



## **ISPA Submission**

in response to

**ICASA's Notice in terms of section 4(4) of the Electronic Communications Act, 2005, of its intention to amend regulations in terms of section 73(3) and (4) in respect of E-rate**

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**ISPA Management Committee:**

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## Introductory remarks

1. ISPA welcomes the recognition by the Authority of the need to attend to certain deficiencies in the existing E-rate Regulations and the resulting publication of the Draft Amendment.
2. In particular ISPA welcomes the provisions in the Draft Amendments which seek to specify the mechanism by which upstream ECS and ECNS licensees participate in the provision of the E-rate.
3. ISPA has set out its submissions relating to the Draft Amendment below and trusts that these will prove useful to the Authority in its further consideration of the E-rate and its implementation.
4. In the event that the Authority elects to hold public hearings with regard to the proposed amendments, ISPA requests an opportunity to participate.

## Definitions

5. ISPA suggests that the Authority consider the insertion of a definition of “Qualifying Institutions” as a drafting aid. The following is suggested.

“Qualifying Institutions” means public schools or public further training institutions as well as independent schools or private further education and training institutions, as prescribed.

6. ISPA submits that the word “services” and “discount” in the definition of “Upstream Licensee” should be deleted as indicated.

“**Upstream Licensee**” means a licensee who provides ECS or ECNS ~~services~~ to a licensee who in turn provides internet services to public schools or further educations and training colleges or independent schools that qualify for the E-rate ~~discount~~”.

7. ISPA proposes the following amendments to the definition of “E-rate”:

“E-rate” means the discount of no less than 50% applicable to Internet services provided to public schools or public further training institutions as well as independent schools or private further education and training institutions, as prescribed Qualifying Institutions by licensees. to be entitled to the discount for utilising Internet services provided by a licensee.

## Retail rates and wholesale rates under the ECA licensing regime

8. Sub-regulation 3(1)(b) specifies that an upstream licensee shall grant a 50% discount of the “retail rate charged for all electronic communications facilities and/or services provided by a licensee to other licensees and used for the provision of Internet services”.
9. The term “retail rate” is defined in Sub-regulation 1(6) as “the lowest commercial charge levied for a service contemplated in terms of section 73(3) of the Act by a licensee for making available services to [Qualifying Institutions].”
10. ISPA’s understanding of wholesale and retail relationships as between licensees and subscribers is as follows (licence exempt persons have been omitted for the sake of simplicity):
  - 10.1. ECNS licensees offer network services to (a) ECS licensees and (b) other ECNS licensees for resale. The ECNS licensee provides a wholesale rate in respect of such network services to its resellers (other ECNS licensees) so as to allow them a margin in reselling such services to ECS licensees. The rate that is offered by the ECNS licensee to an ECS licensee which wishes to utilise the network services to provide its services to subscribers is the retail rate in respect of such network services.
  - 10.2. ECS licensees offer, for example, Internet access services to (a) subscribers and (b) other ECS licensees for resale. The ECS licensee provides a wholesale rate in respect of Internet access provided to another ECS licensee (or licence exempt reseller) so as to allow them a margin in reselling such services to their subscribers. The rate offered by the ECS licensee to its subscribers is a retail rate in the sense that it is generally understood.
11. This is the context within which ISPA understands the reference to “retail rate” in section 73(3) of the ECA and Sub-regulation 3(1)(b) of the Draft Amendment.
12. Current practise in the industry, however, does not properly recognise the licensing structure imposed by the ECA. It is particularly difficult to distinguish how the division between ECNS and ECS licensee is effected in practice by incumbent operators.
  - 12.1. Telkom SA Ltd (“Telkom”), for example, requires that an ISP holds at least a class electronic communications service (CECS) licence before it will enter into a “wholesale” relationship with that licensee. According to ISPA’s understanding as set out in the previous paragraph this would imply that Telkom is in this aspect acting as an ECS licensee, but this cannot be the case where the “wholesale pricing” relates to a facilities leasing agreement. In this case Telkom must be acting as an ECNS licensee and the rate provided to the ECS licensee would be a retail rate.

13. ISPA submits further that the current definition of “retail rate’ is potentially confusing insofar as it may be construed as meaning that the E-rate as contemplated in section 73(1) of the ECA is to be calculated as against the “retail rate” as defined in the Draft Amendment.
  - 13.1. Section 73(1) makes no reference to the term “retail rate”. It states that Internet services “must be provided at a minimum discounted rate of 50% off the total charge levied by the licensee providing Internet services to such institutions”. Section 73(2) provides examples of the services to be included when assessing the total charge against which the E-rate applies.
  - 13.2. The E-rate as between the qualifying institution and its ISP in terms of section 73(1) is not calculated with reference to the “retail rate” which applies in respect of the E-rate as between the ISP and its upstream provider(s) in terms of section 73(3).

### **Cost-recovery vs wholesale / retail rates**

14. Certain of ISPA’s members are recognised non-profit organisations (either under the Non-Profit Organisations Act of 1997 or as section 21 companies under the Companies Act as amended) which operate on a cost-recovery basis as recognised in a directive from the South African Revenue Services (SARS).
15. Particular reference is made in this regard to TENET (Tertiary Education and Research Network of South Africa) and the e-Schools’ Network (eSN). Both of these organisations are non-profit organisations which are dedicated to serving the connectivity requirements of the education and research sectors on a cost-recovery basis which minimises the costs associated with such connectivity.
16. ISPA submits that it is not correct to speak of the services being provided by such entities as being provided at either a retail rate or a wholesale rate, as neither term is applicable within a cost-recovery environment. Rather, the services are being provided on a cost-recovery basis.
17. TENET provides, *inter alia*, upstream ECNS and ECS services to eSN on a cost recovery basis, which in turn manages the provision of such services to a large number of qualifying institutions, also on a cost recovery basis.
18. ISPA submits that the E-rate should not be of application to entities providing Internet services to qualifying institutions on a cost recovery basis. ISPA is of the strongly-held view that any attempt to do so would have severely negative consequences for such service provision.
19. ISPA calls on the Authority to clarify the Draft Amendment in this regard.

## Application processes / Guiding principles

20. ISPA refers to the requirement that a licensee requesting the E-rate under section 73(3) is required to submit a list of “schools”<sup>1</sup> intended for Internet connectivity as proof to another licensee. ISPA does not support this requirement as set out in the Draft Amendment.

20.1. It is ISPA’s position, previously expressed to the Authority, that Telkom has used the obligation to provide the E-rate, as it has existed to date, as a basis for anti-competitive conduct. This has manifested in Telkom approaching qualifying institutions which are existing clients of an ISPA member in order to offer its services to them, notwithstanding that it had refused to grant the section 73(3) discount to the ISPA member. ISPA members have indicated that it appears that Telkom has previously used their requests for upstream discounts as a mechanism for identifying new clients.

20.2. ISPA therefore submits that the Draft Amendment should contain an express prohibition on an upstream licensee seeking to enter into a direct Internet service provision relationship with the qualifying institution pursuant to receipt of a request for the provision of the section 73(3) discount.

20.3. ISPA is any event not convinced that the provision of a “list of schools intended for Internet connectivity” constitutes acceptable proof. The provision of an Application Form signed by the school in respect of which the section 73(3) discount is required would serve this purpose more effectively.

## Unfair discrimination

21. ISPA submits that there is nothing in the ECA or any other legislation of which it is aware that holds that an ECS licensee is obliged to provide services to a qualifying institution which has requested it.

21.1. Section 73 of the ECA contemplates only that a licensee that does in fact provide Internet services to qualifying institutions is obliged to provide the E-rate. It does not contemplate the related antecedent obligation to provide E-rated services where requested to do so by a qualifying institution. Put simply: a qualifying institution cannot, by way of request to a licensee, force such licensee to provide E-rated Internet services.

21.2. ISPA accordingly submits that Sub-regulation 3(4)(e), to the extent that it obliges a licensee to reach an E-rate agreement within the stipulated time period and provide E-rated Internet services upon request of a qualifying institution, is *ultra vires*.

21.3. ISPA submits that this Sub-regulation should be deleted in its entirety

22. The reference to “school” in Sub-regulation 3(4)(f) is incorrect. ISPA suggests the use of the term “Qualifying Institution” as it has proposed above.

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<sup>1</sup> The reference to “schools” here is incorrect.

## **Complexities relating to the implementation of the E-rate**

23. It is extremely unfortunate that the delays in finalising a workable framework for the implementation of the E-rate mean that such implementation must now take place within a starkly different industry environment from that in which the intervention was originally conceived. Since the introduction of the E-rate in the 2002 amendment to the Telecommunications Act of 1996, the repeal of that Act and its replacement with the ECA as well as the outcome of the licence conversion process have, *inter alia*, imported significant complexities into the implementation of the E-rate.
24. ISPA recognises that international service providers not licensed in South Africa are not obliged, under the Draft Amendment, to provide the E-rate to their downstream South African licensees. This does not, however, in any manner diminish the obligation of that licensee to provide the E-rate based on its retail rate to downstream licensees in terms of section 73(3).
- 24.1. This scenario arises with regard to international submarine links but also applies to the provision of broadband services provided to qualifying institutions in rural and other areas utilising VSAT technology which requires the provision of an upstream satellite services provider.
- 24.2. Indeed this issue is, in ISPA's view, pivotal to the success or otherwise of the Gauteng Online schools connectivity initiative. The majority of the 1 500 Gauteng Online schools are being supplied with VSAT connectivity sourced through Intelsat, which has already indicated that they are neither bound nor willing to provide the E-rate discount.
- 24.3. An inflexible application of the E-rate in such a situation will have the unintended consequence of discouraging such service provision. Such an application will, in all likelihood, force the closure of projects like Gauteng Online which are dedicated to providing affordable schools connectivity and act as a significant deterrent to such initiatives being supported by the private sector.
- 24.4. The same unintended consequence, but on a more widespread basis, may flow from the fact that suppliers of subscriber equipment forming part of the total charge are not obliged to pass an E-rate discount on to the licensee supplying such equipment to the qualifying institution at the E-rate.
- 24.5. ISPA requests confirmation of the Authority's view in this regard and for guidance as to how this disjuncture should be handled in practice.
25. ISPA submits that the complexities of the Internet access provider industry will pose significant billing challenges to the implementation of the E-rate.
- 25.1. For example: ISP A purchases a 600Mbps IP Connect + 350Mbps International + 150Mbps Local from Telkom. It pays X for all of the above. ISP A then sells a 3GB ADSL account to a school for price Y. Significant co-operation will be required from Telkom in determining which

portion of X, the payment for the total upstream ECNS and ECS that it has provided, should be subject to the E-rate as required by section 73(3) of the ECA.

- 25.2. ISPA's members experience demand for Internet and managed services such as MPLS and VPN from qualifying institutions. These products are constituted by a number of different upstream ECNS and ECS which have been bundled into a single solution by the ISP providing the service to the qualifying institution.
  - 25.3. The above is further complicated by the fact that ISPs buy from multiple upstream providers in order to improve stability and redundancy and so as to be able to offer better SLAs offered to their customers. This adds to cost and further complicates billing, e.g. ISP might buy SAIX IPLC + SAIX National + Neotel 95%tile (backup only) which it (re)sells as Internet access.
26. The Draft Amendment does not make provision for this degree of complexity and seems to assume a linear simplicity in the supply chain leading to the provision of Internet services to a qualifying institution.
  27. ISPA does not believe that a regulation is a suitable instrument for this degree of specificity, but wishes to bring the billing complexities inherent in the implementation of the E-rate to the attention of the Authority.
  28. ISPA also wishes to highlight the fact that there will be a significant cost attached to the record keeping requirements set out in Regulation 4 of the Draft Amendment. This direct cost of compliance will also serve as a deterrent to licensees to provide the E-rate when requested to do so.

### **Public vs. private institutions**

29. ISPA has been previously informed by the Authority that the Authority has written to the Minister of Communications requesting that the Minister consider making the declaration contemplated in section 73(5) of the ECA so as to broaden the scope of application of the E-rate to categories of independent schools and private further education and training institutions.
30. It seems evident that the current exclusion of such entities would not withstand constitutional scrutiny and ISPA confirms that it is also addressing correspondence to the Honourable Minister in this regard.
31. The need to distinguish between categories of qualifying institutions as is currently required adds, in practice, a further layer of complexity to the provision of E-rated services.

### **Back to the drawing board?**

32. In the light of the issues raised in the preceding sections, ISPA is dubious that the E-rate, as currently conceived in section 73 of the ECA, is capable of proper implementation in South Africa.
  
33. ISPA urges the Authority to recognise that the E-rate will have to function effectively at all levels before ECS licensees acting as ISPs will adopt it. It will not be adopted where such adoption results in an irrecoverable loss to the ECS licensee. ISPA has set out some of the realities militating against the willingness of ECS licensees to provide the E-rate in this Submission.
  
34. ISPA confirms that it will address correspondence to the Department of Communications in this regard.

### **Conclusion**

35. ISPA trusts that the above submissions will be of assistance in the finalisation of the amendment to the existing E-rate Regulations or such other action as the Authority may elect to employ.
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