical integration can stifle competition and distort both wholesale and retail pricing.

ISPA submits that South Africa should learn from its experience with regard to vertically integrated entities: specifically that it is neither possible nor realistic to use regulation in order to prevent anti-competitive conduct and pricing distortion. In other words there is no basis to anticipate that the behaviour of an SPV linked to an incumbent would be sufficiently constrained by the current or any future regulatory framework. The reality is that it will be impossible for an incumbent whose SPV is assigned the combinatorial award to erect an effective Chinese wall separating out their wholesale and retail operations and it will be impossible for ICASA to monitor and enforce such separation.

While ISPA's experience indicates that vertical integration results in delays in ordering circuits and services, the single biggest danger posed by vertical integration to the attainment of the goal of ensuring universal access to broadband by 2020 is the setting and maintenance of unjustifiable wholesale pricing and the knock-on effect this will have in the retail market. ISPA submits that making the award to an SPV linked to an incumbent will serve to impede Government's stated objective of lowering broadband and other communication service prices.

- 15.5. ISPA further submits that allowing SPVs of this nature to participate in the process leading to the assignment of a combinatorial award will inevitably lead to significantly higher prices being

paid for this assignment. This follows from the acute awareness on the part of incumbent operators that – were the combinatorial award to be assigned to an SPV linked to one of their competitors - this would place them at a competitive disadvantage. Once SPVs of this nature are permitted to participate the direct consequence will be a higher auction price and this will in turn disincentivise the winning bidder to prioritise rural network roll-out as it will have a more urgent need to earn revenue by targeting urban centres.

- 15.6. Permitting SPVs to participate also, ISPA submits, greatly increases the chance of the process of assignment of frequency being the subject of litigious processes. As noted above, an incumbent whose SPV has not been successful in the auction will be all too aware that it will be at a marked competitive disadvantage and will therefore have a significant motivation to litigate in order to delay the advantage accruing to its successful competitor.
16. ISPA further wishes to emphasise the fact that the incumbent mobile network operators are in no way being forced to abandon their existing networks. Rather they will be able to vary and optimise the mix of services being provided as between the wholesale network and their own networks.
17. Given acceptance that there is insufficient spectrum available to cater for individual assignments, it must follow that a wholesale model is the rational manner in which to obtain access to critical spectral resources. Logic then further dictates that it would be rational for incumbents to minimise the cost of acquisition of these resources.
18. ICASA have, in publishing its draft Spectrum Plan and ITA, referred to the model used in Russia, where an independent third party has been assigned a combinatorial award and charged with rolling out a network to a vast geographical area including around 180 cities. ISPA submits that there is accordingly a successful model utilising an independent third party which can be looked to to inform the South African process. ISPA notes with interest that the financing of this massive network and the meeting of challenges around returns for the roll-out were partly met by selling put options to incumbents, i.e. after 5 years they would have the option to take up equivalent shareholdings in the network operator.
19. Finally as regards the draft direction on high demand spectrum, ISPA requests that the Minister consider providing greater guidance to ICASA on the circumstances under which resort is to be had to a spectrum auction. In this regard ISPA notes that paragraphs 2.1.4 and 2.1.5 of the draft direction appear to be slightly contradictory. ISPA supports a position aligned with paragraph 2.1.4 in terms of which an auction should only be used as a last resort as such an approach could potentially obviate the need for the successful party to apply capital to the assignment process rather than the network

roll-out process. ISPA submits that the Draft ITA published by ICASA sets the threshold for proceeding to auction too low, with the net result that an auction is an “inevitability” as opposed to a “last resort”.

POLICY DIRECTIONS ON EXPLOITING THE DIGITAL DIVIDEND

20. ISPA has no comment to offer with regard to the draft directions relating to exploring the potential of the digital dividend other than to once again congratulate the Minister and Team DoC on a job well done.

Regards

INTERNET SERVICE PROVIDERS' ASSOCIATION

Per:

ISPA Joint Chairs

(the above intended as an electronic signature)