

3 September 2020

The Acting Director-General, Department of Communications and Digital Technologies

For attention: Mr. A Wiltz, Chief Director, Telecommunications and IT Policy

Per email: rapid@dtps.gov.za

Dear Mr. Wiltz

PROPOSED POLICY AND POLICY DIRECTION ON RAPID DEPLOYMENT OF ELECTRONIC COMMUNICATIONS NETWORKS AND FACILITIES

1. The Internet Service Providers' Association (ISPA) welcomes the publication of proposed policy and a proposed policy direction relating to the rapid deployment of electronic communications networks and facilities for public comment and sets out its submissions below.
2. ISPA's primary concern is that the proposed policy is not so much about rapid deployment as it is an attempt to capture in a policy document the manner in which holders of electronic communications network service (ECNS) licences are required to exercise the rights afforded to them under section 22 of the Electronic Communications Act 36 of 2005 ("the ECA").
 - 2.1. The proposed policy focuses on the interaction between ECNS licensees and private owners, which in ISPA's view is the least problematic area for the deployment of electronic communications infrastructure.
 - 2.2. The proposed policy does not speak to how government red-tape relating to wayleaves and other permissions can be reduced and processes streamlined. This red-tape and the fees charged and obligations imposed by some municipalities and state-owned companies are the primary obstacles to rapid deployment and the proposed policy needs to address these issues and how they are to be resolved on an intergovernmental basis. Much of what is required is set out in the rapid deployment policy captured in section 9.3 of the ICT Policy White Paper.
 - 2.3. ISPA is aware that a rapid deployment coordinating committee is active within the Department of Communications and Digital Technologies ("the DCDT") and that a memorandum of understanding

has been entered into between the DCDT and the Department of Co-operative Governance and Traditional Affairs. ISPA submits that this is implementation of existing rapid deployment policy which should be foregrounded and solidified in this policy document.

3. The proposed policy direction is narrow in its scope, limited to directing ICASA to develop a regulatory framework for the resolution of disputes between ECNS licensees and private landowners. ISPA will participate in the relevant ICASA process. ISPA submits that a finalised policy direction should also direct ICASA to take rapid deployment policy into consideration in all relevant inquiries and regulation-making process which it undertakes.
4. ISPA has also noted the public outcry against the proposed policy, notwithstanding that the proposed policy is a restatement of existing rapid deployment policy contained in the National ICT Policy White Paper and the interpretation by courts of the balance between the rights of ECNS licensees to enter upon land and the rights of the owner of such land. There is an urgent need to address this public perception which has the potential to lead to an overwhelming number of disputes and delay rather than expedite deployment of facilities and networks.
5. ISPA also wishes to set out its understanding of the service licensing framework under Chapter 3 as it relates to the deployment of electronic communications facilities and networks.
 - 5.1. There is a widespread assumption that an ECNS licence is required to deploy an electronic communications facility or network. This is not correct as the definition of “electronic communications network service” in section 1 of the ECA makes it clear that the activity authorised by the ECNS licence is the making available of capacity on an electronic communications network as opposed to deploying such network. This is borne out in practice where there are numerous examples of entities which have deployed and make available electronic communications facilities without holding a service licence/
 - 5.2. It is clear from the wording of section 22 of the ECA that the rights set out in that section apply to ECNS licensees only. This is not in conflict with the previous point: in practice section 22 is rarely resorted to in the context of access to private land with almost all access taking place on an agreed basis.

- 5.3. There is a further assumption that an ECNS licence is required in order to apply for a wayleave from a municipality. ISPA is unable to find any authority for this position and, again, in practice wayleaves are routinely applied for by and granted to non-licensees.
- 5.4. As submitted above, the proposed policy relates more to section 22 of the ECA than it does to section 21. Rapid deployment of facilities and networks is not, however, dependent on use of section 22 and the courts have made it clear that section 22 should only be used by a licensee as a last resort where consent to access is being withheld.
6. ISPA thanks the Minister and the Department for their consideration of these submissions.
-