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INVITATION TO PROVIDE WRITTEN COMMENTS ON PROPOSED POLICY AND POLICY DIRECTION ON RAPID DEPLOYMENT OF ELECTRONIC COMMUNICATIONS NETWORKS AND FACILITIES

3 August 2020

To: The Acting Director-General
Department of Communications and Digital Technologies
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DearSA, a registered national not-for-profit company and civil rights organisation.

DearSA acts in the interest of its supporters as well as in the interest of the public through active participation and advocacy.

DearSA has, through the online public participation platform dearsouthafrica.co.za, facilitated 57,933 submissions (as of 17:00 on 18 August 2020) to government by South African citizens regarding the proposed policy and policy direction on rapid deployment of electronic networks and facilities.

This submission is made on behalf of DearSA and its supporters.



BACKGROUND

During October 2016, The National Integrated ICT Policy was published. Chapter 9 of the said policy aims to transform South Africa into “an inclusive people centred and developmental digital society”. Drastic changes to deployment and electronic communication networks and facilities are expected.

On 22 July 2020, the Minister of Communication and Digital Technologies, Stella Ndabeni-Abrahams, published a notice of intention to issue the policy and policy direction on rapid deployment of electronic communications networks and facilities. The gazetted policy deals with the deployment of communications networks in South Africa (hereafter ‘the proposed policy’).

This submission will be structured as follows and each listed aspect discussed under the heading titled as such:

1. The purpose of the proposed policy;
2. ECNS licensees;
3. Summary of the proposed policy;
4. The right to property in South Africa;
5. Less restrictive alternatives;
6. Top down approach;
7. Conclusion.

1. THE PURPOSE OF THE PROPOSED POLICY

5G technology is undoubtedly the most recent development in cellular networks and is the fifth-generation technology standard for cellular networks, which cellular phone companies began deploying worldwide in 2019. 5G is the planned successor to the 4G networks which provide connectivity to most current cell phones. According to the European Union’s report on 5G technology, 5G will transform the economy and society and open more opportunities for people and businesses.

In light hereof, the stated purpose of the proposed policy is to provide clarity on the deployment of electronic communications networks and facilities while the purpose of the proposed policy direction is to direct the Independent Communications Authority of South Africa (“ICASA”) to prescribe regulations on procedures and processes for resolving disputes that may arise between electronic communications network licensees and landowners. This aims to satisfy the public interest in the rapid rollout of electronic communications networks and electronic communications facilities.

The proposed policy provides that electronic communications network licensees have the right to enter upon and use public and private land for the deployment of electronic communications networks and facilities, subject to meeting certain conditions, including: notifying the property owner, ensuring a consultation process is conducted with the property owner and ensuring minimal damage to the property in question. The proposed policy also deals with matters relating to charging electronic communications network licensees a reasonable access fee in certain instances.



The purpose of the policy (as stipulated in the Government Gazette 43537, 22 July 2020) is:

...to provide clarity on the deployment of electronic communications networks and facilities. The purpose of the proposed policy direction is to direct the Authority to prescribe regulations on procedures and processes for resolving disputes that may arise between an electronic communications service licensee and any landowner, in order to satisfy the public interest in the rapid rollout of electronic communications networks and electronic communications facilities.

To ensure the proposed large-scale investment the network service licensees will need to enter onto property to deploy the critical broadband infra structure. This will affect public and private landowners.

The minister stated that this policy should satisfy the public interest in the rapid rollout of electronic communications networks and electronic communications facilities. The policy gives networks and other licensees the right to select, enter and use public or private land for the deployment of their network infrastructure.

2. AN ELECTRONIC NETWORK SERVICE

Electronic Communications Network Service (hereafter ECNS) is defined by the Electronic Communications Act No. 36 Of 2005 as the following:

It is a service whereby a person makes available an electronic communications network, whether by sale, lease or otherwise-

- (a) for that person's own use for the provision of an electronic communications service or broadcasting service;
- (b) to another person for that other person's use in the provision of an electronic communications service or broadcasting service; or
- (c) for resale to an electronic communications service licensee, broadcasting service licensee or any other service contemplated by this Act, and "network services" is construed accordingly;

ECNS licensees are defined persons to whom an electronic communications network service licence has been granted in terms of section 5(2) or 5(4).

The proposed policy aims to empower ECNS and other licensees the right to select, enter and use public or private land for the deployment of their network infrastructure.



3. SUMMARY OF THE PROPOSED POLICY

The policy entails that ECNS licensees have the right to enter upon and use public and private land for the deployment of electronic communications networks and facilities.

3.1. Responsibilities of the affected owners:

It places a responsibility on the owners of the property: The owners must exercise due care and diligence to avoid damage to the electronic communications networks or facilities deployed on his/her property. If any damage is caused by the owner, he/she will be held liable.

3.2. Responsibilities of the ECNS Providers:

The network provider must notify the property owner with 30 days calendar notice in writing of its “proposed property access activity”. No access fee could be charged by the owner, except in cases of “intrusive electronic communications networks or facilities, such as masts”, when a “reasonable access fee” may be charged.

3.3. Access fees payable:

The proposed policy states property owners may not charge the ECNS with an access fee in certain cases. This includes where the facilities are not intrusive, where it does not constitute a cost to the property owner or deprive the owner use of the land. A reasonable access fee may be charged where more intrusive ECNS (such as masts) are erected on the private property. However, the policy does not clearly define what can be viewed as intrusive in such cases. The property owner may object to the reasonability of the case’s access fee if he or she is not satisfied with it.

3.4. Compensation to property owners:

A property owner is entitled to reasonable compensation agreed to between himself and the ECNS licensee. This compensation is only available for damage caused by the licensee or any other ECNS role player. Therefore, compensation will only be paid out in certain circumstances. Not every affected party will receive compensation.

4. THE RIGHT TO PROPERTY IN SOUTH AFRICA

An owners’ right to property may be limited in some cases. There are several specific acts that limits the entitlements of an owner towards his or her property. This is to ensure that an owner uses his or her property within the interest of the community.

4.1. Property and the Constitution

Much emphasis in constitutional discourse is placed on freedom of expression, so much so that it is often regarded as the basic right which makes all other rights possible. Property rights, on the other hand, are oftentimes seen as clinical or merely ancillary. Indeed, while the property rights of individuals are arguably the most disregarded right and the right treated with the most scorn, it is the most fundamental right of all, and is the right on which all other rights depend.



Property rights enable us to pursue our other rights. Having freedom of expression would be useless if we were not allowed to own our own press media companies, our own computers or cell phones, or our own podiums. The rights to housing and dignity are undermined if we are perpetual tenants on the property of the State and thus unable to make our own improvements, investments, and changes without seeking permission from the bureaucracy first. The right to privacy presupposes property rights. Indeed, the list goes on.

Our Constitution not only has enshrined the right to dignity in the Bill of Rights, South Africa's 'cornerstone of democracy', it emphasises the foundational importance of dignity as a value that permeates the entire Constitution. Any undue limitation or restriction on the right the property could be deemed unconstitutional because it infringes the foundational value (and right) of dignity.

Section 25

The protection of property is enshrined as a fundamental right in Section 25 of the Constitution of South Africa. Section 25 contains a negative property guarantee which entails that property rights may not be restricted unless certain requirements are met.

The property guarantee allows for state regulation but protects private property rights through limiting said interference.

Section 25(1), known as the deprivation clause, states that: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

The implication of the clause is that deprivation may only occur where there is a properly promulgated law in place. Such law may not be arbitrary in that they affect one person or a specific group of persons and not the public as a whole.

The proposed policy which allows for mobile network operators and other licensees to summarily enter upon and use public and private land for the deployment of electronic communications networks and facilities is therefore a gross violation of the right to private property and consequently various other rights, such as the right to privacy and the right to dignity.

Although the proposed policy is said to affect the public as a whole rather than a specific group of persons, the policy still has to comply with section 36 of the Constitution.

Section 36

Private owners' rights will be limited by the proposed policy. Section 36 specifically provides that when limiting rights all relevant factors must be considered, including:

- The nature of the right;
 - The importance of the purpose of the limitation;
 - The nature and extent of the limitation;
 - The relation between the limitation and its purpose; and
 - Less restrictive means to achieve the purpose.
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Therefore, there lies a burden on the ECNCS to prove that they use the less restrictive means to achieve the purpose regarding the 5G towers. Applying for a servitude over the property undergoing a lease agreement would for example serve as less restrictive means in this regard. The Constitution therefore places the obligation on the state to consider less restrictive means to achieve the same purpose when constitutional rights are balanced against each other and/or limited in any manner.

5. LESS RESTRICTIVE ALTERNATIVES

This submission passionately believes that less restrictive means are not only available, but more suitable to achieve the aims of the proposed policy to allow for “rapid deployment of electronic communications networks and facilities”.

5.1. A Lease Agreement:

Currently when an ECNS licensee wants to erect a mast onto private property, a lease agreement is signed by both the ECNS as well as the private property owner. Therefore, they are both parties to a contractual agreement.

By stating that any ECNS Licensee has the right to enter private property and erect network masts, the proposed policy is taking away a valuable right from the property owner, the right to decide what happens on his or her property.

Allowing for mutually agreeable lease agreements, as is currently the prevailing de jure position, is a much better, effective, and constitutionally sound approach to ensure the deployment of the necessary 5G infrastructure. Rather than reinventing the hypothetical wheel, existing means and measures such as the ones confirmed by the Constitutional Court in *Telkom SA SOC Limited v City of Cape Town and Another* CCT 287/19 (which is briefly discussed below) should be used.

5.2. Servitude:

A “servitude” is a limited real right registered in the Deeds Office against the title deed of the property of a person in favour of another person or entity. The holder of the servitude (right) will therefore be entitled to exercise some right on the property of another or prohibit the owner of the property from exercising some of his ownership rights.

A praedial servitude is more suited option in terms of the policy as it is a right that is attached to the property itself. Even though a change in ownership may take place, this servitude will continue to exist and can only be cancelled by agreement between the parties.

Servitudes are another, less restrictive means, to achieve the goal of rapid deployment of 5G infrastructure, without infringing on the constitutional rights of South African citizens.



5.3. Telkom SA SOC Limited v City of Cape Town and Another CCT 287/19

On 25 June 2020, the Constitutional Court handed down judgment in an application for leave to appeal against the decision of the Supreme Court of Appeal which dismissed an appeal by Telkom SA SOC Limited (Telkom).

This application concerned the question whether the exercise of the rights held in terms of section 22 of the Electronic Communications Act (Act) is subject to compliance with municipal bylaws and policies.

Section 22 states:

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; and
 - (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.

Taking section 22 into consideration, the Court held that licensees must comply with municipal bylaws when they exercise the right conferred on them by that provision.

6. TOP DOWN APPROACH

The proposed policy, as it currently reads and is envisaged, provides for a top-down national approach to the deployment of infrastructure as described above. No regard is given to potential conflicts with municipal bylaws as well as certain specific and particular circumstances in different towns and cities through this unnuanced approach.

The potential conflict that arises between the proposed policy and municipalities infringes on the constitutional obligation cooperative governance and the multi-level governance structure developed in the South African Constitution. The structure in question is complex: there are three spheres of national, provincial and local government (though local government is often divided into two spheres itself). All these layers of government are mandated by the Constitution to govern in a co-operative manner.

Section 41 of the Constitution reads:

41. (1) All spheres of government and all organs of state within each sphere must—
- (a) preserve the peace, national unity and the indivisibility of the Republic;
 - (b) secure the well-being of the people of the Republic;
 - (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
 - (d) be loyal to the Constitution, the Republic and its people;
 - (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
 - (f) not assume any power or function except those conferred on them in terms of the Constitution;
 - (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
 - (h) co-operate with one another in mutual trust and good faith by—
 - (i) fostering friendly relations;
 - (ii) assisting and supporting one another;
 - (iii) informing one another of, and consulting one another on, matters of common interest;
 - (iv) co-ordinating their actions and legislation with one another;
 - (v) adhering to agreed procedures; and
 - (vi) avoiding legal proceedings against one another.

The proposed policy, as it currently reads, does not allow room for constitutionally obligated cooperative governance which should avoid any potential conflict between the spheres and layers of government.

7. CONCLUSION

The Proposed Policy might have the purpose to satisfy the public interest in the rapid rollout of electronic communications networks and electronic communications facilities, but it is going to limit private property owner's rights in an adverse way.

The first major problem is that the property owners will be held liable for any damages to the ECNS's erected masts. Secondly, the owners will not be sufficiently compensated for the use of their property by the ECNS. Thirdly, there are less restrictive methods which could be used by the ECNS licensees in accordance with the Constitutions section 36.

DearSA suggests the following:

1. That the proposed policy be amended to rather use existing less restrictive means to achieve the goals of the policy without gravely infringing on various constitutional rights;
 2. That the proposed policy be amended to avoid any potential intergovernmental conflicts and to adhere with the constitutional requirement of cooperative governance;
 3. That the public participation process of the proposed policy be extended to allow for intergovernmental participation in the policy making process.
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Kind regards

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