



23 June 2014

**Independent Communications Authority of South Africa**

Attention: Mr Christian Mhlanga

Per email: [cmhlanga@icasa.org.za](mailto:cmhlanga@icasa.org.za)

CC. The Chairperson [chairperson@icasa.org.za](mailto:chairperson@icasa.org.za)

Dear Sir

**ISPA SUBMISSION ON ICASA'S HIGH-LEVEL INQUIRY INTO THE STATE OF COMPETITION IN THE SOUTH AFRICAN ICT SECTOR**

1. ISPA welcomes the decision of the Authority to launch a high level inquiry into the state of competition in the Information and Communications Technology (ICT) sector in terms of s4B(1)(a) of the Independent Communications Authority of South Africa Act 13 of 2000, as amended ("the ICASA Act").
2. ISPA has noted the procedure which the Authority wishes to pursue and that there will be multiple opportunities for engagement with the process. ISPA reserves the right to augment these initial submissions at a later stage.
3. ISPA's comments are for the most part restricted to telecommunications and Internet-related issues.
4. ISPA records its interest in participating in any further proceedings within the scope of this Inquiry.

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**ISPA Management Committee:**

Ant Brooks\*, Graham Beneke, Marc Furman, Jenny King,  
Duncan Martin, Mohammad Patel, Mike Silber, Warrick Ward-Cox, Elaine Zinn\* (\*ex officio)

## GENERAL COMMENTS

*“They have been very slow to modernize local loop infrastructure, even when sharply increasing demand for digital services since 1994 warranted such investments. They have treated the monopoly of local services market as cash cows, using cash flow for dividends, share repurchases, acquisitions, and lobbying activities rather than for R&D or capital investment in new technology. They have merged with and acquired each other, reducing the total number of large local services providers from nine to four since the passage of the 1996 Telecommunications Act. They have deliberately and systematically avoided competing with each other despite making repeated public statements implying that it would be economically rational for them to do so, and in some cases despite stating that they intended to do so. And they have engaged in massive, highly coordinated political lobbying, regulatory and litigation activities intended to preserve the status quo.”*

(A description of the US market narrated by Economist Charles Ferguson in 2004)

5. The parallels with the local ICT market are obvious.
6. ISPA supports the following statements raised in the Notice:
  - 6.1. That it is an explicit object of the ECA to promote competition within the ICT sector and to promote and facilitate the convergence of telecommunications, broadcasting, information technologies and other services contemplated in the ECA.
  - 6.2. There has been considerable flux in the markets for the provision of electronic communications services and electronic communications services. This should not be taken to mean that these markets have now settled into a stable pattern: on the contrary the pace of change is accelerating and both the market and the regulator are uncertain in how to deal with this.
  - 6.3. The cost to communicate – as evidenced by local and international benchmarks – remains stubbornly high. Nevertheless there is evidence that – where the Authority is able to intervene in the market to stimulate competition – this has a demonstrable impact on the cost to communicate.
7. ISPA does not, however support the statement that “there is the problem that the simple equation that increased competition automatically leads to a reduction in the cost of communication has not taken place in reality”.
  - 7.1. This statement is unfounded and should not form a starting premise for the Authority in this Inquiry.
  - 7.2. Increased competition in the provision of international connectivity has led to a reduction in the cost to communicate.
  - 7.3. Increased competition in the provision of national connectivity services has led to a reduction in the cost to communicate.
  - 7.4. Increased competition in the provision of Internet access services has led to a reduction in the cost to communicate.

- 7.5. Increased competition in the provision of mobile data services through the entry of Telkom Mobile and the re-orientation of Cell C has led to a reduction in the cost to communicate.
- 7.6. The Authority’s intervention to stimulate competition in the provision of voice calls through the call termination rate processes has led to a reduction in the cost to communicate.
- 7.7. When reference is made to “increased competition” this generally refers to the licence conversion process and the resultant issuing of more than 500 IECS and IECNS licences. But it is already well-established that the impact of broadening the right to self-provide was hamstrung by the failure to make available high-demand spectrum and the difficulties in obtaining the permissions necessary to deploy fibre networks. This (unwanted) liberalisation of service licensing cannot - in isolation - be regarded as having introduced competition.
8. ISPA’s submission is that local empirical evidence at our disposal shows that the relationship between increased competition and a lower cost to communicate is valid (although not automatic). The introduction of greater competition – whether through convergence, disruption, regulatory intervention or otherwise – should remain a primary goal of the Authority.

**Context for competition regulation**

9. It is important not to lose sight of the targets that have been set and that the role of the Authority and the issues being discussed as part of this Inquiry are crucial determinants of whether or not these targets will be achieved.

Target	Penetration measure	Baseline (2013)	By 2016	By 2020	By 2030
<b>Broadband access in Mbps user experience</b>	% of population	33.7% Internet access	50% at 5Mbps	90% at 5Mbps 50% at 100Mbps	100% at 10Mbps 80% at 100Mbps
<b>Schools</b>	% of schools	25% connected	50% at 10 Mbps	100% at 10Mbps 80% at 100Mbps	100% at 1Gbps
<b>Health facilities</b>	% of health facilities	13% connected	50% at 10Mbps	100% at 10Mbps 80% at 100Mbps	100% at 1Gbps
<b>Public sector facilities</b>	% of government offices		50% at 5Mbps	100% at 10Mbps	100% at 100Mbps

*Table: SA Connect National Broadband Policy connectivity targets*

**Can ICASA regulate competition in the SA ICT market?**

*While it may appear that many of these issues are policy matters, and that they could be addressed in the ICT Policy Green Paper consultation process, the Authority in its mandate of safe-guarding public interest is compelled to guard against market failure, and wishes to establish what corrective measures can be put in place to ensure a competitive market which delivers goods more efficiently to end-users over the short to medium term. The option to follow an inquiry is further necessitated by*

*prevalent information asymmetries, appeals for regulatory certainty and significant technological changes. As the Authority is a pro-competitive regulator in terms of the ECA, the conduct of the inquiry will not affect pro-competitive activities in the Authority's strategic plan. It is sometimes said that one can't see the wood from the trees. The inquiry aims precisely to take a look at the wood and report on the view. Respondents to the public consultation process are therefore requested to think "outside the box" and view the inquiry as an exploration of these issues and how they may affect the regulation of competition in the ICT sector as a whole.*

10. ISPA has reservations about the current ability of ICASA to operate as an economic regulator such as to promote competition in South Africa. These are based on the track record of the Authority in this regard which has, with respect, featured a large number of false starts and missteps.
  - 10.1. Outside of call termination, ISPA is hard-pressed to identify interventions in the market by the Authority which have demonstrably promoted competition.
  - 10.2. More fundamentally it appears to ISPA that there is still no clarity on the manner in which the service licensing framework set out in the ECA is to be applied or, indeed, what does and what does not constitute a licensed service. In the absence of the Authority asserting itself in this regard this base uncertainty manifests throughout the regulatory environment with licensees adopting interpretations tailored to their own agendas.
11. That this is so is not surprising given the complexity of competition regulation under the ECA on the one hand and the limited resources which the Authority has to pursue such regulation. It is now trite that the Authority has been under-resourced since inception without any effort of substance having been made to address this.
12. ISPA has noted the recent realignment of the political institutional structure as well as the focus on the optimal structure and role of ICASA which forms part of the ICT policy review process. ISPA is also aware of the simplifications to Chapter 10 of the ECA introduced by the Electronic Communications Amendment Act 1 of 2014.
13. Whether or not these changes will make any difference to the ability of the Authority to make progress with issues such as LLU, reforms to the numbering plan regulations, carrier pre-select and other long-outstanding pro-competitive measures which were to be introduced under the ECA, remains to be seen.
14. What is already obvious, however, is that this Inquiry and other processes launched by the Authority will come to nought unless the challenges facing the Authority are addressed.

## **CURRENT STATE OF COMPETITION IN THE ICT SECTOR AS A WHOLE**

16. Competition is evident and beneficial in:
  - 16.1. International connectivity
  - 16.2. Retail Internet access services
  - 16.3. Data centres and Internet exchange points (IXPs)
  - 16.4. Mobile voice services
17. Competition is evident but underdeveloped in:
  - 17.1. National connectivity
  - 17.2. Wholesale Internet access services
  - 17.3. Fixed voice services
18. Competition is not evident to any substantial degree in
  - 18.1. Local access connectivity

### **Wholesale mobile data offerings**

19. ISPA submits that the most critical matter for ICASA to address is the need for the introduction of competition in the mobile data services market.
20. The impact of service competition in the fixed line environment – even within the scope of the limitations of an unbundled resale model - has unquestionably resulted in consumer benefits: lower per-Gigabyte pricing, uncapped products and a greater variety of innovative services being examples.
21. It is obvious that service competition is largely absent in the mobile services sector outside of the incumbents, notwithstanding that there are a substantial number of new entrants who would enter the mobile services resale market were the incumbents to create opportunities to do so.
22. Given that the majority of South Africans currently access broadband services through a mobile device and that the trend towards mobile access will intensify, addressing this market failure has the potential to address the obstacle which affordability presents to achieving the SA Connect target of universal service and access to broadband services for all South Africans by 2020.
23. There is no doubt that universal service will be achieved in the first instance through the mobile networks, with people using their handsets as the device with which they access broadband and other services. Already the mobile networks have close to 99% “2G” coverage with “3G” at around 84% coverage and likely to be pervasive in the next 2-4 years.
24. ISPA submits that there is ample evidence that South Africa has an “affordability gap” rather than an “access gap”.
25. ISPA wishes to state its case for greater mobile services competition in the following strong and simple terms:

- 25.1. In the fixed-line broadband market there has been a massive pricing and service benefit to ADSL customers over the past two years as a result of strong competition in the fixed-line broadband services market.
  - 25.2. Consumers have seen per GB pricing falling from R70 to current pricing which is as low as R8 per GB. At the same time competition from aggressive ISPs has seen the explosion of uncapped broadband product, with an uncapped 1 Mbps account now costing as little as R199 per month excluding line rental costs.
  - 25.3. It is no exaggeration to say that full competition has revolutionised the provision of fixed-line broadband services in South Africa. This has created significant value for consumers and facilitated productivity in the SMME and corporate markets which typically use ADSL as their primary broadband connection.
  - 25.4. This is amply illustrated by the manner in which ISPs immediately passed on to their customers the benefits of the 30% IPC cost reduction provided by Telkom, indicative of a market in which the benefits of full competition are being absorbed by consumers.
  - 25.5. There is agreement that the vast majority of South Africans, who currently do not have access to broadband access will, initially at least, obtain such access through a mobile network using a smartphone or other handset capable of allowing such access.
  - 25.6. But service competition is largely absent in the mobile services sector outside of the incumbents, notwithstanding that there are a substantial number of new entrants who would enter the mobile services resale market were the incumbents to create opportunities to do so.
    - 25.6.1. Although APN solutions are currently available from mobile operators they are not price competitive, making it impossible for ISPs or other operators to resell mobile broadband at competitive prices. In fact it is cheaper to buy mobile broadband in the open market than it is to buy it from the mobile operators on an APN solution. The kind of APN solutions available are not the kind that allow ISPs to resell on an 'open basis', they are typically only corporate-type APNs.
    - 25.6.2. Currently there is also no regional breakout at competitive pricing.
26. The form of intervention to be made is relatively simple and, with sufficient political will, easy to implement.
    - 26.1. ISPA strongly suggests that the mobile network operators should be regulated to offer wholesale solutions on their networks to qualifying third parties at prices related to those which they effectively charge to their own retail arm. ISPA refers to the settlement agreement entered into between the Competition Commission and Telkom which effectively imposes functional separation on Telkom through the imposition of a transfer pricing programme and a code of conduct regulating the interaction between Telkom's wholesale and retail divisions.

- 26.2. This will create a fully-competitive reseller market below the mobile network operators, in the same manner that such a market exists below Telkom.
- 26.3. Properly regulated, we have no doubt that this will have a substantial impact on broadband penetration and usage in South Africa.

27. The Authority has succinctly captured this in its Notice of this Inquiry:

*“The focus on voice services and termination rates are a distraction since these are supposed to be approaching zero, especially considering the transition to IP. Should the actual focus not be data pricing, considering the need for a sustainable information society?”*

## CHALLENGES TO CREATING A LEVEL PLAYING FIELD ACROSS PLATFORMS

28. ISPA's position as regards the convergence of services and platforms is that this is a technology-driven process and that regulators should take care not to impeded or restrict this process.
29. ISPA has noted the outcomes of the Final Report on Review of Broadcasting Regulatory Framework published by the Authority in June 2013. ISPA believes that the Authority's position on IPTV constitutes one example of an unwarranted constraint on the deployment of new technology.

*How can more effective competition be introduced in the subscription television broadcasting environment? The mobile sector has effectively moved to an IP platform. What are the immediate implications for the ICT market?*

*[M]ultiple closed transactions between mobile companies and content developers are taking place outside any regulatory framework, yet broadcasters continue to be subject to strict rules.*

30. The critical decision to be taken is whether to restrict the development and implementation of new technologies by seeking to impose historically-derived obligations on the provision of services using such technologies, or whether to embrace the fact that IP networks are global in nature and not practically susceptible to regulation of this nature. Is local content regulation still relevant in a world in which the delivery of content has converged onto IP networks and the distinctions between broadcasting and telecommunications have fallen away?
31. The largely-failed attempts to introduce competition in the subscription broadcasting services market clearly illustrate the need to embrace new technology in order to promote competition. It is evident that it is not feasible to establish competition based on traditional delivery mechanisms in the face of Multichoice's dominance: if the Authority wishes to facilitate such competition it needs to reconsider its position on IPTV.
32. The conclusion of closed transactions between telecommunications companies and content providers is – contrary to the assertion by the Authority – directly comparable to Multichoice having tied up major content providers in exclusive contracts. ISPA notes that that the amendment of section 67 of the ECA affected by the Electronic Communications Amendment Act 1 of 2014 as at 21 May 2014 have introduced greater scope for the Authority to introduce pro-competitive licence terms and conditions designed to address such arrangements.



## **THE IMPACT OF CONVERGENCE, NET NEUTRALITY AND DISRUPTIVE TECHNIQUES ON THE COMPETITIVE LANDSCAPE**

*In the arena of convergence, there has been little debate within the ICT sector about the impact of convergence on the way the ICT market as a whole is functioning and restructuring. South Africa's per capita Internet penetration should be much higher and this raises questions as to what the multifaceted problems obstructing Internet growth are. For example, while South Africa's broadband capacity and speed increases over the coming years are also a source of concern, what role will Over-the-Top services play with respect to competition in the sector? The focus on voice services and termination rates are a distraction since these are supposed to be approaching zero, especially considering the transition to IP. Should the actual focus not be data pricing, considering the need for a sustainable information society?*

33. ISPA has set out above its position as regards South Africa's affordability gap and the manner in which to address this. ISPA agrees that there is an urgent need for the Authority to commence with preparation for a review of competition in the provision of mobile data services.
34. ISPA submits that it is not the role of policy or regulation to serve vested commercial interests by acting as handbrake to the implementation of new standards and technologies. The Authority's stance on IPTV is a case in point.

### **Innovation, net neutrality and disruptive technologies**

*Innovative technologies introduced through dynamic spectrum management are finding ways of accessing artificial restrictions of spectrum. Is it time to introduce them into the market in the short term?*

*How will issues of net neutrality come into play? What are the implications of the current anxieties in the traditional telecom market regarding becoming 'dumb pipes', simple purveyors of bandwidth? Multiple closed transactions between mobile companies and content developers are taking place outside any regulatory framework, yet broadcasters continue to be subject to strict rules. What role will new disruptive technologies such as TV White Spaces play in making our ICT sector more competitive?*

*How can more effective competition be introduced in the subscription television broadcasting environment? The mobile sector has effectively moved to an IP platform. What are the immediate implications for the ICT market?*

### **How will issues of net neutrality come into play?**

35. What does "net neutrality" mean?
  - 35.1. There is currently no uniform definition of the term "net neutrality".
  - 35.2. ISPA has stressed transparency in offerings to customers, and the industry should support choice for consumers as being key elements of Internet access provision.

- 35.3. Shaping bandwidth is a normal part of network operations at different levels, and is to a significant extent a normal day-to-day part of running Internet networks.
  - 35.4. The key is that this is done transparently so that it is clear to the consumer what is being purchased.
  - 35.5. To this end ISPA has developed a terminology guideline document which seeks to clear up terms used to describe services. This is included as Appendix A to this submission.
36. ISPA's position can be summarised as follows:
- 36.1. There must be fair and open competition in the provision of Internet access and content services. Rules should primarily relate to a prohibition on unfairly prioritising your own network traffic over those of other network operators. Existing competition law in SA and the fundamentals of the ECA can be used to deal with anti-competitive practices.
  - 36.2. Customers should always be in a position to make an informed choice. Customers should always be aware of the specification of the service they are being provided.
  - 36.3. If a customer wants an ISP to provide services which are prioritised in some way, there should not be regulations which prevent an ISP from offering that as a service.
  - 36.4. If a content distributor wants to allow an ISP to offer better access to their services, with the customer's permission, then the market should also support that. Some content providers take steps to move content close to consumers, and this can be very useful in terms of quality of service experienced by users.
  - 36.5. A service provider needs to have some flexibility when it comes to building a network.
  - 36.6. Prioritising of certain content is less of an issue if it isn't happening at the expense of deprioritising other content.
  - 36.7. There is already an increasing trend towards zero-rating certain services and – to the extent that the benefits to consumers of doing so outweigh potential anti-competitive effects – this should be accommodated.
37. ISPA does not believe that there is currently a case for any regulatory intervention regarding net neutrality but that the Authority should strive to reach an understanding of the underlying forces which are shaping the debate in other jurisdictions.
38. In this regard ISPA notes that "net neutrality" has become a major issue in the United States because of the effective monopoly (duopoly in some areas) in the provision of cable access services and the dominance of the cable providers in the Internet access market as a whole. ISPA does not believe that the manner in which the issue is being addressed in US is particularly helpful in the local market, which is at a different stage of development and which has a different set of fair competition issues. Certainly there are currently far more important (and manageable) issues to be addressed in South Africa.

**What roles will new disruptive technologies such as TV White Spaces play in making our ICT sector more competitive?**

39. Disruptive technologies will continue to provide opportunities for competition and the role of the regulator should be to facilitate this process or at least not to impede it.

40. ISPA notes that dynamic spectrum access and Television White Spaces are evolutionary rather than disruptive, unless increasing efficiency of use is regarded as disruptive.

## **THE ROLE OF FIXED (FIBRE) AND WIRELESS (HIGH DEMAND SPECTRUM) IN ENABLING COMPETITION**

41. Both are critical. The primary bottleneck in the broadband delivery value chain is the access portion where there is the lowest incidence of competition.
42. Even more critical is that the open access principles underlying both the SA Connect Policy and the ECA are implemented both in respect of current networks and future deployments of fibre and new assignments of high demand spectrum.
43. It is self-evident that:
  - 43.1. The failure to make high-demand spectrum available has severely retarded competition.
  - 43.2. The continued failure to make high-demand spectrum available entrenches the competitive advantage of the incumbents to a greater and greater degree over time.
  - 43.3. The failure to implement the rapid deployment guidelines contemplated in section 21 of the ECA and rules regarding infrastructure sharing has retarded competition and entrenched a future premium on the cost to communicate.

## **LLU**

44. ISPA believes that LLU remains relevant. LLU is nothing more than a specific application of the principles of open access and facilities leasing which form one of the bases of the SA Connect Policy.
45. It is – moreover – an approach which may be crucial to the manner which fibre networks are utilised in South Africa.

## **Spectrum**

*Additional questions are surfacing as to whether the traditional gatekeepers to spectrum are actively and passively ensuring that spectrum remains a barrier to entry, and whether free-riding is being condoned de facto. The questions cannot remain unanswered and arguments cannot subsist unresolved indefinitely. The issue is what role should the assignment of high demand spectrum play in enabling competition, recognizing that the empowerment of historically disadvantaged people is also a matter of levelling the playing field. Broadcasters do not currently pay for spectrum – is this an unfair advantage in a converged environment or does it offset the cost of local content regulations?*

46. ISPA understands the “traditional gatekeepers to spectrum” to be the erstwhile Department of Communications (presumably now the Department of Telecommunications and Postal Services and the Authority itself. Licensees themselves are not gatekeepers insofar as there is no clear authority for the sub-leasing or transfer of spectrum licences and no application of a “use-it-or-lose-it” policy.
47. ISPA has no insight into the internal workings of these gatekeepers but the ongoing and inexplicable delays in assigning high-demand frequency – which come at a significant cost to the South African economy – seem to speak for themselves. It is also fair to say that this has advantaged some parties at the expense of greater competition and lower costs to South African consumers.

48. It is not clear to ISPA what is meant by “free-riding” in this context but notes that the Radio Frequency Spectrum Licence Fees Regulations 2011 – while far from perfect – have promoted efficiency of use by prompting licensees holding but not using spectrum (or using it optimally) to surrender this spectrum to the Authority.
49. ISPA accepts that transformation imperatives will be a part of any future high-demand spectrum assignment process but notes that this may not have been necessary had the Authority found itself in a position to enforce a cogent set of regulations relating to control and ownership of service licences issued under Chapter 3 of the ECA<sup>1</sup>.
50. As regards the position of broadcasters and the query raised regarding spectrum licence fees and a possible offset against the cost of compliance with local content regulations:
- 50.1. ISPA strongly believes that broadcasters should be required to pay spectrum licence fees. This is particularly so in bands where broadcasters are currently competing with telecommunications service providers as a result of delays in the digital migration process. It is tempting to think that the current impasse which is holding the process to hostage would have continued for this long if there was a real cost attached to holding this spectrum.
- 50.2. ISPA has no insight into the cost of compliance with local content regulations but is opposed to this suggestion on the grounds that the two items are unrelated, the future application of local content regulations is uncertain and the offset is likely to be unacceptably imprecise. Given the value of the spectrum occupied by broadcasters (i.e. if offered to the market through an assignment process) and the spectrum licence fees payable annually, it seems unlikely that such an offset would be practical.
- 50.3. It is also apparent that some broadcasters will seek to enter the broadband market in future. ISPA has no difficulty with this in principle but this interest needs to be recognised. Whatever distinctions may exist for practical purposes between broadcasters and telecommunications service providers in a converged environment will not justify differential treatment in respect of the calculation and payment of spectrum licence fees.

## **THE TENSION BETWEEN CONSOLIDATION AND PLURALITY IN THE ICT SECTOR**

51. Recent announcements indicate that consolidation is becoming the dominating factor. This may in part be a feature of a maturing market with decreasing termination rates and in part a consequence of the constraints on access to critical resources such as high-demand spectrum. The MTN / Telkom and Vodacom / Neotel transactions – although of a very different nature – are examples of a need to realise growth in a constrained market.
52. Further delays in finalising policy relating to high-demand spectrum, the length and complexity of the assignment process and the inevitability of major delays in the digital migration process will aggravate this imbalance.

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<sup>1</sup> This area is still governed by 2002 regulations passed under the Telecommunications Act.

53. Whether this is a good thing or not is a function of perspective: recent deal-making activity is driven by shareholder concerns, not consumer concerns (to state the obvious) and – copious amounts of spin notwithstanding – should not be seen as serving the broader socio-economic needs of South Africa or the narrower focus of lowering the cost to communicate.
54. It must also be borne in mind that delays in assigning spectrum suitable for the provision of access services has retarded the evolution of competition in the provision of network services, directly benefiting the incumbent MNOs.
55. MNOs – generally speaking – are faced with reduced profitability as call termination rates reduce, competition increases and voice service revenues are cannibalised by the need to provide faster and more reliable data services. It is to be expected that in such a context there will be attempts to consolidate and reduce competition.
56. ISPA's view is that competition has very evidently benefited the consumer as regards mobile voice services and that this can be largely ascribed to the Authority's interventions in the wholesale call termination market and Cell C's ability and willingness to compete on price.
57. Perhaps the most concerning of the recent raft of mergers and acquisitions announcements – if it is true – is a persistent rumour that Vodacom wishes to acquire Dark Fibre Africa. It would be the absolute antithesis of the direction we should be moving in were the only substantial open-access fibre provider in South Africa to be acquired by the most dominant – and closed – telecommunications operator.

## **CONCLUSION**

58. ISPA looks forward to participating further in this process.

Regards

Dominic Cull

ISPA Regulatory Advisor