



THE NATIONAL ASSOCIATION OF BROADCASTERS' WRITTEN SUBMISSION

ON THE

ELECTRONIC COMMUNICATION ACT AMENDMENT BILL

SUBMITTED: 30 AUGUST 2023

INTRODUCTION

1. The Honourable Minister of Communications and Digital Technologies, Mondli Gungubele (MP) published the draft Electronic Communications Act Amendment Bill (**Draft Amendment Bill**) in Notice No. 3567 published in GG no. 48841 on or about 23 June 2023 for public comment, and requested that written submissions be made by 4 August 2023.
2. The National Association of Broadcasters (**NAB**) wrote to the Acting Director General of the Department of Communications and Digital Technologies (**DCDT**) on 5 July 2023 to request that the deadline for written submissions be extended to the end of September 2023, to allow NAB members adequate opportunity to provide input on the submission. The Honourable Minister issued an extension in Notice No. 3748 published in GG no. 49073 on or about 4 August 2023, in terms of which the due date for the submission of written comments was extended to 31 August 2023.
3. The NAB thanks the Honourable Minister for the opportunity to provide a written submission on the Draft Amendment Bill. The NAB further requests the opportunity to make oral representations on the Draft Amendment Bill, should public hearings be held.
4. The NAB is a leading representative of South Africa's broadcasting industry, representing the interests of all three tiers of broadcasters (public, community and commercial). Our members include the SABC, all the licensed commercial television broadcasters; e.tv, Multichoice, M-Net, and StarSat-ODM, independent commercial radio broadcasters such as Kaya FM, YFM, Smile FM, Rise FM, YOU FM, Hot 102.7FM, and radio services of media groups Primedia, Kagiso Media, MRC Media, AME, MSG Afrika and a number of community radio broadcasters and a community television broadcaster, Faith Terrestrial. The NAB membership also extends to signal distributors as well as a range of industry associates.
5. As the voice of South Africa's broadcasting industry, the NAB's aim is to foster and promote the development of a sustainable and robust broadcasting system that upholds the principles of South Africa's constitutional democracy. The NAB also seeks to enable and maintain an environment in which broadcasters are able to thrive – by serving audiences and contributing to diversity in the country. For our members, ensuring secure frequency spectrum is vital to the continued growth and development of the sector.
6. The NAB will confine its comments to those aspects of the Draft Amendment Bill which relate to the broadcasting industry.

INTRODUCTORY COMMENTS

7. At the outset, the NAB notes that while the Draft Amendment Bill was published for public comment on 23 June 2023, the Draft White Paper on Audio and Audiovisual Media Services and Online Content Safety: A new vision for South Africa (the **Draft White Paper**) was only published for public comment over a month later on 31 July 2023.
8. The NAB is concerned that the Draft Amendment Bill process is being undertaken prior to the finalisation of the Draft White Paper. Aligning the Draft Amendment Bill with the final outcomes of the Draft White Paper will ensure that the important policy positions set out in the Draft White Paper can be implemented through this legislative process. This will allow stakeholders and other interested parties to provide meaningful feedback on the proposed legislative amendments and to consider all proposed amendments to the Electronic Communications Act 36 of 2005 (**ECA**) holistically.
9. Given the significant complications that may arise for broadcasters and other users of frequency spectrum (such as mobile service providers), the NAB respectfully submits that the current legislative amendment process should be temporarily halted to ensure that all the necessary amendments resulting from the Draft White Paper process are addressed by the Draft Amendment Bill, to ensure fair regulation and fair access to frequency spectrum, and to ensure the creation of a comprehensive and modern ECA. This will also prevent additional legislative amendment processes on the same or similar provisions of the ECA.
10. Alternatively, the NAB respectfully submits that there are certain proposed amendments in the Draft White Paper that could be fast-tracked as part of this process. In this respect, the Draft Amendment Bill in its current format does not address the vital issue of outdated ownership limitations. These concerns are addressed in the Draft White Paper. The

existing ownership and control provisions in the ECA have been in effect since 1993, despite the Independent Communications Authority of South Africa (**ICASA**) conducting a robust public process over 15 years ago on the continued relevance of the statutory restrictions of the ownership limitations.

11. The NAB is of the view that the deletion of the current limitations on the control of commercial broadcasting services (section 65 of the ECA) and cross-media control of commercial broadcasting services (section 66 of the ECA) should not be overly difficult to achieve, since they do not require any amendment or revisions. The DCDT has already consulted with stakeholders in this regard and there is broad consensus that sections 65 and 66 of the ECA should be repealed.
12. As such, the NAB recommends that if the ECA amendment process is not temporarily suspended to allow for the finalisation of the Draft White Paper, that an additional section be included in the Draft Amendment Bill focusing solely on repealing sections 65 and 66 of the ECA. This could easily be included in the current Draft Amendment Bill, or could be fast-tracked separately.

COMMENTS ON THE DRAFT AMENDMENT BILL

13. Section 5 of the Draft Amendment Bill

- 13.1 Section 5(2) of the Draft Amendment Bill has been amended to include that a license is required for “*electronic communication facility services*”. The NAB submits that the scope of what constitutes an electronic communication facility is wide and raises concerns in respect of how such facilities will be licensed. By way of example, satellite transponders that form part of the electronic communications facility will be difficult to licence. Satellites are international in scope and cover more than one territory or region, and do not exclusively provide services to only one country.
- 13.2 It is unclear to the NAB how a satellite transponder or similar electronic communication facility will be licensed when such satellite or facility does not fall within the jurisdiction of

South Africa. The NAB respectfully submits that section 5(2)(d) of the Draft Amendment Bill be carefully considered to determine if licensing of such facilities is practical and workable.

14. Section 31 of the Draft Amendment Bill – the so-called “*Use it or Share it*” principle

14.1 The Draft Amendment Bill introduces the “use it or share it” principle in section 31, which permits ICASA to partially amend a radio frequency licence, if such licence is not used “adequately” for two years. This section will allow for spectrum sharing.

14.2 At the outset, the NAB notes that it is unclear from the Draft Amendment Bill what constitutes “adequate” use. It is further submitted that given the financial challenges that many broadcasters are facing, it may take longer than two years for newer or smaller broadcasters (such as community broadcasters) to become fully operational. A blanket approach, without clear guidelines on what constitutes “adequate” will not be in the best interest of promoting entrance into the market and ensuring sustainable operations for all three tiers of broadcasting in South Africa.

14.3 It is understood by the NAB that the principle of “use it or share it” is more applicable to mobile service providers, which are often allocated a block of spectrum frequency bands by the Regulator. If a mobile service provider fails to use its allocated spectrum, it will be shared with other service providers. This principle should not be applied to broadcasters. It is impractical and will create signal disruptions.

15. Section 31A of the Draft Amendment Bill - Radio frequency spectrum sharing

15.1 The newly added section 31A of the Draft Amendment Bill sets out the rules for governing spectrum sharing, which has historically been prohibited. The NAB notes that this section does not distinguish between passive and active sharing of communication infrastructure. The active elements of network infrastructure include frequency spectrum, while the

passive components include physical infrastructure such as sites and radio towers required to operate the network.

- 15.2 The NAB submits that the sharing of the passive components relating to the physical infrastructure can result in benefits to broadcasters and other operators, by increasing the speed of entry into the market for operations and reducing the cost of signal distribution for broadcasters, as well as improving the quality of services, and improving universal service and access for consumers.
- 15.3 The Draft Amendment Bill proposes the sharing of active components. In this respect, the Draft Amendment Bill defines “radio frequency spectrum sharing” as the “*simultaneous usage of a specific radio frequency or radio frequency band in a specific geographical area by different radio frequency licenses in order to enhance the efficient use of spectrum, and “spectrum sharing” has similar meaning*”.
- 15.4 Active sharing of frequency spectrum, as proposed by the Draft Amendment Bill should be carefully monitored by the Regulator. Certain types of active sharing, such as priority sharing of frequency spectrum, have been used for many years. The South African National Radio Frequency Plan and the International Telecommunications Union’s (ITU) Radio Regulations provide for primary and secondary uses of a frequency band, whereby the primary users are provided with priority over the band in order to avoid interference. The NAB supports this type of active sharing of frequency spectrum.
- 15.5 Other forms of active capacity sharing are more applicable to mobile services. Such as where the network of one network operator can be shared with a different network operator. This type of active capacity sharing is not practical for broadcasters. In addition, the sharing of antennas and combiners also constitutes active capacity sharing, but this

type of capacity sharing should only occur following careful consideration by engineers. In addition, all active and passive capacity sharing should be coordinated by the Regulator.

- 15.6 Section 31A(1)(a) of the Draft Amendment Bill requires ICASA to approve the sharing of high-demand spectrum, but section 31A(1)(b) of the Draft Amendment Bill only requires “notification” for frequency which is not considered high-demand. The NAB respectfully submits that all forms of radio frequency spectrum sharing should be carefully controlled and coordinated by the Regulator in order to avoid the risk of spectrum interference. In addition, all sharing of radio frequency spectrum should be approved by ICASA prior to implementation regardless of whether it is high-demand or not.

16. Section 67 of the Draft Amendment Bill - Market Inquiries

- 16.1 Section 67 of the Amendment Act permits ICASA to undertake market inquiries if it has reason to believe that a feature of the market is anti-competitive. The proposed amendment no longer prescribes that ICASA must conduct a market inquiry if conduct appears to impede, distort or restrict competition in a market. However, if such conduct is found to be anti-competitive, ICASA must determine a remedy, which includes potentially imposing pro-competitive licensing conditions or prescribing regulations.
- 16.2 The NAB generally supports the proposed amendments but has some reservations about the onus on the Regulator to initiate market inquiries when it suspects anti-competitive conduct. The NAB respectfully submits that if such conduct is suspected, the Regulator must take steps to launch a market inquiry to investigate said conduct.
- 16.3 That being said, the NAB notes that the Regulator has not completed a number of market inquiries that have already been initiated. The NAB respectfully submits that this provision of the Draft Amendment Bill should be closely aligned with the market inquiry provisions of the Competition Act⁸⁹ of 1998, and in particular, should impose maximum time periods to complete a market inquiry, in order to ensure that market inquiries are finalised within a set time frame.
- 16.4 In addition, the NAB encourages cooperation between ICASA and the Competition Commission, particularly given that market inquiries into anti-competitive conduct fall

within the concurrent jurisdiction of both entities. Given that the Competition Commission has successfully undertaken a number of complex market inquiries over the years, the NAB trusts that ICASA will engage with, and rely on the expertise of, the Competition Commission in this respect.

CONCLUSION

17. In conclusion, the NAB submits that any amendments to the ECA should only occur once the Draft White Paper process has been finalised. Alternatively, or as a separate fast-track process, the provisions relating to ownership limitations in sections 65 and 66 of the ECA should be repealed.
18. Broadcasters should be exempt from the “use it or share it” principle, as such principle is not applicable to broadcasting services.
19. Frequency Spectrum sharing should, if possible, be limited to passive sharing of frequency only. However, if active sharing of frequency is permitted, all spectrum-sharing arrangements must be approved by (and not just notified to) ICASA in order to avoid interference.
20. The NAB thanks the Honourable Minister for the opportunity to provide a written submission on the Draft Amendment Bill and requests an opportunity to make oral representations on the Draft Amendment Bill, should hearings be held.