

31 January 2018

The Director-General, Department of Telecommunications and Postal Services
Attention: Ms M Masemola, Acting Deputy Director-General, ICT Policy and Strategy Development

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Per email: ecabill@dtps.gov.za

Dear Ms Masemola

ISPA SUBMISSIONS ON THE DRAFT ELECTRONIC COMMUNICATIONS AMENDMENT BILL 2017

1. ISPA refers to the Draft Electronic Communications Amendment Bill 2017 ("**the Draft Bill**") published by the Department of Telecommunications and Postal Services ("**the Department**") for public comment.

GENERAL COMMENTS

2. ISPA is broadly supportive of the Draft Bill and its focus on promoting competition in the provision of electronic communications services. The focus on open access and the drawing of clear distinctions between the provision of electronic communications network services (ECNS) and electronic communications services (ECS) is particularly welcome.

Context of consultation process

3. ISPA's submissions are based on the understanding that the window for debate on policy is – for now – over. The National Integrated ICT Policy White Paper ("**the White Paper**") as approved by Cabinet represents the prevailing National Policy informing the legislative framework for the ICT industry.
4. The Draft Bill has, however, been published in the context of continued contestation of certain aspects of the White Paper, particularly around the proposed wireless open access network ("**WOAN**") and – to a lesser extent – the open access provisions of the Draft Bill. It can therefore be anticipated that a substantial number of the issues raised in this consultation process will actually relate to the positions adopted in the White Paper.

5. The function of the Draft Bill is to translate policy into legislation; it is not the function of the Draft Bill to amend policy. ISPA's submissions are tailored accordingly.

Implementation

6. ISPA consistently raises implementation issues in its interactions with the Department. The Draft Bill brings these issues into sharp focus.
7. In order to further illustrate the implementation challenge, we have set out below a table of **only the new obligations** placed on ICASA/the regulator by the Draft Bill. It does not include reference to the numerous existing obligations which will continue to apply after the Electronic Communications Act 2005 ("the Act") is amended.
8. Note that many of the tasks set for ICASA when the Act came into force in 2006 remain outstanding. Many of the obligations introduced by the Draft Bill are in fact reworkings of existing obligations which have not been achieved. A list of essential facilities, for example, has not been formulated since 2006.

Section of the ECA amended	Obligation	Time period / frequency
Definition of "broadband"	Make an annual recommendation to the Minister on the minimum download speed and quality of access services to be regarded as "broadband"	Every year
Definition of "essential facility"	Prescribe broadband infrastructure in the International Standardisation Organisation Open Systems Interconnect model layer 2 or layer 3	Undefined
4(1A)(b)	Amend any existing radio frequency spectrum fees regulations which are in force when the Minister issues a policy direction as contemplated in section 3(2)(d), within six months after the Minister issues such policy direction	Within 6 months of policy direction
8(4A)	Review regulations designating licensees to whom universal service and universal access obligations are to be applicable and [may] must prescribe additional terms and conditions in respect of the relevant universal service and universal access obligations on such designated licensees	Every 5 years

8(6)	Make regulations providing for obligations applicable to electronic communications network service licensees for the rapid deployment of electronic communications networks or facilities and prescribe additional terms and conditions for such licences	Unspecified
Chapter 3A	The WOAN licensing process, including making recommendations on the terms and conditions including universal service and access obligations which will apply to the WOAN as contemplated in section 31A and 31E	Various deadlines apply
20C	<p>Prescribe rapid deployment regulations covering a wide range of issues, including –</p> <ul style="list-style-type: none"> • the structure of the GIS database contemplated in section 20B(3)(b), its security and the manner in which it can be accessed; • obligations applicable to ECNS licensees for the rapid deployment of electronic communications networks or facilities; • alternatives to new deployment of electronic communications networks and facilities, in order to use suitable existing electronic communications networks and facilities; • processes and procedures to enable a landowner to object to the Authority at least 14 days before the ECNS licensee commences with the activity, if the proposed electronic communication network or facility will cause significant interference with the land; • high sites that are not technically feasible for access and use by an ECNS licensee for the deployment of electronic communications networks and facilities that promote broadband; • processes and procedures that ECNS licensees must follow to request access to high sites of government for the installation of electronic communications networks and 	Unspecified

	<p>facilities that promote broadband, including the determination of cost-based rentals;</p> <ul style="list-style-type: none"> • processes and procedures that enable single trenching for fibre in each geographic location where it is technically feasible to do so; • guidelines on reasonable access fees that may be charged by landholders to ECNS licensees for deploying electronic communications networks or facilities that are intrusive; • procedures and processes for resolving disputes that may arise between an ECNS licensee and any landowner on an expedited basis 	
20M	Enforcement of obligations applicable to licensees operating networks in adequately served areas; Consider and grant approvals for electronic communications networks or facilities that may be deployed in adequately served premises	Ongoing
Chapter 4	Dispute resolution on an expedited basis of disputes between landowners and licensees	Ongoing
30(2)(f)	Conduct radio frequency spectrum audits and evaluation, that should also be made available to the Minister and published on the Authority's website	Periodically
30(2)(g)	[Establish and] Maintain a high quality and appropriately accessible real-time database of radio frequency spectrum assignments, excluding assignments to security services, that includes real-time updates from sector-specific agency databases as contemplated in section 34B	Ongoing
30(2)(h)	Advise the Minister on areas for future research, development and planning	Ongoing
30(2)(i)	Finalise a format and enforce annual reporting by radio frequency spectrum licensees on spectrum usage to the Authority and Minister and establishing this as a requirement for renewal of a radio frequency spectrum licence	Ongoing
31(8)	Develop a framework for, apply and enforce the 'use-it-or-lose-it' principle	Unspecified, ongoing

31(8)(Ab)	Make recommendations to the Minister on the exemption of SMMEs and new entrants from the 'use-it-or-lose-it' principle	Unspecified
31(11)	Develop and maintain an automated licensing system for radio frequency spectrum that is not high demand radio frequency spectrum	Unspecified, ongoing
31A	Design and impose universal access and universal service obligations on existing and new radio frequency spectrum licensees after obtaining the Minister's approval; Provide for annual reporting on compliance, establish compliance as a condition for renewal of radio frequency spectrum licences and enforce.	Unspecified, ongoing
31B	Prescribe and apply spectrum trading regulations for non-high demand spectrum	Unspecified, ongoing
31C	Prescribe, apply and enforce spectrum sharing regulations	Unspecified, ongoing
31D	Prescribe, apply and enforce spectrum refarming regulations	Unspecified, ongoing
31(3)	Finalise an inquiry as contemplated in section 4B of the ICASA Act and make recommendations to the Minister on the terms and conditions which will apply to the Wireless Open Access Network	Within 12 months of the commencement of the Electronic Communications Amendment Act
31(6)	Conduct an inquiry as contemplated in section 4B of the ICASA Act and make recommendations to the Minister on the terms and conditions, as well as the time frame, under which the exclusively/individually assigned high demand spectrum, excluding the high demand spectrum assigned to the Wireless Open Access Network, must be returned to the Authority, taking into account policy, market developments and extent of availability of open access networks	Within 24 months of the commencement of the Electronic Communications Amendment Act
24B	Enter into an MOU with the Minister and sector-specific agencies on matters relevant to the radio frequency spectrum	Unspecified

	contemplated in that section; Develop a database with real-time updates including that such database enables real-time updating by the corresponding databases of sector-specific agencies	
Chapter 7A	Prescribe SADC roaming regulations which may include rate regulation for the provision of roaming services, including without limitation price controls on wholesale and retail rates as determined by the Authority; Collect information required for SADC roaming regulation from ECS licensees and may share such information with CRASA and National Regulatory Authorities of other SADC countries; Engage National Regulatory Authorities of any other SADC country	Within 6 months of the coming into operation of the Electronic Communications Amendment Act
44	<p>Prescribe wholesale open access regulations to facilitate wholesale open access to electronic communications networks and facilities, including:</p> <ul style="list-style-type: none"> • wholesale open access agreement principles; • implementation and enforcement of open access principles; • a list of vertically integrated entities including the criteria used to determine vertically integrated entities; • accounting separation procedures for vertically integrated entities; • determination of deemed entities, itself involving <ul style="list-style-type: none"> • following the definition of markets as contemplated in section 67(3A), determining in respect of infrastructure markets, which ECNS licensee, if any, has significant market power in such market or has an electronic communications network that constitutes more than twenty-five percent of the total electronic communication infrastructure in such market, following which such ECNS licensee is regarded as a deemed entity • determine which ECNS licensee, if any, controls an essential facility or a scarce resource such as exclusively assigned radio frequency spectrum, following which such ECNS licensee is regarded as a deemed entity 	Within 18 months of the coming into operation of the Electronic Communications Amendment Act

	<ul style="list-style-type: none"> the quality, performance and level of service to be provided, including time to repair or restore, performance, latency and availability; wholesale rates as contemplated in section 47; a list of essential facilities; services associated with open access such as support systems, colocation, fault reporting, supervision, functionality, unbundling, and co-operation in the event of faults; access and security arrangements; the manner in which unbundled electronic communications facilities are to be made available 	
67(3A)	Define all the relevant markets and market segments relevant to the broadcasting and electronic communications sectors, including ICT services dependent on the use and provision of the Internet, including Internet exchange points, hosting and data centre services, by notice in the Gazette.	Within 12 months of the coming into operation of the Electronic Communications Amendment Act
67A(2)	Amend existing concurrent jurisdiction agreement between the Authority and the Competition Commission to include a mechanism to facilitate consultation between the Authority and the Competition Commission on market definition, market reviews and mergers as contemplated in Chapter 10, and any other matter	Within three months of the coming into operation of the Electronic Communications Amendment Act
79C	<p>Publish a market performance report in respect of the broadcasting, electronic transactions, postal and electronic communications sectors, which must cover:</p> <ul style="list-style-type: none"> an assessment of affordability of services, accessibility to services, quality of service, impact on users of market trends and compliance by licensees with conditions and obligations set; and 	Annually

	<ul style="list-style-type: none"> the effects of convergence, including monitoring of the extent and impact of horizontal and vertical integration and bundling of services 	
Amendment to section 4(k) of the ICASA Act	Make regulations to apply the B-BBEE ICT Sector Code to existing and new licences, exemptions or other authorisations including spectrum assignment to promote broad-based black economic empowerment	Within 12 months of the promulgation of the Electronic Communications Amendment Act

9. This is a daunting list of activities to undertake for a regulator which has historically been unable to implement legislative provisions, particularly relating to competition in the various markets for electronic communications.
10. This is even more so given that ICASA is to be disbanded or restructured; a process which will cause significant delays to the implementation process.
11. The questions must be asked: are we not putting the horse before the cart by not first ensuring we have a regulator that:
 - 11.1. Has the people, expertise and the passion for electronic communications and what positive changes in affordable access can do for South Africa;
 - 11.2. Has sufficient support and budget to implement the letter and intent of the Draft Bill in the face of the powerful vested interests that want to retain the status quo; and
 - 11.3. Is able to resolve disputes between licensees as well as between licensees and landowners on an expedited basis (which is clearly not the case now).
12. Changing the word “may” to the word “must” when referring to something ICASA/the regulator is to do is not going to solve anything.
13. Is it so unrealistic to consider tripling or quadrupling the budget made available to ICASA given the enormous socio-economic, international-competitiveness and commercial benefits that this would realise for South Africa? To the extent that the Department is seeking submissions on the cost implications of implementing the Draft Bill, it is ISPA’s submission that the process of enacting an Amendment Act is largely pointless in the absence of a commitment to increase its budget. Debate over whether the regulator should be funded from the revenue it collects are irrelevant; what is required is the political will to recognise that if effective regulation of electronic communications has cross-cutting

benefits through the economy, then we should have the imagination to have the broader economy prioritising the funding of the realisation of those benefits.

14. Is it unrealistic to consider making the regulator a centre of excellence and incubator for the development of skills critical to the future of the country (as the Competition Commission is perceived to be)?
15. Many stakeholders are deeply frustrated by the lack of progress that has been made; transformation and lowering the cost of communication through the introduction of greater competition are the two obvious examples.
16. The White Paper and the Draft Bill represent another framework and opportunity for effecting opportunity. It will be another opportunity lost unless we focus hard here and now on how it will be implemented.

Replacement of ICASA

17. For the record, ISPA does not support the replacement of ICASA in an apparent reversal of the merging of the IBA and SATRA in 2000. ISPA's view is that it would be far more practical to reimagine and re-engineer the existing regulator.
18. Notwithstanding which ISPA notes the intention of the Department to publish a Draft ICT Sector Commission and Tribunal Bill during 2018.
19. ISPA anticipates that the failure to allow the two Draft Bills to be considered side-by-side will be problematic. The amendments proposed in the Draft Bill to the relationship between the Minister and ICASA/the regulator indicate that the enactment and commencement of the two resulting Acts will need to be carefully co-ordinated.
20. At this stage it is far from clear how this will be done, but it is a crucial aspect of the success or otherwise of the changes embodied in the Draft Bill that this be sorted out as soon as possible.

Unrealistic timelines

21. The timelines specified for ICASA/the regulator to perform certain functions – such as concluding regulation-making processes – are uniformly unrealistic and unachievable and ignore the time periods which ICASA has actually taken to conclude the same or analogous processes or which an efficient regulator would take bearing in mind the need for public consultation processes.

22. ISPA urges the Department to review these timelines; missed deadlines do not serve anyone.

Enactment and commencement

23. ISPA welcomes the express provision in the Draft Bill that different dates may be fixed for the coming into operation of different sections of this Act.
24. The lessons learnt from the enactment of the ECA in 2006 should be taken to heart. The ECA with its radically different licensing framework and pro-competitive approach was finalised and became law without affording ICASA any opportunity to prepare for it. This leads to legislative obligations existing in a vacuum until the necessary regulatory framework has been finalised. ICASA understandably was unprepared for the ECA, and implementation thereof has suffered as a direct result.
25. ISPA submits that provisions allowing the regulator to commence with and finalise regulation-making and other processes prior to the relevant sections coming into full force and effect should be inserted.
26. Where appropriate, a further period can be allowed for licensees to make such changes as will be necessary to ensure with the legislative and regulatory framework when it comes into force.
27. This approach has been taken with various acts and amendment acts, including, recently, the Protection of Personal Information Act of 2014.

Working with the Competition Authorities

28. ISPA has noted the publication of the Draft Competition Amendment Bill as well as the Data Services Market Inquiry currently being undertaken by the Competition Commission. It is apparent that the Commission has decided to play a more active interest in the cost to communicate and the promotion of competition in the electronic communications industry.
29. It is revealing that the Commission's study informing the rationale for the Draft Competition Amendment Bill identifies telecommunications as the most concentrated market in South Africa.
30. ISPA therefore welcomes the provisions in the Draft Bill intended to facilitate a closer working relationship between ICASA/the regulator and the Commission.

Transformation

31. ISPA supports the proposal to allow transformation obligations imposed on licensees through ICASA to be aligned with broader transformation frameworks and objectives.

32. ISPA submits that it should be made clear that licensees may comply with either obligations linked to the ICT Sector Code or the existing obligations relating to equity ownership.

Spectrum

33. ISPA notes the contentious nature of the provisions regarding high-demand spectrum, the WOAN and the deterioration in the relationship between the Minister and ICASA over the use of high-demand spectrum (which seems to inform provisions in the Draft Bill relating to the allocation of powers and functions between them). ISPA is aware that there are other processes at play and the possibility of amendments to the position in the White Paper which would occasion amendments to the Draft Bill.
34. In line with the general tenor of its submissions, ISPA urges the Department to ensure that it has the capacity to execute effectively any functions and obligations it assumes upon commencement of the Amendment Act.

SPECIFIC COMMENTS

Definitions

35. The definition of “essential facility” includes a reference to “International Standardisation Organisation Open Systems Interconnect model layer 2 or layer 3”.
36. ISPA is not certain that layer 3 equipment used for provision of ECS is capable of being an “essential facility” within the meaning contemplated in the balance of the proposed definition.

Addition of subsection 8(6)

“(6) The Authority must by regulation make provision for obligations applicable to electronic communications network service licensees for the rapid deployment of electronic communications networks or facilities and must prescribe additional terms and conditions for such licences.”

37. ISPA is concerned that this subsection contemplates a distinction to be drawn between ECNS licensees who can deploy electronic communications facilities (and would therefore bear additional obligations) and ECNS licensees who cannot deploy electronic communications facilities. Such a distinction – if intended – would lack any legal merit.
38. ISPA submits that this subsection appears to duplicate the obligation to be imposed on the regulator to prescribe rapid deployment regulations.

New property developments and buildings

39. The following amendment is proposed to section 20L to promote internal consistency:

20L. (1) New property developments and buildings must provide for the installation of electronic communications facilities such as ducts for fibre optic cabling, conduit pipes and space for radio equipment that will enable electronic communication services, including voice services and broadband services, at the quality and speeds ~~provided in SA Connect~~ determined annually by the Minister by notice in the Government Gazette.

40. The same amendment is proposed to section 20M:

Adequately served

20M. (1) For the purposes of this section "adequately served" means-

(a) an electronic communications network or facilities that enables electronic communications services including voice services and broadband services at the quality and speeds ~~provided in SA Connect~~ determined annually by the Minister by notice in the Government Gazette, has already been deployed to and within a set of premises such as a gated complex, an office park, a shopping mall, a government building or a block of flats, by an electronic communications network service licensee ("in this section referred to as the access provider"); and

(b) the access provider has the ability to connect each and every occupant or user within such premises.

Section 79C

41. This section if enacted would place responsibilities allocated to the National Broadband Council established under section 72A on ICASA/the regulator.

42. As far as ISPA is aware, this body is not functional and has been largely replaced by the National ICT Forum. If ISPA's understanding is correct in this regard, then the Draft Bill should repeal section 72A.

PRESSING ISSUES NOT ADDRESSED IN THE DRAFT BILL

43. ISPA submits that the opportunities to effect legislative amendments are rare and urges the Department to include provisions relating to the following issues:

43.1. The insertion into the ECA of a definition of the term "control". This is required to make sense of the provisions of the ECA requiring ICASA to approve transfer of ownership of licences and transfer of control of licences. Currently this is causing confusion and delays and legal challenges

in the processing of these applications, and the Department is urged to engage with ICASA in this regard.

- 43.2. The insertion into the ECA of deeming provisions applicable to the time periods applied to the processing of applications, registrations and notifications to ICASA where appropriate. Where a deeming provision currently exists – as with registration of class licences – ICASA is able to meet and exceed the specified timeframe. Where a process does not have a deeming provision turnaround times are at odds with commercial reality. Applications for transfers of Individual licences take up to 14 months, and ISPA members report that the applications for type approval of equipment are routinely delayed past three months.
- 43.3. The reversal of the amendment of the limitation of the scope of class ECS licences to a geographic area constituted by a district or metropolitan municipality. This distinction is nonsensical and ignored in practice.

CONCLUSION

44. ISPA extends its appreciation to the Department for its consideration of these submissions and looks forward to participating further in this process.

Regards,

ISPA Regulatory Advisors