



13 November 2015

Independent Communications Authority of South Africa

Attention: Mr Jake Mongalo

Per e-mail: jmongalo@icasa.org.za

Dear Sir

SUBMISSION ON INFRASTRUCTURE SHARING DISCUSSION DOCUMENT

1. Introduction

ISPA refers to the Discussion Document on Infrastructure Sharing published by the Authority for comment on 15 September 2015 (“**the Discussion Document**”) and sets out its submissions in response thereto below.

2. ISPA’s interest in the Discussion Document

- 2.1. The Internet Service Providers Association (ISPA) is a South African Internet industry body not for gain. ISPA is a voluntary organisation, representing the interests of its members.
- 2.2. Established on 6 June 1996, the association currently represents in excess of 150 Internet Service Providers with a diverse range of services and target markets. Significantly the number of ISPA members increase almost on a monthly basis.
- 2.3. The Minister of Communications formally recognised ISPA as an Industry Representative Body in terms of section 71 of the Electronic Communications and Transactions Act, 2002 on 20 May 2009.
- 2.4. ISPA’s membership comprises a strong blend of providers of network and communications services, as well as resellers of network and communication services.
- 2.5. ISPA members generally focus on services and competition at the service level, and thus have a vested interest in assisting ICASA with achieving its objectives “*in order to reduce wholesale costs and encourage services-based competition*”.

ISPA Management Committee:

Ant Brooks*, Graham Beneke, Guy Halse, Jenny King, Siyabonga Madyibi,
Duncan Martin, Mohammad Patel, Mike Silber, Elaine Zinn* (*ex officio)

3. General submissions

Clarity

- 3.1. It is critical for there to be clarity around and a shared understanding of the different concepts and processes that are raised in the Discussion Document.

Wholesale Access

- 3.2. Infrastructure sharing should not be confused with wholesale access.
- 3.3. ISPA understands that infrastructure sharing will generally take place between more-or-less equally-positioned entities. Wholesale access implies a technical and commercial arrangement to use an existing network rather than a joint venture type arrangement.
- 3.4. ISPA appreciates the intention behind the launch of the inquiry into infrastructure sharing and the relationship between infrastructure sharing and open access.
- 3.5. **ISPA, is not, however, convinced that there is a compelling case for the Authority to prioritise infrastructure sharing above the development and enforcement of an effective wholesale access regime.** This regime should seek to:
 - 3.5.1. Remove unfair price discrimination between wholesale/retail arms or “special” deals entered into; and
 - 3.5.2. Introduce greater transparency into the availability of wholesale products/ infrastructure available for sharing on a wholesale basis.
- 3.6. Infrastructure sharing initiatives would therefore be most effectively identified and addressed by a proper market analysis of the Internet services market with ancillary interventions under Chapter 10 of the ECA.
- 3.7. **ISPA submits that there is more value in focusing on wholesale layer 2 and layer 3 services and ensuring that these are offered on an open access basis. In this regard, ISPA submits that particular emphasis should be the last mile networks, as it is the access network that (a) is required to deliver a service to a consumer and (b) is the highest cost component directly attributed to and recovered from consumers.**
- 3.8. The introduction of the IPC ADSL access product by Telkom – as imperfect as it is - shows that an effective wholesale mechanism is one that allows the downstream provider with the flexibility to differentiate and innovate. This in turn leads to reductions in retail pricing (as has been seen in the ADSL ISP market over the past decade).
- 3.9. Such a mechanism is glaringly opposite in the offerings of the largest Internet access providers in South Africa: Vodacom and MTN.
- 3.10. The interaction between the competition authorities and Telkom and the eventual launching of a structurally-separated OpenServe shows the way and is a model which should be applied to other incumbent providers.

Infrastructure as a colloquial term for networks and facilities

- 3.11. ISPA is concerned with the conflation of electronic communication facilities ('ECF') and electronic communication networks ('ECN') in the Discussion Document.
- 3.12. The various stakeholders, market dynamics, operational requirements, risks, benefits and interactions between parties are vastly different in the ECF and ECN environments. In the ECN environment, licensees normally interact directly with each other, whilst in the ECF environment there is often an indirect relationship between licensees with an unlicensed party being the common denominator, where the absence of "good neighbour" guidelines often lead to adverse consequences.
- 3.13. ISPA illustrates in the table below how the sharing of ECNs and ECFs raises different considerations and is achieved using different remedies.

| | | |
|------------------------|-----|----------------------------------------------------|
| INFRASTRUCTURE SHARING | ECN | INTERCONNECTION (including peering and transit) |
| | | WHOLESALE ACCESS |
| | | NETWORK SHARING |
| | ECF | FACILITIES LEASING (Between licensees - Chapter 8) |
| | | FACILITIES LEASING (With non-licensees) |
| | | FACILITIES SHARING |

- 3.14. Sharing of ECNs and ECFs is not– a mechanism for larger entities to subsidise network builds for smaller entities to utilise. This is more properly wholesale access: either in the form of interconnection when applied to ECNs or facilities leasing when applied to ECFs.**

Interconnection and facilities leasing regulations

- 3.15. There is an urgent need to review the current interconnection and facilities leasing regimes. Interconnection and facilities leasing are fundamental building blocks of the Internet. Why have the provisions of the ECA regarding essential facilities not been implemented? Why is the focus on interconnect regulations mostly limited to voice interconnect agreements?

Rapid Deployment Guidelines

- 3.16. The process to develop regulations for rapid deployment of electronic communications facilities is related to this inquiry. ISPA understands that the Authority is awaiting the required policy but consideration should be given to what aspects raised in the inquiry will be regulated under future section 21 regulations.

4. Responses to questions posed in the Discussion Document

Do you believe that the Authority should deal with infrastructure sharing matters in one regulation?

ISPA is of the view that a distinction should be drawn between the sharing of electronic communications facilities and the sharing of electronic communication networks.

Do you agree that infrastructure sharing will encourage the deployment of networks to rural and sparsely populated areas? If not, please provide the reason(s) for your answer.

ISPA does not support the view that infrastructure sharing will always assist in meeting the challenge of building access networks in hard-to-serve areas. Where there is one or a very limited number of entities operating in such areas, infrastructure can't be shared if there aren't people to share it. Those areas are economically marginal and enforced sharing may even provide a disincentive to invest. This should not detract from the role of effective facilities leasing regime and commercially driven infrastructure sharing in expanding broadband networks in other areas.

In your opinion, how do you think infrastructure sharing will encourage service-based competition?

ISPA has submitted that wholesale access is distinct from infrastructure sharing. Accordingly, ISPA is of the view that regulatory intervention under the provisions of Chapter 10 will be required in addition to infrastructure sharing regulations.

To what extent do you believe that the objectives of infrastructure sharing are reached?

To the extent that infrastructure sharing has been shaped by market forces the identified objectives have been reached as a consequence. As mentioned above, the extent to which such benefits are expressed in reductions in the cost to communicate is a separate enquiry.

Please list other benefits realised as a result of infrastructure sharing

The Discussion Document in paragraph 4.1 sets out a comprehensive list of potential benefits and ISPA agrees with these.

Do you think that it is necessary for the Authority regulate for 'one-build' civil works and mast erections at this time? Please state your reasons?

As noted in the comments above regarding the scope of this inquiry there is significant overlap here with the process to develop rapid deployment guidelines. The Authority should be cautious of over-regulation that removes flexibility from the various build options available. There is room here for incentivising but ISPA believes that commercial pressures and interactions with landowners and authorities will continue to drive a trend towards shared deployments.

In your view, what incentives will encourage infrastructure sharing in general?

ISPA welcomes the focus on incentives and encouragement of infrastructure sharing, which we believe to be a more effective means to an end than the imposition of obligations.

What form could these incentives take?

- Financial incentives such as allowing deductions from annual license fees, USAF contributions and annual radio frequency spectrum licence fees.
- Operational incentives such as preferential access to radio frequency spectrum surrounding a shared high-site.
- The provision of universal access subsidies to defray civil engineering costs.

ISPA notes in this regard that it is unfortunate that the Authority has moved recently to disincentivise sharing by removing the allowable deduction for facilities leasing and interconnection previously applied in the calculation of license fees under the General License Fee Regulations 2012. The sole amendment introduced by the General License Fee Amendment Regulations 2014 was to amend the definition of licensed services as follows:

“Licensed Service” as defined in the Electronic Communications Act under “broadcasting service”, “electronic communications service” and “electronic communications network service”; and as contained in the relevant license ~~and does not include the resale of electronic communications services, service provider discounts, agency fees, interconnection and facilities leasing charges, and government grants and subsidies;~~

In your view, how can the Authority improve on its intervention in terms of non-discriminatory access to infrastructure?

Non-discriminatory access to electronic network services (especially the last mile access networks) can also be promoted with proper wholesale open access principles, and need not only be achieved with intervention in facilities sharing.

Would you say that the facilities leasing regulations adequately cater for infrastructure sharing needs in South Africa? If not, please state the areas that have not been covered.

Section 43(3) of the ECA sets out a non-exhaustive list of matters that the Authority may include in electronic communications facilities regulations. It is apparent from Section 43(3) contemplates sharing of both passive and active facilities.

The Electronic Communications Facilities Regulations 2010 create a framework for the leasing of ECFs but do not provide for many of the matters set out in section 43(3). This framework needs to be further developed in respect of specific applications of leasing such as local loop unbundling and spectrum sharing.

There is scope for interventions under Chapter 10 of the ECA aimed at assessing the competitiveness of facilities leasing markets and the desirability of imposing pro-competitive conditions including pricing remedies. The Authority has not exercised any of its powers in respect of mandating access to essential facilities notwithstanding the recent amendment of the ECA and the nature of the powers afforded to the Authority.

It therefore appears that the ECA creates a framework for the sharing of both active and passive ECFs and that is what is required is for the Authority to utilise the relevant provisions of Chapter 8 of the ECA. The failure of the Authority to utilise the provisions of Chapter 8 relating to essential facilities is inexplicable given the nature of the powers involved.

ISPA notes further that there are a variety of ECFs which are not owned or operated by or under the control of an ECNS licensee. This includes mobile towers owned by tower companies such as ATC and Eaton as well as ducting and cabling in business parks and other multi-tenant complexes or buildings. In this regard, the lack of clear legal rights for licensees have often frustrated and prevented ISPA members from being able to deliver services to its customers affordably, or at all.

Do you agree with the Authority on the definition of passive infrastructure? If not, please provide an alternative definition.

ISPA submits that the term passive facilities would be more appropriate. Passive facilities would also include items such as equipment shelters, meet-me-rooms, internal cabling and reticulation.

Please state other passive infrastructure that you consider essential for sharing.

This should be a reference to passive electronic communications facilities as contained in the definition in section 1 of the ECA.

Please state the advantages and disadvantages of passive infrastructure sharing.

Please state the advantages and disadvantages of active infrastructure sharing.

The major advantages of the sharing would be linked to benefits arising out of the sharing of capital expenditure. These benefits must however be weighed against the increase in operational costs as a result of sharing. From an ISPA perspective, the operational costs are what mostly determines the wholesale pricing of network providers. It is for this reason that ISPA maintains that it is essential to do a comprehensive market assessment to determine the impact that sharing has or will have on wholesale pricing.

Do you agree with the Authority on the definition of active infrastructure? If not, please provide an alternative definition.

ISPA does not disagree with the definition.

Please state other active infrastructure that you consider essential for sharing.

ISPA submits that the sharing of access networks (whether it be fixed or wireless) is critical to promoting competition at the services layer.

5. Conclusion

ISPA supports:

- Incentives / obligations around passive infrastructure sharing where there is found to be market failure
- That sharing of active ECFs not be prohibited
- The prioritisation of sharing through wholesale access regulation

ISPA has noted the publication by the Minister of Telecommunications and Postal Services of a draft policy direction calling on ICASA to take steps to use Chapter 10 of the ECA to investigate the broadband market in South Africa and consider whether pro-competitive obligations should be imposed on some or all licensees in order to promote competition in the provision of broadband services and reduce the cost of data.

ISPA submits that the prioritisation of this matter by the Minister and his request for the Authority to prioritise competition in the broadband services market supports ISPA's central submission that the focus of the Authority should be on wholesale access.

ISPA trusts that the above submissions will assist the Authority in its deliberations around this critical process.

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ISPA REGULATORY ADVISORS