



WRITTEN COMMENT ON

**PROPOSED POLICY AND POLICY DIRECTION
ON RAPID DEPLOYMENT OF
ELECTRONIC COMMUNICATIONS NETWORKS AND FACILITIES**

1. INTRODUCTION

- 1.1 This commentary is submitted by AfriForum NPC. AfriForum currently has approximately 253 000 members from across the Republic of South Africa.
 - 1.2 Among others, AfriForum promotes and advocates the protection of our constitutional dispensation and the fundamental rights entrenched in the Constitution.
 - 1.3 It is important to note that AfriForum does not generally oppose technological advancement. The organisation believes, however, that constitutional rights may not be violated in the process and – especially – that property rights must be respected.
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2. CONSTITUTIONAL RIGHTS AT PLAY

2.1 **There are various rights contained in the Bill of Rights, which find application elsewhere in the Constitution. These include:**

- a. The right to human dignity (Section 10 of the Constitution);
 - b. The right to privacy (Section 14);
 - c. The right to religion, belief and opinion (Section 15);
 - d. Environmental rights (Section 24);
 - e. The right to not be deprived of property, except in terms of a law of general application which may not be arbitrary or amount to expropriation without compensation (Section 25);
 - f. The right to access to information (Section 32);
 - g. The right to just administrative action (Section 33); and
 - h. The right to access to court (Section 34).
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3. GENERAL COMMENT

- 3.1 AfriForum is opposed to any development that limits property rights. It can result in dangerous precedents that may lead to economic decline.
- 3.2 It is important that the dignity and privacy of the general public are preserved where their private property is concerned.

- 3.3 It must also be noted that some members of the public may have environmental, health-related or religious objections to the installation of certain infrastructure on their private property.
- 3.4 AfriForum believes that a registered servitude is a prerequisite for access to private property. The owner must be compensated for this servitude in terms of an agreement; alternatively, compensation can be determined by a court of law in accordance with Section 25(3) of the Constitution.
- 3.5 AfriForum therefore contends that the proposed policy, which allows entry and installation without proper compensation, is arbitrary and unconstitutional.
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4. COMMENT ON CERTAIN SECTIONS OF THE PUBLISHED DRAFT POLICY

4.1 Clauses 2.1 to 2.6

- 4.1.1 It is of grave concern to AfriForum that the policy provides for arbitrary access to public and private property for the installation of relevant infrastructure.
- 4.1.2 Clause 2.4 states that owners must exercise care and diligence to avoid damages to the infrastructure. It indicates that, where damages do occur, agreement of compensation should be reached. This seeks to limit the right of access to court. The rights of property owners to fully enjoy and develop their properties are severely limited if they are forced to accept the installation of infrastructure on their properties, around which they then have to work. Such infrastructure and the fact that sections of their immovable property may become difficult or impossible to utilise, subtract from the dominium of the owner, which necessitate the registration of a servitude against the title deed.
- 4.1.3 Compensation must be paid to the owner for access and/or use of the property.
- 4.1.4 The process outlined in paragraph 2.5 is vague and arbitrary. There is no indication as to how notices will be served. It must be kept in mind that there are various vacant properties or properties where the owner is temporarily absent. A mechanism must be introduced to ensure that proper notices are served.
- 4.1.5 AfriForum contends that 30 calendar days are insufficient to negotiate and register proper servitudes.
- 4.1.6 The draft policy is furthermore silent on what would happen in case of any objections to access. It goes without saying that, in case of objections, access is prohibited in the interim. To insert any other mechanism would be arbitrary and inconsistent with the Constitution, specifically in direct violation of Section 33.
- 4.1.7 AfriForum also foresees that damages will inevitably be incurred on various properties, especially if access is gained without knowledge of and/or consent by the landowner.

4.2 Paragraphs 2.6 to 2.16

- 4.2.1 The procedure proposed for the resolution of disputes in relation to compensation to property owners is arbitrary and likely inconsistent with the Constitution.
- 4.2.2 The Constitution prohibits the dictation that no amount may be charged by property owners for inconveniences which result from access and which subtract from the dominium.
- 4.2.3 It is also inconsistent with the Constitution to dictate that only reasonable access fees may be charged for more intrusive installations. Full compensation must be paid, which must be calculated in accordance with Section 25(3) of the Constitution.
- 4.2.4 In terms of Section 25(2)(b) of the Constitution, compensation must be determined by agreement or by a court of law. Therefore, the restrictive stipulation that disputes must be resolved by the Complaints and Compliance Committee is a direct violation of the Constitution and the remedies that the Constitution provides to protect property rights. This complaint also applies to any other dispute resolution provider or process that may be appointed.
- 4.2.5 Clause 2.14 is therefore especially of grave concern, as it would be unconstitutional to bind property owners to the decision of a third party other than a court of law.

4.3 Paragraphs 3.1 and 3.2

- 4.3.1 It is in AfriForum's view inappropriate to prescribe a process to resolve disputes, especially since compensation must be determined by an agreement or a court of law. The proposed measures are severely restrictive and in violation Sections 25, 33 and 44 of the Constitution.

5. CONCLUSION

- 5.1 AfriForum contends that the proposed policy will not stand constitutional muster and must therefore be amended.
- 5.2 AfriForum also argues that the very short window of 30 business days for commentary is insufficient for such an intrusive measure. This is a further violation of the constitutional rights of the public.
- 5.3 AfriForum therefore formally objects to the proposed policy and reserves all rights in this regard.