



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

March 7, 2017

The Hon Mr MC Ramaphosa
Deputy President
Leader of Government Business
Parliament of the Republic of South Africa

Dear Honourable Ramaphosa,

I am concerned that the process of developing legislation arising from the National Integrated ICT Policy White Paper, gazetted on 3 October 2016, is irregular in terms of the Electronic Communication Act 2005 and is proceeding with reckless haste.

I fear that unless a lawful public participation process of some of its key aspects and a credibly researched socio-economic impact assessment is done, much of the legislation will be legally contested because of its unconstitutionality, asset expropriation, and inadequate processes. I am sure that you appreciate how critical is the need for an efficient, widespread, economically sustainable ICT infrastructure to the economic and social delivery needs of South Africa.

Such is the fundamental opposition to the contentious aspects of this White Paper that I am concerned that, should we leave the public participation until the parliamentary legislative process, positions on these will become unnecessarily entrenched and hostile.

The Director General of the Department of Telecommunications and Postal Services told the portfolio committee that it was planned to submit legislation to Cabinet by the end of March. The Minister has told various public forums that there will be no discussion on the recommendations, only on how they will be implemented.

I urge you to propose to Cabinet that the implementation of the White Paper initially focus on legislating the recommendations which are urgent, and not contentious – such as the Rapid Deployment Guidelines that were unnecessarily delayed for inclusion into the White Paper – and embark on a thorough public participation process to develop a wireless network strategy that is constitutionally, legally and financially sound.

Legal opinion I have obtained states that the White Paper is inconsistent with section 85(2)(b) of the Constitution of the Republic of South Africa, 1996, and specifically the doctrine of legality, insofar as it does not constitute policy and strays into the legislative realm.

He states that the failure of the White Paper properly to identify, isolate and distinguish policy under section 3(1), policy directions under sections 3(2) and 3(1A), of the Electronic Communications Act 36 of 2005 (the ECA), the lack of adequate public participation and future-looking White Paper elements, thereby violate the Rule of Law.

On these and other grounds senior counsel maintains that the entire White Paper could be sent on review.

The most contentious proposal in the White Paper is the establishment of a national Wireless Open Access Network (WOAN), purportedly based on the Mexican model. It seems that the South African

WOAN will be rapidly established without the necessary legal grounding in place and with the expropriation of the businesses built by local and foreign investors during the past 25 years. The reason for this haste is given as the urgent need to meet the deadline of South Africa Connect to connect 90% of the population to the internet by 2020.

Since the collapse last September of the tender for a lead agency for the fixed infrastructure rollout, and now with no coherent plan nor budget allocation to connect the 41 446 government sites, SA Connect's targets are but a pipe dream.

I ask for your intervention in the process of legislating the White Paper's recommendations based on concerns on three main issues:

1. Inadequate public participation process;
2. Inadequate regulatory impact assessments, and
3. The lack of understanding and preparation of the constitutional, legislative and regulatory requirements and sound financial preparation required for the White Paper's most controversial and disruptive proposal, the national WOAN.

Inadequate Public Participation Process

The process of reviewing the ICT policy environment was endorsed by Cabinet in 2012. The first meeting of the review panel was held in 2013. The Green Paper was published in January 2014, followed by a Discussion Paper in November 2014 and a Review Report was published in March 2015. This was tabled with the ¹ESEID Cabinet Committee on 9 March 2016 after which it was subjected to rigorous debate within the committee, and discussions with ICT sector players and the Independent Communications Authority of South Africa (ICASA).

Following these discussions ICASA gazetted its Invitation to Apply to bid for high-demand spectrum, which Minister Cwele took to the High Court, Pretoria, for an interdict to a) halt the auction process and b) review ICASA's decision for the auction. Judgment on 30 September 2016 halted the auction, but the decision on the review portion of the Minister's application is likely to proceed mid-year.

When the White Paper was gazetted on 3 October 2016 it immediately attracted much negative comment and media debate about the controversial proposal for the WOAN and the destructive and negative impact this would have on the ICT sector, particularly the mobile network operators (MNOs), who – along with a number of ICT lawyers and analysts – viewed the proposal as an attempt at expropriation of the MNOs' spectrum and customer assets. The proposal also came out of left-field and took the sector by surprise because, although a national broadband network had been discussed in general terms during the public participation process, the detail was not.

The department's Acting Director General, Mr Joe Mjwara, who chaired the ICT Policy review panel, responded by saying that the ICT sector needed to be upended if it was to be transformed.

The ICT Policy Review Report (March 2015) states that a national broadband network built on open access principles was considered. It makes the following recommendation under section R32 Open Access Systems on Page 34:

*The following **principles** should be adopted, and that the regulator is mandated to develop and implement regulations, which are informed by and which are consistent with the same. **An open access network, is a network which satisfies all of the following:** i. **Offers effective access to the infrastructure:** Effective access will be defined as attainable access easily accessed in reasonable locations using standardised interfaces. The service must be unbundled to a sufficient degree so the*

¹ Reply to Parliamentary question: RNW 1604-160617

access seeker does not have to purchase services it does not need. The quality of service should be suitable to the access seeker's needs and requests for variants of a service should be accommodated where technically feasible.

This was followed by recommendations to promote already legislated infrastructure sharing by network service providers and that regulations on this matter need to be revised to remove fragmentation and to ensure affordable access.

Spectrum Allocation under Section R47 (Page 52) states:

There should be spectrum provision for an open access network: *An open access model is advocated in the SA Connect broadband policy to facilitate competition and ensure universal service and access is achieved. High demand spectrum should thus be set aside for an open network that will sell wholesale access to new and established operators.*

That was the all that was said on the matter of a national network and its spectrum usage.

The National Integrated ICT Policy White Paper (October 2016) devotes two pages (75 + 76) to the Wireless Open Access Network, and seven pages on the radio frequency spectrum policy (pages 77 – 83) that, briefly, states that all high-demand spectrum not yet assigned will be given to the WOAN and spectrum currently held by the MNOs must be surrendered to it over time. Should these operators seek access to spectrum they need to become participating members of the WOAN which will be a private-public-sector owned and managed consortium. The management of the WOAN need not have experience in the network sector.

Should the MNOs not have access to high-demand spectrum their businesses will wither and die, and the billions of rands invested in mobile network businesses will be a worthless asset to their investors because the WOAN is unlikely to have the funds to buy them. It will also lead to an uncompetitive monopoly communications network provider that will inhibit investment in leading-edge infrastructure, complacent management and maintain high prices through lack of competition.

The allocation of all spectrum to the WOAN and its structure and operations was never raised in the proceeding public participation process. Neither has there been any legally compliant public participation on this issue since the details of the WOAN were gazetted last October.

In terms of the Electronic Communications Act (ECA) 36 of 2005 the Minister must, in terms of Chapter 2, Section 3, “in order to obtain the views of interested person, publish the text of such policy direction in the Gazette-

- i) declaring his or her intention to issue the policy direction;
- ii) inviting interested person s to submit written submissions in relation to the policy direction in the manner specified in such notice in not less than 30 days from the date of the notice.”

No such invitation to submit comments on the WOAN as outlined in the White Paper was made.

Instead the Minister has participated in workshops and symposia organised by ICT sector organisations. In his reply to a parliamentary question² on what meetings, in accordance with the EC Act, had been held since October 2016, Minister Cwele provided details of three meetings with ICT sector players: 2 November, 2016 – organised by the Black IT Forum; 28 November, 2016 – organised on behalf of the MNOs by Vodacom; 14 December, 2016 – organised for a cross section of ICT sector organisations, organised by Fibre to the Home (FTTH).

² Reply to Parliamentary question: RNW94/170216

None of these can remotely be considered legally complaint in terms of the Act. The author of the reply was clearly ignorant of the law.

A subsequent meeting was held on 17 February, 2017, which the Minister asked his National ICT Forum to organise. About 300 people were invited to attend.

Following the 14 December meeting the six major network providers most impacted by the establishment of the WOAN met to discuss how they could work with the Minister to make the WOAN implementable and sustainably profitable in order to help him achieve his developmental and empowerment targets. They appointed an independent consultant to distil their divergent positions and devise a compromise agreement that would able them to maintain their competitive independence, protect their infrastructure and customer base assets from expropriation, work alongside the WOAN, commit to providing connectivity in rural areas, cede spectrum space to the WOAN to operate in profitable urban areas and accelerate their Broad Based Black Economic Empowerment initiatives in return for concessions from the Minister.

They presented their high-level suggestions at the 17 February meeting, but there was no discussion on them. They were surprised to see the Minister's subsequent media statement³ which gave the impression that the MNOs had now agreed to support the WOAN.

The Minister also neglected to mention in his statement that any agreement the MNOs might make would be subject to him making concessions, particularly around spectrum assignment. The MNOs have no idea whether the Minister is considering their proposals, as he has repeatedly said at these meetings that the White Paper recommendations are not up for discussion. He will only discuss their implementation.

As far as the network operators are concerned no agreements have been made or deals struck.

My view is that the Minister has taken part in these events to create the impression of public participation when, in fact, he has approached them with a closed, uncompromising mind in his haste to radically transform the sector to meet political objectives at the expense of the coherent and sustainable ICT communications infrastructure

Lack of Understanding on Issues Around the WOAN

There has been much public consternation about the proposed national WOAN because its structure and composition was neither discussed during the ICT policy review process started in 2012. The proposal in the White Paper seems to have been drawn from a superficial understanding of Mexico's planned WOAN.

Minister of Telecommunications and Postal Services Dr Siyabonga Cwele and a departmental delegation visited Mexico for the first time in December. I am given to understand that this visit has changed his understanding of the WOAN idea and how it is being rolled out in that country, but this has not been shared with the public.

The Mexican WOAN, which, since it was mooted in 2012, has yet to lay its first cable as that country has spent five years getting the Constitutional, legislative and regulatory platforms in place.

³ Minister's statement – February 20, 2016

https://www.dtps.gov.za/index.php?option=com_content&view=article&id=698:the-dtps-makes-progress-in-its-engagements-with-the-sector-on-the-implementation-of-the-national-ict-policy-white-paper&catid=13:statements-releases&Itemid=138

Mexico's Minister of Finance has spent 18 months giving roadshows of his rigorously researched financial plan for the WOAN to financiers around the world and has raised \$7 billion to get the project rolling. And the Mexican network is only for a portion of the available spectrum, not all of it as is planned for South Africa.

The Mexican model is a hybrid – different bands of spectrum are allocated to the WOAN and existing private sector operators to entrench infrastructure competition.

Mexico has also entrenched the independence of the regulator who is the only authority in the telecommunications and broadcasting sector. Called the Federal Telecommunications Institute it grants licences and, inter alia, oversees and regulates the markets. It protects consumers from dominant and vested interests of political and ICT sector players.

The White Paper's regulatory recommendations are to return ICASA, a Chapter 9 institution, to being solely a broadcasting content regulator. ICT electronic communications networks and services, will be governed by an economic regulator, reporting to the Minister, so will not be independent from political interference. This is unhealthy as it gives the Minister the right to control who gets network licences and spectrum assignments.

The Lack of Research and Impact Assessments

Despite the White Paper's repeated assertions that policy must be informed by sound research, there seems to have been no attempt to research the impact these radical recommendations will have on the operating efficiency of the ICT sector, their cost implications, or impact on infrastructure investment and customer experience.

A request I filed last year under the Promotion of Access to Information Act 2000 for the Minister to provide any regulatory impact assessment or socio-economic impact assessment that was done in support of the White Paper's recommendations. The PAIA request was ignored, as was the follow-up appeal.

In February 2017 I submitted a parliamentary question asking why no impact assessments had been done.

This prompted the posting to the department's website of a ⁴Socio-Economic Impact assessment for the White Paper, done by the Department of Planning, Monitoring and Evaluation in the Presidency. It is dated 2 February 2016. This is superficial and reads like an assumption of desired outcomes, without any credible research.

This paper was sent to me in response to my question. I wonder why DTPS's legal department failed to send it last year in response to my PAIA application.

Had the department done a proper regulatory assessment it would know that, according to the senior counsel, the White Paper recommendations will need amendments to at least 26 Acts of Parliament – such as RICA, Consumer Protection Act and the ECA - and 19 regulations, before new Acts are created to cater for the WOAN, Digital Development Fund and Economic Regulator.

These will take years to process at immense cost, of which we are unaware at this stage

⁴ SEIAS ICT Policy Review -

https://www.dtps.gov.za/index.php?option=com_phocadownload&view=category&id=3&Itemid=133

Please give my request to have Cabinet insist that legally prescribed public interaction is undertaken particularly in respect of the WOAN and that credibly researched impact assessments and cost projections are done, before the legislative process starts and positions become hostile and entrenched.

Best Regards

A handwritten signature in blue ink, appearing to read 'Marian Shinn', with a horizontal line underneath the name.

Marian Shinn MP

Democratic Alliance Shadow Minister for Telecommunications and Postal Services