



18 December 2013

Independent Communications Authority of South Africa

Attention: Mr Godfree Maulana
Per email: gmaulana@icasa.org.za

Dear Sir

DRAFT AMENDMENT: UNIVERSAL SERVICE AND ACCESS LICENCE OBLIGATIONS

Introduction

1. ISPA refers to the Authority's invitation to comment on the Draft Amendment to Universal Service and Access Licence Obligations published as General Notice 1173 in Government Gazette 37071 of 27 November 2013 ("**the Draft Amendments**") and sets out its submissions below. ISPA's comments also make reference to the Findings on the Review of Universal Service and Access Obligations (USAOs) published as General Notice 725 of 2012 in GG 35674 on 10 September 2012 ("**the USAO Findings Document**") and the USAO Compliance Review of Licensees for ICASA compiled by BMI-TechKnowledge and Mkhabela Huntley Adekeye Inc. in March 2010 ("**the USAO Compliance Report**").
2. ISPA's members, with one or two exceptions, have not previously been required to comply with specific universal service and access obligations (USAOs) but have been required to comply with general obligations such as the annual contribution to the Universal Service and Access Fund (USAF) and the e-Rate as introduced in the Telecommunications Act of 1996 ("**the Telecommunications Act**") and retained and amended in the Electronic Communications Act of 2005 ("**the ECA**").
3. This lack of specific obligations reflects the lack of opportunity presented to ISPA members to obtain access to – *inter alia* – radio frequency spectrum suitable for the building of access networks. Notwithstanding which, ISPA members have a clear and direct interest in the USAO framework in their capacity as holders of service licences and potential future subjects of USAOs.

ISPA Management Committee:

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

General submission

4. The Draft Amendments in no way seek to remedy the problems that have faced the implementation of USAOs to date as confirmed by the USAO Findings Document and the USAO Compliance Report.
5. These documents make it abundantly clear that the existing formulation of USAOs is reactive and that they have failed both in their design and in the failure of the Authority to either inform them or enforce them.
6. The USAO Compliance Document is particularly scathing in its implications:

“With regards to issues relating to reporting by the licensees and compliance monitoring and evaluation, generally, the licensees are required to submit reports to ICASA on services provided by them including on progress in achieving USAOs.

Specifically for mobile operators, licensees were required to submit compliance reports within two months after the end of each rollout period in relation to internet access/connectivity (clause 2.3 of schedule 5), ICASA and the licensees could agree on performance indicators to assess compliance with schedule 5 obligations (clause 3.9) and ICASA is authorised to periodically assess the mobile operators’ level of compliance with their schedule 5 obligations (clause 3.7).

Mainly because of the problems associated with the implementation of the USAOs, based on the documentation that has been provided to us, it does not appear that monitoring and evaluation of the operators’ compliance with the USAOs was ever done. Some operators stated in their response to our questions that they have submitted compliance reports to ICASA but that no response (feedback) was given by ICASA.

With regards to compliance with USAOs, note that no verification of whether the licensees did comply or not, was done, nor have the answers been checked against the annual compliance reports of the licensees which are provided to ICASA in terms of legislation and/or the operators’ respective licences. Accordingly, the findings in this report, unless the context otherwise indicates, are based solely on the answers provided by the licensees.”¹

¹ USAO Compliance Report pp4-5

“The previous USAO model before the ECA seems to have come about in a reactionary way as South Africa evolved from a monopolistic environment to a more liberalised environment where more competition came into the market. As more operators were licensed, obligations were given to them.

Generally, there has been very minimal compliance with the USAOs. It is a common course that Telkom did not comply with its obligations in full. With regards to CSTs, all the three mobile operators exceeded their roll out targets. With regards to sim-cards and handsets, none of the mobile operators has rolled out, with regards to roll out of internet connectivity / access and terminal equipment to public schools, the operators had done some roll-out, although not generally fully compliant and not within the prescribed time periods. With regards to internet connectivity/access and terminal equipment to rural clinics/hospitals as well as to IPWDs, there has generally been no compliance.

All the operators cite problems relating to the development of the USAOs and to the implementation and co-ordinations thereof as major reasons for non-compliance.

These issues range from legislative / regulatory issues (such as lack of definition of key concepts such as rural areas) to implementation issues (such as unresearched / “thumb-suck” allocation of obligations and lack of allocation of roles and responsibilities for the implementation of the USAOs).²

- 6.1. Notwithstanding these findings, the Authority has not produced any substantive basis for the Draft Amendments which would protect the new proposals against an accusation that they are “thumb-sucks”. Indeed, given that the nature of the obligations has not been varied as opposed to the same obligation being made less onerous, it is hard to sustain any argument that the new proposals are scientific or evidence-based.
- 6.2. It beggars belief that no verification of compliance has been undertaken and that the simple exercise of checking information submitted against publicly-available information has not been done. The overriding impression is that the Authority lacks the capacity to do this fundamental work and that it was thought sufficient to simply impose the obligations.
- 6.3. Non-compliance has been evident since shortly after the majority of the current obligations were imposed in 2004. Nevertheless it does not appear that any steps were taken by the Authority to address this.

² USAO Compliance Report p5

- 6.4. What has been done to change this state of affairs? What additional capacity has been secured to ensure that the target licensees observe the proposed obligations this time around? Will compliance be monitored and evaluated? Will the Authority be in a position to provide the information reasonably required by licensees in order to fulfil their obligations? What, if anything, does the Authority propose to do differently this time to ensure that the obligations imposed are enforceable and enforced?
- 6.5. It appears counter-intuitive – possibly even harmful – for the Authority to seek to forgive obligations previously imposed as part of a contractual relationship entered into around the issuing of a radio frequency spectrum licence. The USAOs imposed were effectively an element of the cost of acquiring the licences to which they were attached; the Draft Amendments create the impression that this contractual relationship is now to be varied and the cost of acquisition reduced.
- 6.6. The Authority must be aware of the precedent which it is creating.
- 6.7. ISPA notes in this regard that Telkom SA SOC Ltd was fined substantial amounts for its failure to meet its roll-out obligations. There is, however, no indication that the other holders of USAOs are to be in any way sanctioned for their failure to observe their obligations and ISPA is not aware of any disciplinary or other process initiated in this regard.

Ensuring a cohesive universal access and service framework

7. It has been abundantly evident for some time that the overall framework for addressing the challenges of ensuring universal service and access in South Africa is in dire need of a comprehensive overhaul. Currently efforts in this regard are characterised by a high degree of fragmentation and a lack of any enforcement effort, leading to a damning and obvious lack of progress.
8. ISPA is concerned that the Draft Amendments will serve to perpetuate the current, unacceptable, state of affairs.
- 8.1. No research or other motivation is provided for the new obligations the Authority proposes to impose. Rather it seems only that the same forms of obligation – already and by the Authority’s own admission no longer relevant – are to be imposed, only in less onerous terms.

8.2. No attempt is made to situate this process within other initiatives to address universal service and access challenges and no reference is made to the review process embodied in the ICT Policy Process initiated by the Minister of Communications.

9. In the absence of any apparent attempt to place the Draft Amendments within the context of the greater situation regarding universal service and access, ISPA's view is that the process will in all likelihood amount to nothing.

Legislative basis for Draft Amendments

10. ISPA notes the reference in the Draft Amendments to the Constitution of the Republic of South Africa and section 10 of the Electronic Communications Act of 2005 ("the ECA"). Section 10 provides that the Authority may amend provisions of an individual licence relating to universal service and universal access after consultation with an affected licensee where³:

10.1. The Authority is satisfied that the amendment is necessary to ensure the achievement of the objectives of the ECA; and

10.2. The Authority holds an opinion that the amendment is necessary as a result of changed circumstances in the market or as a result of a lack of electronic communications services, broadcasting services or electronic communications services in specifically identified areas of the Republic.

11. ISPA is concerned that the Authority has in no way sought to justify the grounds on which it (a) is satisfied that the Draft Amendments are necessary to ensure the achievement of the objectives of the ECA (taking into consideration that they represent a dilution of existing obligations) and (b) holds the opinion that the Draft Amendments are necessary as a result of changed circumstances in the market or as a result of a lack of electronic communications services or electronic communications services in specifically identified areas.

12. In the USAO Findings Document the Authority expresses the view that licensees from the same category need not be subject to the same obligations and cannot be compelled to carry equal obligations by virtue of the type of licence category alone. Yet no evidence is provided that other factors "such as market presence, size of the entity and revenues generated" have been considered.

³ S10(g)

13. It is by no means obvious as to how the Draft Amendments relate to the conclusions set out in the Findings Document and in some instances the two documents conflict. The USAO Findings Document, for example, makes specific reference to section 67(8) of the ECA but the Draft Amendments appear to ignore this.

1. Transition

Section 93(4)(b) of the ECA states "The following framework must be used by the Authority for converting existing licences and issuing new licences:

Consistent with the licence types set out in Chapter 3.

(b) As part of the conversion process, the Authority may grant rights and impose obligations on the licence, in order to ensure that the existing licenses comply with this Act, including the continuation of any obligations imposed upon existing licensees by virtue of a previous determination. Such obligations remain in force until such time as the Authority completes a review in terms of section 67(8)."

Given the above it is the Authority's view that the obligations which were imposed during the Telecommunications Act are still binding.

Added, in the General Notice on converted licences in terms of section 93 of the ECA (gazette No. 31803 published on the 16th January 2009), it was the Authority's decision to have all obligations in lieu of spectrum issued under the Telecommunications Act to be reflected under the Spectrum Licence and remain binding until such time the Authority reviews the same obligations. The notice states that during the transition period all obligations imposed during the Telecommunications Act relating to roll-out of services shall remain. Licensees have a continuing obligation to ensure that services provided remain available until such time the Authority reviews such under section 67(8) of the ECA.

14. ISPA accepts that there is a re-negotiation process set out in section 10 of the ECA and can only assume that these negotiations have taken place.

15. It has to borne in mind, however, that the intended beneficiaries of USAOs are the people of South Africa: particularly those who currently do not have adequate access to electronic communications. In particular USAOs relate to alleviating the challenges of education and health in rural areas.

National policy – restated this month in the National Broadband Policy 2013 – is abundantly clear in this regard.

16. The Draft Amendments represent a compromise on the undertakings made for the benefit of South Africans as reached between the Authority and relevant licensees. Due to the failure of the Authority to monitor and enforce existing USAOs the negotiations informing this compromise have been based on information provided by licensees and there is no evidence presented that broader concerns have been taken into account (indeed given the net effect of the Draft Amendments the opposite seems true).

Conclusion

17. ISPA confirms its desire to participate in any oral hearings or other events scheduled in respect of the Draft Amendments.

Regards

Dominic Cull
ISPA Regulatory Advisor