



30 October 2015

**Independent Communications Authority of South Africa**

**Attention: Mr Joseph Dikgale**

E-mail: [JDikgale@icasa.org.za](mailto:JDikgale@icasa.org.za)

Dear Sir

**SUBMISSIONS ON THE INFORMATION MEMORANDUM FOR RADIO FREQUENCY SPECTRUM PROSPECTIVE LICENSE TO PROVIDE MOBILE BROADBAND WIRELESS ACCESS SERVICES FOR URBAN AND RURAL AREAS USING THE COMPLIMENTARY BANDS, 700 MHZ, 800 MHZ AND 2.6 GHZ**

**1. Introduction**

- 1.1. ISPA refers to the the “Information Memorandum for radio frequency spectrum prospective licence to provide mobile broadband wireless access services for urban and rural areas using the complimentary bands, 700 MHz, 800 MHz and 2.6 GHz” published as General Notice 914 of 2015 in GG 39203 on 11 September 2015 (“**the Information Memorandum**”) and sets out its submissions in response thereto below.

**2. ISPA’s interest in the assignment of high-demand spectrum**

- 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, ISPA has 177 members and represents in excess of 150 Internet Service Providers with a diverse range of services and target markets.
- 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 communicaiton services.

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**ISPA Management Committee:**

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

- 2.5. ISPA members generally focus on services and competition at the service level, and thus have **a strong focus on open access business models, as opposed to the technical models underlying open access.**
- 2.6. More information about ISPA is available from <http://www.ispa.org.za>.

### 3. What ICASA should also consider in the spectrum assignment process

- 3.1. While recognising the uncertainty created by the fact that the Minister of Telecommunications and Postal Services has indicated that spectrum policy relating to high-demand spectrum will only be finalised by the end of March 2016, ISPA submits that the design of the lots to be auctioned as well as the obligations to be attached thereto should seek to further as many of the objects of the Electronic Communications Act (“the ECA”) as can reasonably be accommodated.
- 3.2. ISPA has identified the following objects of the ECA as set out in section 2 that it regards as directly relevant to the much-delayed assignment of high-demand spectrum:
  - (c) *promote the universal provision of electronic communications networks and electronic communications services and connectivity for all;*
  - (d) *encourage investment, including strategic infrastructure investment, and innovation in the communications sector;*
  - (e) *ensure efficient use of the radio frequency spectrum;*
  - (f) *promote competition within the ICT sector;*
  - (i) *encourage research and development within the ICT sector;*
  - (l) *provide assistance and support towards human resource development within the ICT sector;*
  - (p) *develop and promote SMMEs and cooperatives;*
- 3.3. Furthermore the extant National Radio Frequency Policy 2010<sup>1</sup> has as one of its express objectives the contribution of radio frequency spectrum licensing “to the promotion of national interests, development and diversity within the framework of Government strategic objectives” and it is self-evident that the work of the Authority should also ultimately be directed to the achievement of these objectives.
- 3.4. Finally, the assignment of high-demand spectrum is a critical determinant of whether South Africa will meet the connectivity targets set out in SA Connect.
- 3.5. SA Connect expressly:-

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<sup>1</sup> Notice 306 of 2015, GG 33116, 16 April 2010

3.5.1. identifies, *inter alia*, the following “immediate priorities with respect to spectrum”<sup>2</sup>:

- *The re-allocation and assignment of broadband spectrum taking into consideration job creation, small business development, national empowerment and the promotion of NDP goals;*
- *Approval of spectrum sharing between spectrum licensees and across services by ICASA in support of efficient use of spectrum and where it does not impact negatively on competition;*
- *The enabling of dynamic spectrum allocation :and*
- *Ensuring sufficient spectrum for extensive Wi-Fi and other public access technologies and services.*

3.5.2. sets out the public interest policy objectives to be furthered by “licensing of broadband spectrum” (our emphasis):

*It is Government's objective to ensure that access to broadband for all is attained. Therefore, licensing of broadband spectrum should contribute to the realisation of the following public interest policy objectives:*

- *The achievement of universal access to broadband;*
- *Effective and efficient use of high demand spectrum;*
- *Adoption of open access principles;*
- *Safeguard the spectrum commons and spectrum required for public access technologies and services; and*
- *The promotion of broader national development goals of job creation, the development of small and medium sized businesses and South African-owned and controlled companies, and the broad based economic empowerment of historically disadvantaged persons.*

3.6. It cannot be sufficiently stressed how important the assignment of this spectrum is for South Africa’s future. The outcomes of this process and the implementation of the ensuing regulatory framework will shape the competitive landscape of South African communications for the next ten to twenty years. Moreover the potential exists – if the process is optimally designed and executed – for this assignment process to shape broader policy outcomes and to stimulate the South African economy.

#### **4. The omission of the 3.5 GHz band**

4.1. It is highly-desirable to assign all available access spectrum at the same time. This approach allows interested parties to make decisions based on certainty about their options in making

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<sup>2</sup> SA Connect paragraph 12

strategic decisions around the substantial capital investments involved in obtaining and utilising a spectrum licence.

- 4.2. The failure to include this band in the proposals set out in the Information Memorandum is inexplicable given the previous processes undertaken by the Authority regarding this band. ISPA submits that this band must be included in the process contemplated in the Information Memorandum.

**5. Wider participation in the assignment process to include class ECNS licensees**

- 5.1. All the lots are currently assigned to apply nationally. This automatically disqualifies class ECNS licensees to apply for spectrum in areas where they currently operate under their class ECNS licenses.
- 5.2. ISPA submits that the scope of participation in the assignment process can be amended to allow class ECNS licensees to participate through the inclusion of a set of municipal district lots for assignment. This would make the costs much more attainable and would serve to promote the development of the policy directives as set out in paragraph 3 above.

**6. Obligations to be imposed**

- 6.1. The proposed obligations set out in the Information Memorandum can be summarised as follows:

	<b>Lot:</b>	<b>Obligation</b>
<b>Wholesale</b>	<b>A</b>	Provide wholesale open access services on the following basis: <ul style="list-style-type: none"> <li>• Non-discriminations access;</li> <li>• Transparency;</li> <li>• Fair and reasonable pricing; and</li> <li>• Cost oriented with reasonable rate of return</li> <li>• 3 years of obligation holiday from paying radio frequency spectrum license fees with regard to the 700 MHz spectrum license (worth ZAR81 000 000 without factoring in licence fee increases)</li> </ul>
<b>Coverage</b>	<b>B, C, D, E</b>	<ul style="list-style-type: none"> <li>• Rollout 70% of the broadband network in the identified areas before rolling out in the cities</li> <li>• Coverage = provision of data services in the areas with an average downlink user throughput of 30 Mbit/s in the period from 07:00 to 20:00</li> <li>• Provide services to all identified underserved areas within three years from the date that 700 MHz/800 MHz spectrum becomes available</li> </ul>
<b>DTT</b>	<b>A, B, C, D, E</b>	<ul style="list-style-type: none"> <li>• Provide set-top-boxes free of charge to households for Free To Air Terrestrial Television Service</li> <li>• Cost to licensee offset against the auction price</li> </ul>

<b>BEE</b>	<b>A - F</b>	<ul style="list-style-type: none"> <li>• Achieve BBEE level 2 status within twenty four (24) months from date of issue of licence OR</li> <li>• Increase equity ownership by Historically Disadvantaged Persons (HDP) by three percent (3%) within 24 months from date of issue of licence</li> </ul>
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6.2. ISPA recognises that the proposed obligations:

- Seek to enhance service layer competition as contemplated in SA Connect;
- Seek to advance transformation of the industry;
- Seek to ensure universal service and access; and
- Seek to serve as a funding mechanism for the set-top box distribution programme.

6.3. These objectives are aligned with the objects of the ECA and the relevant policy set out in SA Connect.

6.4. Notwithstanding, ISPA submits that the proposed obligations are nevertheless not optimal and represent a number of missed opportunities to further other objects of the ECA and to promote other national interests, development and diversity.

6.5. ISPA submits that in furtherance of the recommendations of the National ICT Review report, the requirement to provide wholesale open access to network services should be mandatory for all lots. In addition to the wholesale access obligations to the Radio Access Networks (RAN), successful bidders should have an obligation to interconnect its RAN (at least at an IP level) with interconnection seekers. In this regard ISPA wishes to highlight the success that the IP Connect (IPC) model had in promoting competition, quality of service and reduction of costs in the ADSL market. To increase competition in the downstream market across wireless access networks, something similar is required of wireless network providers, be they fixed or mobile wireless network providers.

6.6. The transformation obligation appears to be improperly formulated in that effecting a 3% increase in HDP equity ownership will in most circumstances be far easier to achieve than attaining Level 2 status. The latter obligation is also relative in the sense that the content of the obligation is informed by the BEE status of the applicant (i.e. it discriminates between an applicant with Level 4 status and an applicant with level 3 status). The obligation requiring a 3% shareholding similarly does not take into account the current shareholding of the applicant. For the record the incumbent operators currently hold the following BEE certification status:

- Telkom – Level 3
- Vodacom – Level 2
- MTN – Level 2
- Cell C – unknown

What is the impact of an obligation to attain Level 2 status where the applicant already has that status? Does this really advance the transformation agenda?

ISPA has noted the work of the ICT BEEE Council and that the outcomes of the alignment process will need to be taken into account by the Authority when considering how best to advance the transformation agenda through this assignment process.

- 6.7. There are no obligations relating to utilisation of the spectrum assigned within a specified period failing which the licence will lapse – so-called “use-it-or-lose-it” provisions. This is a historical lesson that we must surely have learnt by now. The inclusion of such an obligation would promote more efficient use of spectrum as required by subsection 2(e) of the ECA. This is particularly critical in South Africa where the market continues to prompt incumbent operators to grow through acquisition. Market consolidation is mentioned as a particular concern in the authorities’ memorandum. The Authority is aware of the challenges presented by such consolidation and has its own ongoing process in this regard.

Given our history, it would be inexcusable not to attach clear, measurable and enforceable use-it-or-lose-it obligations to the licences to be assigned.

- 6.8. There are no obligations relating to empowerment of SMMEs and the creation of jobs, particularly in the rural areas in which Lots B, C D and E are required to be deployed. The inclusion of such obligations would develop and promote SMMEs and co-operatives as required by subsection 2(p) of the ECA as well job creation as required by national socio-economic objectives.

ISPA acknowledges that this may be partially achieved through meaningful transformation obligations set with reference to the ICT Sector Code.

- 6.9. There are no obligations relating to skills transfer to empower SMMEs, co-operatives and local communities, particularly in the rural areas in which Lots B, C D and E are required to be deployed. The inclusion of such obligations would develop and promote SMMEs and co-operatives as required by subsection 2(p) of the ECA, provide assistance and support towards human resource development as required by subsection 2(l) of the ECA as well as job creation by national socio-economic objectives and would:-

- Promote infrastructure and service competition;
- Promote job creation;
- Promote affordable universal service and access; and
- Promote skills transfer and entrepreneurship.

ISPA acknowledges that this may be partially achieved through meaningful transformation obligations set with reference to the ICT Sector Code.

- 6.10. ISPA's submission is that there are alternative obligations which should be considered for imposition in association with the lots to be auctioned. These should, in part at least, include mechanisms requiring or incentivising the empowerment of SMMEs and the utilisation of existing access networks.
- 6.11. The Authority's experience in imposing universal service and access obligations and monitoring compliance with such obligations has made the following clear:
- Incentivise rather than penalise: this is the lesson from the Community Service Telephone obligations imposed on the previous set of high-demand spectrum licences assigned. Incentivising compliance reduces the cost of monitoring and enforcement, increasing the effectiveness of the mechanism.
  - Keep it simple and realistic: if a rational incentive is not available then the obligation represents a cost to the operator upon which it is imposed. The operator will seek to recover this through retail pricing or to avoid it through litigation.
- 6.12. Far greater detail in respect of the proposed obligations must be provided for public debate. The devil is very much in the detail and the importance of this process requires the detail and the enforceability of the detail to be scrutinised.

## **7. Open Access rules**

- 7.1. The need to have clear and enforceable open access rules is particularly important for Lot A (but ought not to be disregarded for the other lots) given its express purpose. Of importance to ISPA is that the same clear and enforceable rules are needed in respect of the entities which currently dominate the market and will continue to do so for the foreseeable future.
- 7.2. The Authority may need to consider developing a two-tier regulatory framework:
- 7.2.1. Functional separation rules of general application to incumbent operators setting out how the Authority will enforce open access through transparency and non-discrimination provisions. The Authority should consider as a model the settlement agreement entered into between Telkom and the Competition Commission and the manner in which it deals with transfer pricing and related matters.
- 7.2.2. Structural separation rules of specific application to an open access wholesale wireless network operator. These rules would be entrenched as obligations attaching to Lot A.

## **8. Delay in assignment process for Lot A**

- 8.1. ISPA is concerned that the proposed delay in the assignment of Lot A will weaken the likelihood of the successful implementation of what is already a marginal business case. Allowing incumbent operators a head start over a new wholesale operator will simply allow them to entrench their positions and does not promote competition.
  
- 8.2. This raises an extremely important consideration: Lot A should not be presented as the regulatory intervention for promoting service layer competition while ignoring the current lack of service layer competition evident on the networks of the incumbent mobile network operators.

## **9. Conclusion**

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

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**ISPA REGULATORY ADVISORS**