

# Electronic Communications Amendment Bill



Internet Service Providers' Association

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## About ISPA

- Founded in June 1996
- ISPA currently has **142** members (13 large, 6 medium) – vast majority are SMEs
- Currently an average of 2-3 new members join each month
- Members are primarily Internet access providers (including resellers or “virtual” ISPs)
- Since 2001, affiliate membership has been available for ISPs who do not sell access (e.g. content hosting services)
- Most ISPA members are for-profit enterprises, but members also include non-profit organisations, individuals and trusts (e.g. TENET, e-Schools Network, NetDay, SchoolNet SA)

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## Lack of Context

- No policy context for the proposed amendment
- One of the significant criticisms of the ECA itself
- Memorandum refers to a “forward looking legislative framework”
- Bill itself is anything but forward looking or a legislative framework
- Amounts to a reversal of the separation of powers in the ECA and a parallel licensing mechanism
- Inextricably linked with Broadband Infraco Bill

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## Position of Amendment in the ECA

- Currently in Section 5 – Licensing
- Not Section 3 – Ministerial Policies
- Clear parallel licensing framework
- More appropriately placed under Section 3 of the ECA
- Must be **subject to Sections 3(1), 3(2) and 3(3)** of the ECA

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## Objects

- “... to provide an opportunity for Government to make strategic interventions on infrastructure investments whenever it deems necessary. In amending the Act Government will be able to address some of the significant challenges such as—
- reducing the cost to communicate by providing infrastructure at a wholesale rate to other operators;
  - improving on government service delivery and supporting ASGISA;
  - link Nepad broadband with Africa, Latin America and Europe;
  - provide the much needed bandwidth for strategic projects and consumers in general.
  - The Bill will provide a forward looking legislative framework which facilitates government’s intervention in the ICT sector in line with a developmental state.”
- Laudable and applauded
  - ISPA supports any initiative that can achieve these objectives

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## Compared to objects of ECA

- **(d) encourage investment and innovation in the communications sector**
  - Ministerial short-cut and preference is likely to stifle investment and innovation
- **(f) promote competition within the ICT sector**
  - Private sector is unable to compete on an equal footing
  - uncomfortably reminiscent of the current legacy of public entities controlling and in some instances enjoying monopoly rights in respect of electronic communications network and service provision

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**ISPA**

## Public Entities with Existing Rights

- Public entities (as defined in the PFMA) include the following (who enjoyed monopoly or preferential licences in terms of the Telecommunications Act, Act 103 of 1996, which continue to subsist due to the delays in the licence conversion process in terms of the ECA)
- It should be noted that Schedule 2 of the PFMA specifically provides that "Any subsidiary or entity under the ownership control of the above public entities" is also a major public entity.

Public Entity	Provision of the PFMA
Telkom South Africa Limited	Schedule 2 to the PFMA
Transnet Limited (specifically its Transnet Division and its shareholding into Neotel)	Schedule 2 to the PFMA
Eskom (specifically its Eskom Telecommunications subsidiary and its shareholding into Neotel)	Schedule 2 to the PFMA
South African Broadcasting Corporation Limited	Schedule 2 to the PFMA
Sentech	Part B - Schedule 3 to the PFMA

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**ISPA**

## Compared to objects of ECA

- (h) promote the empowerment of historically disadvantaged persons, including Black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities;*
  - significantly impact the ability of new entrants to the electronic communications market and specifically those who are historically disadvantaged persons
  - potentially limits the future growth of existing electronic communications market players
  - in turn limits their ability to participate in BBBEE structures which largely rely on future growth to fund new investors' contributions
  - operators in a stagnant market limited in attempts to employ new staff so as to transform organisational demographic, empower its current staff as well as give opportunities for youth and challenges for people with disabilities.

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**ISPA**

## Compared to objects of ECA

- (j) provide a clear allocation of roles and assignment of tasks between policy formulation and regulation within the ICT sector;*
  - contravenes fundamental object of the ECA
  - unwarranted intrusion of policy makers into the regulatory sphere
  - licence conversion under the ECA **NOT** complete
  - no Section 4B investigation / market study
- (k) ensure that broadcasting services and electronic communications services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in the Republic*
  - significant proportion of the electronic communications market is already controlled by public entities
    - add additional public entities to the market **OR**
    - extend the rights and entitlements of public entities currently in the market
  - result in an increase in market concentration
  - contradicts diversity that the ECA seeks to promote

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## Compared to objects of ECA

- (y) *refrain from undue interference in the commercial activities of licencees while taking into account the electronic communication needs of the public;*
  - private sector roll-out delayed by regulatory uncertainty
  - “short cut” for public entities
  - manipulation of the structure of the electronic communications market
- (z) *promote stability in the ICT sector.*
  - skew the ICT sector even further towards public entity dominance
  - lack of competition at an infrastructure level is currently destabilising the ICT sector
  - Bill seeks to perpetuate the current situation.
  - no long term benefits for the country as a whole or the ICT sector in particular
  - instead of being forced to obtain facilities from a single public entity, the ICT sector will have a choice of public entities from which to acquire such facilities, with no perceptible benefit

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## Scope of Amendment

- Bill in its current form is either:
  - much broader than necessary to enable the licensing of Infraco; or
  - far too narrow in its scope to achieve the laudable objects set out in the Memorandum – **AS RESTRICTED TO PUBLIC ENTITIES ONLY**

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## Too Broad

- No restriction on number of interventions / licences
- No need for 4B enquiry / market study
- Not just new licensees
  - Possibly further rights to existing licensees
- No limitation to wholesale
  - Even if restricted to wholesale, will this really help?
- If for Infraco
  - One single intervention for Infraco
  - Stringent restrictions and controls
    - Infrastructure on a wholesale basis
    - Not entitled to provide ECS
    - Pre-emptive declaration of facilities as essential facilities S43(8)
    - S44(7) should not apply

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## Too Narrow

- If not just for Infraco
  - Infrastructure investment should not be limited to public entities alone
  - available to the private sector, *inter alia* in the form of loans, loan guarantees, tax incentives and the like
  - the grant of new licences should not be restricted to public entities and private sector entities should be able to benefit from Ministerial *largesse*;
  - strict criteria will still need to be applied to both public entities and private sector recipients of infrastructure investment and licences
    - As set out above

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## Definition of Public Entity

- Very broad definition - Appropriate for PFMA
- Inappropriate for ECA
  - Unnecessary, already at least five public entities with a dominant position in the electronic communications market **OR**
  - If really is necessary, should be restricted to a single public entity (presumably Infraco)
- Allows unwarranted interference in the electronic communications market
- Unfair advantage to public entities

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## Public Entities

- Long history of preferential treatment in the electronic communications market
  - Similarly long and dismal record of
    - reducing electronic communications costs and
    - increasing electronic communications access
- in South Africa

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