

8 November 2018

The Director-General
Department of Telecommunications and Postal Services
For attention: Mr T Ngobeni, DDG, Infrastructure Support

Per email: woan@dtps.gov.za

ISPA Submissions: Proposed policy and policy directions to the Authority on licensing of unassigned high-demand spectrum

1. ISPA refers to the “Proposed policy and policy directions to the Authority on licensing of unassigned high-demand spectrum” published in GG 41935 on 27 September 2018 (“the Proposed Policy Directions”) and set out below matters which it requests that the Minister and Department take into consideration in their finalisation of the process.

Introductory remarks

2. Progress in the assignment of high-demand spectrum and structural reform of the market is most welcome.
3. ISPA has noted that the Department is infused with a new energy for implementation and involvement and this is greatly appreciated by industry.
4. ISPA is an Industry Representative Body recognised by the Minister as representing the interests of member Internet Services Providers and related entities. ISPA’s membership consists largely of horizontal competitors in the Internet access and voice markets.
5. ISPA has been closely involved in telecommunications policy, legislation and regulation in South Africa for more than 20 years: we have a deep understanding of the legal framework and its history and the implementation challenges which at times have delayed progress in attaining policy objectives.
6. It follows that in making the submissions below, ISPA’s point of departure is a commitment to service-based competition, which is an express intended outcome of the ICT Policy White Paper and the Proposed Policy Directions.
7. As the Department is aware, ISPA also seeks to focus on the practicality of policy from an implementation perspective.

The Proposed Policy Directions and the Electronic Communications Amendment Bill 2018

8. ISPA appreciates the reasons for the Department initiating the policy direction process. After significant delays, it is difficult not to embrace any process which offers the prospect of ending the wasteful underutilisation of radio frequency spectrum in South Africa.
9. However, we are sure that the Department recognises that there are significant risks in taking a “short cut”, which in effect amounts to a piecemeal implementation of a set of interventions contemplated in the ICT White Paper.
10. This implementation, moreover, must take place within the framework created by the ECA as it currently exists, complete with regulations which do not reflect the content of the ICT Policy White Paper and which, ISPA submits, are ill-suited for the imposition of open access and other obligations to be imposed under the Proposed Policy Direction.
11. This is, moreover, a framework which the Authority has largely failed to implement over the past 12 years.
12. ISPA’s primary concern is that high-demand spectrum will be assigned without the associated obligations and regulatory framework contemplated in the ICT Policy White Paper and the Electronic Communications Amendment Bill.

Open access

13. The Proposed Policy Directions, for example, make frequent reference to “open access” and “open access principles”, but what is the detailed content of these terms in the absence of the wholesale open-access regulations to be developed by the Authority as set out in the Electronic Communications Amendment Bill?
14. The provisions in the Electronic Communications Amendment Bill relating to “vertically-integrated entities” and “deemed entities” are of particular interest to ISPA’s members, and ISPA regards the implementation of these provisions as the essential core of implementing an effective open-access regime.
15. If the processes to implement the relevant provisions are not to be completed prior to the assignment of high-demand spectrum then it must be made clear:
 - 15.1. When this will be done by; and

15.2. That the terms and conditions of radio frequency spectrum licences issued through the policy direction process and/or the associated IECNS licence are subject to amendment where they are in conflict with regulation which the Authority is required to introduce after the coming into effect of the Electronic Communications Amendment Bill 2018.

16. The questions must be asked:

16.1. What are we going to do to ensure different outcomes and to ensure that the outcome of this process is not to simply enable existing dominant operators to perpetuate their dominance?

16.2. What are we going to do to ensure that measures designed to enable the WOAN to be an effective intervention are actually implemented and enforced and that the mistakes made with the failed Under-Serviced Area Licensees (USALs) are not repeated?

The role of the regulator

17. ISPA has placed on record on previous occasions its agreement with the sections of the ICT Policy White Paper which highlight a lack of effective regulation and the failure to implement key provisions of the ECA as being a core cause of the current market structure and the high cost to communicate in South Africa.

18. It is the failure of the regulator to further transformation and competition, allowing the perpetuation and strengthening of the current market structure, that is a direct cause of adopting the WOAN intervention.

19. Once the Proposed Policy Directions have been finalised it will be in the hands of the Authority to complete the required processes in an efficient and procedurally-sound manner. It is, with respect, difficult to believe – based on the history of ICASA’s implementation of the ECA – that this will happen.

20. It is also a truism that rights and obligations imposed without an effective enforcement mechanism to allow them to be enforced are worthless. As is further discussed below, the facilities leasing regime required by Chapter 8 of the ECA and imposed through the Electronic Communications Facilities Leasing Regulations 2010 is an example of legislative provisions and regulation which have proven to be practically ineffective in driving pro-competitive outcomes and infrastructure sharing in South Africa.

21. ISPA appreciates the difficulty faced by the Department: on the one hand it is clear that the sector regulator is in urgent need of reform and recapitulating, and on the other such an exercise is by its

nature a lengthy one and it is doubtful whether we can afford the delays occasioned by waiting for this process to be completed before enabling the establishment of the WOAN and ensuring that high-demand spectrum is put to efficient use.

22. ISPA therefore supports the decision to proceed with amendments to the ECA and embark on the policy direction process prior to undertaking the replacement of the regulator contemplated in the ICT Policy White Paper.
23. It does not follow, however, that nothing should be done to ensure that the Authority is able to discharge the tasks falling to it. The Department is requested to consider:
 - 23.1. Providing for a discrete additional budget for ICASA relating to implementation of the finalised policy directions and specified provisions of an amended ECA, to be funded out of the receipts received from application fees and successful bid amounts received during the auction.
 - 23.2. Engaging with the Authority to undertake a gap analysis aimed at identifying competencies and additional resources which will be required to ensure effective implementation.
 - 23.3. Engaging with the Authority to ensure that there is a shared clarity on the implementation steps to be taken and the deadlines by which this must be done.
24. It is no overstatement to claim that the success of the policy direction process and the implementation of an amended ECA is directly and essentially linked to the ability of the regulator to perform its functions. Delays and procedural irregularities will fatally harm the business case for the WOAN.
25. A cost-benefit analysis – where the cost may be relatively trivial in terms of support to be given to ICASA and the benefit existing in the achievement of policy objectives – indicates that some form of intervention or support must be provided to the Authority.

Managing parallel processes

26. A danger of engaging in the parallel process envisioned is that amendments to the Electronic Communications Amendment Bill effected through the Parliamentary process and the subsequent review of the regulatory framework will be in conflict to the terms and conditions on which the licences contemplated in the Proposed Policy Directions will be issued.

27. The potential for such conflicts introduces an immediate element of uncertainty on the part of applicants for these licences. It also introduces scope for loopholes and tensions which can be used to resist and delay observance of obligations to be imposed.

When will spectrum be available?

28. A further material factor in determining the optimal process to be followed is ensuring that it is aligned with the projected dates on which spectrum in the bands to be auctioned will be available for use by successful applicants.
29. ISPA understands that the Department of Communications has indicated that this spectrum may only be available in 2022¹.
30. While the intention should be to conclude the assignment process well before this date, there needs to be a realistic assessment of what can be achieved in terms of emplacing wholesale open access and other regulatory interventions contemplated in the ECA or the ECA as amended prior to the assignment process commencing.
31. If – as is currently anticipated – completion of the digital migration and subsequent digital restacking processes is staggered across different provinces, then when will the spectrum be regarded as being available and how will this interact with the obligation to be imposed in respect of utilising assigned spectrum in underserved areas first?

Give us a detailed process

32. What is really required to provide certainty is a roadmap setting out the various processes required before:
- 32.1. The issuing of an individual electronic communications network service (IECNS) licence and assignment of radio frequency spectrum licences to the WOAN is completed.
- 32.2. The assignment of radio frequency spectrum licences through a competitive process is completed.
- 32.3. The finalisation of detailed pro-competitive and open-access regulations is completed.

¹ <https://techcentral.co.za/why-operators-will-have-to-wait-longer-for-prime-spectrum/84564/>

- 32.4. Such an analysis would have to take into account the requirement as set out in paragraph 1.7 of the Proposed Policy Directions that high-demand spectrum must be issued to the WOAN and other licensees simultaneously. ISPA understands from the text of paragraph 1.7 that this is a condition of the approval of Cabinet for a deviation from the position on high-demand spectrum in the ICT Policy White Paper.
- 32.5. We request that the Department engage with the Authority with a view to providing stakeholders with a clear roadmap towards the finalisation of the processes contemplated in the Proposed Policy Directions.
-

Policy directions relating to the licensing of the WOAN / wholesale electronic communications network service

33. The core of the direction to be provided to the Authority is set out in paragraph 1.14 of the Proposed Policy Directions:

1.14 The Minister intends to direct the Authority, in terms of section 3(2) read with section 5(6) of the ECA, to issue an Invitation to Apply (ITA) and accept and consider applications for an individual electronic communications network service license and intends to direct the Authority in terms of section 3(2) to urgently consider the licensing of a radio frequency spectrum license, for a WOAN.

34. As regards the licensing of the WOAN, the Proposed Policy Directions contemplate the following conditions, obligations and entitlements associated with the IECNS licence:

34.1. The WOAN may only provide “wholesale services”.²

34.2. The WOAN must, upon request from a licence or licence-exempt person, provide “wholesale open access” to its networks and facilities on terms that are “effective, transparent and non-discriminatory”.³

34.3. The WOAN must lease networks and facilities.⁴

34.4. The WOAN must charge wholesale rates as prescribed the Authority⁵, although the Authority may defer imposition of such an obligation for a specified period to be determined by it.⁶

34.5. Requirements relating to the composition of consortia qualifying to participate in the ITA process for the WOAN IECNS licence. These include a requirement that a participant “must comply with the empowerment requirements contemplated in section 9(2)(b) of the ECA”.⁷

34.6. Any member of the consortium awarded the WOAN IECNS licence which provides electronic communications services (ECS) in South Africa must have functional separation in the sense that

² Para 1.10 f)

³ Para 1.9 a)

⁴ Para 1.9 b)

⁵ Para 1.9 c)

⁶ Para 1.12 b)(v)

⁷ Para 1.10 a) – e)

the entity participating in the WOAN and the entity providing ECS must be separate business entities operating independently of each other.⁸

34.7. Universal service and access obligations.⁹

34.8. Incentives to be applied in favour of the WOAN licensee, including:

34.8.1. "Immediate" access through facilities leasing to the networks and facilities of licensees assigned high-demand spectrum simultaneously with the assignment of spectrum to the WOAN.¹⁰

34.8.2. The reduction or waiver of annual radio frequency spectrum licence fees and reduced spectrum application fees (covering administrative costs only).¹¹

34.8.3. Offtake obligations to be imposed on licensees assigned high-demand spectrum simultaneously with the assignment of spectrum to the WOAN, expressed in the following terms:

iv) offtake i.e. a minimum of 30% national capacity is procured from the WOAN as soon as the WOAN is licenced, for a period of not more than three years, by each radio frequency spectrum licensee that is assigned currently unassigned high demand spectrum as contemplated in paragraph 2. The percentage to be procured by each licensee may be proportionate to the amount of high demand spectrum assigned to such licensee. The Authority may determine that, after expiry of the period contemplated herein, a minimum of 30% national capacity must be procured in the WOAN collectively by the radio frequency spectrum licensees contemplated in paragraph 2, for a further period determined by the Authority;

34.9. Regulatory remedies which ICASA considers necessary to ensure effective service-based competition and to avoid any anti-competitive effects which may result from the establishment and operation of the WOAN.¹²

⁸ Para 1.11

⁹ Para 1.12 a)

¹⁰ Para 1.12 b)(ii)

¹¹ Para 1.12 b)(i), Para 1.12 b)(ii). In ISPA's understanding radio frequency spectrum application fees are currently set at R830 per application.

¹² Para 1.13 a)

Wholesale services

35. ISPA supports the restriction of the WOAN to the provision of wholesale services. This is in keeping with the core nature of the intervention as it has always been conceived.

36. The ECA defines “wholesale” as:

the sale, lease or otherwise making available an electronic communications network service or an electronic communications service by an electronic communications network service licensee or an electronic communications service licensee, to another licensee or person providing a service pursuant to a licence exemption¹³

37. Under this definition wholesale services means:

37.1. making capacity available over an electronic communications network by an ECNS licensee to an ECS licensee (which could include itself);

37.2. the making of capacity available over an electronic communications network by an ECNS licensee to another ECNS licensee for resale of that capacity; and

37.3. the making of ECS available to another ECS licensee or a person holding a licence exemption for the resale of such ECS.

38. It is clear from the Proposed Policy Direction that the Authority is to be directed to issue an IECNS licence to the WOAN operating entity. No reference is made to an IECS licence.

39. Given that both ECNS and ECS may be made available on a wholesale basis, the Proposed Policy Direction should – when referring to restrictions on the services to be provided by the WOAN – specify that the restriction is to “wholesale electronic communications network services” or “wholesale ECNS”.

Obligations to provide wholesale open access to networks and facilities and to lease networks and facilities

40. This is discussed in paragraphs 73-80 below.

Prescription of wholesale rates

41. ISPA does not understand why the WOAN as a new entrant would be subject to prescribed rates. This remedy is usually employed to counter dominance in a market or control of an essential facility.

¹³ ECA section 1

42. Reference is made to concerns about the WOAN being a monopoly. ISPA cannot see how this is the case in the current context. Should future developments around the assignment of “5G” spectrum alter this position so that the WOAN is in a de facto monopoly provider then this form of remedy would be appropriate.

Offtake requirements

43. This is discussed in paragraphs 69-72 below.

Empowerment requirements

44. This is discussed in paragraphs 81-84 below.

Functional separation requirement

45. ISPA notes and supports the requirements relating to functional separation for members of the WOAN operating entity that also provide ECS.
46. In ISPA’s view, the framework for functional separation to be imposed in this context will have to be finalised before the ITA process can commence, as this framework will constitute a condition on which the WOAN IECNS licence will be issued.
47. The Department is requested to note that this process would provide a framework for the enforcement of the COACAM and other obligations to be imposed on vertically-integrated entities as set out in the Electronic Communications Amendment Bill.
48. It would therefore be available as a condition to be imposed on the radio frequency spectrum licences to be assigned to entities other than the WOAN.

Which obligations attach to which licences?

49. Note that there are two separate processes contemplated:

49.1. The issuing of an IECNS licence under Chapter 3 of the ECA; and

49.2. The issuing of radio frequency spectrum licences under Chapter 5 of the ECA.

50. To which licence type are the obligations, conditions and incentives set out above to attach? ISPA notes that the heading for paragraph 1 of the Proposed Policy Directions refers to “Wholesale Electronic Communications Network Service”, which suggests that the obligations, conditions and incentives will attach to and be recorded in the IECNS licence to be issued to the successful applicant, and not to the radio frequency spectrum licences to be assigned.

WOAN radio frequency spectrum licences

51. As regard the issuing to the WOAN of radio frequency spectrum licences, the Proposed Policy Directions contemplate that the Authority is directed to “consider the recommendations of the CSIR study urgently”.
- 51.1. ISPA respectfully submits that the Minister should make it clear whether the core recommendation of the CSIR is to be regarded as final or whether the Authority has a discretion to adopt an approach which varies the spectrum to be made available to the WOAN.
- 51.2. ISPA is unaware of the precise terms of the approval by Cabinet of the deviation from the ICT Policy White Paper’s position on high-demand spectrum. Was the approval on general terms or was the approval specifically that the recommendation of the CSIR be implemented by Authority?
- 51.3. ISPA submits that this is a material issue which must be clarified as soon as possible.
- 51.4. Stated differently: is the Authority required to “consider” or to “implement” the recommendations set out in the CSIR Report?
- 51.5. It is perhaps in the interests of efficient progress to regard the CSIR Report as authoritative for current purposes.

Is the WOAN a new entrant or an incumbent?

52. It is ISPA’s view that the Proposed Policy Direction fails to take into account adequately that the WOAN will be a new entrant into a mature industry with entrenched incumbent operators.
53. The struggles of Cell C and Telkom Mobile to gain market share at the expense of Vodacom and MTN is highly instructive as to the challenges which the WOAN will face in establishing itself as a viable commercial proposition.
54. Where progress has been made in the voice call market, this has been realised through asymmetrical regulation.
55. The Proposed Policy Direction, however, with references to pricing and access obligations to be imposed on the WOAN, gives the impression that the WOAN is to be regulated as an incumbent rather than a new entrant.
-

Policy directions relating to assignment of high-demand spectrum

56. The core of the direction to be provided to the Authority is set out in paragraph 2.1 of the Proposed Policy Directions:

2.1 The Minister intends to direct the Authority, in terms of section 3(2) of the ECA, to urgently consider the licensing of radio frequency spectrum licences for unassigned high demand spectrum not reserved for assignment to the WOAN.

57. As regards the assignment of this spectrum, the Proposed Policy Directions contemplate the following conditions to be imposed on successful applicants:

57.1. An obligation to lease networks and facilities to the WOAN upon request “as soon as the WOAN is licensed”. To ensure compliance the Authority must “perform strict regulatory oversight”.¹⁴

57.2. Obligations in terms of offtake, which mirror the incentive to granted to the WOAN.¹⁵

57.3. That “the spectrum is assigned subject to Chapters 8 and 10 of the ECA”.¹⁶

57.4. Universal service and access obligations “to ensure high quality network availability in rural and under-serviced areas” which obligations “must be complied with in rural and under-serviced areas before the assigned spectrum may be used in other areas by the licensees”.¹⁷

57.5. Compliance with empowerment requirements in terms of section 9(2)(b) of the ECA.¹⁸

58. The Authority is further required to ensure that any competitive process for this spectrum ensures that it is not assigned to a single entity.¹⁹

58.1. ISPA submits that the language used should reflect the pro-competitive drive behind the policy direction process, rather than prohibiting what is an unthinkable outcome.

58.2. ISPA suggests that wording such as “the Authority is further required to ensure that any competitive process for this spectrum ensures optimal competitive outcomes” or a variation thereon would be more appropriate.

¹⁴ Para 2.2 (a)

¹⁵ Para 2.2 (b)

¹⁶ Para 2.2 (c)

¹⁷ Para 2.2 (d)

¹⁸ Para 2.2 (f)

¹⁹ Para 2.2 (e)

59. The Proposed Policy Directions further provide that the Authority shall have the discretion to determine the term of all licences to be issued or assigned as contemplated in the finalised policy directions.

Term of licences

60. The discretion given to the Authority to determine the term of the WOAN IECNS licences and the spectrum licences to be assigned to the WOAN and others is extremely broad and ISPA submits that the finalised policy direction should contain some principles within which this discretion should be exercised.

61. These could include:

61.1. A principle that the term of the WOAN IECNS licence will be linked to the terms of the spectrum licences to be assigned to it.

61.2. Reference to section 5(10)(a) of the ECA which states that individual licences may be issued for a period not exceeding 20 years.

61.3. Guidance on how to treat the term of spectrum licences to be issued to entities with existing IECNS licences that expire in 2029, noting the provisions in the Electronic Communications Amendment Bill in this regard.

62. This is material issue for any potential participant: maximum clarity should be provided.

Assignment of spectrum subject to Chapter 8 and Chapter 10 of the ECA

63. ISPA is uncertain as to how to interpret this provision of the Proposed Policy Direction.

64. An entity issued with an ECNS licence will automatically be subject to Chapter 8 of the ECA. An entity issued with an ECNS or an ECS licence will automatically be subject to Chapter 10 of the ECA by virtue of their holding of such licences.

65. ISPA understands that the Department is seeking to make the point that – even though the ECA has not been amended to provide for open access and other pro-competitive remedies set out in the Amendment Bill – the existing provisions of these chapters will apply.

66. ISPA does not believe this is necessary. It is further legally contestable whether it is correct to refer to radio frequency spectrum licences or licensees as being subject to facilities leasing obligations in respect of the radio frequency spectrum assigned to them.

67. The application of Chapter 10 is of no relevance until a process in terms of that Chapter has been completed.

68. ISPA refers to its earlier submissions about clarity on which licence types obligations and conditions will be imposed.

Offtake obligations

69. ISPA is not in a position to comment on the percentages and time periods contemplated for the offtake obligation, noting that these arise as a result of negotiation between the Minister and industry incumbents.

70. It is not clear to ISPA what is being referred to by "capacity" in the context of this obligation and we suggest that the Department be more explicit in defining what this means.

71. ISPA submits that the wording of the paragraph relating to the offtake obligation is confusing and should be broken up and clarified.

72. It is also interesting that there is an assumption implicit in this paragraph that not more than three lots of licences will be available in any competitive process to be conducted.

Access to electronic communications facilities

73. It is evident that even if the various licences contemplated in the Proposed Policy Direction are issued/assigned simultaneously, this will still disadvantage the WOAN, which will have to establish a network and the wherewithal to provide a commercially competitive service before it can utilise the spectrum assigned to it.

74. A critical element in getting to market is access to existing electronic communications facilities, as is recognised in the Proposed Policy Directions.

75. The Proposed Policy Directions refer to these forms of obligations in three paragraphs:

1.9 The WOAN must provide wholesale open access to its electronic communications networks and facilities, upon request, to any other person licensed in terms of the ECA and persons providing services pursuant to a licence exemption, in accordance with the following wholesale open access principles:

- a) Wholesale open access on terms that are effective, transparent and non-discriminatory;*
- b) Leasing of its electronic communications networks and electronic communications facilities; and*
- c) Charge wholesale rates as prescribed by the Authority.*

—
1.12 The Authority must determine the following for the WOAN-
(a)

(b) incentives such as-

(i)

(ii)

(iii) immediate facilities leasing of electronic communications networks and electronic communications facilities of the radio frequency spectrum licensees, if any, that are assigned currently unassigned high demand spectrum as contemplated in paragraph 2.

2.2 The radio frequency spectrum licences contemplated in paragraph 2.1 must be issued on condition that-

(a) the licensees, must lease its electronic communications networks and electronic communications facilities, if any, to the WOAN upon request, as soon as the WOAN is licenced. The Authority must perform strict regulatory oversight to ensure compliance with this network and facilities leasing requirement;

76. ISPA submits that it is incorrect to refer to the leasing of an electronic communications network. This is more properly a relationship between:

76.1. An ECNS and an ECS licensee in terms of which network capacity is made available to the ECS licensee; or

76.2. An ECNS and an ECNS licensees in terms of which capacity is made available for resale.

77. This is simply the provision of ECNS as opposed to the leasing of an electronic communications facility which is a component of an electronic communications network. ISPA suggests that the words "lease its electronic communications network" be replaced with "provide ECNS".

78. ISPA submits that the technical and economic feasibility criteria set out in Chapter 8 of the ECA and the Electronic Communications Facilities Leasing Regulations 2010 will continue to apply to facilities leasing requests made by the WOAN to the licensees assigned high-demand spectrum through the policy direction process. This is notwithstanding the failure to specifically reference reasonableness criteria in paragraph 2.2(a) of the Proposed Policy Directions.

79. ISPA urges the Department to recognise the practical challenges involved in realising this through the existing provisions of the ECA and the Electronic Communications Facilities Leasing Regulations 2010 and taking into account the lack of an effective enforcement mechanism.

80. It is doubtful that the existing facilities leasing framework will support requests for access to active facilities.

Empowerment obligations

81. Applicants for all of the licences contemplated under the Proposed Direction are required to comply with the requirements of section 9(2)(b) of the ECA. This subsection requires ICASA – when giving

notice of an application for an individual licence – to publish a notice in the Gazette stipulating, inter alia:

“...the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act;”

82. ISPA is not aware of regulations have been finalised under section 4(3)(k) of the ICASA Act, which provides that the Authority “may make regulations on empowerment requirements to promote broad-based black economic empowerment”.
83. In our understanding it is the Authority’s intention to draft and finalise such regulations as part of or consequent to the process it launched on 31 March 2017 with the publication of a “Discussion Document into Equity ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code on the ICT Sector in terms of section 4B of the ICASA Act, as amended”.²⁰ Public hearings were held in May 2018 and presumably a findings document and draft regulations are being prepared.
84. It is not clear to ISPA whether these regulations must be finalised before the ITA for the WOAN licences are issued.

Universal service and access obligations

85. ISPA submits that the required processes should be commenced as soon as possible to ensure that universal service and access obligations imposed are constructive, measurable, sustainable and enforceable.

Conclusion

86. ISPA trusts that the above will be of assistance to the Department in finalising the Proposed Policy Directions.

²⁰ GG 40759, 31 March 2017