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25 April 2026

The Director-General, Department of Communications and Digital Technologies

For attention: Mr A Wiltz, Chief Director, Digital Access and Services

Per email: rapid@dcdt.gov.za

Sir,

DRAFT POLICY DIRECTION ON MATTERS RELEVANT TO ELECTRONIC COMMUNICATIONS NETWORK DEPLOYMENT PURSUANT TO THE NATIONAL POLICY ON RAPID DEPLOPYMENT OF ELECTRONIC COMMUNICATIONS NETWORKS FACILITIES, 2023

1. ISPA refers to the above draft policy direction gazetted on 12 March 2026 for public comment and sets out in the attachment its submissions in the hope that these will offer constructive input to the Department.

Regards

ISPA

ISPA SUBMISSION ON THE DRAFT POLICY DIRECTION ON MATTERS RELEVANT TO ELECTRONIC COMMUNICATIONS NETWORK DEPLOYMENT PURSUANT TO THE NATIONAL POLICY ON RAPID DEPLOPYMENT OF ELECTRONIC COMMUNICATIONS NETWORKS FACILITIES, 2023

Contents

Introduction

1. As a general comment, ISPA welcomes what amounts to a detailed, well-considered draft policy direction. The focus on open access and on the mechanics of creating and maintaining a central geographic information system (GIS) database which captures the location and critical characteristics of electronic communications network infrastructure in SA is particularly welcomed by ISPA's members.

Where do ISPA's members fit into this discussion?

2. ISPA is a trade association representing the interests of internet access providers and related service providers. Members are predominantly ISPs using ECS licences but there are also a number of members that deploy the networks over which ISPs provide services.
3. ISPA has a particular interest in "open access" and has undertaken several mapping initiatives to identify the location of fibre networks in South Africa and to highlight which of these are open access networks[1].
4. Ultimately implementation of rapid deployment mechanisms and more efficient use of infrastructure benefits ISPA members in providing innovative and affordable internet access services to a greater number of South Africans.

Related processes

5. In February 2024 the DCDT circulated a questionnaire intended to gather information and assess whether the National Rapid Deployment Policy finalised in April 2023 has had any impact on the ability of licensees to deploy electronic communications infrastructure. No outcomes based on an assessment of responses to the questionnaire has been made public.
6. During August 2024 ISPA responded to an ICASA questionnaire relating to the experience of ISPA members in gaining access to land or property to rapidly deploy electronic communications networks and electronic communications facilities. ICASA has not published any outcomes based on an assessment of responses to the questionnaire.
7. Presumably the Policy Direction on Rapid Deployment of Electronic Communications Networks and Facilities published on 31 March 2023 will be superseded by this policy direction once finalised.

[1] See National Fibre Mapping Project Highlights Minimal Choice of Fibre Providers, available from https://ispa.org.za/press_releases/national-fibre-mapping-project/ and which includes a summary of results based on available data.

8. ISPA is also aware that the Electronic Communications Amendment Bill 2026 will be introduced into Parliament in the next few months. This includes e a number of proposed amendments to the ECA which are directly relevant to this process.

9. Further, it appears that there has been a lack of communication between the DCDT and ICASA.

    9.1. ICASA published the Draft Rapid Deployment Regulations 2026 for comment on 12 April 2026, based on the 2023 National Rapid Deployment Policy and accompanying Policy Direction.

    9.2. It is clear from the timing that this was done without ICASA alerting the DCDT.

    9.3. ISPA will address correspondence to ICASA expressing ISPA's view that ICASA is not in a position to commence with public consultation on its draft regulations given that it is aware of the current policy direction consultation process. ICASA knows that it will be bound to consider the terms of the finalised policy direction before commencing with the regulatory processes contemplated in the draft policy direction.

Structure of the draft policy direction

10. The draft policy direction directs ICASA to undertake two separate activities:

    10.1. Review and, if necessary, strengthen the Facilities Leasing Regulations 2010 (paragraph 1 of the draft policy direction), and

    10.2. Develop Rapid Deployment Regulations (paragraph 2 of the draft policy direction).

11. ISPA is concerned that there is confusion between different concepts:

    11.1. Facilities leasing and essential facilities;

    11.2. Rights and obligations relating to deployment of electronic communications facilities and electronic communications networks by ECNS licensees as provided for in Chapter 4 of the ECA;

    11.3. Procurement of wholesale connectivity services as between an ECNS and an ECS licensee, including where done on an open access basis.

12. Much of the same confusion is evident in the ICASA questionnaire referred to above.

13. Paragraph 1 of the draft policy direction provides a list of five items which ICASA should have particular regard to. However, only three of these properly relate to facilities leasing.

    13.1. Paragraph 1(a) relates to Chapter 4 rights afforded to ECNS licensees. These rights relate to entering onto land to deploy facilities (which make up networks): this is not facilities leasing as contemplated by Chapter 8.

    13.2. Paragraph 1(b) relates to essential facilities, which is a subset of facilities leasing but one involving elements of competition regulation and which requires the regulator to complete different processes to develop a regulatory framework. ICASA has not utilised the powers afforded to it to prescribe a list of essential facilities and this would not fall within a review of the Facilities Leasing Regulations.

13.3. Paragraph 1(c) relates to open access. As explained below, this is not in the South African context a facilities leasing issue but relates to the provision of ECNS to ECS licensees.

13.4. Paragraphs 1(d) and 1(e) fall within the scope of a review of the Facilities Leasing Regulations.

14. ISPA suggests that the draft policy direction be structured as follows:

Strengthening the facilities leasing framework	• General review to update (not done in the last 16 years) having regard to data collected and court precedent • Improve time periods for finalisation and approval of facilities leasing agreements • Implementation, monitoring and enforcement of the amended regulations • Regulating essential facilities
Develop rapid deployment regulations	• Access to government, SOE and parastatal servitudes, property and infrastructure • Dispute resolution process
GIS mapping	• Collection of information from licensees • ICASA obligations relating to interoperability, security, access, competitively sensitive information
Open access	• Investigation of open access models in South Africa • Consider specific reference to the open access policy contained in the National Integrated ICT White Paper 2016

Submissions relating to facilities leasing

15. After sixteen years an overhaul of the Facilities Leasing Regulations from an infrastructure sharing, rapid deployment and a pro-competitive perspective is long overdue.

16. ISPA's assessment – without the advantage of analysis of information collected by the DCDT and ICASA – is that the Facilities Leasing Regulations 2010 have had limited impact on competition or efficient use of infrastructure.

16.1. The vast majority of facilities lease agreements are entered into on commercial terms agreeable to the parties and outside of the ICASA framework in the sense that no formal request under the Facilities Leasing Regulations is made from one party to another.

16.2. Where a facilities provider is unwilling to enter into a facilities lease agreement it remains easy to frustrate a formal facilities leasing request. Where a powerful incumbent like Vodacom takes

more than five years to access facilities belonging to Telkom (the Telkom v ICASA matter discussed below) there is an insurmountable challenge for smaller operators.

16.3. In ISPA's view the Facilities Leasing Regulations do not properly take into account or provide for the massive negotiating power imbalance between incumbent operators, new entrants and smaller operators. Incumbents are willing and able to litigate while smaller players cannot.

16.4. In practice, timeframes for concluding facilities leasing (and interconnection) are not observed and there is no benefit to the access seeker in approaching ICASA for relief.

16.5. Smaller operators have no trust in ICASA to resolve disputes correctly or within a commercially reasonable timeframe.

17. ISPA is unconvinced that facilities leasing happens in practise or that it will be a silver bullet for rapid deployment. It would be interesting to know from ICASA how many facilities leasing agreements have been filed with it since the Facilities Leasing Regulations came into force.

18. ISPA members also indicated that facilities leasing between licensees is not an inhibitor for infrastructure sharing. The more pressing challenges are:

18.1. where licensees have to share facilities of non-licensee owners, and

18.2. access to public and SOE property.

2014 Amendment Act

19. The Electronic Communications Amendment Act 2014 effected material amendments to Chapter 8 of the ECA, notwithstanding which ICASA has not sought to amend the Facilities Leasing Regulations to accommodate these.

20. For example: section 43 of the ECA now refers to "economic feasibility" while the Facilities Leasing Regulations still refer to "financial feasibility". Presumably the amendment was made for a reason and ICASA's failure to respond creates grounds for future disputes.

21. Part of the review and strengthening of the Regulations must be to incorporate the 2014 amendments.

Judicial development of the facilities leasing framework

22. The policy direction should specifically enjoin ICASA to have regard to recent court decisions on the proper interpretation of Chapter 8.

22.1. The North Gauteng High Court delivered a comprehensive judgement on the mechanics of the facilities leasing process in the matter of *Telkom SA SOC Limited v Chairperson of ICASA and others* delivered on 15 August 2020[2]. In this judgement reference is made to a "speedy two stage process: first a determination of whether a lease ought in principle to be given (the reasonableness phase or stage); and then, once established, what the terms and conditions of the lease ought to be (the negotiation phase or stage)"[3].

[2] Telkom SA Soc Limited v Chairperson, Independent Communications Authority of South Africa and Others (38332/18) [2020] ZAGPPHC 443 (15 August 2020)

[3] @ para 6

22.2. The Supreme Court of Appeal will later this year to hear two appeals from two conflicting decisions of the same division of the High Court relating to facilities leasing[4]. Both of these matters involve a dispute between Openserve and competing FNOs which have – with the agreement of the relevant homeowners' associations – deployed fibre optic cables and related infrastructure in infrastructure originally deployed at the direction of Telkom. ICASA ruled in favour of Telkom in both matters.

22.3. It is noteworthy that both judgements accepted that some of the infrastructure had acceded to or become part of the ground in which it was buried, as it could not be removed without destroying it. This infrastructure was therefore owned by the body corporates governing the estates.

22.4. Hopefully the decision of the SCA will provide further clarity on the manner in which Chapter 8 should be implemented.

Time frames for concluding and submitting facilities leasing agreements

23. Notwithstanding ISPA's reservations about the utility of these time frames, we have no objection to ICASA considering whether the existing timeframes within which facilities leasing requests must be considered and approved and agreements finalised can be improved.

24. Under subsection 44(3)(a) ICASA may in its facilities leasing regulations also include "*time frames and procedures for the technical implementation of electronic communications facilities leasing agreements*".

25. As technical implementation is also a potential point of delay for infrastructure sharing the policy direction should also reference this.

26. ISPA submits that it would also be useful for the policy direction to specifically refer to enforcement of the prescribed time frames so that ICASA also considers its role in providing relief to access seekers.

Monitoring and enforcement

27. ISPA supports improved monitoring, enforcement and learning under a framework which forms part of the revised Facilities Leasing Regulations, and which will lead to evidence-based improvements in the future.

28. A review of recent ICASA State of the ICT Sector Reports shows no information on or reference to facilities leasing. It would be useful if the policy direction could also request ICASA to consider publishing annual statistics on facilities leasing agreements filed.

Regulating pricing

29. In the Telkom v ICASA matter the High Court held that phase 1 of the inquiry subsequent to a facilities leasing request considers the reasonableness of the request – in principle, is the request economically and technically feasible.

[4] Metro Fibre Networx Telkom Facilities Leasing Judgement 12 September 2024 and Octotel Telkom Facilities Leasing Judgement 13 January 2026

30. If this is established the second phase involves the negotiation of the terms and conditions of the lease to be entered into, including the rental and any other charges to be applied. Under the ruling the commercials of the lease do not fall to be determined within phase 1.

31. The judgment provided no guidance on how to determine reasonable pricing[5] and ICASA has not exercised the power it has to determine facilities leasing pricing principles under section 47 of the ECA.

32. ISPA members have indicated that – even where the first phase is successfully concluded – there is almost inevitably a dispute regarding the rental and other charges stipulated by the access provider, leading to further delays. For example, an incumbent fixed infrastructure providers set fees for leasing of its infrastructure equal to the capital cost of installation.

33. Similar issues arise with access to private land and servitudes and property of state entities.

34. Access remedies must be tied to pricing remedies if they are going to be effective.

35. ISPA submits that it would be useful for the final policy direction to specifically request ICASA to utilise its powers under section 47 read with Chapter 10 to determine facilities pricing principles.

Submissions relating to essential facilities

36. ISPA supports ICASA being prompted to use the provisions of the ECA relating to essential facilities, although it is not clear that the draft policy direction achieves this.

37. Paragraph 1(b) requires the review of the Facilities Leasing Regulations to have regard to

    "*the terms on which access to essential facilities will be granted including as to price (on the basis that the Authority will determine 'essential facilities' as required below, as a priority)*"

38. There is, however, no further mention of "essential facilities". There is also no reference to this term in the National Rapid Deployment Policy.

39. What is required is for ICASA to prescribe a list of essential facilities within the meaning set out in section 1 of the ECA and as required by subsection 43(8) of the ECA. This is what the policy direction should target.

40. This will lead to an interesting debate around what now constitutes an essential facility given technical and commercial evolution in the twenty years since the examples in the ECA were provided.

41. Regulation of essential facilities is a subset of regulation of facilities leasing. Inclusion in the prescribed list simply means that the request for access to a facility is deemed to promote efficient use of electronic communication networks and services, while ICASA is provided with greater powers to impose time limits and terms and conditions. It remains open to the facilities lessor to argue that access is not economically or technically feasible.

42. Any regulation of the price of access to a declared essential facility will need to follow a Chapter 10 process.

[5] Other than to confirm that the terms and conditions of a facilities leasing agreement, including commercial terms, granted by the facilities provider must be non-discriminatory.

Submissions relating to Chapter 4 of the ECA

43. ISPA does not believe that a policy direction can introduce qualifying criteria which have the effect of limiting a statutory right, or that ICASA can do this by way of regulation.

44. Section 22 of the ECA as interpreted by the Constitutional Court in Link Africa is explicit that the only qualifying criteria for exercising the rights it creates are holding an ECNS licence and having due regard to applicable law – which includes the common law.

45. Additional criteria such as a lack of suitable alternatives or the making available of information on the location of deployed facilities to ICASA require an amendment to the ECA.

46. What could be more useful is to instead direct ICASA to conduct a process to establish procedural requirements relating to notice periods, reinstatement, safety and build coordination.

47. ISPA acknowledges the argument that regulatory requirements imposed by ICASA may form part of "the applicable law" to which a licensee must have due regard. ISPA's view is that such an approach will invite further litigation on what has become a settled part of law and will in practice lead to delays in deployment.

Not all duplication of infrastructure is undesirable

48. The draft policy refers to discouraging duplication of facilities where existing facilities are available.

49. ISPA wishes to emphasise that the desirability of having more than one set of facilities or networks must be evaluated on a case-by-case basis.

50. Competition at the infrastructure layer is also critical to reducing the cost to communicate and ensuring a generally high quality of service.

51. ISPA's mapping initiative (see above) identified where subscribers were served by:

    51.1. Multiple open access networks

    51.2. A single open access network

    51.3. A closed network.

52. ISPA's members receive constant complaints from subscribers in estates, multi-dwelling units and commercial premises such as malls about poor network quality. In many cases multi-year exclusivity agreements have been entered into. The Competition Commission stated publicly last year that it was investigating similar complaints which it had received.

Standard By-Laws for the Deployment of Electronic Communications Facilities

53. The promulgation of the Standard By-laws for the Deployment of Electronic Communications Facilities under the Municipal Systems Act was widely welcomed but implementation has been disappointing.

54. The reasons for this are instructive:

54.1. Many municipalities are in crisis. Their ability to deliver services relating to wayleaves and broadband infrastructure deployment will hopefully improve as various interventions centred in the Presidency targeting local government take hold.

54.2. There is an expectation on the part of COGTA that the DCDT will take the lead in implementation as the Standard By-Laws relate to digital infrastructure. This is notwithstanding the empowering legislation for the Standard By-Laws being the Municipal Systems Act.

54.3. COGTA has not budgeted for any implementation of the Standard By-Laws or for any support to municipalities. Other interventions using the standard by-laws mechanism have received discrete funding.

54.4. The Operation Vulindlela Phase 1 initiative which championed the By-Laws process allowed for pilot implementations – including capacity building and business process training – in two local municipalities.

54.5. The DCDT pilot project to provide training to municipal officials on broadband does not appear to have been mainstreamed.

55. In short, there is a complete lack of commitment to assisting municipalities to adopt the Standard By-Laws in a context where the municipalities that most need investment in broadband infrastructure are least able to adopt them.

56. ISPA notes further that the Standard By-laws:

56.1. Have a broader scope than deployment in the road reserve: provisions relating to leasing of land and space on municipal property are included as is a template lease agreement.

56.2. Include requirements to notify other operators of planned builds and provide them with an opportunity to share the cost of civil works and/or some broadband infrastructure.

56.3. Include provisions relating to single trenching.

56.4. Does not deal with fees and tariffs as this is a competency reserved for each municipality.

56.5. Require the submission of as-built data in GIS format to the municipal authority.

The relationship between the Standard By-Laws and Chapter 4 of the ECA

57. It is important to understand the relationship between the Standard Draft By-Laws and Chapter 4 of the ECA.

58. Section 22 reads as follows (our emphasis):

22. Entry upon and construction of lines across land and waterways

(1) An electronic communications network service licensee may—

(a) enter upon any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic;

(b) construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic; an

(c) alter or remove its electronic communications network or electronic communications facilities, and may for that purpose attach wires, stays or any other kind of support to any building or other structure.

(2) In taking any action in terms of subsection (1), ***due regard must be had to applicable law*** *and the environmental policy of the Republic.*

59. The Standard Draft By-Laws – once adopted by a municipality – form part of the applicable law to which a licensee exercising its section 22(1) rights must have due regard.

Local government fees and tariffs

60. A major issue for private and public sector players deploying broadband infrastructure is the high fees and tariffs imposed by some municipalities for permission to deploy fibre networks and the disparities in fees and tariffs between municipalities.

61. Municipalities point to damage and disruption caused to the infrastructure they are mandated to develop and maintain by the deployment of electronic communications infrastructure and the lack of accountability by licensees after expiry of wayleave permits. Competition between licensees trying to be the first to deploy, overbuilding and improper approaches to municipal officials are also cited as problematic.

62. ISPA's central submission is that a collaborative approach between industry and local government and other government entities is required. Bluntly: the DCDT and the ICT industry need to abandon the notion that they can dictate obligations to municipalities and rather consider creative ways to support them.

63. The National Rapid Deployment Policy 2023 does not apply to fees charged by local government and other governmental authorities for permits, authorisations or other approvals. The Policy, however, references the ICT White Paper provision that wayleave administration fees or tariffs levied by a municipality should not exceed the administrative cost of processing the application.

64. Municipalities are empowered to determine their own budgets and to set their own tariffs through the finalisation of a medium-term revenue and expenditure framework (MTREF) on an annual basis and with reference to a municipal tariff policy developed under section 74 read with section 75A of the Municipal Systems Act. The MTREF sets out fees and tariffs applicable to obtaining wayleaves and other permissions and its finalisation is subject to conclusion of a public participation process (in which interested parties such as ECNS licensees can take part).

65. There is no conflict between the National Rapid Deployment Policy 2023 and the legal framework under which municipalities determine tariffs for wayleaves and other permissions. The principles underpinning municipal tariffs set out in section 74 of the Municipal Systems Act include that:

    65.1. Tariffs must reflect the costs reasonably associated with rendering the service, including capital, operating, maintenance, administration and replacement costs, and interest charges; and

    65.2. Tariffs must be set at levels that facilitate the financial sustainability of the service, taking into account subsidisation from sources other than the service concerned.

66. The Constitution requires that the power of a municipality to impose surcharges on fees for services or other taxes, levies or duties be exercised in a way that does not materially and unreasonably prejudice national economic policies.

67. What is problematic is that local government does not have a standard model for calculating its costs in accordance with these principles when it comes to the deployment of broadband infrastructure.

Submissions on open access

68. ISPA welcomes the inclusion of a reference to open access in the draft policy direction.

69. Open access is a core principle for ISPA because it promotes fair competition, lower prices, and more choice for the public.

70. South Africa represents a success story for the voluntary adoption of open access principles by fibre network operators looking to drive subscriber take-up and usage over their networks.

What does this mean in South Africa?

71. The term "open access" is not defined in the ECA, but this concept has been developed in the decisions of the competition authorities in the context of remedies designed to limit the potential anti-competitive outcomes of mergers and acquisitions.

72. The only reference to "open access" in the ECA is where ICASA has a discretion when prescribing standard terms and conditions under section 8 of the ECA to include terms and conditions that "*serve the public interest in ensuring service interoperability, non-discrimination and open access, interconnection and facilities leasing*".

73. Before this can be imposed it is likely that it would require a Chapter 10 process – this is more a pro-competitive remedy than a facilities leasing issue.

74. In the South African context "open access" is generally understood to be an arrangement whereby a fibre network operator allows multiple ISPs to sell ECS to subscribers over the FNO's network.

75. In ECA licensing terms this is a relationship between an ECNS licensee and multiple ECS licensees.

76. ISPA has developed its own definition of open access that is relevant to the position of its members in the value chain for the delivery of internet access services in South Africa. This is contained in *ISPA's Fibre Network Operator and Internet Service Provider Best Practice Recommendations*:

    Minimum requirements for an Open Access Network

    For a network to be considered an OAN in South Africa, it must meet the following minimum requirements:

    - *An OAN operator must offer the **same pricing to all ISPs** on its network. It cannot offer any ISP preferential pricing for any services provided using the OAN. Preferential pricing includes offering volume-based discounts and promotions.*

      > *Offering preferential prices is not only counter to best practices, but also a regulatory concern. Section 9(1) of the Competition Act and Price Discrimination*

> *Regulations restrict dominant firms from engaging in price discrimination, particularly in the supply of services to small and medium-sized enterprises and firms owned by historically disadvantaged persons.*

- *An OAN operator must have **transparent pricing**. It must not be a requirement for an ISP to enter into a non-disclosure agreement in order to obtain pricing information from an OAN operator. In addition, FNOs should not contractually prohibit ISPs from disclosing the costs of the FNO's services.*
- *An OAN operator **must not compete** directly with the ISPs using its network. No services on the OAN can be offered directly to end-users of the OAN, but must only be made available by an ISP using the OAN.*

> ***FNO best practice checklist***
> - *Do offer the same pricing to all ISPs.*
> - *Do not offer any ISPs preferential pricing.*
> - *Do not offer volume discounts.*
> - *Do not require that ISPs sign a non-disclosure agreement.*
> - *Do not prevent ISPs from disclosing the cost of the services.*
> - *Do have a standard contract applicable to all ISPs.*
> - *Do not sell services directly to customers in competition with ISPs.*

77. A fuller excerpt from the Best Practice Recommendations is included as Annexure A.
78. ISPA acknowledges this is a restrictive definition and that, in reality, there have been an increasing number of ISPs in the fixed market owned or controlled by FNOs. Where this is the case then it is a matter of competition law that the ECNS provided by the FNO must be non-discriminatory (including as to pricing) as between the FNO's own ISP and third party ISPs.
79. There are, however, fibre network operators who have chosen a closed model – i.e. where ECS over the network is provided by an ISP owned by or forming a division of the FNO – argue that there are consumer benefits from this model.
80. In considering this aspect of the policy direction ICASA should also have reference to the work of the Competition Commission and relevant decisions of the Competition Tribunal and the Competition Appeal Court.
81. ISPA believes that service level competition – be it ISPs over fibre and fixed wireless networks or MVNOs over mobile networks – has been a major driver of uptake, affordability and innovation in South Africa.

Submissions on the creation of a GIS database of electronic communications infrastructure

82. ISPA notes and welcomes the growing momentum towards establishing a GIS database of electronic communications facilities and networks. This includes the initial mapping effort undertaken by the

DBSA and the workshop hosted by ICASA and the Internet Society (ISOC) on 23 April 2026 on the Open Fibre Data Standard (OFDS), which ISPA attended.

83. The existence of such a database – self-evidently necessary for evidence-based interventions relating to universal service, infrastructure sharing and protection, rapid deployment, competitive failures and quality of service – is long overdue.

Broadening data collection and interoperability

84. The draft policy direction requires that the ICASA GIS database "be capable of connecting to and interfacing with other databases". The importance of this cannot be overemphasised.

85. Broadband infrastructure must be situated within broader, standardised spatial data infrastructure frameworks and steps taken to identify different sources of broadband infrastructure data and collect and aggregate this data.

86. This is critical as broadband infrastructure in reality coexists with and often relies on infrastructure that does not fall within the definition of an electronic communications facility. Interoperability between datasets for different kinds of infrastructure must be ensured.

87. Further, the value of the database increases with the ability to overlay other datasets such as StatsSA affordability data.

88. Information on broadband infrastructure that could potentially be used to populate this database is already collected by:

    88.1. Licensees which have their own coverage and infrastructure data.

    88.2. Non-licensees such as tower companies and licence-exempt private electronic communications networks.

    88.3. Private companies which have developed proprietary infrastructure maps.

    88.4. ICASA, which requires all ECNS licensees to submit coverage and network deployment information.

    88.5. Municipalities and provincial governments routinely require submission of as-built information from holders of wayleaves permitting deployment of broadband infrastructure in the road reserve and will have records of land leased for the siting of masts and other infrastructure. Both will also have records of their own broadband infrastructure.

    88.6. SOEs such as BBI, SENTECH, SANRAL, ESKOM, TRANSNET, PRASA and SITA have data of network infrastructure which they own, operate or authorise the construction of.

89. Given agreed acceptable levels of security and access restrictions, there is no reason why all of this data should not be included.

90. Key to broadening data collection to include broadband infrastructure data held by municipalities and provincial governments is engagement between the DCDT and COGTA.

91. ISPA notes that the Portfolio Committee for Communications and Digital Technologies has engaged with COGTA and SALGA around municipal broadband mapping.

Standardising data collection

92. The Spatial Data Infrastructure Act 2003 is intended to facilitate and coordinate the availability, exchange and sharing of geospatial data and services between various stakeholders, including different levels of government. This Act promotes efficient, cost-effective collection and sharing of spatial data across government while promoting access to information by the public.

93. Spatial Data Infrastructure ("SDI") consists of policies, institutional arrangements, geographical information systems, databases, networks and web services and portals falls within the portfolio of the Department of Agriculture, Land Reform and Rural Development with the Spatial Data Infrastructure Committee ("SDIC") overseeing implementation.

94. SDI serves to support the spatial and land development planning contemplated by the Spatial Planning and Land Use Management Act 2013 ("SPLUMA") in terms of which inter alia the three levels of government must prepare spatial development frameworks and make clear information accessible to the public and private sector.

95. The Minister of Agriculture, Land Reform and Rural Development has published spatial information standards to be observed under the Spatial Data Infrastructure Act[6].

Data collection from licensees

96. As part of its development of rapid deployment regulations, ICASA is expected to launch a formal inquiry process into developing the regulatory framework required to, inter alia, ensure collection of required information from licensees. This should include:

    96.1. a detailed specification on the data to be submitted,

    96.2. the required format(s),

    96.3. an online portal for uploading licensee data,

    96.4. applicable security standards and

    96.5. the mechanism for collating and transmitting this information to the DCDT.

97. ICASA should also take steps to conduct workshops and otherwise provide guidance to licensees – particularly SMEs – on how to collect and submit network coverage and deployment information in the required format.

98. ISPA submits that information should be collected more often than every two years. Currently the obligation exists on ECNS licensees to submit this information annually.

Access to the database

99. The value and utility of the database will be optimised by making it broadly available, subject to any restrictions imposed by applicable law.

100. Access should be guided by Constitutional rights to access to information and with reference to the Promotion of Access to Information Act 2000 and the work of the Information Regulator.

[6] Copies of all applicable SANS standards can be obtained by emailing nsif@dalrrd.gov.za.

101. ISPA notes that different jurisdictions follow different approaches to the availability of broadband infrastructure data.

    101.1. At a national level, regulatory authorities provide a publicly accessible anonymised network infrastructure map to show the availability of different services at a particular location.

    101.2. At a planning authority level, interested parties who are intent on deploying network infrastructure may either request access to a detailed database or are obliged to review the database and coordinate any network construction with existing network operators prior to commencing any work.

Competitively sensitive information and confidentiality

102. This is a very real concern for a licensees.

103. ICASA should be explicitly directed to have regard to the Competition Commission's *Guidelines on the Exchange of Competitively Sensitive Information by Competitors under the Competition Act 1989* and to consult with the Commission when investigating restrictions imposed by competition law.

104. The Commission's Guidelines indicate that the use of nationally aggregated, historical data effectively mitigates against competition concerns relating to the sharing of competitively sensitive information through a publicly available database.

Security

105. Technical specifications and measures for securing the database should be provided by SITA.

106. ISPA is aware that a National Cybersecurity Strategy for 2026 – 2030 is under development and anticipates that security requirements for the database will In future be guided by cybersecurity legislation and regulation.

107. ICASA should also investigate whether the database falls to be declared as "critical infrastructure" under the Critical Infrastructure Protection Act 2019 (CIPA).

Submissions on ICASA's role in research and development

108. ISPA does not support ICASA being directly involved in research and development into new deployment methods and alternatives to existing methods of deployment. This is the realm of the private sector and public institutions with a research and innovation mandate, such as the CSIR.

109. A recent presentation to the Portfolio Committee for Communications and Digital Technologies highlighted that the CSIR has a specific Strategic Focus Area within its Smart Society Division on NextGen Enterprises and Institutions with the objective of enabling digital transformation in government, public institutions and industry.

110. Under this Strategic Focus Area, the CSIR seeks to "unlock the transformative power of next generation technology to support the digital economy" by:

    110.1. Developing foundational digital capabilities and technologies for South Africa's digital economy

110.2. Increasing digital access, economic participation and development for marginalised communities, and

110.3. Localising technologies to build a vibrant digital economy

111. The role of ICASA should be to facilitate research and development into new deployment methods and budget should be set aside for regulatory sandboxes and similar measures.

112. Research should be undertaken into innovative forms of regulation and resource management.

113. ISPA suggests the following wording:

d. The Authority shall ensure that a reasonable portion of its budget for technical matters is set aside for the development and use of regulatory tools such as sandboxes and trials that will facilitate rapid deployment and infrastructure sharing.

Submissions on access to government servitudes, property and infrastructure

114. It is not clear to ISPA what the policy direction in its current form is trying to achieve or whether it is possible for policy or regulation developed within the ICT sector to have the intended effect.

115. What is required is:

115.1. A common model for developing charges and tariffs for access to government property and facilities which can be used for the deployment of electronic communications networks.

115.2. A common set of terms and conditions governing access to property and different categories of facilities.

115.3. ISPA requests that the Minister and the Department champion these issues in intergovernmental engagements.

Obligation to file wayleave applications with ICASA

116. ISPA does not support an obligation on licensees to file copies of wayleave applications with ICASA.

116.1. It is not clear exactly how ICASA would accurately and expeditiously determine the availability of suitable infrastructure which could be leased as an alternative to a new deployment.

116.2. As noted above, duplication of infrastructure may in some circumstances be desirable.

116.3. The decision on whether to lease or to build is a commercial one which should not be subject to assessment by ICASA.

116.4. ISPA has no doubt that this requirement will delay rather than expedite deployment.

Submissions on dispute resolution

117. ISPA is unaware of the volume of genuine disputes between licensees and private landowners relating to the planned or actual deployment of electronic communications facilities and therefore is

uncertain whether the development of a dispute resolution mechanism is a constructive use of the Authority's resources.

118. It is also not clear to what extent public landowners such as local government will consent to be subject to ICASA's jurisdiction.

119. ISPA supports subparagraphs (ii), (iii), (iv), (v) and (vi) as currently drafted.

Suspension of works pending resolution

120. Subparagraph (i) proposes the automatic suspension of works where a valid dispute is lodged with ICASA. Presumably this suspension would hold from the date ICASA notifies the affected licensee of the lodgement of the dispute in accordance with finalised Rapid Deployment Regulations until the date of resolution of the dispute by ICASA.

121. The following concerns are raised:

    121.1. Industry has no faith in the ability of ICASA to resolve disputes, expeditiously or otherwise. Disputes can often be technical and require the evidence of experts. The delay occasioned to planned works is likely to be substantial.

    121.2. This provision could potentially slow down deployment rather than speed it up.

    121.3. Automatic suspension creates a tactical tool with which to delay a competitor's rollout.

    121.4. The loss occasioned to a licensee could be significant.

    121.5. It is arguable that automatic suspension negates the essential character of the non-consensual public servitude created by section 22 (as per the Link Africa judgement) in that suspension without regard to the merits or any further inquiry amounts to a withholding of consent by the landowner.

122. ISPA appreciates that the intent behind automatic suspension is to protect landowners from irreparable harm where a deployment goes ahead notwithstanding the dispute. This is legitimate but does not justify an automatic suspension in all circumstances.

123. It follows that what is required is a more nuanced approach which incorporates:

    123.1. An urgent interim procedure to determine whether works should be suspended. Timelines governing the exchange of papers, hearing and delivery of decision must be short and aligned with commercial reality.

    123.2. This procedure should focus on whether the deployment will result in irreparable harm (including whether the harm can be compensated by an award of damages) or whether there is a safety risk.

    123.3. If suspension of works is not justified in the circumstances, then deployment should be allowed to continue subject to final determination of the dispute.

Conclusion

124. ISPA is available to clarify any aspect of the above submissions and wishes the drafters well in completing this process.

Annexure A – ISPA Best Practice Recommendations provisions on "open access"

The below is an excerpt from Version 3.2. of the Fibre Network Operator and Internet Service Provider Best Practice Recommendations published on 28 August 2024.

SECTION A: OPEN ACCESS NETWORKS

Many FNOs market their networks as Open Access Networks ("**OANs**"). There is no universal definition of an OAN, nor does South Africa's electronic communications legislative framework define the term in any way. Although Wikipedia is not a telecommunications terminology authority, we can get some sense of the intended meaning from its definition.

This has the following key points, paraphrased and with emphasis added:

- Open Access is a model in which an infrastructure provider limits its activities to fixed value layers in order to **avoid conflicts of interest**.
- An Open Access provider creates a platform for **ISPs to add value** and remains neutral and independent.
- An Open Access provider offers **standard and transparent pricing** to ISPs on its network.
- An Open Access provider **never competes** with the ISPs using its network.

It is recommended practice for FNOs to operate their networks on an Open Access basis. Operators who refer to their networks as Open Access Networks are strongly encouraged to take cognisance of these recommendations. Even for FNOs who do not specifically operate Open Access networks, these principles are recommended practices.

A1. Minimum requirements for an Open Access Network

For a network to be considered an OAN in South Africa, it must meet the following minimum requirements:

- An OAN operator must offer the **same pricing to all ISPs** on its network. It cannot offer any ISP preferential pricing for any services provided using the OAN. Preferential pricing includes offering volume-based discounts and promotions.

> Offering preferential prices is not only counter to best practices, but also a regulatory concern. Section 9(1) of the Competition Act and Price Discrimination Regulations restrict dominant firms from engaging in price discrimination, particularly in the supply of services to small and medium-sized enterprises and firms owned by historically disadvantaged persons.

- An OAN operator must have **transparent pricing**. It must not be a requirement for an ISP to enter into a non-disclosure agreement in order to obtain pricing information from an OAN operator. In addition, FNOs should not contractually prohibit ISPs from disclosing the costs of the FNO's services.

- An OAN operator **must not compete** directly with the ISPs using its network. No services on the OAN can be offered directly to end-users of the OAN, but must only be made available by an ISP using the OAN.

FNO best practice checklist

- Do offer the same pricing to all ISPs.
- Do not offer any ISPs preferential pricing.
- Do not offer volume discounts.
- Do not require that ISPs sign a non-disclosure agreement.
- Do not prevent ISPs from disclosing the cost of the services.
- Do have a standard contract applicable to all ISPs.
- Do not sell services directly to customers in competition with ISPs.

A2. Shareholding conflicts of interest

Ideally, the operator of an OAN should not have a financial interest in any ISP. This is the simplest way to avoid conflicts of interest and incentives to engage in discriminatory tactics. However, it is acknowledged that the reality of the South African sector is that there are many FNOs that share a common holding company with an ISP, have ISP subsidiaries, or have some other financial interest in one of the ISPs selling services on their network.

Competition law places significant restrictions on the activities of vertically integrated firms, particularly if a company is dominant in a particular market segment. The nature of fibre rollouts means that most FNOs could be considered dominant in particular geographic areas or market segments. FNOs with a direct or indirect financial interest in an ISP should thus exercise exceptional care to ensure that wholesale and retail operations are structurally and financially separate and that they do not engage in unlawful sharing of resources or customer information.

An FNO with any interest in an ISP (or vice versa) must treat that ISP identically to all other ISPs selling services on its network.

FNO best practice checklist

- Avoid financial interests that create conflicts of interest.
- Do keep wholesale and retail operations structurally and financially separate.
- Do not share information or resources between wholesale and retail operations.

A3. Prohibition on discriminatory tactics

It is possible for an FNO to engage in discriminatory tactics (deliberate or inadvertently) whether or not it claims to operate an Open Access network, and whether or not it has a financial interest in an ISP. To avoid behaving in a discriminatory manner, best practice is for an FNO to have a clear policy of equal treatment for all ISPs using its network.

Treating ISPs equally is not limited to pricing of services, but includes other incentives or advantages. In a highly competitive market, characterised by thin margins and largely transparent input costs, promotions that enhance one ISP's ability to sign-up customers at the cost of its competitors can be just as damaging as preferential pricing.

Although this is not intended to be an exhaustive list of possible discriminatory tactics, these recommendations cover the following practices specifically:

- An FNO should provide all ISPs with equal access to its network and equal access to all of the services offered on its network. There should not be portions of the network accessible to only a subset of ISPs, nor should there be types of fibre services that only some ISPs are permitted to sell. An exception to this is technical capability. If there are some services for which an ISP must have specific technical expertise or infrastructure to be able to sell effectively, then it is acceptable to restrict access to those services only to the ISPs who can demonstrate the required capability.
- Providing preferential treatment to one ISP during the initial roll-out of services to a geographic area is prohibited. An operator should not give one ISP exclusive access to customers in an area before other ISPs. All ISPs must be given access to the network in an area at the same time.
- Providing promotions or special offers to only one ISP is prohibited. If an operator wishes to offer price reductions, limited-time special offers or other promotions on its fibre access services, then those offers must apply equally to all ISPs.
- Discriminatory promotion of one ISP over another in marketing material is prohibited. Any information an operator provides about the ISPs offering service on its network must promote all ISPs equally. This includes any listing of ISPs on the operator's website. Where an operator lists its ISPs on a web page, the order of the listing should be randomised for every view, so that no ISPs are unduly favoured.
- Paid-for promotion of one ISP over another is strongly discouraged. An example of this is accepting payment from one ISP to give that ISP particular prominence on a website. This practice is confusing for consumers, who may have no way of knowing that the ISP has paid for special treatment. As a minimum, any paid advertising needs to be clearly labelled as a paid-for promotion so that a consumer does not mistakenly believe that the FNO is recommending one ISP over others.
- Avoid preferential access to information. This includes details of upcoming promotions, news of planned new coverage areas, access to mapping data, and access to technical information about the network. Information about an FNO's network and services should be communicated to all ISPs in the same manner and at the same time, preferably via a centralised ISP portal.

FNO best practice checklist

- Do provide all ISPs with equal access to all parts of the network.
- Do provide all ISPs with equal access to all of the services offered on the network.
- Do not provide preferential access to one ISP when rolling out services in a new location.
- Do provide all ISPs with equal access to promotions and special offers.
- Do not give some ISPs advanced knowledge of upcoming promotions and specials.
- Do not promote one ISP over another on any marketing material, including websites.
- Do list ISPs in a random order on a website for each visitor to the site.
- Do not engage in "paid for" promotion of one ISP over others.
- Do provide all ISPs with equal access to mapping information.
- Do provide all ISPs with equal access to technical information about the network.

A4. Barriers to entry

The previous best practice recommendations in this section deal with the equitable treatment of ISPs already using an operator's network. However, unreasonable barriers to entry for new ISPs who wish to gain access to a network can also prevent that network from being truly open.

The creation of new businesses and development of SMMEs is generally considered to be an important requirement to grow South Africa's economy. It is thus important for FNOs to make it feasible for new ISPs to sell internet access services over fibre networks, and not to restrict access to the fibre market only to established operators.

No arbitrary numerical limits on ISPs

An FNO should not place an arbitrary limit on the number of ISPs it provides with access to its network. While it is understood that it might be undesirable for an FNO to have an ISP on its network who has only a very small number of customers, there may be strategic advantages to that ISP in being able to offer services on that network to a limited number of customers. Such a situation should be addressed by other means, for example by implementing a minimum revenue commitment linked to the cost of providing access to the ISP, rather than simply blocking any new ISPs from selling services on that network.

Placing a simple numerical limit on the number of ISPs is an unacceptable restriction, unless there are demonstrable technical limitations preventing an FNO from adding additional ISPs to its network.

Minimum revenue commitments

Some FNOs have minimum revenue commitments for ISPs using their networks. This means that irrespective of the number of customers an ISP has on that network, the ISP will be charged a fixed minimum cost for access to the network. Where they exist, minimum revenue commitments

should be reasonable, and must not exist solely for the purpose of limiting the number of ISPs using that network.

In addition:

- Any minimum revenue commitments for ISPs must be clearly defined, transparently communicated, non-discriminatory and applied consistently to all ISPs.
- Any minimum revenue commitments should bear a reasonable correlation to the cost of providing an ISP with access to the network.

Ramp-up periods

In some cases, FNOs specify a ramp-up period, giving an ISP a fixed period to grow its customer base before a minimum revenue commitment becomes applicable. This practice is recommended, as it offers new market entrants an opportunity to develop their businesses in order to cover the fixed minimum costs.

It should be noted that meeting a minimum revenue commitment for a new market (for example, a geographic area not previously serviced by fibre operators) is easier for an ISP than meeting a commitment for a market where demand for services is already saturated. Where it is administratively and technical feasible, the ramp-up period should take into account this difference. A new operator offering services in a saturated market will need more time to reach minimum revenue commitments.

FNO best practice checklist

- Do not have minimum revenue commitments that are unrelated to the cost of providing an ISP with access to the network.
- Do give new ISPs a ramp-up period to reach any minimum revenue commitments.
- Do not place a numerical limit on the number of ISPs able to connect to the network.