



**THE NAB'S SUBMISSION TO THE  
DRAFT ELECTRONIC COMMUNICATIONS AMENDMENT  
BILL NO. [B38-2007] PUBLISHED  
IN TERMS OF GOVERNMENT GAZETTE 30307,  
NOTICE 1200 OF 2007**

**24 OCTOBER 2007**

## 1. INTRODUCTION

- 1.1. On 17 September 2007, the Department of Communications published its intention to introduce the Electronic Communications Amendment Bill (the Amendment Bill), into Parliament before the end of 2007, in Government Gazette 30307, Notice 1200 of 2007 (the Notice). Subsequently, the Portfolio Committee invited interested persons to submit their written representations on or before 24 October 2007.
- 1.2. The National Association of Broadcasters (the NAB) would like to thank the Portfolio Committee for the opportunity to make its written representation, in relation to the Amendment Bill.
- 1.3. The NAB would like to be given the opportunity to participate in oral representations as well.
- 1.4. The NAB has a proud history of actively participating in national policy and legislative formulation processes, and is keen to participate in the amendments to the EC Act, that the Portfolio Committee is embarking on.
- 1.5. The NAB is the leading representative of South Africa's Broadcasting industry. The NAB aims to further the interests of the broadcasting industry in South Africa by contributing to its development. The NAB membership includes:
  - Three television public broadcasting services, and eighteen sound public broadcasting services, of the South African Broadcasting Corporation of South Africa (the SABC);
  - All the commercial television and sound broadcasting licensees;
  - Both the licenced common carrier and the selective and preferential carrier broadcasting signal distributors;
  - Over thirty community sound broadcasting licensees, and the first licensed community television broadcasting service, Trinity Broadcasting Network (TBN)

## **2. OBJECTS OF THE AMENDMENT BILL**

- 2.1 The memorandum of the Amendment Bill clearly stipulates that, the Bill seeks to provide an opportunity for Government to make strategic interventions on infrastructure investment whenever it deems necessary. One of the most important issues, which this amendment will address, for which the NAB applauds the Portfolio Committee, is reducing the cost to communicate by providing infrastructure at wholesale rates to other operators.
  
- 2.2 The NAB notes with regret however, that although a number of entities were consulted prior to the publication of the Amendment Bill, broadcasting service licencees and broadcasting signal distribution licencees were not consulted to provide their inputs. The EC Act encourages the promotion and facilitation of convergence of telecommunications, broadcasting, information technologies and other services contemplated by the EC Act. Consequently, absence of consultation with broadcasting licensees and broadcasting signal distributors in light of the Portfolio Committee's consultation with other stakeholders raises some concern, as it creates deviation from the object of the EC Act.
  
- 2.3 The NAB would furthermore like to indicate to the Portfolio Committee that it is quite regrettable that government has decided to introduce amendments to the EC Act in a piecemeal manner. There are certain provisions of the EC Act, which the broadcasting industry believes should be amended to reduce ambiguity and to clarify the intention of the legislature, but these amendments should form part of a more formal review of the legislation at an appropriate time.
  
- 2.4 It is the NAB's submission that in entertaining submissions, the Portfolio Committee should avoid opening any other issues for debate in the current amendments until the Independent Communications Authority of South Africa (ICASA) has completed the licence conversion process. The Portfolio Committee should avoid entertaining any written submissions that are broader than the ambit proposed in the Amendment Bill. Furthermore, oral submissions should be limited to the proposed amendments only.

### **3. COMMENTS ON THE BILL**

#### **3.1 Amendment of section 1 of Act 36 of 2005**

3.1.1 The Portfolio Committee proposes the insertion of the definition of “public entity” in section 1 of the EC Act. According to the Amendment Bill, public entity has the same meaning assigned to it in section 1 of the Public Finance Management Act, 1999 (Act No.1 of 1999) (the PFMA).

3.1.2 Section 1 of the PFMA provides as follows:

*“public entity “ means a national or provincial public entity.*

3.1.3 In terms of Chapter 6 of the PFMA, in particular, section 46 thereof, the provisions of Chapter 6 apply to the extent indicated, to all public entities cited in Schedule 2 or 3 of the PFMA.

3.1.4 Section 48 of the PFMA empowers the Minister of Finance to classify public entities listed in Schedule 3 to the PFMA, by notice in the national Government Gazette and the classifications are categorised as:

- National government business enterprises;
- Provincial government business enterprises;
- National public entities; and
- Provincial public entities.

3.1.5 The NAB has a concern with the insertion of the definition of public entity in the proposed EC Act. The concerns emanate from the following:

3.1.5.1 Both schedule 2 and 3 to the PFMA contain public entities which are already licenced and regulated by ICASA, for instance, the South African Broadcasting Corporation (the SABC), Sentech and Telkom.

3.1.5.2 Including the definition of public entity in the Amendment Bill will have unintended consequences.

3.1.6 The EC Act sets out criteria and procedures that an entity needs to fulfill in order for it to be licenced to provide electronic communications network services, broadcasting services or electronic communications services. In the case of public entities, the applicable section is section 5(3)(d) of the EC Act,

*5(3) “electronic communications network services, broadcasting services and electronic communications services that require an individual licence, include, but are not limited to-*

*(d) Any electronic communications service where a state entity (directly or indirectly) holds an ownership interest of greater than twenty-five percent of the share capital of the person providing such service.”*

3.1.7 From the NAB’s point of view, section 3 read together with section 5(3)(d) are the enabling sections under which the objects of the Amendment Bill can be realised as articulated in the memorandum.

3.1.8 Section 5(6) further states as follows:

*“in consideration of the implementation of the managed liberalisation policies, the Authority may only accept and consider for individual electronic communications network services licenced in terms of a policy direction issued by the Minister in terms of section 3.”*

3.1.9 Section 3(3) of the EC Act prohibits the Minister from issuing policy directions in relation to the granting, amendment, transfer, renewal, suspension or revocation of a licence, except as permitted in terms of the EC Act. Section 5(6) of the EC Act empowers the Minister to issue policy directions to ICASA directing it to issue individual Electronic Communications Network Service licences. As such, in the current legislative framework, the Minister already has the power to provide policy directions to ICASA regarding the issuing of an invitation to apply for an Individual Electronic Communications Network Services Licence. Any

attempt to expand this existing power in the EC Act further runs the risk of falling foul of section 192 of the Constitution.

3.1.10 From the NAB's point of view, it is not necessary for the Portfolio Committee to amend the EC Act in order to include the definition of public entity, for purposes of accommodating the licencing of a public entity. In its current form, the EC Act makes provision for the licencing of entitles in which the state holds an ownership interest of greater than 25%.

### 3.2 **Amendment of section 5 of Act 36 of 2005**

3.2.1 The Portfolio Committee proposes the amendment of section 5 of the EC Act to include the following:

- (13) *The Minister may, after having obtained Cabinet approval, issue a policy direction in order to-*
- (a) *initiate and facilitate intervention by Government to ensure strategic ICT infrastructure investment; and*
  - (b) *provide for a framework for the licensing of a public entity by the Authority”.*

3.2.2 It is the NAB's submission that chapter 3 of the EC Act clearly outlines the licencing framework for ICASA when granting individual and class licences. It is therefore unnecessary for the Portfolio Committee to amend the EC Act to introduce section 13(b).

### 3.3 **CONCLUSION**

3.3.1 The NAB is thankful for the opportunity to make its written representation to the proposed amendments to the EC Act. In principle, the NAB supports the Portfolio Committee's intention of introducing amendments that support strategic ICT infrastructure development. However, the Bill as currently drafted would not meet the Constitutional test of section 192, and is likely to have unintended consequences in its current form.

- 3.3.2 The NAB would like to impress on the Portfolio Committee that ICASA is currently undergoing the process of converting existing licences in terms of the EC Act, therefore, the Portfolio Committee should not accept any comments from interested parties that are not related to the proposed amendments, and which will interfere with the smooth running of the licence conversion process.
- 3.3.3 The NAB has a proud history of participating in national policy and legislation formulation and amendment processes, and is keen to actively participate in this process the Portfolio Committee is initiating. The NAB is available to clarify any further issues the Portfolio Committee may call upon ourselves to clarify.