



ISPA Submission

in response to the publication of the

ICASA Framework for introducing Local Loop Unbundling Discussion Paper for public comment

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CONTENTS

INTRODUCTORY REMARKS.....	3
GENERAL COMMENT	4
The need for a technology-neutral approach to unbundling access networks.....	4
Policy context: is there a need for LLU?.....	7
The positioning of the incumbent fixed line provider	12
The positioning of the incumbent mobile network operators.....	15
Pricing.....	16
Information asymmetry	18
SPECIFIC QUERIES RAISED FOR INPUT.....	20
Is ICASA's proposed approach to unbundling the local loop through the implementation of the facilities leasing regulations reasonable, feasible and acceptable?.....	20
What form of local loop unbundling do stakeholders realistically favour in the South African market? ..	21
What other cost items should be included in each form of local loop unbundling (LLU)?	22
Should a standardised ordering and specifications system be developed?	22
In the event that an access line deficit is identified, would you be willing to contribute to an access line deficit recovery scheme?.....	23
CONCLUSION.....	24

INTRODUCTORY REMARKS

1. The first steps in the development of a regulatory framework for introducing competition into the access portion of electronic communications networks in South Africa are long overdue and the publication of the Discussion Paper on a Framework for introducing Local Loop Unbundling (“the Discussion Paper”) by the Authority is most welcome.
2. ISPA wishes to thank the Authority for the opportunity to meet with it on a one-to-one basis prior to the finalisation of this submission. This consultation was found to be extremely helpful in clarifying the issues which need to be addressed and certain of the challenges facing the Authority in its conduct of this process.
3. ISPA confirms that it wishes to make oral submissions at public hearings relating to the Discussion Paper should they be held.

GENERAL COMMENT

The need for a technology-neutral approach to unbundling access networks

4. The Authority explicitly recognises in paragraph 2.2 of the Discussion Paper that the Electronic Communications Act 36 of 2005 (“the ECA”) adopted as a fundamental tenet the principle of open access and that it has introduced an “open-access approach to regulating electronic communications services”. This approach is characterised, according to the Discussion Paper, by:

4.1. A technology-neutral framework that encourages innovative, low-cost delivery to users;

4.2. Competition at all layers in the network, allowing a wide variety of physical networks and applications to interact in an open architecture;

4.3. Transparency to ensure fair trading within and between layers that allows clear, comparative information on market prices and services;

4.4. Circumstances where everyone can connect to everyone else at the layer interface so that any size organization can enter the market and no one takes a position of dominant market power; and

4.5. Devolved local solutions rather than centralized ones encouraging services that are closer to the user.

5. The Discussion Paper further references the objects of the ECA which are directly relevant to the application of the principle of open access to access networks. These legislative objects speak to the desirability of access network unbundling in the sense of promoting competition and facilitating consumer choice and welfare.

6. The Discussion Paper also refers to binding international legal instruments such as the Kigali Protocol¹ to which South Africa is a party and which express its commitment to the open-access approach in respect of national, regional and international electronic communications networks.

6.1. The Kigali Protocol sets out an interesting definition of open access:

“Open Access” means that any Authorised Service Provider shall have access to any network facility and any network service of the regional open access network on terms and conditions that

¹ Protocol on Policy and Regulatory Framework for NEPAD ICT Broadband Infrastructure for Eastern and Southern Africa (“Kigali Protocol”), into force 13 February 2008.

are non-discriminatory, transparent and affordable to all parties and that the Operating Entity/Entities shall not compete with Service Providers in provision of retail services.²

7. ISPA agrees with the analysis set out in the Discussion Paper and with the statement that the ECA mandates the Authority to adopt an “open-access approach to regulating electronic communications services”.
8. Within this context ISPA submits that it is not correct for the Authority to initiate a process which focuses exclusively on copper as an access medium. ISPA queries the validity of an intervention undertaken under the authority of an Act based on the principles of open access and technology neutrality where the intervention restricts itself to a particular access technology.
9. The need for a technology-neutral approach is further underpinned by the Authority’s decision to pursue unbundling through the facilities leasing regime created by Chapter 8 of the ECA.
 - 9.1. The definition of the term “electronic communications facility” in the ECA is self-evidently technology-neutral and it refers to both wired and wireless networks.
 - 9.2. The facilities leasing principles and processes set out in said Chapter 8 as well as the Facilities Leasing Regulations 2010 are of application to all forms of electronic communications facilities, including all electronic communications facilities which form elements of access networks.
 - 9.3. If the Authority is arguing, as it is, that unbundling of the copper local loop is based on Chapter 8 of the ECA together with the Facilities Leasing Regulations 2010, then it follows that the same basis is applicable to other forms of electronic communications facilities and electronic communications networks utilising such other forms of facilities to provide access services.
10. ISPA submits that there are policy, legal and practical considerations which militate towards a broader approach to “unbundling the local loop”. The Discussion Paper should have a broader scope which encompasses all access media, including radio frequency spectrum and fibre. The essence of the unbundling exercise should, ISPA submits, centre on the laying down of a set of principles which are capable of being applied across access media.
11. ISPA notes that it may be argued that adopting a technology-neutral approach to unbundling may constitute an undesirable broadening of the scope of the process but does not believe that such an argument bears scrutiny. It is clear from the Discussion Paper that it does not seek to set out and deal with the practicalities attendant on unbundling the copper local loop and ISPA does not suggest that it

² Ibid. Article 1

does so – such details are best left to industry working groups to settle within a general regulatory framework. The same approach should apply to other access media: while there may be different and substantial challenges associated with, for example, unbundling the wireless local loop (WLL), this does not imply that the Authority should not proceed to establish applicable principles and then mandate industry working groups to thrash out implementation detail.

12. It certainly cannot be argued that there is not an urgent need for intervention to address competitive deficiencies in wholesale models and pricing currently employed by mobile network operators that control the WLL.
13. ISPA therefore requests that the Authority consider broadening the scope of its intervention so as to cover access networks and focus on “access network unbundling”.
14. ISPA does not intend, in making the above submissions, to in any way detract from the importance of unbundling the extensive last-mile copper network owned, operated and under the control of Telkom SA (Pty) Ltd (“Telkom”). ISPA explicitly recognises that:
 - 14.1. The wired local loop represents a significant bottleneck in the delivery of quality, affordable broadband services to South African consumers who have a fixed copper twisted pair into their home or business premises. This particularly impacts upon the SMME sector which is largely reliant on ADSL for connectivity.
 - 14.2. The wired local loop was in essence paid for by the South African taxpayer, a fact which ISPA believes should be taken into account in determining whether or not and under what terms Telkom should be obliged to share the use thereof.
 - 14.3. Significantly more literature and relevant precedent exists to guide the unbundling of the wired as opposed to the wireless local loop.
 - 14.4. There is perhaps a stronger case for intervention in the fixed broadband market given the obvious inefficiencies in the current operation of the copper local loop.
15. ISPA accordingly does not seek to de-prioritise the focus on Telkom’s copper local loop: rather we submit that there should be explicit recognition that the facilities leasing approach to unbundling the copper local loop has equal application to other forms of local loop.

Policy context: is there a need for LLU?

16. There has been a degree of questioning within the Portfolio Committee and the media and on behalf of the fixed-line incumbent as to whether LLU is desirable and, in particular, whether or not it will serve to deepen broadband penetration in South Africa.
17. At the outset it should be emphasised that considerations relating to the socio-economic or other value of an unbundling process are not directly relevant to the Discussion Paper and that the Authority does not appear to have much discretion in this regard.
18. The policy context for local loop unbundling forms the basis for the Authority's intervention and its publication of the Discussion Paper. As noted in paragraph 2 of the Discussion Paper the relevant policy is explicit that the Authority must pursue unbundling as a policy objective.
 - 18.1. The policy cornerstone for unbundling is the decision taken and direction given by the former Minister of Communications, Ivy Matsepe-Casaburri, published in the Government Gazette on 17 September 2007:

8. LOCAL LOOP UNBUNDLING (LLU) PROCESS

I HAVE ALSO TAKEN THE POLICY DECISION that, given the complexity of local loop unbundling process on the one hand and the urgency for South Africa to enable all operators appropriately licensed to have access to the local loop on the other hand, the unbundling process in South Africa should be urgently implemented and completed by 2011. In addition, the Authority should urgently and as appropriate, take advantage of the report of the Local loop unbundling committee and its recommendations on the proposed unbundling models and ensure that we achieve the 2011 deadline.³

- 18.2. This policy was affirmed by former Minister of Communications General (Ret.) Sipiwe Nyanda during his Budget Speech on 20 April 2010 where he referred to his intention to issue a policy directive to ICASA "to conclude the unbundling of the local loop"⁴.
- 18.3. Further affirmation was provided by the current Minister of Communications shortly after taking office in November 2010:

³ Government Gazette No. 30308 dated 17 September 2007

⁴ Budget vote speech by the Communications Minister, National Assembly, 20 April 2010, sourced from <http://www.polity.org.za/article/sa-nyanda-budget-vote-speech-by-the-communications-minister-national-assembly-20042010-2010-04-20>

“Building an efficient, competitive and responsive ICT infrastructure network is critical to propel South Africa into a knowledge-based economy. This would require that government continue to implement a programme to ensure the liberalization of the ICT sector in order to promote competition, In this regard, we continue to implement interventions aimed at promoting appropriate cost structures in the ICT sector. We also note the significant progress made in addressing the mobile termination rates. The **Unbundling of the local loop** remains a critical and important intervention. In this regard we will work closely with ICASA to ensure that the local loop is unbundled by November 2011.⁵”

18.4. On 25 February 2011 the Honourable Minister stated that the Ministry would “work with ICASA and industry on the unbundling of the local loop as another potential contribution towards facilitating broadband access to homes on a large scale”.⁶

19. It is not clear to ISPA that questions regarding the desirability of pursuing local loop unbundling which are being directed at the Authority are appropriate or relevant within this policy context.

20. It appears recently, however, that there has been a degree of reconsideration of the policy expressed above, as reflected in the following excerpt from the minutes of a meeting of the Parliamentary Portfolio Committee on Communications (“the Portfolio Committee”):

“The Committee was still waiting for feedback from discussions between Department of Communications (DoC) and ICASA on Local Loop Unbundling (LLU).Currently, the Committee, ICASA and the DoC were not in agreement on the matter. The issue would not be discussed until the entities could agree on how to move forward with the LLU programme. The Committee would wait for the DoC and ICASA to come back to the Committee.”⁷

21. In a recent interview with the New Age newspaper the Minister of Communications alluded to difficulties experienced with local loop unbundling and raised questions regarding the motivation behind the process:

⁵ Media Briefing Statement by Minister of Communications Roy Padayachie, 11 November 2010, accessed from http://www.supportpublicbroadcasting.co.za/library/entry/media_briefing_statement_by_new_minister_padayachie_-/

⁶ Speech of Minister Radhakrishna L Padayachie (Roy) during the occasion of the Round-Table Discussion with members of the ICT Sector, 25 February 2011, http://www.doc.gov.za/index.php?option=com_content&view=article&id=486:speech-of-minister-radhakrishna-l-padayachie-roy-during-the-occassion-of-the-round-table-discussion-with-members-of-the-ict-sector&catid=88:press-releases

⁷ ICASA and SABC on their 2011/12 First Quarter Reports, 6 September 2011, accessed at <http://www.pmg.org.za/report/20110906-south-african-broadcasting-corporation-independent-communications-aut>

“The unbundling of the local loop had encountered some sticky problems, said Padayachie. “The regulator was not ready to unlock the local loop. They asked us to have a second look at certain directives to ascertain if they are still relevant.”

He said the push for unbundling seemed to have been based on experiences of eastern European countries. Comparable countries like India and China have not gone swiftly into unbundling the local loop.”⁸

22. ISPA has no insight into the detailed nature of the discussions referred to above or into the reasons underlying any reconsideration of policy, but it is clear that – until such time as the policy context for local loop unbundling may be amended – questions raised regarding the fundamental validity of unbundling are at best premature.
23. Notwithstanding the above analysis and taking into account what appears to be a dynamic policy environment, ISPA wishes to set out below, in brief, its argument as to why unbundling constitutes a highly desirable remedy to the high-pricing and under-utilisation of communications infrastructure which currently restricts growth in South Africa.
24. ISPA believes that an overview of the broadband value chain which distinguishes the five primary elements of the cost of connectivity is useful in placing the need for an unbundling intervention in context:
 - 24.1. *International peering and transit in London and other termination points*: this area is already highly competitive and accordingly characterised by low costs and market efficiency.
 - 24.2. *International submarine connectivity*: this area has already seen increased competition with significant future developments in progress or in advanced planning stages. South Africa has resolved the high costs previously associated with this element and the SAT-3 monopoly and the imminent coming into operation of the West African Cable System (WACS) and other submarine cables will underpin continued cost reductions and access to international connectivity and content.
 - 24.3. *National long distance connectivity*: this element remains subject to price distortions, notwithstanding a major increase in deployments on a shared and individual basis and the launch of Broadband Infracore as a State-owned Enterprise mandated to target such distortions. Constraints in the supply of national long distance connectivity services have been

⁸ http://www.thenewage.co.za/blogdetail.aspx?mid=186&blog_id=1221

emphasised by the vastly increased supply of international bandwidth, creating the counter-intuitive situation in terms of which it is cheaper to route electronic communications from Cape Town to Johannesburg via London as opposed to directly. ISPA is, however, of the view that the challenges presented by this segment of the value chain are being addressed by the market and that the situation will normalise in the short-to-medium-term without the need for any further intervention on the part of the Authority or Government.

24.4. *Metro-reticulation / backbone*: this element remains dominated by Telkom with municipal projects in the metros largely underperforming although other operators are slowly building capacity. ISPA submits that this element is subject to pricing distortion but that this is easing due to increased self-provision by municipalities, licensees and passive infrastructure providers.

24.5. *Access / last mile*: this element remains the most problematic, principally due to the fact that infrastructure is owned and operated by a single provider or group of providers. It is evident that, until there is effective unbundling of the wired and wireless loop, the benefits of interventions higher up the connectivity chain will not be realised to the advantage of South Africans. The lack of progress in opening up the local loop to competition has been exacerbated by the lengthy delays experienced in the issuing of new licences for radio frequency spectrum suitable for the deployment of access networks.

25. While the benefits of competition are being felt in all of the other cost elements set out above, they remain absent in the provision of broadband services and network services over the “last mile” and it is no exaggeration to state that the unbundling of access networks is the single most important regulatory intervention as regards lowering the cost of broadband services in South Africa.

26. Stated from a different perspective:

26.1. In January 2009 and the following months the Authority issued out some 543 pairs of individual electronic communications network service (IECNS) and individual electronic communications service (IECS) licences. The majority of these were issued to entities which had previously held Value Added Network Services (VANS) licences and the awarding of such licences formally recognised the ability of the former VANS licensees to compete on an equal footing with the incumbents from a service licensing perspective.

26.2. Notwithstanding this liberalisation of service licensing there has not, since that time, been a single intervention which is specifically targeted at allowing newly-empowered licensees to

control or participate directly in the access networks constituting the last mile to their subscribers or potential subscribers.

- 26.3. Nor, with the notable exception of the Call Termination Regulations and intervention, has there been any regulatory intervention specifically targeted at wholesale pricing practises extant in the wired and wireless access markets.
- 26.4. The unbundling of wired and wireless access networks is therefore long overdue in ensuring that consumers of electronic communications in South Africa are able to realise the benefits of choice and competition when receiving electronic communications services.
27. ISPA agrees with the view expressed by the Authority that the unbundling of access networks is in essence an exercise in introducing efficiencies through the creation of a framework for the sharing of infrastructure. These efficiencies should lead to direct consumer benefits by reducing the cost of network deployment as well as indirect benefits through a reduction in public disruption related to such network deployment. As things stand the cost of unnecessary duplication of last-mile infrastructure is borne by consumers and reducing uptake of broadband services.
28. Having stated its case for access network unbundling, ISPA reiterates the important point that the Discussion Paper should not be misconstrued as an opportunity to debate whether or not unbundling should take place. That decision rests with the policy-makers and, as things stand, has been made. The focus of the Discussion Paper and the debate which it engenders must be on the modalities: the how rather than the why.
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The positioning of the incumbent fixed line provider

29. ISPA has noted that Telkom SA Ltd ("Telkom") appears implacably opposed to the LLU initiative. This attitude is likely to have a significant impact on the time-frames attendant on unbundling the copper local loop.
30. Telkom argues, inter alia, that LLU should not be seen as a remedy for the ills affecting broadband in South Africa. In particular "there is no correlation between LLU and increasing access in deep rural areas. It has been recognised by the Portfolio Committee that LLU "speaks to the 8% of the population that have fixed line access and not the 92% that don't"⁹. LLU is therefore pro-rich and anti-poor.
31. ISPA believes, with respect, that this line of argument misses the point on two counts:
- 31.1. Firstly, LLU in the specific sense of unbundling the Telkom's copper access network was never conceived of or intended to function as a panacea for the universal access and universal service challenges facing South Africa. It is disingenuous to criticise the desirability of an unbundling intervention by pointing out that it does not achieve something it was never intended to achieve in the first place.
- 31.2. Indeed there are a number of other policies and regulatory actions which are specifically targeted at furthering universal service and access objectives. It is also evident that such objectives will be attained at least initially through the use of radio frequency spectrum and the proper appreciation of the potential of new wireless technologies and standards in bridging the digital divide.
- 31.3. Moreover an exclusive focus on universal access and service which seeks to tie all regulatory interventions to these objectives would ignore the need for South Africa to ensure that it remains internationally competitive and that South African businesses are able to adopt and exploit new technologies and trends. The current trend towards cloud-based computing, for example, requires greater reductions in the cost of bandwidth and the provision of SLA-based access services. A reluctance to intervene to address market failures purely because such intervention is aimed at those already receiving a service would, ISPA respectfully submits, be short-sighted in the extreme.

⁹ Comments of Dr Andrew Barendse, Telkom Group Executive: Regulatory Affairs, during a panel discussion at SATNAC 2011, September 2011, as reported at <http://mybroadband.co.za/news/telecoms/33332-local-loop-unbundling-pro-rich-and-anti-poor.html>

- 31.4. Notwithstanding the above it is indeed foreseeable that the unbundling of Telkom copper local loop will serve to deepen broadband penetration in South Africa in that it will create opportunities to exploit the substantial number of fixed lines which are DSL-enabled but not being used to provide a DSL service. A map overlay of Telkom exchanges shows that a great number of these are spread throughout rural South Africa.
- 31.5. Secondly, ISPA submits that the unbundling of access networks in the broader technology-neutral sense will indeed have a significant impact on universal service and access in South Africa.
- 31.6. ISPA holds the view that universal access has largely been achieved through the roll-out of GSM networks and that the core challenge facing South Africa is an affordability gap rather than an access gap. ISPA submits that a focus on the development of a vibrant wholesale wireless broadband market would result in the same reductions in pricing as have been witnessed in services layer of the fixed broadband market over the past two years.
32. Telkom has also raised in a number of regulatory processes its view that mobile broadband is a substitute for fixed broadband in South Africa taking into account the respective numbers of subscribers to these services.
- 32.1. ISPA has consistently rejected this view and its reasons for such rejection are on record.
- 32.2. Within the context of its submissions above regarding the need for a technology-neutral approach to access network unbundling ISPA regards the control exercised by Telkom and by the MNOs over their respective access networks as being the only relevant determinant of whether an unbundling process should be considered. The issue of whether one form of broadband access network is a substitute for the other is not relevant. The emergence of a fast-growing mobile broadband market does not mean there is no need to address a market failure in the fixed market.
33. Telkom further argues that the LLU in South Africa will be complex, costly and counter-productive and that caution should be exercised as it appeared that the costs of the exercise would outweigh the benefit. Telkom points to potential for job losses and maintains that LLU was not designed for developing countries such as the BRICS countries¹⁰. ISPA notes in this regard only that such issues should be raised with the policy-makers and not with the regulatory authority.

¹⁰ Noted from Telkom presentation at SACF Workshop, 14 July 2011 and as quoted in <http://mybroadband.co.za/news/telecoms/29060-telkom-looks-ready-to-fight-llu.html>

34. ISPA recognises Telkom's right to determine its own strategy and that it serves a policy mandate while simultaneously seeking to act in the interests of its private shareholders. ISPA however regards the failure of Telkom to recognise the potential benefits of the unbundling of access networks – including but not limited to its own copper local loop – as regrettable in that it will serve to hinder economic growth in South Africa. While copper as an access medium has a limited lifespan it is likely to remain relevant in South Africa for some time to come and should in this time be leveraged to produce the maximum possible benefit for the country.

 35. ISPA agrees with the Authority's analysis that unbundling of the copper local loop represents a revenue-generation opportunity for Telkom, primarily through the outsourcing of customer acquisition costs and increased utilisation of its existing network. It would, in ISPA's view, also allow Telkom to address its over-reliance on a small number of exchanges for a large percentage of its revenue – given the relatively high revenue per subscriber in these areas it is inevitable that fixed competition will arrive, whether or not the copper local loop has been unbundled. The potential also exists to reduce or reverse the cash-negative status of other exchanges.

 36. Acceptance by the incumbent of unbundling as a win-win scenario rather than a win-lose scenario would probably constitute the single biggest breakthrough in implementation.
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The positioning of the incumbent mobile network operators

37. ISPA understands that the mobile network operators (MNOs) or some of them have adopted the view that the process initiated by the Discussion Paper has no application within a mobile voice or data environment.
38. As set out above ISPA believes that the process must be technology neutral and that it will as a matter of course apply in general to wireless access networks notwithstanding that the Discussion Paper is specifically targeted at Telkom's copper local loop.
39. ISPA wishes to make it clear that unbundling of the wireless local loop does not amount to forcing the MNOs to resell radio frequency spectrum assigned to them. ISPA submits that radio frequency spectrum assignments are an incidence of an ECNS licence and the provision of a carriage or conveyance service utilising radio frequency spectrum constitutes the provision of ECNS.
40. ISPA accepts that there is a related but different set of technical and pricing challenges attendant on the unbundling of a radio access network and that a specific process involving the setting up of working groups will be required so as to enable the Authority to finalise the necessary guidelines.
41. ISPA submits that, while there is currently a limited resale of mobile broadband packages at an ECS level by the MNOs, this is done on a basis where wholesale pricing is set above retail pricing, resulting in ISPA members seeking to enter this market not being able to compete effectively. Given the growing role of mobile broadband in connecting South Africans to the Internet ISPA submits that there is an urgent need to address price distortions in the wholesale mobile broadband market through the application of unbundling principles.
42. The benefits of competition in this space have already been observed through the aggressive tactics employed by Cell C and 8ta. ISPA believes that this process constitutes an opportunity to deepen the benefits of competition in the mobile broadband sector.

Pricing

43. ISPA is concerned that the Discussion Paper does not address in any detail the fundamental challenges posed by the role of pricing in an effective unbundling exercise. While the Discussion Paper acknowledges the importance of pricing, it is evident that the success of the intervention hinges to a large degree on ensuring that incumbents are not in a position to thwart the process through price-setting which removes the business case for new entrants to take up unbundling opportunities.
44. The Carrier Pre-Selection (CPS) intervention undertaken by the Authority provides a useful analogy to illustrate this point. Notwithstanding the publication of CPS Regulations in 2010¹¹ which oblige relevant licensees to offer CPS services to duly-qualified requestors, the market has to date seen only insignificant uptake of this pro-competitive remedy due to the price-setting behaviour of the incumbent providers. Telkom, for example, while bound by the Call Termination Regulations to offer regulated pricing in respect of the termination of voice calls on its network, has stipulated a rate for the origination of voice calls on its network of R0.43 ex VAT per minute, far in excess of the regulated termination rate. This has effectively emasculated CPS as an intervention designed to promote competition in the voice origination market and provide consumers with the resulting benefits of lower prices and choice¹².
45. ISPA submits that the failed implementation of CPS provides a clear indication of the behaviour of incumbent operators in the absence of price regulation (which is not to say there is not an abundance of other evidence in this regard) and the consequences of this behaviour for the efficacy of an intended remedy. Unbundling an access network without regulating the wholesale pricing of the unbundled elements of such a network is likely to be a largely pointless exercise.
46. ISPA's understanding is that there are two potential avenues for dealing with pricing in the context of access network unbundling. These would be (a) to undertake a Chapter 10 exercise with the intention of imposing price regulation as a pro-competitive remedy and (b) utilising the non-discrimination provisions of the Facilities Leasing Regulations 2010 as an implicit price control.
47. ISPA submits that the second option is greatly preferable in that it is based on an existing obligation and the theoretical functional separation created by the ECA licensing framework. Regulation 9 of the Facilities Leasing Regulations 2010 states:

“9. Non-discrimination

¹¹ General Notice 924, GG 33589, 27 September 2010

¹² Note that the one mobile network operator offering CPS and seeking uptake of the service is offering it on an “origination equals termination” basis.

(1) The parties to an electronic communications facilities leasing agreement must not unfairly discriminate in the negotiation, conclusion and implementation of such agreement, unless otherwise requested by the electronic communications facilities seeker;

(2) Requests from an electronic communications facilities seeker, including requests for additional facilities in terms of an already concluded electronic communications facilities leasing agreement, must be dealt with in the order in which they are received; and

(3) An electronic communications facilities provider must apply similar terms and conditions, including those relating to rates and charges, in similar circumstances to itself, affiliates and other electronic communications facilities seekers requiring similar services, unless otherwise requested by the electronic communications facilities seeker.”

48. Simply stated the logic is as follows:

48.1. Facilities leasing takes place between an ECS licensee (“the facilities seeker”) and an ECNS licensee (“the facilities provider”).

48.2. Telkom Wholesale (ECNS licensee / facilities provider) provides local loops as a facility forming part of the ECNS sold to Telkom Retail (ECS / the facilities seeker).

48.3. There is a price X or a price formula to determine X where X represents the unit price charged by Telkom Wholesale to Telkom Retail per local loop.

48.4. In keeping with sub-regulation 9(1), Telkom Wholesale cannot unfairly discriminate in the negotiation, conclusion and implementation of a facilities leasing agreement as between Telkom Retail and any other facilities seeker.

48.5. In keeping with sub-regulation 9(3), Telkom Wholesale must “apply similar terms and conditions, including those relating to rates and charges, in similar circumstances to itself, affiliates and other electronic communications facilities seekers requiring similar services”.

48.6. ISPA understands that the only permissible deviation from X would be based on volume discounts (which seem obviously applicable as a starting position and inbuilt advantage for Telkom Retail).

49. This is in essence an approach based on equivalence of inputs such as introduced in the United Kingdom under the Enterprise Act 2002.

50. ISPA supports the formation of an industry pricing working group charged with addressing pricing and non-discrimination concerns and will gladly participate in such a working group.
51. As a final note in this regard ISPA wishes to emphasise to the Authority that it is currently not possible to ascertain to what extent Telkom is observing the principle of non-discrimination which is embodied in the Facilities Leasing Regulations 2010. ISPs have little insight into whether or not their traffic is being prioritised or otherwise dealt with on the same basis as Telkom Retail's traffic to their end-users.
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Information asymmetry

52. ISPA wishes to emphasise the point that the finalisation of the process initiated by the Discussion Paper and the ongoing implementation of unbundling will require that the Authority take positive steps to address existing information asymmetries as between the incumbent and access seekers and as between the incumbent and the Authority.
53. The current lack of information makes it extremely difficult for access seekers to assess the business cases for the various forms of unbundling while it is obviously critical that the Authority is able to access the technical and pricing information which it requires to finalise an unbundling process.
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SPECIFIC QUERIES RAISED FOR INPUT

Is ICASA's proposed approach to unbundling the local loop through the implementation of the facilities leasing regulations reasonable, feasible and acceptable?

54. Yes.

54.1. Access to the local loop is mandated under the obligation to lease electronic communications facilities.

54.2. All ECNS licensees face this obligation until otherwise exempted.

54.3. The pricing of access to the specified facilities must be non-discriminatory at all times.

55. The correctness of the approach adopted is likely to be thoroughly tested during the course of the resolution of the complaint lodged by Neotel (Pty) Ltd ("Neotel") with the Authority pursuant to a refusal by Telkom to agree to a facilities leasing request submitted to it by Neotel in respect of copper local loop circuits. ISPA understands that the Authority has now referred the matter to the Complaints and Compliance Commission (CCC) and that the parties to the dispute are in the process of being notified of such referral.

55.1. ISPA regards it as unlikely that this dispute will be resolved in the short term as there is a strong probability, given what is at stake, that, should either party be dissatisfied with the result, it will exercise its rights to approach the courts.

55.2. It is interesting to note, however, that the launching of the complaint has effectively removed questions regarding the desirability of local loop unbundling from the policy realm. The issue of whether Chapter 8 of the ECA and the Facilities Leasing Regulations 2010 constitute - by themselves and without reference to any policy - a basis for the unbundling of access networks will be determined by the CCC (and, presumably, the courts) on the basis only of said Chapter 8 and the Facilities Leasing Regulations 2010. The hearing of the matter will no doubt exercise some of the best legal minds in South Africa and include a comprehensive examination of the underlying law.

55.3. It will be potentially difficult for the Authority to finalise its position on unbundling of access networks until such time as this matter is finally disposed of.

56. Finally in this regard, ISPA seeks clarity from the Authority as to whether it intends to utilise the provisions of Chapter 8 of the ECA regarding essential facilities.

What form of local loop unbundling do stakeholders realistically favour in the South African market?

57. ISPA is of the strong view that the forms of local loop unbundling set out in the Discussion Paper should be regarded neither as exhaustive nor as a set of alternatives.

58. It should be clear from its submissions that ISPA has limited expectations regarding the timeframes within which an access network unbundling framework should be finalised. Without derogating from its position that access seekers should be offered access in the form of a complementary suite of unbundled products, ISPA wishes to be pragmatic about time frames and the need to pursue objectives which are attainable in the short-to-medium term.

59. ISPA also accepts that LLU is not a simple process and that it will pose significant challenges and management

60. ISPA accordingly advocates a phased approach to unbundling within the framework of an overarching document setting out the various phases and the time-periods for their implementation.

60.1. The initial phase should see the introduction of naked ADSL and bitstream access for fixed broadband. There is no reason that ISPA is aware of as to why this could not be achieved by November 2011. To the best of ISPA's knowledge Telkom is able to release wholesale bitstream access services – IP Stream and Data Stream – within this time period as the services have already been trialled and are ready for implementation but are being withheld due to concerns regarding the LLU process. These services would replace the largely broken current IPC model and their introduction should not be disruptive to Telkom.

60.2. ISPA requests that the Authority seek clarity from Telkom as to its plans in this regard and take a positive role in facilitating the release of bitstream access services into the market as soon as possible. ISPA can only believe that the withholding of these services constitutes a lost revenue opportunity for Telkom and that it would accordingly be a “win-win” situation if they are introduced without further delay.

60.3. ISPA submits that the second phase of unbundling of access networks within a technology-neutral framework should be the introduction of a mobile broadband bitstream service. ISPA accepts that this would be a new service but there is no shortage of guidance as to the implementation thereof and the principles applicable to copper local loop unbundling would be of equal application. A different set of working groups could be constituted to deal with the

different technical and pricing challenges presented by a mobile as opposed to a fixed environment. The key result of this exercise would be to ensure that there is sufficient wholesale margin to allow sustainable market entry.

- 60.4. It is ISPA's strongly-held view that there is already a strong business case for the uptake of services offered pursuant to the implementation of phases 1 and 2. Telkom currently offers its IPC solution as the only means for connecting to the last mile ADSL network but the pricing associated with this solution is uniformly regarded as being prohibitive and several times in excess of connectivity charges to Europe.
- 60.5. Any bitstream service released should be accompanied by an appropriate SLA in order to underpin the provision of the service on a non-discriminatory basis.
- 60.6. ISPA wishes to be clear, however, that bitstream access is a limited solution with limited benefits and that it will not facilitate greater investment in an access network because it does not allow access seekers sufficient opportunities to expand on the limited product suite offered by an incumbents so as to offer new and competitive products to consumers.
- 60.7. The third phase should see the introduction of an independent third party created specifically to manage ordering, maintenance and related issues for other forms of unbundling in both the fixed and mobile environments. ISPA submits that it may be acceptable to require that demand be demonstrated for specific forms of unbundling in specific areas prior to implementation. Full unbundling should be if mandatory application to any new fixed access network deployments.

What other cost items should be included in each form of local loop unbundling (LLU)?

61. ISPA has no specific submission in this regard and supports the submissions made by its members as to the relevant cost items to be included in the various forms of LLU.

Should a standardised ordering and specifications system be developed?

62. Yes – ISPA agrees that crucial to standardise the format in which any request for access to facilities is governed by an industry-wide accepted standard and to impose timelines for responses and the conclusion of the agreements to the extent to which this has not already been achieved under the Facilities Leasing Regulations.
63. Such systems already exist and can be adapted to suit this purpose. ISPA submits that it would be preferable for such a system to be operated by a neutral third party, perhaps modelled on the Number Portability Company and perhaps doubling in function as a neutral third party maintenance provider.

In the event that an access line deficit is identified, would you be willing to contribute to an access line deficit recovery scheme?

64. ISPA defers to the submissions made by its members in this regard while noting that, while there may be such a willingness to contribute, contribution to an access line deficit recovery scheme would be contingent upon provision of a transparent analysis of the existence and extent of an access line deficit based on the notion of an efficient operator. It should be made clear to potential contributors how any deficit has been calculated and how it was accumulated.
65. ISPA understands that there may be reluctance to contribute to such a fund on the part of some of its members on the basis that Telkom was provided with an opportunity to rebalance its tariffs which it did not fully exploit. There is further an argument that it would be inequitable to require access seekers to contribute to an access deficit incurred by Telkom, given that Telkom was provided with an extended monopoly period as a quid pro quo for meeting universal access and service targets (which presumably underpin such access deficit as is found to exist).
66. It would be counter-productive for any form of pro-competitive remedy – which has consumer benefit as its ultimate objective – to take as a benchmark inefficient pricing (and ISPA does not believe that it can be argued that Telkom could be construed as an efficient operator). The object of an unbundling exercise is to introduce efficiencies into the access network and it would be nonsensical for these efficiencies to be offset by the historical inefficiencies of the incumbent.
67. ISPA accepts, within the context of the above, that pricing based on the actual cost of the access network would be fair but regards it as critical that there is sufficient wholesale margin to create a business case for access seekers.

Should the Authority have included naked ADSL as an unbundling option in the Discussion Paper?

68. ISPA submits that a discussion regarding naked ADSL and its place within an unbundling exercise should have been included in the Discussion Paper. The current Telkom practise of bundling the voice and ADSL line is regarded by ISPA as *prima facie* anti-competitive and contrary to the anti-bundling provisions set out in section 13 of the Consumer Protection Act 2010.
69. ISPA submits further that the basis for naked ADSL is already contained with regulation 9 of the Facilities Leasing Regulations 2010 and that the current Telkom offering which forces consumers to pay the voice line rental notwithstanding their desire for a standalone ADSL service is not sufficiently unbundled as required by said regulation 9.

70. ISPA believes that it would be useful for this aspect of bundling to be directly considered by the Authority as this is one of the easiest and beneficial forms of unbundling to pursue.

CONCLUSION

71. ISPA trusts that the above submissions will be of assistance and will gladly provide any further assistance which may be asked of it.
