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Convergence Bill

[B9-2005]

WRITTEN SUBMISSION ON BEHALF OF THE SOUTH AFRICAN POST OFFICE

This submission may be disclosed to all participants

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SUBMISSION BY THE SOUTH AFRICAN POST OFFICE ON THE CONVERGENCE BILL [B9-2005] TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON COMMUNICATIONS

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INFORMATION TECHNOLOGY ATTORNEYS

TABLE OF CONTENTS

PAGE

1 INTRODUCTION

1.1 INTRODUCTION

The South African Post Office (SAPO) is pleased to contribute to the ongoing efforts to enhance and grow Information services in South Africa through its comments on the Convergence Bill (B9-2005) ("the Bill") submitted to the to the Parliamentary Portfolio Committee on Communications.

1.2 ABOUT THE SOUTH AFRICAN POST OFFICE

A national postal service has traditionally been the most basic and most common means by which information can be widely communicated and distributed.

The SAPO is and always has been strategically positioned through its vast retail and distribution network to receive and deliver information and goods, as well as allow the population access to a point of collection in addition to delivery of services.

Furthermore, the SAPO is unique in its critical ability to serve the entire South African population scattered across widespread geographical areas of the country and across language and income barriers.

Hence the SAPO serves as an important medium of communications and transactions on behalf of the Government and its structures, the business community, public bodies and individual citizens.

This is especially true with regard to the communication and "transactive" needs of lower-income groups and rural populations.

Growth in the electronic communication medium has impinged dramatically on the traditional postal services that various national post offices have historically delivered. Globally, this has resulted in national postal services fast evolving and positioning themselves to embrace electronic communications and to extend and add to their existing service offerings.

The SAPO is strategically repositioning itself to provide new and innovative Information services as the opportunities, enabling legislation, and enabling technologies arise.

Through its market presence and legacy activities, the SAPO is in a unique position to play a pivotal role to play in South African society and the development and rollout of national Information services.

1.3 OUTLINE OF SUBMISSIONS

Below, we outline our proposals on a number of aspects which, we submit, will both advance the objects of the Bill and will also enable the SAPO to expand its offerings to the populace more effectively were it to execute the opportunities that the Bill presents.

2 APPLICATION SERVICES

2.1 COMMENT

The SAPO has been tasked with frontline provision of e-government and universal services to the populace via public access terminals and other such application devices at each of the SAPO branches. It is also part of the SAPO's mission to provide connectivity through the distribution of information, goods and financial services.

The SAPO of course also provides national postal delivery services, made more efficient by use of parcel-tracking applications. Provision of these services has to date been a seamless (unlicensed) exercise which has met with great success in helping bridge the digital divide, especially in under-serviced areas.

The Bill however introduces amongst its various licence classes the concept of an "application" which is linked to the provision of an "application service" and the need for an associated "application service license." SAPO is concerned that the requirement that it would henceforth need a license, specifically an application service license, may impede its national mandate to provide many of the services described above. We submit that a 'license-exempt' category should be created under the proposed application services regime, and that the SAPO application services be included in this category.

By way of explanation, an "application" is defined in the definition clause as being:

"any technological intervention by which value is added to a communications network service which includes the—

(a) manipulation;
(b) storage;
(c) retrieval;
(d) distribution;
(e) creation; and
(f) combination,

of content, format or protocol for the purpose of making such content, format or protocol available to customers".

The SAPO understands the "application[s]" above could refer to services that are currently unlicensed in South Africa. This would include the running of applications on a national infrastructure, and may encompass software currently used for facilitating access to the Internet of any next-generation networking facility; for viewing of content; access to messaging services; for hosting of any data; and for provision of secure services.

These are services that the SAPO to some extent currently provides, but on an unlicensed basis. For example, the SAPO's parcel-tracking service may in the future be classed as an application service.

Under the Bill however, all these services would henceforth require an application licence for legal operation.

From a procedural perspective, the Bill further proffers that the awarding of these application licences is in the remit of the Regulator, ICASA, and that the awarding

of thereof is a managed process subject to the provisions of a general prohibition in section 7 of the Bill and award of an appropriate license by ICASA.

The outcome of this process appears to indicate that any development of a novel, possibly even revolutionary application service - or alteration of application service already licenced were the application service provisions to become law – would first require approval from the regulator before the *de novo* application service or modification could be commercialised.

The Regulator in turn would itself first have to identify the class and create the necessary framework and procedures for applications for that particular class licence before that service could be put in commercial operation.

In toto, it appears that the overall goals of the Bill and in particular that the inclusion of the application service licencing scenario may be to create a competitive environment by disallowing those with Significant Market Power (SMP) the ability to dominate other sectors by possible cross-subsidisation between the SMP's business units – for example an SMP player with an individual licence deciding to enter the application service or any other defined space.

However, the SAPO submits that the inclusion of a general application service licence class would have the exact opposite effect of this mooted protection, by hampering growth and stifling potential entrepreneurial greats through unnecessary and unprecedented bureaucratic intervention in the innovation cycle.

Creating barriers to entry in an already competitive area is undesirable in a growing economy, and would hamper not only growth targets set for the ICT sector, but would also stagnate overall development of the South African economy.

Certain services, we submit, should be license-exempt. These include the current (license-free) services SAPO provides.

2.2 SAPO SUGGESTION

The SAPO respectfully submits that the broad reference and associated onerous licensing conditions of "application services" is contrary to the aims of the Bill of fostering competition.

The SAPO respectfully submits that:

Any an application licence need only be applied for if a class has *already* been specifically identified by the Regulator, concomitant with an effortless application framework created by the Regulator. This alternative methodology may obviate any delays in commercialising a novel application service.

In the alternative, a new "license-exempt" category of application services should be created in the Bill that would allow rapid deployment of services that would fall under this category.

3 PROVISIONS RELATING TO CONTENT

3.1 COMMENT

The SAPO through its information terminals at various branches provides certain informational-type content to users as part of the upfront portion of the service. The possibility of content licensing is only obliquely excluded through the definition of "content" in the definitions clause of the Bill. The SAPO is concerned with any suggestion or implication by provisions in the Bill, even inadvertently, that content – and hence the information provided on its terminals – would be subject to any type of regulation.

3.2 SAPO SUGGESTION

The SAPO respectfully submits that an explicit and definitive provision in the Bill be inserted that indicates that no content licences whatsoever are required.

4 PROCEDURAL ASPECTS OF LICENSING

4.1 COMMENT

Running an efficient national branch network as the SAPO does is dependent on a comprehensive infrastructure that adapts not only to competitive issues, but also to technological advances. The SAPO, as a potential retailer of enhanced communications services, would also need to rapidly adapt and react to competitive offerings. The SAPO is thus concerned that section 19 which details how changes to communications services should be handled, is unwieldy in its practical application because of the rapid proliferation of new and novel services, at that sometimes only mere tweaking of existing services for competitive or technical reasons.

Sections 16 to 19 of the Bill outline the administrative procedures for suspension or cancellation of an individual licence.

Section 19 in particular says that the Regulator must be provided with advance notice of any material change to the communication service provided, or the cessation of provision of services.

The SAPO believes that prescribing a compulsory bureaucratic component that involves having to submit applications and await receipt and reply because of any mere modification of services would be wholly untenable in commercial practice.

4.2 SAPO SUGGESTION

The SAPO respectfully submits that section 19 should be deleted in its entirety because of the negative commercial impact it would have on the operational aspects of any licencee.

A more effective procedural and administrative regime could be created by simply expanding the heading of section 14 to refer to **"Suspension or cancellation of individual and class licences".**

5 FACILIITES LEASING

5.1 COMMENT

The SAPO could in the near future begin offering enhanced communications services on a commercial basis so as to fulfill its national mandate. However SAPO believes that a major stumbling block to universal provision of services has been the unjustifiably high cost of bandwidth in South Africa, the provision thereof dominated as it has been by those who may be considered as having Significant Market Power (SMP). The SAPO thus welcomes the 'Facilities Leasing' provisions of the Bill that seeks to promote access to scarce national infrastructure resources. Section 42 in particular details an "Obligation To Lease Communications Facilities" by a communications network services licensee, and emphasizes the need for fair and equitable provision of quality of service to anyone leasing these facilities [s42(2)]. However the Bill does not directly address a major stumbling block that may hamper service provision: that of wholesale rates that unreasonably favour affiliates of SMPs or the SMP itself. The Bill hence needs to explicitly address equitable wholesale rates by outlawing price discrimination whereby SMPs may be providing better rates only to their affiliates.

Access at affordable rates to bandwidth, even at ostensibly wholesale levels, has been lacking, meaning that the scope for competitive differentiation based on economies of scale resulting from bulk usage and turnkey service provision has been effectively nullified. In addition, those with SMP appear to have been able to favour affiliates within their purview with effectively discounted wholesale rates that give these affiliates unfair advantages on the retail level.

This, we submit, is anti-competitive and has meant in part that the vast majority of South Africans have not had direct exposure to the benefits and seamless information network facilities that the Internet provides, a unnecessary lacunae which the state itself has identified as being a major touch point in having hindered rollout of national information services and technical skills development in South Africa.

The SAPO has a vast and trusted national retail distribution and marketing infrastructure which allows it to rapidly and efficiently roll out services to urban and under serviced areas. SAPO would, given its national footprint, be able to provide commercial communications services throughout the country at more reasonable and profitable terms were it able to source bandwidth using a rates and service regime that is more equitable and effectively allows for a level playing field.

The SAPO thus welcomes the section 42 facilities leasing provisions in the Bill that seeks to promote this level playing field. The effect of these provisions is that the SAPO may be able to enter the services arena, which under the tentative definitions in the Bill, would possibly be as "communications service licensee" and/or as an "application service Licensee".

The SAPO would however point out that while a communications network service licensee must, on request, lease communications facilities, that protection for the lessee is only restricted to "quality" parity between the lessee and the (SMP) licensee [section 42(2)].

Rate protection is only obliquely touched upon in section 47, where ICASA is mandated by this section to consider wholesale rates under a framework it (ICASA) may decide upon.

We submit that to foster competition and to prevent cross-subsidization of services by SMPs that may have the effect of favouring their affiliates in prejudice to other players, that the granularity of non-discrimination should be explicitly or implicitly provided for in section 47 as an additional protection mechanism for the lessee beyond just quality of service non-discrimination indicated in section 42(2). This would extend ICASA's 'protection' mandate as regards facilities leasing to beyond just Quality Of service parity issues.

However, the basis on which ICASA may formulate such potential non-discriminatory rates regulations in the future is not, based on our reading of the Bill, currently informed via an underlying 'instruction' anywhere in the Bill for it to consider wholesale rates on a *pari passu* basis.

Without derogating from ICASA's possible future role under section 47 to in time determine wholesale rates on an equitable basis based on the need to foster competition, we submit that it seems logical to insert such non-discriminatory rate provisions that would have the effect of preventing *ex post* controversy as to the precise mandate proffered to ICASA under section 47 regarding wholesale rates.

A logical solution, we submit, would be to add into the Bill an explicit framework instruction to the effect that SMPs may not favour their affiliates either on the basis of quality of service or on wholesale rates.

5.2 SAPO SUGGESTION

The SAPO respectfully submits that a clause be added to section 47 ("Rules Regarding Wholesale Rates") that provides for non-discriminatory rates by SMPs.

We submit that a new clause be added as a new section 47(4) to read as follows:

"s47(4): The framework in subsection (1) must ensure the wholesale rates provided by those entities identified in subsection (3) as having SMP do not unreasonably favour any affiliate or subsidiary of an SMP."

6 INTERCONNECTION

6.1 COMMENT

The SAPO welcomes the provisions in section 37 of the Bill which specifies an obligation to interconnect. However, we submit, it does not go far enough to promote reasonable and seamless interconnection between all classes of licensees, only restricting as it does the obligation of interconnect to "a communications network service licensee" [section 37(1)] . This obligation, we submit, does not instruct communications services licensees to interconnect, which may practically mean there could arise islands of connectivity in South Africa, an untenable situation in a networked world. It could further mean that customers of a potential SAPO commercial communications service may not be able to connect to all users in South Africa even though the underlying ability to do so has been provided for.

Without derogating from the technologically neutral aspects of the Bill, we give as an example the implications for the SAPOs (potential) provision of VoIP services were there to be no interconnect obligations on those providing such services as part of say its communications services License:

VoIP implies an ability and need to connect where physically possible, a largely innate feature of the VoIP design. Given that South Africa could in all probability follow some jurisdictions – such as the UK – in allocating non-geographic phone numbers to VoIP services, it seems logical that users of one VoIP service be able to seamlessly and directly connect to users of another VoIP service, or that a PSTN or mobile licensee connect to these number ranges (and visa versa). The interconnectivity could of course also be via direct IP-to-IP interconnectivity.

The Bill however only instructs the communications network services licensee to interconnect with other communications network services licensees, which does not necessarily translate to a downstream instruction to a communications services licensee feeding off the communications network services licensee's facilities to effect that interconnect ability by interconnecting to other communications services licensees or anyone else.

Hence, in the VoIP example, an untenable situation may arise that because of competitive or any other reason that effectively blocks interconnection, users of one communications service licensee's services may not be able to interconnect directly, or at all to any other users obtaining services from another Communications service licensee despite that underlying interconnectivity being available (on the communications network services level).

This effect is contrary to section 37(3)(b) of the Bill which seeks to "promote the efficient use of communications networks," which the SAPO believes is a scarce national resource.

6.2 SAPO SUGGESTION

The SAPO submits that section 37(1) be modified to include communications service licensees in the obligation to interconnect.

The modified Section 37(1) would thus read:

"**s37(1):** A communications network service licensee **and a communications service licensee** must, on request, interconnect to any other communications network service licensee **and communications service licensee** in accordance with the terms and conditions of an interconnection agreement entered into between the parties for the purposes of delivery of any service authorised in terms of this Act or the related legislation, unless the Authority considers such request to be unreasonable."

7 CONTRIBUTIONS TO UNIVERSAL SERVICE FUND

7.1 COMMENT

SAPO is possibly currently subject to more service obligations than any non-state entity so licensed under current regulations. Section 81(1) of the Bill refers to contributions to the Universal services Fund by holders of licences granted or considered to have been granted in terms of Chapter 3 of the Bill. Based on its existing obligations for national coverage however, the SAPO submits that any further obligatory contributions that may arise from the Bill may amount to a "double taxation" of SAPO activities. The SAPO respectfully submits that the SAPO be exempted from the provisions of section 81.

In the alternative, but more as a general principle of equity, the SAPO respectfully submits that the method of determine the amount of the contributions to the Fund should be reworked.

Currently, the basis for the value of the contribution in section 81(2) is calculated as a percentage of a licencee's annual turnover or such other percentage of the licencee's annual turnover as may be determined by the Minister by notice in the Gazette. However, this basis for the calculation, we submit, is problematic since it is certainly possible that many of the licencees would be commercial entities that provide a multitude of services and products completely unrelated to their class licence or to (even non-licensable) telecommunications as a whole.

These telecommunications service could, in relative terms to these other business units of the same entity, be a small percentage of the entity's annual turnover.

In particular, the SAPO is in this commercial position. Its service offerings deal primarily with the provision of postal services, as well as other ancillary services such as commercial resale of airtime (for what the Bill would class as Individual licencees), as well as some financial services. Even on a resale basis, airtime provisioning is not a licensable service.

That said, it seems inequitable that since the majority of a commercial enterprises' activities turnover may not be derived from its licence activities that the contribution to the Universal service Fund should based on its total turnover.

The contribution should instead be derived from the turnover emanating only from the licence-related activities of the entity. The distinction between the sources of its total revenue is normally identifiable in any audited statements of accounts.

7.2 SAPO SUGGESTION

The SAPO respectfully submits:

That the SAPO be exempted from section 81.

That in the alternative, but more as a general principle of equity, that s81(2) should be modified to base the Universal service Fund contribution only on the Licence-related turnover of the entity, and not based on the entity's total turnover.

Under these circumstances, the modified Section 81(2) would then read as follows:

81. (2)

The Authority must prescribe —

(a) the basis and manner of determination of such contribution, which must not exceed 1 per cent of the licencee's annual licence-related *turnover or such other percentage of the licencee's annual* licence-related *turnover as may be determined by the Minister by notice in the Gazette;*

8 CONCLUSION

8.1 COMMENT

The SAPO wishes to laud the Portfolio Committee on Communications for the for its extensive work on the Bill, and for the opportunity provided by it to the SAPO to provide cogent commentary on the Bill.

This is an important piece of legislation that will reshape as it is currently defined the IT, Broadcasting and Telecommunications landscape for many years.

It can serve as a legislative and technology beacon to similar germinating efforts at technology innovation in Africa.

The Bill can also provide a framework that contributes to the growth and well-being of the Republic, as well as enhancing our capabilities for the Soccer World Cup 2010.

8.2 CONTRACT INFORMATION

If the Portfolio Committee on Communications wishes to obtain any details from the SAPO relating to this submission, please contact:

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