



**THE NAB WRITTEN SUBMISSION ON THE ELECTRONIC
COMMUNICATIONS AMENDMENT BILL**

20 NOVEMBER 2018

THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL, 2018

INTRODUCTION

- 1 On 19 September 2018, the Minister of Telecommunications and Postal Services tabled the Electronic Communications Amendment Bill (Bill) before the National Assembly. The Portfolio Committee on Telecommunications and Postal Services subsequently published a notice inviting the public to comment on the Bill. Interested persons were given until 20 November 2018 to submit their written input.
- 2 The National Association of Broadcasters (NAB) is a leading representative of South Africa's broadcasting industry, representing the interests of all three tiers of broadcasters. Our members include the public broadcaster, commercial radio media groups; Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, as well as independents, Classic FM, Kaya FM, YFM, Smile FM, and LM Radio; all the licensed commercial television broadcasters e.tv, Multichoice, M-Net, and StarSat-ODM; a host of community radio broadcasters and community television broadcaster, Faith Terrestrial. The NAB membership also extends to training institute, NEMISA and the broadcast signal distributors, Sentech and Orbicom

BACKGROUND CONTEXT

- 3 This public participation process follows a legislative review process that was initiated by the Department of Telecommunications and Postal Services (DTPS) in November 2017. It is the NAB's understanding that the Bill seeks to *inter alia* provide for transformation of the ICT sector, reduce infrastructure duplications, and encourage service-based competition through a wholesale open access network (WOAN).
- 4 The Bill also addresses the critical issue of radio frequency spectrum and the national radio frequency plan - this includes new approaches to the administration

of spectrum, spectrum assignment, spectrum allocation, as well as the determination and assignment of high demand spectrum on open access principles.

- 5 The NAB is concerned with critical issues that affect the broadcasting sector and that require further consideration and policy harmonisation between the DTPS and the Department of Communications (DoC). These relate to institutional arrangements and the administration of spectrum. There are also parallel government processes, namely the Competition Amendment Bill, which we believe will impact on the Bill. The NAB previously raised these concerns with the DTPS when the Bill was first published in November 2017.
- 6 The NAB notes that this revised version of the Bill has taken into account earlier comments made by the NAB and ECNS licensees who are broadcasting signal distributors, are now correctly excluded from the open access provisions of the Bill. However, the NAB is still concerned with certain provisions relating to spectrum management and institutional arrangements. These issues are revisited in this submission.

INSTITUTIONAL ARRANGEMENTS

The independence of ICASA - s30

- 7 Section 192 of the Constitution of the Republic of South Africa provides for the independent regulation of broadcasting in the public interest, to ensure fairness and a diversity of views broadly representing the South African society. Currently, the independent regulator for broadcasting services, as well as telecommunications and postal services, is the Independent Communications Authority of South Africa (ICASA). The main legislative instruments through which these sectors are regulated are the Electronic Communications Act 36 of 2005, as amended (ECA) and the ICASA Act 13 of 2000, as amended.
- 8 The independence of the regulator is further safeguarded by both the ECA and the ICASA Act. Section 3(4) of the ECA provides that ICASA in exercising its powers

and performing its duties in terms thereof, must *consider* (our own emphasis) policies made by the Minister in terms of sections 3(1) and 3(2). ICASA is therefore not bound by these ministerial policies although it must take due consideration thereof. We note that whilst section 3(4) of the ECA has not been amended by the Bill, the Bill does however introduce a new provision in terms of which ICASA must now comply with ministerial policies and policy directions in its administration and management of spectrum.

- 9 Furthermore, sections 3(3) and 5(4) the ICASA Act, both of which have not been amended by the Bill, provide that ICASA is independent, and subject only to the Constitution and the law, and the council of ICASA must be committed to *fairness, freedom of expression, openness and accountability and must uphold and protect the Constitution and the laws of the Republic*.
- 10 The NAB is therefore concerned about the impact of the new approaches to spectrum management on ICASA's independence, especially given that the licensing of broadcasting services hinges on access to spectrum to enable the provision of and access to diverse content toward advancing freedom of expression – a core pillar of the South Africa's Constitutional democracy.
- 11 The NAB submits that these amendments may have the unintended consequence of weakening the independent regulation of broadcasting, as guaranteed in section 192 of the Constitution and on this point alone, we are concerned that the Bill may not pass constitutional muster in its current form.
- 12 Whilst the intention of the proposed amendments may be to address matters pertaining to ministerial policies and policy directions specific to telecommunications operators and specifically the WOAN licensing process, these new provisions also impact on broadcasters as broadcasters are also users of radio frequency spectrum. The NAB therefore strongly recommends that the Bill be revised to give meaningful effect to ICASA's independence.

Implications of new provisions on ICASA's capacity

- 13 The NAB notes that the Bill stipulates timelines within which ICASA is to develop regulations pursuant to specific sections. Furthermore, the Bill proposes substantial tasks for ICASA without any indication of whether there has been consideration of ICASA's capacity to deliver thereon. Any revision of these timelines would necessitate another legislative review process which requires time and resources. Therefore, NAB respectfully cautions against this approach.

SPECTRUM MANAGEMENT

Administration of spectrum - s30

- 14 Spectrum is assigned for services including broadcasting services in accordance with the National Radio Frequency Plan. However, the effect of the proposed amendments is that the development of the radio frequency plan is now placed squarely within the purview of the Minister of Telecommunications and Postal Services. Although the Bill provides for coordination with the Minister of Communications on issues relating to spectrum which has been allocated for broadcasting services, the NAB submits that a far greater role is needed for the Minister of Communications particularly in light of the digital migration process.

Spectrum sharing – s31C

- 15 In recognition of the importance of efficient use of spectrum, the Bill proposes provisions for spectrum sharing subject to either a notification to or approval from ICASA depending on whether the spectrum is high demand. The Bill further provides that ICASA must prescribe spectrum sharing regulations within 12 months of commencement of section 31C.
- 16 The NAB respectfully recommends that this provision must only come into effect *after* the said regulations have been developed and finalised. This will ensure that spectrum sharing is implemented only in instances where it has been determined

that such sharing will not cause any harmful interference as the regulations will determine the criteria and conditions for spectrum sharing.

Spectrum re-farming – s31D

- 17 The NAB understands that the demand for new technological services is growing at a rapid pace and have consequently resulted in spectrum re-farming. Whilst the NAB supports the proposed legislative framework for spectrum re-farming, it is important to ensure that the impact of spectrum re-farming on the broadcasting industry, particularly television broadcasters, is given due regard to ensure that licensed broadcasters are not squeezed out as a result of competition for limited frequencies on the radio spectrum over which they broadcast.

HIGH DEMAND SPECTRUM - IMPLICATIONS FOR BROADCASTING

High demand spectrum - s31E

- 18 The Bill seeks to enable the licensing of the WOAN which will provide wholesale electronic communications networks and facilities on open access principles as defined in the Bill. Furthermore, within 6(six) months of the promulgation of the Bill, the Minister shall determine what constitutes high-demand spectrum as well as which unassigned high demand spectrum must be assigned to the WOAN.
- 19 On 27 September 2018, the Minister published a notice inviting comments on the proposed policy to ICASA on the licensing of unassigned high demand frequency spectrum. The proposed policy directive identifies the 700 MHz, 800 MHz and 2600 MHz as the suitable spectrum bands to operationalise the WOAN. Whilst this published policy directive is a separate process from the legislative review process, it must be noted that broadcasters have a number of digital terrestrial television (DTT) transmitters operating in the 700 MHz and 800 MHz bands. After analogue switch-off, these transmitters need to be migrated to below 694 MHz following a process of restacking. The NAB submits that any use of these bands while the aforementioned transmitters are still in operation will result in serious interference

and prejudice to broadcasters. This is especially so as the WOAN is concerned with broadband, not broadcasting.

- 20 The NAB therefore respectfully recommends that the timelines for the determination and assignment of the high demand spectrum should take into account the Broadcasting Digital Migration and the restacking processes as well as the spectrum needs of broadcasters. The NAB notes that, since they are already in use, these spectrum bands can be brought to use for the WOAN only after analogue switch off, and digital to digital migration has been completed, even if the bands are licensed beforehand. The NAB has made similar recommendations to the DTSP on the proposed policy directive.

FREQUENCY LICENCES

- 21 The Bill provides that radio frequency licences that include exclusively or individually assigned high demand spectrum as determined by the Minister may not be renewed on the same terms and conditions at the end of the licence term. The NAB respectfully submits that this provision should be carefully reconsidered as it is likely to prejudice licensees who make substantial long-term investments in their infrastructure and networks.

INTER-GOVERNMENTAL POLICY PROCESS LIKELY TO IMPACT ON THE BILL

Parallel legislative review processes

- 22 The Bill also seeks to address competition related matters within the sector. The Bill provides that ICASA must conclude a concurrent jurisdiction agreement with the Competition Commission which will address *inter alia* management of complaints, mergers, market reviews and market definitions. Parallel to this legislative review process, on 11 July 2018 the Minister of Economic Development tabled the Competition Amendment Bill (Competition Bill), which was subsequently passed by the National Assembly and referred to the National Council of Provinces for concurrence on 23 October 2018.

- 23 The Competition Bill seeks to address the structural challenges in the South African economy including the concentration and the racially-skewed spread of ownership of firms in the economy. Furthermore, it seeks to promote institutional and procedural efficiency in order to improve the effectiveness of the Competition Commission and Tribunal as well as the Competition Appeal Court. Notably, the Competition Bill also seeks to empower the Competition Commission to initiate and conduct market inquiries. Upon completion thereof, the Commission must submit its report together with recommendations to the Minister of Trade and Industry. The recommendations may also be to other regulatory authorities in respect of competition matters.
- 24 The NAB submits that regulatory certainty is crucial to ensure stability and increased investment in the broader ICT sector. We therefore trust that matters falling within the above-mentioned concurrent jurisdiction agreement will be coordinated and managed in a clear and consistent manner.
- 25 The NAB is also concerned about how this legislative review process will unfold in light of the possible reintegration of the DTPS and DoC as part of the rationalisation of national government departments, and the impact thereof on the overall administration of the ECA.

CONCLUSION

- 26 In conclusion, the NAB thanks the Portfolio Committee for the opportunity to make this written submission and we look forward to the next step in the process.