Internet Service Providers' Association

queries@ispa.org.za
+27 11 314 7751
http://www.ispa.org.za
PO Box 3423, Parklands, 2121

14 September 2012

The Department of Communications

For attention: Ms M Mphahlele, The Chief Director: Economic Development Policy
Per email: lerato@doc.gov.za

Dear Ms Mphahlele

ISPA SUBMISSIONS ON THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL, 2012

1. We refer to the Electronic Communications Amendment Bill, 2012 ("the Bill"), published for comment in GG 35525 on 18 July 2012, and set out below ISPA's response.

_____

GENERAL COMMENTS

2. ISPA welcomes the publication of the Bill. Some five years after the coming into operation of the Electronic Communications Act, 36 of 2005 ("the Act"), it is evident that there are aspects of the Act which need to be updated and improved.

3. While ISPA has concerns regarding certain of the proposals embodied in the Bill, as a general comment we wish to commend the drafters on the inclusion of a number of provisions which seek to remedy practical difficulties experienced in the implementation of the Act to date.

4. ISPA has, however, reservations around the inclusion of several proposed amendments which effectively represent the making of policy decisions. The primary instances of this in the Bill relate to:

   4.1. The proposal to create a Spectrum Management Agency with the responsibility of, *inter alia*, assigning radio frequency spectrum for government use.

   4.2. The proposal to provide the Independent Communications Authority of South Africa ("the Authority") with the power to prescribe that only certain electronic communications network service (ECNS) licensees will be able to exercise the rights expressed in Chapter 4 of the Act.

5. ISPA submits that it is an inappropriate time to be seeking to introduce new policies through amendments to the Act. This is due to the fact that South Africa has only recently commenced with a comprehensive policy review which will include a green and white paper process: it seems premature and counter-productive to seek at this stage to introduce new, fundamental institutional rearrangement and to propose new limitations on service licensing rights.

6. ISPA respectfully submits that the citation of a 1998 White Paper on Broadcasting is not a sufficient underpinning for creating a Spectrum Management Agency. Nor is such White Paper aligned with the National Radio Frequency Spectrum Policy, while neither is aligned with the proposal in the Bill.

7. ISPA will also argue below that the proposal to empower the Authority to prescribe which ECNS licensees will and which will not be entitled to exercise infrastructure deployment rights is based on incomplete evidence.

8. Ideally both of these proposals should have been subjected to public consultation and debate, rather than being introduced in the Bill.

9. For the reasons set out above ISPA submits that the provisions in the Bill relating to the creation of a Spectrum Management Agency and the limitation of access to infrastructure rights set out in Chapter 4 of the Act should be withdrawn from the Bill and raised for debate in the Green Paper on Communications Policy which the Department has indicated will be released for public comment later this year.

PROPOSED AMENDMENTS TO THE DEFINITIONS SECTION

10. ISPA welcomes the proposed amendments to the definitions section. Specific submissions relating to the proposals in respect of the terms "control" and "electronic communications facility" are set out in the sections of this document relating to ownership and control and facilities leasing respectively.

Insertion of definition of "broadband"

11. ISPA supports the insertion of this definition and the flexibility which it imports to the meaning of the term "broadband". ISPA believes the proposed definition to be an improvement on that currently contained in the National Broadband Policy[1].

12. ISPA submits that the definition to be inserted should reference upload as well as download speeds. Upload speeds should be regulated on the same basis as download speeds given the role of the former in promoting local content and economic activity. The importance of upload speeds will become more critical over time given the trend towards cloud computing.

13. ISPA suggests the following amendment to the proposed definition:

    "broadband" means an always available, multimedia capable connection with a minimum download <u>and upload</u> speed as determined by the Minister from time to time by Notice in the Gazette;

Correction of use of "allocation" and "assignment"

14. ISPA supports the amendments intended to ensure the correct use of these terms, but notes that this has not been implemented consistently throughout the Bill.

    14.1. For example: the proposed amendments to subsections 31(8), 31(9) and 31(10) of the Act make an incorrect reference to "allocated radio frequency spectrum" instead of "assigned radio frequency spectrum".

    14.2. ISPA suggests the following as the correct position:

    (8) Subject to subsection (9), the <u>Spectrum Management Agency and the</u> Authority may withdraw any radio frequency spectrum licence <u>or ~~allocated~~ [assigned] radio frequency spectrum</u> when the licensee fails to utilise <u>the ~~allocated~~ [assigned]</u> radio frequency spectrum in accordance with the licence <u>conditions</u> applicable to such licence.

[1] GG 33377, 13 July 2010

(9) Before the Spectrum Management Agency or the Authority withdraws a radio frequency spectrum licence or ~~allocated~~ [assigned] radio frequency spectrum in terms of subsection (8), it must give the licensee prior written notice of at least 30 days and the licensee must have 7 (seven) business days in which to respond in writing to the notice (unless otherwise extended by the Spectrum Management Agency or the Authority) demonstrating that it is utilising the radio frequency spectrum in compliance with this Act and the licence conditions.

(10) The Spectrum Management Agency or the Authority, based on the written response of the licensee, must notify the licensee of its decision to withdraw or not to withdraw the licence or ~~allocated~~ [assigned] radio frequency spectrum."

Amendment of the definition of "days"

15. ISPA understands the motivation behind the proposed amendment to the definition of "days" to be the need to align the Act with other legislation.

16. ISPA requests that the Department consider the impact of such an amendment to various provisions of the Act, in particular the periods set out for public comment on draft policy, policy directions and regulations and the conduct of inquiries under section 4B of the Independent Communications Authority of South Africa Act, 2000.

17. ISPA submits that the complexity of matters under consideration, administrative justice and the shared interest in policy and regulation of the highest possible quality require that stakeholders are afforded a reasonable opportunity to consider and comment, and the current time period of 30 business days should not be shortened.

PROPOSED AMENDMENTS TO THE SERVICE LICENSING FRAMEWORK

Proposed amendments to the distinction drawn between individual and class electronic communications service licences

18. The Bill seeks to introduce a fundamental change to the service licensing framework by amending the basis on which an individual electronic communications service (IECS) licence is distinguished from a class electronic communications service (CECS) licence.

19. Previously this distinction was made on the basis that, while both the IECS and the CECS licences conferred the right to provide ECS on a national basis, only the IECS licence allowed the holder to apply for and receive assignments of numbers from the National Numbering Plan.

20. The Bill proposes to align the distinction between IECS and CECS licences with that between individual electronic communications network service (IECNS) and class electronic communications network service (CECNS) licences, namely the extent of coverage. An IECNS licence allows the holder to provide electronic communications network services (ECNS) on a national or provincial basis, while a CECNS licence authorises the provision of ECNS only over a specified district or metropolitan municipality.

21. In order to effect this the Bill proposes:

    21.1. the substitution of subsection 5(3)(c) with the following new subsection:

    "(c) electronic communications services **[consisting of voice telephony utilising numbers from the national numbering plan]** <u>of provincial and national scope operated for commercial purposes</u>;

    21.2. and the insertion of a new subsection 5(5)(c):

    “"<u>(c) electronic communications services of district municipality or local municipal scope operated for commercial purposes;</u>"”

22. The Memorandum does not provide context for this proposal other than to note that the substitution of subsection 5(3)(c) is intended to “better describe the types of electronic communications services that require an individual licence” and that the insertion of a new section 5(5)(c) is intended to ensure that the same distinction that applies between individual and class electronic communications network services should also apply to electronic communications services using scope and coverage”.

23. ISPA does not support this proposed amendment for the following reasons:

23.1. The distinction currently drawn between an IECNS licence and a CECNS licence, namely geographical coverage, makes sense given that the provision of ECNS involves the provision of physical networks.

23.2. ISPA submits that applying this same basis for distinction to the provision of electronic communications services (ECS) does not make sense in that the provision of ECS is not dependent on the ECS licensee having a physical network. By definition an ECS licensee uses an ECN provided either by itself in the capacity of an ECNS licensee or a third party ECNS provider.

23.3. An entity currently seeking to enter the ISP market at the bottom of the value chain will typically seek to resell the ADSL services provided by an upstream provider such as Telkom SA Ltd ("Telkom") or Internet Solutions. The agreement entered into allows the resale of these services on a national basis, i.e. the ISP is able to use the upstream provider's electronic communications network (ECN) in order to resell the upstream provider's ECS wherever its clients may be.

23.4. ISPA is of the view that the proposed amendment is impractical and does not take account of technical or commercial reality. ISPA does not believe that it is technically feasible for an ECNS provider to limit access to its ECN in this manner.

23.5. ISPA submits further that the removal of the current distinction - which holds that an IECS licence is required in order to apply for and receive an allocation of numbers drawn from the National Numbering Plan from ICASA - will result in confusion. There is, for example, no provision proposed in the Bill that unequivocally indicates the licence type required to apply for and receive an allocation of numbers (presumably this would be an ECS licence irrespective of whether it is a class or individual licence and noting that currently an IECS licensee is permitted to sub-allocate numbers to a CECS licensee).

23.6. ISPA is unconvinced by the argument advanced in the Memorandum that the proposed distinction "better describes" the types of ECS that require an IECS licence. Industry is accustomed to and largely comfortable with the current arrangement and ISPA submits that the present distinction should not be amended without compelling reasons.

24. Should the Department nevertheless wish to pursue this proposal, it will be necessary to create a transitional mechanism.

25. ISPA has no objection to the proposal to limit the number of CECNS licences which may be issued to a single entity on the basis that that entity may not hold CECNS licences such that they effectively have the scope of operation of an IECNS licensee. ISPA notes that its understanding of the licensing framework under Chapter 3 of the Act is that a CECNS licensee does not in any event have the right to provide ECNS across the border of a district or metropolitan municipality and therefore cannot through the holding of multiple CECNS licences replicate the rights attaching to an IECNS licence.

Proposed amendments to procedures relating to the granting and transfer of class licences

26. ISPA has no objection to the tightening of the time periods within which the Authority is required to issue class licences. ISPA's experience is that the division within the Authority responsible for the processing of class licence registrations is efficient and should have no difficulty in meeting a 30 day deadline.

27. ISPA notes from the Memorandum that the proposed amendment to section 16 of the Act is also intended to enable "ICASA to prescribe the intervals at which registrations may be submitted and allows the transfer of a class licence upon notification to ICASA".

    27.1. ISPA does not understand the rationale for seeking to restrict the availability of class licences according to a calendar or as designated by ICASA and submits that to do so would be to ignore commercial reality and the underlying principle in the Act that class licences should be readily and speedily available.

    27.2. ISPA notes that there is currently a procedure for the transfer of class licences provided for in the Class Licensing Processes and Procedures Regulations (as amended) 2010[2]. ISPA therefore assumes that proposed amendments specifying that a "person who intends to transfer a class licence to any other person must notify the Authority in writing at least thirty days prior to such transfer" are intended to make it clear that no fee is payable to ICASA in respect of this procedure and that ICASA has limited discretion to refuse the requested transfer. ISPA further understands that the existing application procedure will be replaced by a notification procedure.

    27.3. If this case, ISPA requests that the Department consider the following amendment to its proposed new subsection 16(6) as contained in the Bill:

    "(6) **[No class licence may be ceded or transferred without the prior written approval of the Authority]** A person who intends to transfer a class licence to any other person must notify

[2] Regulation 526, GG 33297, 14 June 2010

the Authority in writing at least thirty days prior to such transfer. No fee shall be payable in respect of any notifications submitted in terms of this subsection."

27.4. In practical terms ICASA will be required to amend its General Licence Fee Regulations, 2009 to remove the R10 000 fee currently payable in respect of an application for the transfer of a class licence. The fact that this fee is the same as the fee for registering a new class licence means that the transfer procedure for class licences is rarely used as there is no economic incentive to do so.

The amendment of the definition of reseller

28. ISPA notes that the definition of the term "reseller" is to be amended to correct a typographical error, but submits that the Department is missing an opportunity to clarify a troublesome aspect of the licensing framework and in particular the distinction to be drawn between electronic communications services and the resale thereof.

29. ISPA's experience in this regard is that there is substantial confusion on the part of the Authority and industry as to when an entity will be regarded as providing ECS as opposed to when it will be regarded as reselling ECS provided by an ECS licensee. Aside from prompting uncertainty as to when an ECS licence is required, this confusion is fundamental to the calculation of annual licence fees under the ICASA General Licence Fee Regulations 2009 and the annual contribution to the Universal Service and Access Fund (USAF) under the USAF Contribution Regulations 2011. This flows from the fact that annual licence fees and the USAF contribution are calculated with reference to revenue derived from the provision of licensed services.

30. ISPA submits that the current difficulties experienced by the Authority in the accurate calculation and the collection of annual licence fees and the USAF contribution from licensees will not be overcome until such time as this confusion has been authoritatively dispelled. This can, it is submitted, be partly achieved through a more substantial amendment to the definition of the term "reseller" designed to clarify what does and what does not constitute a service requiring an ECS licence under the Act.

31. One of the manifestations of this confusion is that a new entrant wishing to provide ADSL services to its customer base will do so by contracting with an upstream ADSL provider. As things stand, should such new entrant approach Telkom in order to enter into such a relationship it will be required to be in possession of at least a class ECS licence before it will be entitled to contract with Telkom on a wholesale as opposed to a retail basis. Should, however, the new entrant approach an alternative upstream provider of ADSL services, it will not be required to be in valid possession of an ECS licence in order to contract for ADSL services on a wholesale basis.

32. It appears that Telkom's position is that a reseller is an entity which does not itself manage and bill for the ECS provided to its customers. This would be in contrast to a "service provider" which would so manage and bill the ECS obtained from Telkom as the upstream licensee and thereafter provided to its customer base. The key to whether a licence is or is not required therefore rests, in Telkom's view, on whether the entity with which it contracts, manages and bills for the ECS provided to such entity's customers.

33. ISPA does not wish to comment at this time on the practical merits of either approach, other than to note that its understanding of Telkom's position is that it is not aligned with the definition of "reseller" currently set out in the Act (incorporating the amendment proposed in the Bill), *viz*.:

> **"reseller"** means a person who -
>
> (a) acquires, through lease or other commercial arrangement, **[by]** any electronic communications network service or electronic communications service; and
> (b) makes such electronic communications network service or electronic communications service available to subscribers for a fee,
>
> whether or not such electronic communications network services or electronic communications services made available by the reseller -
>
> (i) are identical to the electronic communications network service or electronic communications service acquired;
> (ii) are packaged, bundled or otherwise re-grouped to form new or varied service offerings;
> (iii) are combined, linked or used in connection with electronic communications networks or electronic communications facilities owned by the reseller; or
> (iv) add value to such electronic communications network services or electronic communications services,
> and **"resale"** is construed accordingly;"

34. ISPA urges the Department to consult further with the Authority and stakeholders in this regard.

Sub-letting of individual licences

35. ISPA welcomes the proposed amendments intended to remove doubt regarding sub-licensing of individual licences by making it clear that the transfer of control, letting and sub-letting of these licences requires the prior approval of ICASA. This will hopefully clarify the considerable confusion in industry regarding this matter.

36. ISPA notes that the central cause of this confusion flows from the wording of clause 3.2 (or clause 4.2 in some licences) of the terms and conditions set out in the licence documents for IECNS, IECS, CECNS and CECS licences:

"3.2. The rights and obligations under this licence may be exercised or performed by a third party, including its agent and contractors. The Licensee shall be responsible for the acts or omission in respect thereof on the basis that –

3.2.1 the liability of the Licensee for any acts or omissions of such third party, including agents or contractors, in relation to the exercise of such rights shall be limited to acts or omissions which constitute a contravention of the conditions of this Licence;

3.2.2 the Licensee shall stipulate adequate provisions in its contracts with such third party, including agents or contractors, to ensure that their exercise of any of the above rights do not contravene any of the conditions of this licence;

3.2.3. should any such third party, including agents or contractors, commit any act or omission in contravention of a condition of this licence, the Licensee shall, upon becoming aware thereof, act expeditiously as is reasonably possible to remedy such contravention and for this purpose the Licensee shall be afforded reasonable time; and

3.2.4. the Authority shall, upon becoming aware of any contravention of this licence by such third party, including the Licensee's agents or contractors or any complaints lodged with the Authority in relation thereto, forthwith in writing notify the Licensee accordingly.

3.3. The Licensee and any or all of its subsidiaries shall be entitled by virtue of this Licence to provide all or any of the services together with all or any other rights granted to it under the licence."

(ISPA's emphasis)

37. This wording appears to have been adopted from mobile cellular telecommunications service licences issued under the Telecommunications Act and was never the subject of a public comment process. ISPA submits that clause 3.2 as set out above will need to be amended should the proposed amendment to section 13 be implemented (noting that even if this amendment is not finalised the Authority should in any event review said clause 3.2).

38. ISPA submits that this prohibition on sub-licensing should also be applied in respect of class licences.

Proposed amendments relating to ownership and control of individual licences

39. A new section 13A is proposed, dealing with ICASA's powers to impose limitations on ownership and control over licences in the general course (and not only when there is a transfer application before it) with due regard to section 4(3)(k) of the ICASA Act – this will be applicable to both existing and new licences. ISPA broadly supports this insertion.

40. The Bill proposes to do away with the concept of Historically Disadvantaged Individuals (HDIs) or Historically Disadvantaged Persons, which has historically been used as the basis for equity

ownership transformation requirements in the communications industry, and to introduce the more widely used BEE basis. This will also align the Act with the ICASA Act and other industries and, according to the Memorandum, enable the Authority "to prescribe regulations in accordance with the BBBEE Act, Code of Good Practice, and Balanced Scorecard".

41. ISPA notes further from the Memorandum that the intended effect of the proposed amendments in this regard is to "replace the required equity ownership by historically disadvantaged groups in section 9(2)(b) with broad-based black economic empowerment requirements prescribed under section 4(3)(k) of the ICASA Act".

42. ISPA strongly supports the proposed amendment and, in particular, the intention to move away from narrow equity-based transformation to broad-based black economic empowerment as applied across other industries and as given substance in the recently-finalised ICT BEE Charter.

43. ISPA is concerned, however, that such intention may not have been clearly expressed in the Bill and that the Bill may perpetuate confusion in this regard in that the proposed subsection 13A(1) empowers the Authority to set, by regulation, a limit or restriction specifically relating to the ownership and control of licences. This appears to be at odds with subsection 13A(3) which requires that the subsection 13A(1) regulations must be made with due regard to the "broad-based black economic empowerment requirements prescribed under section 4(3)(k) of the ICASA Act". It is not clear to ISPA how a narrow, equity-ownership-based approach can be mandated within the context of the intention to follow a broad-based approach and the recently promulgated ICT BEE Charter.

44. ISPA notes further that the finalisation of the ICT BEE Charter means that this document as opposed to the Codes of Good Practice must be used by licensees for calculating their BEE scorecard.

45. Finally in this regard ISPA notes that the proposed insertion of a definition of "control" into section 1 of the Act is limited in its application to broadcasting service (BS) licensees in that the proposed definition specifically refers to the use of the term in sections 64 to 66 of the Act. ISPA is uncertain as to why this definition should not also apply to ECS and ECNS licensees.

PROPOSED AMENDMENTS TO CHAPTER 4 OF THE ACT REGARDING INFRASTRUCTURE RIGHTS

46. Legislative clarity on the framework for the exercise of infrastructure rights accorded to ECNS licensees is one of the most critical issues dealt with in the Bill.

47. South Africa is in the midst of an explosion in the roll-out of optical fibre networks and there is also an urgent need for more base stations to be deployed to cater for the exponential growth in data carried over mobile networks. ISPA submits that all parties are aware that a failure to facilitate and co-ordinate network deployment and the roll-out of passive infrastructure will translate into higher consumer costs for the medium-to-long term.

Proposal to limit the application of Chapter 4 of the Act to specific ECNS licensees

48. The Bill proposes to amend section 20 of the Act so as to "limit the application of Chapter 4 to specific ECNS licensees as prescribed by the Authority since it is currently impractical". The Bill also seeks "to make better provision for the regulation of ECNS licensees that exercise any rights and obligations under this Chapter".

49. For ease of reference the proposed amendments to section 20 of the Act are set out below:

"20(1) This Chapter applies only to specific electronic communications network service licensees as prescribed by the Authority.

(2) The guidelines must provide procedures and processes for -

(a) obtaining any necessary permit, authorisation, approval or other governmental authority including the criteria necessary to qualify for such permit, authorisation, approval or other governmental authority; and

(b) resolving disputes that may arise between an electronic communications network service licensee and any landowner, in order to satisfy the public interest in the rapid rollout of electronic communications networks and electronic communications facilities.

(3) The Authority must prescribe how electronic communications network service licensees must exercise their rights and obligations under this Chapter and may impose conditions and obligations on licensees in the exercise of such rights and obligations, in accordance with the policy and policy directions, if any, contemplated in section 21, within eighteen (18) months of the coming into operation of the Electronic Communications Amendment Act, 2012."

50. The Memorandum provides the following rationale:

"Following the Altech judgement, a significant number of former Value Added Network Service licenses were converted to ECNS licenses with accompanying right of way rights under Chapter 4. The section 20 amendment seeks to limit the application of Chapter 4 to specific ECNS licensees as prescribed by the Authority since it is currently impractical; it also seeks to make better provision for the regulation of ECNS licensees that exercise any rights and obligations under this Chapter."

51. ISPA is strongly opposed to this proposed amendment for the following reasons:

51.1. The proposed amendment appears to have no policy precedent.

51.2. The implementation of the proposed amendment may constitute an *ultra vires* expropriation of rights currently vested in ECNS licensees and be in conflict with the requirement that licences issued under the Telecommunications Act, 1996 be converted to licences issued under the Act on no lesser terms. The inability to exercise Chapter 4 rights will in most cases denude an ECNS licence into a hollow shell.

51.3. ISPA disputes the assertion that the application of Chapter 4 of the Act is currently impractical due to the number of ECNS licensees, and notes in this regard that:

51.3.1. The Authority has not utilised the tools available to it to enforce the surrender of ECNS licensees which are not being utilised for the provision of ECNS. It is an explicit term of the grant of ECNS licences issued by the Authority that the holder thereof is required to commence the provision of ECNS within 12 months of date of issue of the licence. The licensee may apply for an extension of a further 12 months within which to commence service provision which the Authority has the ability to grant should it believe there is good cause for doing so.

51.3.2. There is little doubt that there are a significant number of ECNS licensees who have not commenced service provision as required. In the event that the Authority were to exercise its powers as set out above, ISPA submits that a more realistic total would be arrived at in respect of licensees providing ECNS and therefore relying on their Chapter 4 rights. A purported restriction of rights which are fundamental to the expression of rights authorised by an ECNS licence should at the least be based on accurate information.

51.4. ISPA submits that the real issue is not the number of licensees but rather the continuing absence of the guidelines referred to in section 21 of the Act or any other policy or regulatory

document which seeks to give practical effect to the right to deploy and maintain infrastructure, notwithstanding the passing of more than six years since the commencement of the Act.

51.4.1. This is recognised in the Memorandum which speaks to the "critical importance of the provision in section 21 on the Guidelines for the rapid deployment of electronic communications facilities especially for broadband roll-out".

51.4.2. That this is the case has been confirmed by the High Court of South Africa in the matter of SMI Trading CC v Mobile Telephone Networks (Pty) Ltd and two others, delivered in February 2011[3], in which the High Court considered the meaning to be given to section 22 of the Act.

51.4.3. The relevant facts of the matter were as follows:

51.4.3.1. The Applicant was a private landowner in respect of land on which MTN had installed a base station. There had originally been a lease agreement entered into between MTN and the prior owner of the land which had expired at the end of February 2008 and which MTN did not seek to renew. The Applicant took transfer of the property at the end of March 2008.

51.4.3.2. MTN and the Applicant entered negotiations to finalise a new lease agreement but were unable to agree on the monthly rental payable.

51.4.3.3. MTN initially indicated that it would relocate the base station but later changed its mind and averred that it was entitled to remain in occupation of the property pursuant to the provisions of section 22 of the ECA and further that it was entitled to stipulate the monthly rental to be paid.

51.4.3.4. The Applicant sought an order directing that MTN was required to remove such base station while MTN countered that it was entitled to maintain the base station in its current position as a result of the rights which it enjoyed as an ECNS licensee under section 22 of the Act, irrespective of whether there was an agreement in place with the Applicant.

51.4.3.5. The Applicant further argued that, in the event that the Court found in favour of MTN's argument regarding section 22 of the ECA, the Court should then

[3] SMI Trading CC v Mobile Telephone Networks (Pty) Ltd and Others (2012 (2) SA 642 (GSJ)) [2011] ZAGPJHC 230; [2011] ZAGPJHC 7 (15 February 2011), available from http://www.saflii.org/za/cases/ZAGPJHC/2011/230.pdf . The matter has been appealed by MTN and is due for hearing in the Supreme Court of Appeal on 7 September 2012.

find that such section was unconstitutional in that its effect amounted to expropriation without compensation. This line of argument resulted in the Department of Communications joining the application as the Third Respondent, specifically to argue that section 22 as written was indeed constitutional.

51.4.4. The Court expressed its view regarding the balance to be struck between the rights afforded to an ECNS licensee by section 22 of the Act and the rights of ownership held by a landlord, with particular regard to the requirement in section 22(2) that the rights afforded by section 22(1) need to be exercised with "due regard to applicable law":

"[23] The term, "applicable", restricts and further defines the term "law". The "applicable law" is that which is applicable to the action which is intended to be taken by the licensee in terms of s. 22(1) of the ECA. Thus, for example, if the action the licensee intends to take is to go on to someone's land, there are other applicable laws such as laws relating to ownership, the law of trespass, etc., for which due regard must be had. In my view that term "applicable law" is not confined to "environmental type" laws, but refers to all laws (i.e. as defined in the Interpretation Act) that are applicable to the intended action and may include laws, whether statutory or common, relating to ownership, trespass, expropriation, legislation such as the Administrative Justice Act (PAJA) etc. and the Constitution, depending on the nature of the action which the licensee intends to take in terms of s. 22(1)."

51.4.5. The Court noted that section 21 of the ECA provided for the development of guidelines "which must include procedures and processes for, *inter alia,* resolving disputes that may arise between a licensee and a landowner in order to satisfy the public interest in the rapid roll out of electronic communications networks and facilities".

"[26] The procedures and processes envisaged in s. 22(1) of the ECA is significant....The procedures and processes are clearly intended to facilitate due process and prevent arbitrary action on the part of licensees. Their absence most definitely complicates the position of licensees and landowners."

51.5. The proposed amendment therefore comes at a time when the ability of ECNS licensees to exercise the rights afforded to them by Chapter 4 is substantially constrained. A mechanism for balancing the competing rights of landowners, municipalities and others has not been put into place.

51.6. Industry has frequently raised the difficulties in obtaining permissions for wayleaves or base stations as a significant contributor to:

51.6.1. The cost of providing ECNS;

51.6.2. The quality of service which ECNS licensees are able to provide; and

51.6.3. The time taken to roll-out infrastructure.

51.7. Finally in this regard, ISPA notes that neither the Bill nor the Memorandum sets out on what basis the Authority will make a determination as to which specific ECNS licensees will fall within the scope of application of Chapter 4 and which will not. Nor does the proposed subsection 21(1) specify that this determination must be made with reference to any policy or policy direction or other instrument issued by the Minister.

51.7.1. ISPA submits that a prescription as contemplated is a policy matter which does not fall within the competence of the Authority.

51.7.2. ISPA is hard-pressed to arrive at a rational, fair and lawful basis on which the Authority would make the determination required of it by the proposed amendment. It is fair to say that any determination would be highly contentious.

51.8. If the intention behind the proposal is to return to the position prior to former Minister Matsepe-Casaburri's Policy Determination of 3 September 2004, before which the then VANS licensees were required to use facilities provided by Telkom or the "Second National Operator", ISPA submits with respect that such intention is ill-founded and contrary to the national policy objective of 100% broadband penetration by 2020.

Proposed amendments to section 21 of the Act relating to rapid deployment of electronic communications infrastructure

52. ISPA welcomes the proposed amendments to section 21 of the Act. As set out above it is in the interests of all stakeholders that the finalisation of the processes and procedures contemplated in this section is perhaps the most pressing priority in deepening broadband access. The writing in of deadlines for the completion of this work indicates that the Department is aware of the urgency involved.

53. As set out in the Memorandum, the proposed amendment seeks to replace “guidelines” as currently specified in section 21 of the Act with policy and policy directions made by the Minister. The intention in doing so is to remove uncertainty as to the legal status of “guidelines”. The processes and procedures to be followed will then be set out in regulation drafted by the Authority with reference to the aforementioned policy and policy directions.

54. ISPA wishes to make the following submissions relating to the proposed amendments:

    54.1. ISPA remains of the view that the requirements of the proposed subsection 21(1) - in terms of the wide-ranging consultations required to be undertaken by the Minister - will serve as an obstacle to the efficient finalisation of the policy and policy directions.

    54.2. ISPA requests that the Department verify that the regulations made by the Authority are of sufficient legal status to trump rights which another entity may enjoy by virtue of primary legislation where required. This is of particular concern relating to agencies such as SANRAL and municipalities.

THE PROPOSED SPECTRUM MANAGEMENT AGENCY

55. ISPA notes the initiative to create a Spectrum Management Agency ("SMA"), taking into account that the details of the functions, powers and composition of the SMA will only be determined by new legislation specifically drafted to establish it. ISPA will provide further input on these fundamental aspects of the SMA if and when the relevant empowering bill is published for comment.

56. ISPA has submitted above that the provisions of the Bill seeking to create a SMA should be withdrawn due to the fact that the creation of a SMA represents a policy decision which should form part of the current policy review and not be introduced in the Bill. ISPA nevertheless raises the following submissions regarding the SMA proposal.

57. The motivation for the proposed amendments to sections 30 - 34 of the Act and the creation of the SMA is set out in the Memorandum:

    "This clause seeks to align the radio frequency spectrum issues in Chapter 5 of the Act with the Cabinet approved National Radio Frequency Spectrum Policy. It further seeks to introduce a Spectrum Management Agency within the portfolio of the Minister of Communications with overall responsibility for the country's spectrum as contemplated in the White Paper on Broadcasting Policy, 1998."

58. The Memorandum states further that:

    "The role and functions allocated to the Minister in the National Radio Frequency Spectrum Policy should be assigned to the Spectrum Management Agency with the exception that the Minister must approve the national radio frequency policy 'as the custodian of the spectrum on behalf of the people of South Africa'."

59. The White Paper on Broadcasting Policy of 1998[4] ("the Broadcasting Policy White Paper") sets out the following position:

    "**6.2.3 Spectrum Management Agency**
    Technological innovations have put added emphasis on the need for the proper management of the spectrum. The frequency spectrum can now be used to deliver a variety of services including education, communication, commerce, health and emergency services.

[4] 4 June 1998, available from http://www.polity.org.za/polity/govdocs/white_papers/broadcastingwp02.html#6.2.3

The Government is of the view that spectrum management in South Africa must be administered by a body that is not also responsible for the provision of services utilising spectrum.
In other words spectrum management and allocation decisions should not be taken by the armed services, the police, telecommunications companies, broadcasters, signal distributors, airline interests or the like.

A body needs to exist that retains overall responsibility for the efficient, effective and economic use of the country's spectrum assets. These assets are immensely valuable and should be exploited in ways, which best meet the needs of the country as a whole.

No sectional interest should be preferred above another. A body independent of sectional interests is best placed to make major management and allocation decisions and to rule over demarcation disputes.

Many other countries have specialist regulatory agencies of this kind. And whether they have a separate specialist agency or, as an alternative, the function of spectrum management is merged in an agency with other, related functions, most countries acknowledge the need to separate spectrum management from spectrum use. The conflicts of interest that inevitably arise when a spectrum user is also the spectrum manager are impossible to resolve in a publicly acceptable way.

Spectrum allocation is, as well, an international affair. In order to ensure that domestic use of the radio frequency spectrum does not have international consequences that are unintended, many domestic allocation decisions follow international practice.

The International Telecommunications Union is the principal international forum within which international consensus is reached about spectrum use, and ITU Conventions have, in some countries, been given the equivalent status of international treaties.

This international work also needs to be conducted on behalf of the State by an agency that is independent of spectrum users.

6.3 Policy Framework

In order to achieve these ends the government feels that a Spectrum Management Agency should be established, by Parliament, within the portfolio of the Minister for Communications.

The Agency should be vested by Parliament with the function of overall policy development and supervision of South Africa's radio frequency spectrum in order to maximise, by ensuring the efficient

allocation and use of spectrum, the overall public benefit derived from using the radio frequency spectrum.

In addition, the Agency should be responsible for the overall research and planning of the use of the spectrum to meet the needs of the various services and to allocate the frequency bands that will be used for communications, broadcasting, telecommunications etc.

The Regulator will continue to perform the important tasks of planning and supervising the frequency spectrum designated for broadcasting purposes in accordance with the national frequency allocation plan.

It is targeted that this Agency will commence operations in the year 2000 when competition will be opened up in the area of signal distribution."

60. The National Radio Frequency Spectrum Policy[5] sets out the following with regard to the respective roles of the Minister of Communications and the Authority:

"2.1.3 The Minister of Communications ("The Minister") acts as the custodian of the spectrum on behalf of the people of South Africa."

…

2.5 Roles and Responsibilities

2.5.1 The Minister

The Minister represents South Africa in the ITU. This includes, *inter alia* the allocation of the radio frequency spectrum to various radio-communication services.

The Minister is responsible for all international spectrum matters pertaining to South Africa, including Regional and sub-Regional spectrum planning, all cases concerning international harmful interference and international frequency co-ordination. The Department will liaise with ICASA in such matters.

2.5.1.1 The Minister is responsible for issuing policies and policy directions in relation to the radio frequency spectrum.

2.5.1.2 The Minister is responsible for the development of the South African national allocation plan, and for the allocation of spectrum to the different radio-communication services.

[5] Government Notice 306, GG 33116, 16 April 2010

2.5.1.3 The Minister is required to allocate spectrum for the exclusive use of the security services, and that such spectrum be included in the national frequency plan.
2.5.1.4 The Minister is responsible for the co-ordination and approval of any Regional radio frequency spectrum plans applicable to South Africa.

2.5.2 ICASA

2.5.2.1 ICASA is responsible for, administering and managing the usage of the radio frequency spectrum, and for the licensing thereof.
2.5.2.2 In order to fulfil its functions ICASA issues National Radio Regulations that must be adhered to by all the users of national spectrum.
2.5.2.3 ICASA is responsible for the implementation of this Policy.
2.5.2.4 ICASA is responsible for the assignment of radio frequency spectrum to licensees and for the development of national assignment plans."

61. To the extent that the proposed amendments seek to align the Act with applicable policy and to enhance the capacity of the Minister to undertake the role of policy-maker as set out in the Broadcasting Policy White Paper and the National Radio Frequency Spectrum Policy, ISPA believes that such amendments may be desirable and that they underscore the principle that the Authority is responsible for implementing and enforcing policy but not for setting it.

62. ISPA wishes, however, to raise the following submissions with regard to the alignment between the two policy documents cited above and the proposed amendments as motivated for in the Memorandum.

    62.1. ISPA notes that the Broadcasting Policy White Paper first mooted the concept of a SMA within the specific context of signal distribution, notwithstanding that the quoted text indicates a broader intended application to allocation and assignment of radio frequency spectrum in general. The Broadcasting Policy White Paper also predates the drafting and promulgation of the ECA and, for that matter, the formation of ICASA as a “converged” regulator.

    62.2. It is not clear to ISPA why the concept of an SMA is being reinvigorated at this time, some 14 years after the concept was mooted and notwithstanding that the original intention was for the SMA to be put in place by the year 2000. ISPA notes that there was no mention of an SMA in the previously published and withdrawn Electronic Communications Amendment Bill, 2011. Nor was the matter raised at any stage in the policy review process to date.

62.3. ISPA believes that it is furthermore clear that the position under the Broadcasting Policy White Paper conflicts with that under the National Radio Frequency Spectrum policy in several material respects.

62.3.1. The Broadcasting Policy White Paper contemplates an SMA with the function of "overall policy development and supervision of South Africa's radio frequency spectrum" together with "overall research and planning". The Authority is charged with "planning and supervising the frequency spectrum designated for broadcasting purposes".

62.3.2. The National Radio Frequency Spectrum Policy, in contrast, authorises the Authority to perform the implementation of the provisions of that Policy, which includes "the assignment and managing usage of the radio frequency spectrum" and "the assignment of radio frequency spectrum to licensees and for the development of national assignment plans".

62.3.3. The proposals around the SMA set out in the Bill appear to contradict the National Radio Frequency Spectrum Policy.

62.4. ISPA submits that the proposed powers of the SMA, with specific regard to the power to assign radio frequency spectrum licences for government use, appear to go beyond those set out in the Broadcasting Policy White Paper and the National Radio Frequency Spectrum Policy. Stated differently: there does not appear to be a policy antecedent for according the SMA the power – currently held by the Authority – to assign radio frequency spectrum licences for government use.

62.5. The balance of the powers to be exercised by the proposed SMA, *viz*. long term spectrum planning including the development of the national radio frequency plan and the allocation of spectrum for government and non-government use appear to be well-founded in existing policy and largely reflect the current split between the policy-maker and the Authority as set out in the Act. ISPA understands the context here to be the need to increase the capacity to deal with policy decisions falling to the Minister under the Act.

62.6. The Minister will retain her current authority to approve the national radio frequency plan.

Co-operation between the SMA and the Authority

63. The Bill contemplates that the SMA and the Authority will enter into an agreement to cover their mutual co-operation when requesting assistance or advice from the other. While the Bill requires under the proposed section 30(7) that such agreement must be finalised within three months of the

Bill coming into force, ISPA submits that, given the need to prepare and finalise separate legislation to create and empower the SMA and the subsequent process to elect members thereof, it would be more appropriate to stipulate that the co-operation agreement be finalised within a set time after the commencement of the legislation creating the SMA. Taking into account the need to constitute the SMA and get it operational, a period substantially longer than three months would be required to allow the drafting and settling of such co-operation agreement.

64. It is clear from the proposed amendments that the SMA and the Authority will have to co-exist and co-operate closely in their respective activities and that there will be a degree of overlap in their particular areas of competence. The management of this relationship will be critical to the success of the proposed new arrangement and to whether it will import greater effectiveness and efficiency in spectrum planning, management, licensing and use.

65. It is also clear that the SMA will need to co-ordinate its activities with other public and private sector bodies and that the composition and governance of the SMA will be crucial in this regard. There is increasing demand for the allocation of spectrum for private commercial service provision and the assignment of licences, and the SMA will need to be receptive to the needs of industry in this regard.

66. ISPA submits that the success of the SMA will to a large extent be a function of whether members are representative of a diverse set of skills, expertise and experience in the management and use of radio frequency spectrum and the efficient operation of wireless networks and a premium should be placed on ensuring objective technical expertise is available to the SMA.

67. ISPA looks forward to engaging further with the Department in this regard at the time of the publication of the Bill to create the SMA.

The scope of government use

68. ISPA is uncertain as to the scope of the term “government use” and requests that the Department provide public clarity on this point prior to the finalisation of the Bill.

69. While it is clear that use of radio frequency spectrum by the SANDF, SAPS and other entities falling within the cluster would be included as “government use”, the proposed amendments do not indicate whether state-owned companies such as Sentech would fall within such use and therefore fall within a parallel radio frequency spectrum licence assignment process. While the mandate and actions of Sentech fall within government control and government may in future take up a position as an anchor tenant on a national wireless network operated by Sentech, it is also the case that Sentech currently holds and will, in all likelihood, continue in future to hold, assignments in bands which it shares with

private commercial licensees such as the 800MHz and 2.6GHz bands. Sentech may also in future be a provider of wholesale wireless access and backhaul services to such non-government licensees.

70. If it is the case that assignments of radio frequency spectrum licences to Sentech and similarly-situated state-owned companies will fall within the competence of the SMA, this will underscore the need for the SMA and the Authority to closely co-ordinate their activities.

71. ISPA submits that it would preferable for the assignment process for radio frequency spectrum to entities such as Sentech be undertaken by the Authority to facilitate planning and efficient use of the relevant bands.

72. Further, the Bill does not provide guidance on whether the use of radio frequency spectrum by municipalities would constitute government or non-government use. Currently many municipalities and even government departments are served by private licensees using radio frequency spectrum. ISPA submits that, given that the radio frequency spectrum licences in this scenario are assigned to non-government users, such assignments should fall within the competence of the Authority.

Further delays in the assignment of radio frequency spectrum suitable for the provision of broadband access services

73. ISPA's primary concern with the proposed amendments to Chapter 5 of the Act is the potential introduction of massive scope for delay in the current assignment processes relating to the 800MHz, 2.6GHz and 3.5GHz bands. It will take a considerable amount of time to finalise the legislation intended to establish and empower the SMA and thereafter to appoint its members and for the SMA to become generally operational.

74. Developing and managing a national radio frequency spectrum management agency requires a highly trained, technical staff to meet the daily as well as long-range spectrum requirements resulting in the implementation of new systems and technologies.

75. ISPA refers to the Draft Frequency Migration Regulations and Draft Migration Plan published for comment by the Authority on 17 August 2012[6]. It is ISPA's view that this is an excellent document which has the potential to significantly advance radio frequency spectrum management in South Africa, but the proposal to create an SMA raises confusion as to the status of the Draft Frequency Migration Regulations and Draft Migration Plan given that it can be argued that the power to undertake radio frequency spectrum migration would lie with the SMA and not the Authority.

[6] General Notice 606 of 2012, GG 35598.

Sub-letting of frequency licences

76. ISPA strongly supports the proposal in the Bill to amend section 31 of the Act through the insertion of a new subsection 31(2A) to make it clear that spectrum licences may be assigned, ceded or otherwise transferred to another person subject to obtaining the permission of the SMA or the Authority in accordance with the procedures and criteria to be established under subsection 31(3)(c).

77. While ISPA notes that the current position is that a prohibition on sub-assignment, cession or other transfer currently exists and the Authority has previously included such procedures in draft regulations (but withdrawn these for reasons which are not clear), any express provisions in this regard are welcome.

78. ISPA submits that, given the importance of introducing flexibility in the sub-assignment, cession or other transfer of radio frequency spectrum licences and the potential which this has for introducing greater efficiencies into the use of radio frequency spectrum, there should not be a discretion on the part of the SMA and the Authority as to whether to prescribe the required procedures and criteria as is proposed in the amendment to subsection 31(3). The same argument is applicable to the procedures and criteria for the processes contemplated in subsections 31(3)(a) and 31(3)(b).

79. ISPA further submits that the finalisation of said procedures and criteria should be subject to a time limit as has been done for the regulations contemplated in the proposed amendments to section 21 of the Act, discussed above. ISPA notes in this regard that the procedures and criteria in respect of subsections 31(3)(a) and 31(3)(b) have already been finalised by the Authority.

80. ISPA suggests the following amendment to the proposed section 31(3):

(3) The Spectrum Management Agency and the Authority ~~may~~ [must, within 12 months of the date of commencement of the Electronic Communications Amendment Act 2012,] taking into account the objects of the Act, prescribe procedures and criteria for-
(a) **[awarding]** radio frequency spectrum licences **[for competing applications or]** in instances where there is insufficient spectrum available to accommodate demand;
(b) the amendment, transfer, transfer of control, renewal, suspension, cancellation, and withdrawal of radio frequency spectrum licences; and
(c) permission to let, sub-let, assign, cede or in any way transfer a radio frequency spectrum licence, or assign, cede or transfer control of a radio frequency spectrum licence as contemplated in subsection 2A.

PROPOSED AMENDMENTS TO THE INTERCONNECTION AND FACILITIES LEASING REGIMES

81. ISPA welcomes the proposed amendments to Chapters 7 and 8 of the Act and the related definition of “electronic communications facility”.

82. ISPA appreciates that the proposed amendments are intended to strengthen the pro-competitive regulation of interconnection and facilities leasing.

Amendment to the definition of “electronic communications facility”

83. The Bill proposes to amend the definition of “electronic communications facility” contained in section 1 of the Act so that it explicitly includes access to wiring in multi-tenant buildings as well as both active and passive components. Passive components of an electronic communications network are those which do not themselves carry electronic communications but enable such carriage, e.g. ducts, collocation space and the like. This is pursuant to a request from the Authority which faces argument from incumbent operators that they are only obliged to lease the passive components on their network.

84. ISPA is concerned that the proposed amendment does not fully meet the challenges faced in practise with the existing definition.

84.1. ISPA is aware that legal opinion has been obtained which hold that the words “which can be used for, or in connection with” as contained in the current definition imply that the items listed after this phrase are not themselves to be regarded as electronic communications facilities.

84.2. ISPA submits further that the words “where applicable” are not required in the definition and that they only serve to introduce uncertainty.

84.3. ISPA believes that this issue can be easily put to rest and suggests the following amendment to make it clear that address this issue:

'"electronic communications facility' includes but is not limited to any-

(a) wire (<u>including wiring in multi-tenant buildings</u>);

(b) cable (including undersea and land-based fibre optic cables);

(c) antenna;

(d) mast;

(e) satellite transponder;

(f) circuit;

(g) cable landing station;

(h) international gateway;

(i) earth station; and

(j) radio apparatus or other thing, whether an active or passive infrastructure component, which can be used for, or in connection with, electronic communications, ~~including~~ and which shall further include, where applicable-

(i) collocation space;

(ii) monitoring equipment;

(iii) space on or within poles, ducts, cable trays, manholes, hand holds and conduits; and

(iv) associated support systems, sub-systems and services, ancillary to such electronic communications facilities or otherwise necessary for controlling connectivity of the various electronic communications facilities for proper functionality, control, integration and utilisation of such electronic communications facilities;";

84.4. ISPA further requests that the Department take into account the fact that it is passive electronic communications facilities which constitute the greatest network deployment cost. The focus of facilities leasing / infrastructure sharing must therefore be on passive electronic communications infrastructure in order to promote competition and decrease input costs which are a major driver or retail prices.

84.5. Finally in this regard, ISPA requests that the Department consider broadening the proposed amendment specifying the inclusion of wiring in multi-tenant buildings to further include business parks and other entities under the control of a single landlord / body corporate.

Amendment to the feasibility criteria applicable to the obligation to interconnect and lease facilities

85. The Bill proposes to use “economic feasibility” as opposed to “financial feasibility” in determining whether an interconnection or a facilities leasing request is reasonable. According to the Memorandum the former term has “wider application”.

86. ISPA’s understanding of this proposed amendment is that an assessment of the economic feasibility of an interconnection or facilities leasing request involves an assessment of the overall economic status of the interconnection or facilities provider. This would constitute a broader assessment than financial feasibility, which may be argued to apply to the specific interconnection or leasing request.

Under financial feasibility a request for the leasing of a specific facility may be refused on the grounds of a determination that the leasing of that facility, without regard to any other factor, is not financially feasible. Using economic feasibility, however, the determination of feasibility would take into account a broader set of factors, including the financial state of the provider and, potentially, efficiency and market-related considerations.

Strengthening of the prohibition on discrimination in the provision of interconnection and facilities leasing agreement

87. ISPA welcomes the proposed amendments in the Bill which seek to make it explicit that the statutory prohibition on discrimination in the provisions of interconnection and facilities leasing agreements includes any discrimination between the services provided by the provider to the access seeker and the services provided by the provider to itself. ISPA notes, however, that the practical enforcement of this prohibition remains and will remain a challenge until such time as the Authority is provided with greater resources.

88. ISPA wishes to raise the following submissions in this regard:

88.1. ISPA is concerned that the proposed use of the term “network services” in subsection 37(6) is inaccurate:

"(6) The interconnection agreement entered into by a licensee in terms of subsection (1) must, unless otherwise requested by the party seeking interconnection, be non-discriminatory as among comparable types of interconnection and not be of a lower technical standard and quality than the technical standard and quality provided by such licensee to itself or to an affiliate or in any other way discriminatory compared to the comparable network services provided by such licensees to itself or an affiliate."

88.1.1. The term “network services” is short-hand for the term “electronic communications network services” as set out in section 1 of the Act. The use of the term “network services” within the context of Chapter 7 of the Act relating to interconnection may therefore be construed as implying that interconnection may only take place between two ECNS licensees.

88.1.2. As is unambiguously clear from section 37(1) of the Act this is not a correct interpretation. Section 37(1) states that “any person licensed in terms of Chapter 3 must, on request, interconnect to any other person licensed in terms of this Act and persons providing service pursuant to a licence exemption in accordance with the

terms and conditions of an interconnection agreement entered into between the parties".

88.1.3. ISPA submits further that the use of "network services" ignores the fact that interconnection involves the provision of both ECS and ECNS and only extends the prohibition on discrimination to the ECNS portion. There is no bar on an entity holding only an ECS licence entering into an interconnection agreement, subject to such entity obtaining the required ECNS from a third party licensee.

88.1.4. ISPA therefore requests that the Department avoid the use of the term "network services" and rather refer to "services" which term can refer to both ECS and ECNS.

88.2. ISPA holds a related concern regarding the proposed use of the term "network services" in subsection 43(7) is inaccurate:

"(7) The lease of electronic communications facilities by an electronic communications network service licensee in terms of subsection (1) must, unless otherwise requested by the leasing party, be non-discriminatory as among comparable types of electronic communications facilities being leased and not be of a lower technical standard and quality than the technical standard and quality provided by such electronic communications network service licensee to itself or to an affiliate or in any other way discriminatory compared to the comparable network services provided by such licensees to itself or an affiliate."

88.2.1. ISPA notes that the leasing of an electronic communications facility does not necessarily imply the provision of ECNS by the leasing ECNS licensee. An electronic community facility is by definition a component of an ECN, i.e. it is only where electronic communications facilities are combined into a system that an ECN is created and ECNS provided.

88.2.2. ISPA therefore submits that the use of the term "network services" is therefore not accurate and the term "services" is to be preferred.

Interconnection and facilities leasing pricing framework

89. ISPA welcomes the proposed amendments in the Bill which seek to simplify the process in terms of which the Authority can prescribe regulations which establish a framework of wholesale rates to be charged for interconnection and facilities leasing respectively. ISPA notes that previous attempts by the Authority to create such frameworks were met by objections from incumbent operators based on

the argument that the Authority could only prescribe these regulations after undertaking a full Chapter 10 process.

90. ISPA is of the view that the amended provisions could play a useful role in providing frameworks for regulating wholesale pricing for services such as peering.

Essential facilities

91. ISPA supports the proposed insertion of a new subsection 43(8A) into Chapter 8 of the Act.

92. ISPA is aware that the provisions of the ECA relating to essential facilities remain unused by the Authority and that a list of essential facilities has not been prescribed as required by subsection 43(8), notwithstanding the publication of a draft list during 2007[7]. ISPA is not aware of the reasons for the failure on the part of the Authority to finalise this list.

93. ISPA notes that the Memorandum states that the proposed section 43(8A) is intended to "provide clarity on how essential facilities are to be treated and provided without delay and to enable ICASA to act swiftly in terms of this provision, which is essential to the implementation of a non-discriminatory access regime".

94. ISPA urges the Department to engage with the Authority to determine what obstacles the Authority is experiencing that are preventing the prescription of a list of essential facilities so that the proposed subsection 43(8A) and section 67 of the Act, insofar as it specifies control of an essential facility as indicative of Significant Market Power, can be effectively utilise in the enforcement of a non-discriminatory access regime.

[7] Regulations prescribing a list of essential facilities and matters related thereto, pursuant to section 43(8) of the Electronic Communications Act, General Notice 1800 of 2007, GG 30612, 24 December 2007

PROPOSED AMENDMENTS TO SECTION 67 OF THE ACT REGARDING COMPETITION MATTERS

95. ISPA strongly supports the proposed overhaul of section 67 of the Act. It has been evident for some time that the provisions of this section as it currently exists are too complex for implementation by the Authority and offer significant scope for affected parties to delay proceedings through procedural and other challenges.

96. To date this section has only been utilised successfully once when wholesale call termination rates were regulated through the ICASA Call Termination Regulations 2009. This process was exceptional in that there was significant direct support for the process from the then Minister of Communications as well as other role-players such as the Portfolio Committee for Communications.

97. Given the persistence of high retail and wholesale pricing in South Africa and the urgent need for the Authority to take further action to address such persistence, any attempt to simplify section 67 is to be welcomed.

THE PROPOSED BROADBAND INTERGOVERNMENTAL IMPLEMENTATION COMMITTEE

98. ISPA believes that there is a definite and urgent need for greater co-ordination amongst Government and SoE role-players in the ICT market.

99. This is required on both the demand and the supply side market: stakeholders from portfolios impacted upon by ICT and broadband development, such as education, health and trade & industry should also have a presence on the proposed Committee to ensure that interventions are relevant and uptake of available services is optimised.

100. ISPA has noted in particular the lack of co-ordination between different tiers of Government and between these tiers and Broadband Infraco and Sentech. The current allocation of responsibilities between the national, provincial and local Government as set out in the National Broadband Policy is not reflected in practise, principally due to the inability of Broadband Infraco and Sentech to meet the demands of provincial and local Government broadband initiatives.

101. ISPA therefore welcomes the proposed formation of a body which will seek to streamline Government broadband programmes and interventions and to realise the synergies between the considerable assets which Government holds in the sector.

102. ISPA wishes, however, to raise the following submissions in respect of the proposed Committee:

    102.1. ISPA does not believe that it is appropriate for a document such as the proposed broadband implementation plan to be developed by a Committee consisting solely of Government representatives. It is not clear from the terms of the proposed section 72A or the Memorandum whether the development of the broadband implementation plan will be a process which seeks to involve industry and the public.

    102.2. The finalisation of a broadband implementation plan is a matter of the highest urgency. ISPA requests that the Department consider inserting a provision into the proposed section 72A(3)(c) which stipulates that the Committee must complete the development of the broadband implementation plan within a specified period of time after the finalisation of its appointment.

    102.3. ISPA requests that the proposed section 72A make provision for the proceedings of the proposed Committee to be transparent given the high degree of importance attaching to the Committee's work.

102.4. ISPA welcomes the provisions of the proposed subsection 72A(3) which specify that the proposed Committee will be charged with facilitating and monitoring broadband penetration in South Africa and to “annually survey and evaluate the status of broadband penetration in the Republic including, without limitation, household broadband penetration, electronic communications network connectivity to municipalities and broadband providers”. ISPA requests that specific provision is made for the results of such annual survey to be published for general consumption.

PROPOSED AMENDMENTS TO SECTION 73 OF THE ACT REGARDING THE E-RATE

103. ISPA has noted the proposed amendments to section 73 of the Act but does not believe that these are sufficient to remedy the problems experienced with the implementation of this policy, which was introduced in the 2002 Telecommunications Amendment Act.

104. The Memorandum notes that the amendments are intended to "assist with the enforcement of the e-rate provisions" and further that that the Department is of the view that it is "necessary to make it clear when an ECS licensee should give the discount and when the ECS licensee is entitled to a discount from the ECNS licensee". ISPA supports this underlying intention.

105. The regulatory position pertaining to the E-Rate is currently deficient:

105.1. The Authority published "Regulations in terms of section 4 read with section 73 of the Electronic Communications Act 36 of 2005, in respect of E-Rate" on 3 March 2009[8] ("the 2009 E-Rate Regulations").

105.2. The Authority published notice of its intention to revise the 2009 E-Rate Regulations on 7 December 2009[9] and public hearings in this regard were held in March 2010. This exercise has not, however, been completed and the 2009 E-Rate Regulations remain in force. These Regulations do not make provision for recovering the E-Rate discount from upstream providers.

105.3. It was evident during the abovementioned hearings that some providers, in particular Telkom, were opposed to any attempt to introduce a right on the part of the providing licensee to obtain a discount from upstream licensees.

105.4. Neither the 2009 E-Rate Regulations or the proposed amendments in the Bill make provision for the position of licence-exempt resellers and clarify that such resellers, although not licensees, are also bound by the E-Rate obligation as well as being able to recover from upstream providers (whether ECS or ECNS licensees).

105.5. The applicable law is accordingly, at best, highly uncertain as there is a disjunct between the Act and the Regulations.

106. ISPA calls on the Department to recognise that the E-Rate constitutes a failed policy intervention which has not been successfully implemented over the decade it has been in place. ISPA's view is

[8] Regulation 246 of 2009, GG 31979
[9] General Notice 1610 of 2009, GG 32789

that the best way forward is to scrap the E-Rate and to replace it with a subsidy system to be channelled through the Universal Service and Access Agency of South Africa (USAASA) utilising funds contributed by licensees through the USAF Contribution Regulations. This approach would have the advantages of making the process far simpler, equalising the burden on licensees and allowing more flexibility on the part of schools in their choice of service provider.

107. ISPA submits that it would be preferable for policy options for facilitating communications access for educational institutions to be debated as part of the comprehensive policy review process announced by the Minister. This would also provide an opportunity for the various disparate initiatives relating to schools connectivity -such as the Dinaledi Schools project and the work being done by the Department of Science and Technology and the Department of Public Service Administration - to be streamlined and for the synergies between them to be captured. Cognisance should also be taken of the roll-out obligations relating to schools set out in certain licences issued by the Authority and the efforts of State-owned Entities such as Broadband Infraco and Sentech and agencies such as USAASA.

108. In the event that the Department wishes to persist with the proposed amendment to section 73, ISPA requests that it consider the following:

    108.1. Making specific provision for resellers and noted above.
    108.2. Aligning subsection 73(2) with the realities of service provision. In particular ISPA does not understand the reference to “call charges for access to the Internet”.

CONCLUSION

109. ISPA thanks the Minister and the Department for their consideration of these submissions and trusts they will prove to be of assistance.

Regards
INTERNET SERVICE PROVIDERS' ASSOCIATION
Per:

ISPA Joint Chairs
(the above intended as an electronic signature)