



UPDATE REPORT TO ICT MINISTERS

**ON THE DEVELOPMENT OF THE NEPAD BROADBAND ICT INFRASTRUCTURE
NETWORK FOR EASTERN AND SOUTHERN AFRICA, INCLUDING THE EASSy
CABLE**

**PRESENTED TO THE MINISTERS OF ICT BY THE CHAIRPERSON OF THE INTER-
GOVERNMENTAL WORKING COMMITTEE (I-GWC)**

**28 AUGUST 2006
KIGALI, RWANDA**

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TABLE OF CONTENTS

1	THE PROTOCOL	3
2	BACKGROUND.....	3
3	DEVELOPMENT OF THE EASSY PROJECT UNDER THE CONSORTIUM.....	4
4	DEVELOPMENT OF THE POLICY AND REGULATORY FRAMEWORK.....	5
5	ACTIVITIES SINCE ICT MINISTERS' MEETING IN JOHANNESBURG.....	9
6	MEETING OF THE EAST AFRICAN COMMUNITY.....	11

1. THE PROTOCOL.

The Protocol on the Policy and Regulatory framework for NEPAD ICT Broadband Infrastructure Network is based on the **Constitutive Act of the African Union**. Its main objective is to facilitate and commit the Parties to the construction and operation of the NEPAD ICT Broadband Infrastructure Network for Eastern and Southern Africa, on Open Access principles. It further aims at providing for the formation of Special Purpose Vehicles to own, operate, and maintain the Submarine (EASSy) cable and the Terrestrial network.

The Protocol commits Signatories to harmonise their national policy and regulatory instruments to facilitate the speedy formation and operation of these open access networks, independent of who owns them.

An overriding policy objective is to ensure that the networks are constructed, owned, operated and maintained in line with NEPAD Objectives and Principles, as well as Open Access Principles.

2. BACKGROUND.

On 9th March, 2003, a meeting of the NEPAD Heads of State and Government Implementation Committee (HSGIC), in Abuja, Nigeria, adopted the development of a broadband ICT network linking all countries in Africa to one another and in turn to the rest of the world as **a top priority NEPAD project**.

The Agreed basic rationalized broadband ICT network for Eastern and Southern Africa (now known as the NEPAD ICT Broadband Infrastructure Network for Eastern and Southern Africa) was agreed by stakeholders during a workshop convened by the NEPAD e-Africa Commission in Johannesburg, 28 to 30 July 2004. The stakeholders included ICT Policy Advisors, ICT Regulators, Telecommunications Operators, and other utility infrastructure operators (i.e. power line, gas, and oil pipeline). The agreed network brought together a number of network development initiatives in the region, such as COMTEL and the EASSy cable, into a cohesive plan for progressing the development of the agreed basic network.

At the conclusion of the meeting, the Commission was tasked with monitoring progress and assisting the various initiatives in practical ways as well as initiating a dialogue with ICT Policy Advisors in the region with a view to resolving such policy and regulatory issues as may impede or prevent the realisation of the rationalised regional network.

The network was subsequently adopted as **a NEPAD flagship project** by the twelfth summit of the Heads of State and Government Implementation Committee (HSGIC) of NEPAD, in Algiers, Algeria, on 23 November 2004.

It should be noted that the NEPAD e-Africa Commission is engaged in a similar effort for the development of ICT Broadband Infrastructure in other parts of Africa.

3. DEVELOPMENT OF THE EASSY PROJECT UNDER THE CONSORTIUM

In the initial stages of developing the EASSy project, the MoU parties convened its first Project Management Committee (PMC) meeting in January 2004, in Gaborone, Botswana. Eleven telecom operators from the region had signed the MoU by this stage. The meeting established a number of workgroups that were tasked to address, amongst others, the ownership structure of the cable, the funding of the project, commercial issues related to the pricing of broadband capacity, technical specifications, and the development of the terrestrial backhaul links that will connect the land-locked countries in the region to the cable stations. The Commission was elected to chair the Backhaul Workgroup and has attended most of the PMC meetings since then. To date, the PMC has held a total of 10 meetings in various countries in the region. The meetings were convened in order to review the work and recommendations of the various workgroups and approve or modify these as necessary.

The EASSy Parties opted to structure the ownership of the cable along the lines of the traditional 'Consortium' or 'Club' model. In this model, the Parties form a closed consortium that determines its own rules and obligations amongst the owners, and also sets the prices at which it will lease international broadband capacity to Telecom Operators who are not members of the Club. These non-club Operators are at the same time, competitors of the 'Club' members in their individual countries.

The service providers that are not part of the Club pay a premium for the capacity they lease from the Club, leading to a skewed playing field in the provision of services. This results in the price of services to end-users being higher than necessary. In addition, being a loose arrangement amongst the owners – the 'Club' is not a legal entity – they cannot raise loans to cover any shortfall there may be in financing the construction of the cable. Furthermore, there is little incentive for the owners to consider the developmental opportunities such a strategic infrastructure should bring to the region. As such, benefits of lower telecoms costs to the community will not be realized, as witnessed by other submarine cables around Africa, which are built on the 'Club' model.

The PMC held its 10th meeting in Johannesburg, January 2006. During the meeting, it was noted with concern that although the stage had been reached where the Parties were in a position to award the tender for the supply and commissioning of the cable, inadequate funding had so far been committed by the Parties, resulting in a serious delay in moving the project forward.

It was noted during the meeting that a total of 27 African and international operators had now signed the project MoU.

4. DEVELOPMENT OF THE POLICY AND REGULATORY FRAMEWORK.

In May 2005, the Commission requested a number of Governments in the region to nominate policy experts from their ministries who could work together to assist the Commission in formulating policy principles that could be applied to the development of the broadband network. The experts were drawn from Botswana, Kenya, Madagascar, Mozambique, Rwanda, South Africa, Uganda and Tanzania. After a number of meetings, the Group of Experts made a number of policy recommendations, including:

1. The realization of an integrated ICT Broadband backbone connecting all countries in the Eastern and Southern Africa region should be based on the principles of:
 - Non-discriminatory Open Access
 - Equitable Joint Ownership of the backbone infrastructure across the region

- Separation of ownership of the infrastructure from its use.
2. These principles would cover the submarine (EASSy) cable as well as the Terrestrial network.
 3. Use of Special Purpose Vehicles (SPVs) to build and operate the Broadband ICT network as jointly owned SPVs operating across national borders stood a better chance of raising funding for the infrastructure than entities operating country by country.
 4. Broadband ICT Infrastructure should be viewed as a “public good” and operated on a cost-recovery basis.
 5. Broadband ICT Infrastructure could also be viewed as a “Carriers’ Carrier” which could lease network capacity to Telecom Operators of the region on an equitable open access basis.
 6. Governments of the region should be prepared to participate in the development of the infrastructure on a Public Private Partnership (PPP) basis, as private Telecom Operators may not, if left on their own, realize the developmental objectives of the infrastructure.
 7. A Protocol should be signed between the countries of the region in order to underpin their collaboration in developing this network. This Protocol should be developed in the context of provisions of existing treaties such as the AU, COMESA or SADC, which call for regional cooperation in various fields.
 8. The Commission should take the lead role in drafting this Protocol and conducting the necessary consultations with governments.

About the same time, a meeting of SADC ICT Ministers, held in Johannesburg on 7th October 2005, resolved that an urgent meeting of senior officials and regulators from the SADC countries be convened to develop a policy and regulatory framework within which the NEPAD ICT Broadband Infrastructure Network for Eastern and Southern Africa, including the EASSy cable, should be constructed and operated. As the regional broadband network and the EASSy project extend beyond the SADC countries, the meeting would of necessity include the officials and regulators of

relevant countries outside of SADC. The Commission was tasked with facilitating and organizing the meeting.

The Commission convened the meeting of ICT Policy Advisors and Regulators on 7th November 2005. The meeting benefited from the work of the Group of Experts and agreed on a set of 5 policy principles that Governments of the region should adopt to provide a framework for, and facilitate the rapid implementation of the NEPAD ICT Broadband Infrastructure Network for Eastern and Southern Africa. The meeting also agreed on a set of actions aimed at articulating the agreed principles, and making recommendations for presentation to the Ministers of the region, in early 2006.

Between January and May 2006, the Commission convened a number of meetings between Government ICT Policy Advisors, Regulators and Executives of Telecom Companies to articulate the policy principles.

At the same time, the Commission awarded a contract, funded by PPIAF, to the Commonwealth Telecommunications Organisation (CTO) in January 2006, to carry out a comprehensive study of the policy and regulatory frameworks in the region, and to propose solutions that will enable the speedy development of the regional infrastructure.

In February 2006, the Commission obtained a contribution from the Government of South Africa in the form of services of the Industrial Development Corporation (IDC), to structure Special Purpose Vehicles (SPVs) that would own, develop, operate, and maintain the NEPAD ICT Broadband Infrastructure Network, including the EASSy cable. The IDC proposed 2 SPVs; one for the EASSy cable, and another for the Terrestrial Network. This became an input into the draft Protocol.

Although the original draft Protocol was drawn up by the CTO consultants, the final version takes into account inputs from the groups listed below:

1. ICT Policy Advisors (PSs/SGs, DGs, and their Policy Advisors)
2. ICT Regulators
3. Government and Regulatory Legal Experts

4. Telecom Operators – mainly the EASSy Parties
5. The IDC Consultants
6. Regional Regulatory Associations – mainly CRASA
7. Civil Society
8. Regional Economic Communities – mainly EAC and COMESA
9. Development Funding Agencies
10. Ministers of ICT / Telecommunications

It is recognised that the following groups had specific meetings

1. ICT Regulators
2. Government and Regulatory Legal Experts
3. Communications Regulatory Association of Southern Africa (CRASA)
4. Regional Economic Communities – East African Community (EAC) and SADC Ministers.

A landmark in the process was the meeting of Ministers of ICT / Telecommunications from the region, which was held on the 5th & 6th of June, this year.

The Ministers agreed on the following:

1. A Policy and Regulatory Framework within which the NEPAD ICT Broadband Infrastructure Network, including the EASSy cable, can be owned, developed, operated, and maintained.
2. The structure of the SPVs of the Terrestrial and Submarine components of the network.
3. That countries be given more time to propose changes to the Protocol.

To Fast Track the Implementation of the regional network. This should include the establishment of a Steering Committee consisting of 7 representatives of governments and 7 representatives of Telecom Operators. The countries selected to be on the Steering Committee are:

1. Botswana (as Chair of SADC)
2. Malawi
3. Mozambique
4. Rwanda
5. Somalia
6. Tanzania
7. Uganda

The Ministers instructed that a meeting be held with operators within 2 weeks. Kenya offered to host the meeting.

The Ministers further **RESOLVED** that:

1. The submarine (EASSy) cable should be extended to incorporate the Republic of Mauritius.
2. The Republic of Rwanda should be the domicilium of the submarine (EASSy) Special Purpose Vehicle.
3. The Protocol should be signed, under the auspices of the African Union, by duly accredited High Level representatives of the governments of the region, in Kigali, Rwanda, during the third week of August 2006, and that the ratification process will commence immediately thereafter.

The Ministers ended their meeting by issuing a Declaration affirming their commitment to facilitate the speedy construction of the regional backbone ICT infrastructure network and to facilitate the formation of an entity and/or entities to own, maintain and operate the said infrastructure on Open Access Principles.

5. ACTIVITIES SINCE ICT MINISTERS' MEETING IN JOHANNESBURG.

A meeting of EASSy Parties and Collaborators was held in Nairobi 4th-6th July, 2006. The main outcomes of the Nairobi meeting were:

1. To request governments to take into account the spirit of the outcome of this meeting and the work of the Task Force in the finalisation of the Protocol, Shareholders Agreement and the Construction and Maintenance Agreement (C&MA). This would include consideration of a Hybrid SPV model for the submarine (EASSy) cable.

2. The EASSy MoU Parties should meet their commitments so as to hasten the implementation of the submarine project taking into account the existing and new policy frameworks created by the Policy-Advisors particularly to ensure that the Hybrid SPV Shareholders' Agreement and the EASSy Construction and Maintenance Agreement (C&MA) incorporate NEPAD Objectives and Open Access principles.

3. A Task Force was formed comprising of:

7 representatives of governments, 7 representatives of the EASSy Parties and two DFIs, as observers. It was agreed that the representatives of governments would be the same as those selected for the Steering Committee.

The first Task Force meeting was held immediately after the EASSy Parties and Collaborators' meeting. The meeting agreed that the documents required to facilitate the work of the Task force were:

- The draft Protocol
- The draft C&MA
- The draft SPV Shareholders' Agreement.

It was agreed that the I-GWC should avail the draft Protocol to the EASSy Parties while the EASSy Parties would avail the C&MA on signing a Confidentiality & Non-Disclosure Agreement (C&NDA).

However, to date only 3 countries have signed the C&NDA and have received the C&MA. The other countries have been unable to sign the C&NDA, citing among others, the following concerns:

1. Whereas Governments and the Task Force members are expected to sign, only the Chairman of the EASSy Project Management Committee (PMC) is signing on behalf of the Consortium.
2. In addition, the consortium is not a legal body corporate to be able to sign the C&NDA.

6. MEETING OF THE EAST AFRICAN COMMUNITY.

The East African Community convened a meeting on the 1st of August, in Arusha, Tanzania, to seek a common position on ICT Policy and Regulatory issues. Telecom Operators, including the EASSy Parties participated in the meeting. The meeting lauded and supported the resolutions by the ICT Ministers meeting in Johannesburg, South Africa on 5th-6th June, 2006.

The I-GWC held a meeting on the 10th August in Tshwane, South Africa, to discuss, amongst other issues, the SPV as well as proposed amendments to the Protocol. At this meeting, the following was agreed:

1. Governments should be informed that if they are unable to sign the Protocol in Kigali, they will have an opportunity to accede to the Protocol at a later date.
2. Hybrid SPV structure be adopted in which the principle of predominant African ownership and leadership as well as that of equality of participation by African companies be realised through the SPV of the Hybrid. Accordingly, it was recommended that African companies be in the SPV of the Hybrid.

Having been informed that the Task Force would be holding a meeting on the 20th and 21st August, the I-GWC scheduled a meeting to be held on August 22nd, at the same venue.

The I-GWC representatives on the Task Force were requested to draft proposed amendments to the C&NDA, which was done and sent to the EASSy Parties.

The SADC ICT Ministers met in Tshwane during August 14th and 15th and adopted a resolution which, among other things, affirmed the important role played by governments in the development of the NEPAD ICT Broadband Infrastructure Network. In line with the I-GWC, the Ministers recommended that all African Telcos should be in the equally owned African-led SPV and that the financial arrangements for the SPV should be done in an open and transparent manner. The SADC Ministers went further to mandate Telcos from SADC countries to be in the equally owned SPV.

The ICT Ministers urged SADC member states to go to Kigali and sign the Protocol.

The I-GWC meeting of the 22nd August was hosted in Gaborone by Botswana. During this meeting the I-GWC was informed by the Chair of the Task Force that the EASSy Secretariat had written, informing her that they were not in a position to participate in the Task Force meeting. In the letter, the EASSy Secretariat stated that most governments had not signed the C&NDA and therefore had not had access to the C&MA. In addition, the letter stated that the EASSy Parties had not received the revised Protocol on time and therefore requested that the meeting be postponed.

She informed the I-GWC that those present, which included four I-GWC Task Force members, one EASSy Party member, and the two DFIs, who are observers on the Task Force, used the two days to receive comments on the Protocol as well as used their best endeavours to remove or amend those areas that were thought to be contentious and objectionable to the EASSy Parties.

The I-GWC considered the input of the meeting of the 20th and 21st, August which included written inputs from Rwanda and Mozambique. The I-GWC further reviewed the submitted written inputs from Uganda and Tanzania.

The I-GWC went through the draft Protocol bearing in mind all the inputs and adopted a final document that was circulated ahead of the Protocol signing ceremony. It was further agreed that a final planning meeting of the I-GWC for the Protocol signing be held in Kigali, Rwanda, on 27th August.

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