



**BLACK BUSINESS COUNCIL**

# **RESPONSE TO ECA BILL 2017**

Black Business Council response to the  
Electronic Communications Act Amendment  
Bill

31 January 2018



## BBC RESPONSE TO THE ECA BILL

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## BACKGROUND OF THE BLACK BUSINESS COUNCIL

The Black Business Council (BBC) is the over-arching confederation that represents black professional, business associations and chambers. The primary purpose of the BBC is to lobby government on policy related matters and to play an advocacy role where policies are in place in order to accelerate the participation of black business in the mainstream economy.

Our position as the pillar of hope and support for black business and like minded established business has created a lot of expectations from beleaguered entrepreneurs who are faced with a plethora of obstacles daily in their quest to run sustainable enterprises. These challenges have been engaged by the BBC through a series of seminars, consultative workshops, stakeholder engagement and outreach programmes, just to name a few. We need to sustain these along with the advocacy work in order to have a sustained transformative impact on the economy.



# OVERALL POINTS SUPPORTED BY THE BBC WITHIN THE ECA BILL

## Positives arising from the ECA Bill

- The BBC appreciates the following points contained within the ECA Bill:
- New regulatory framework that ensures the rationalisation of the regulators to be in line with their more precise mandate. This also assist in the curbing of regulatory capture by the entrenched players in the sector.
- The open access principles that now enables the entry of black SMMEs into the sector which increases competition in the sector
- The expansion of the focus of the objects of the Act to include issues of access to scarce resources such as radio frequency spectrum allocation, competition, open access, etc. This gives the regulators more teeth to enforce the robust transformation within the sector.
- The focus on service based competition rather than infrastructure helps to level the competitive playing field especially for new entrants and SMMEs.
- The way that infrastructure is dealt with by clarifying the concepts of radio frequency spectrum sharing, trading and refarming.
- The single trench rule for fibre is good for fostering working together within the sector while cutting down costs.



**BLACK BUSINESS COUNCIL**

# SECTION A: BIG ISSUES RAISED



# 1. BLACK OWNERSHIP WITHIN THE SECTOR

The need for black ownership in  
the sector

- The BBC supports the policy of radical economic transformation. This means that black people must participate in the entire value chain of the sector. The meaningful ownership means active participation in the strategic and the day to day running of enterprises in the sector by black people and black women. The ICT Sector Code currently governs the transformation requirement of companies operating in the ICT sector and has set a 30% black-ownership target. We believe that this target is not going to result in the meaningful participation of black people and women in the ICT sector.
- We propose the following:
- The minimum ownership requirement for enterprises operating within the entire value chain of the ICT sector be 51% black owned. This target must be used before any licence, procurement or concession within the ICT sector is granted. (See 1.1 black ownership requirement application);
- There must also be special focus on black women;
- The composition of the 51% black ownership must follow that the majority must be held by strategic black entrepreneurs (See 1.2 black ownership breakdown minimums)



# 1.1 BLACK OWNERSHIP REQUIREMENTS APPLICATION

## 1

### – Licensing

- No licence must be issued if the 51% black-ownership requirement is not met in accordance with the minimum conforming to the black entrepreneurs, black employees and black communities.

## 2

### – Procurement

- Procurement from 51% Black-owned companies across the value chain off the ICT sector. This must be actively monitored in order to ensure the impact of radical economic transformation is felt.
- If there is non-compliance with the procurement requirements then the ultimate sanction is to revoke the licence given. Furthermore any other procurement and concessions from any organ of state should be discontinued as a result of non-compliance.

## 3

### – Other concessions

- In line with the Broad-based BEE Act which requires that organs of state must consider Broad-Based BEE in giving any other concessions over and above licensing and procurement. In line with radical economic transformation we propose that the department not only look at the overall BBEE Level of Recognition status but to look at 51% black-ownership as well.
- In practice many State Owned Entities apply this requirement without any problem as most legislation and sector codes lays the minimum requirements and never limits the upper range of ownership.



## 1.2 BLACK OWNERSHIP BREAKDOWN MINIMUMS



### – Black Entrepreneurs

- ❑ At least a minimum of 31% should be in the hands of black entrepreneurs who are able to influence the strategic direction and day to day operations of the company.
- ❑ Passive ownership does not drive meaningful radical economic empowerment.

### – Employees/ESOP

- ❑ At least 10% should be in the hands of black employees
- ❑ This allocation ensures that the employees are aligned with other shareholders in creating value within the entity.
- ❑ This assists with the retention of employees and preserves jobs through the enhanced productivity.

### – Community

- ❑ At least 10% should be in the hands of community grouping
- ❑ This ensures that the benefits of value created through the robust implementation of radical economic empowerment trickles down to members of the community.
- ❑ Alignment with community interest ensures that there is a greater buy-in within the community.



# 1.1 BLACK OWNERSHIP PROPOSALS

ECA Bill Elements	Current amendment	Proposed Amendment
Amendment of section 9 of Act 36 of 2005	<p>7. Section 9 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (b) of the following paragraph: "(b) include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which <b>must not be less than 30%</b>, or such other conditions or higher percentage as [may be] prescribed under section 4 (3) (k) of the ICASA Act;"</p>	<p>7. Section 9 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (b) of the following paragraph: "(b) include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which <b>must not be less than 51%</b>, or such other conditions or higher percentage as [may be] prescribed under section 4 (3) (k) of the ICASA Act;"</p>
Amendment of section 8 of Act 36 of 2005	<p>Section 8 of the principal Act is hereby amended — ...(e) by the addition of the following subsection: “(6) The Authority must by regulation make provision for obligations applicable to electronic communications network service licensees for the rapid deployment of electronic communications networks or facilities and must prescribe additional terms and conditions for such licences.”</p>	<p>Section 8 of the principal Act is hereby amended — ...(e) by the addition of the following subsection: “(6) The Authority must by regulation make provision for obligations applicable to electronic communications network service licensees for the rapid deployment of electronic communications networks or facilities and must prescribe additional terms and conditions for such licences <b>as well as the penalties and sanctions in cases of non-compliance.</b>”</p>



## 2. COMPLIANCE WITH UNIVERSAL SERVICE OBLIGATIONS

*The history of the universal service obligations*

- In 1993, the licences awarded to South Africa's fixed-line operator Telkom and the then two mobile operators Vodacom and MTN all included universal service obligations.
- South Africa's Universal Services and Access Obligation (USAO) refers to a state objective to provide broad public access to information and communication technologies (ICTs) to ensure the provision of services to rural, remote, and lower-income users who would not, in the absence of such policies, be served. Universal service and universal access are both regulated in order to facilitate full access to modern technologies, to promote economic development, and to eliminate current disparities between rural and urban areas.
- The Universal Service and Access Agency of South Africa (USAASA) was established, established through the Electronic Communications Act, No 36 of 2005, to push things along and the Independent Communications Authority of South Africa (ICASA) imposed and administered universal service and access obligations to be observed by some licensees. All licensees were required to contribute a percentage of their revenue from licensed services to the Universal Service and Access Fund, administered by the agency and to be used to reach universal access and service goals.



## 2. COMPLIANCE WITH UNIVERSAL SERVICE OBLIGATIONS

*The current shortcomings of the universal service obligations (USAO)*

- In 1993 Vodacom and MTN were placed under obligation to install 22 000 and 7 500 community service phones, respectively, in under-serviced areas within stipulated geographic limits, at a low community service tariff, over the 5-year period 1997 – 2002. Later, extra stipulations were levied, per operator, for the provision of 1 250 000 SIM-card connection packages, 125 000 handsets, 140 institutions for people with disabilities provided with Internet access over three years, and 5 000 public schools provided with Internet access over eight years, subject to approval of an implementation plan. Cell-C was issued a licence in 2001 with an obligation to provide 52 000 community service telephones over seven years.
- Weaknesses to USAO policy fall within the realms of its implementation, including:-
  - A lack of coordination and cooperation within national and provincial departments as well as with ICASA;
  - The lack of an integrated approach towards the policy between government and the operators, and between the operators themselves;
  - A lack of effective regulatory governance as well as monitoring or evaluation of USAO for mobile network operators during implementation. To date no Regulatory Impact Assessment (RIA), ever been used by ICASA in respect of the USAO initiative.



## 2. COMPLIANCE WITH UNIVERSAL SERVICE OBLIGATIONS

*The current shortcomings of the agency administering the universal service obligations*

- SUMMARY OF USAF 2016-2017 PERFORMANCE (USAASA)
- The Fund's achieved annual performance against the planned annual targets in the 2016-2017 approved Annual Performance Plan was one (1) of the three (3) planned targets was achieved, being 33% of the total planned targets, and two (2) of the three (3) planned targets were not achieved, being 67% of the total planned annual targets.
- Irregular expenditure incurred by not following the appropriate bidding processes amounted to R530 million, out of a grant of R645 million from the department of Telecommunications and Postal Services
- A surplus of R656 million was incurred by the USAASA, as a result of underspending on the subsidisation of the set-top boxes.
- Cash equivalents of R1,8 billion is mostly held in short term deposit in addition to inventories relating to Broadcast Digital Migration amounting to R662 million.
- Conclusion: There are cash and other resources that could be used to drive transformation in the sector and the development of black-owned SMMEs



## 2. COMPLIANCE WITH UNIVERSAL SERVICE OBLIGATIONS

### BBC Proposal on USOs

- The BBC proposed that the Department address the following issues in the suite of bills that are to follow and strengthening the overall framework within the ECA for the universal service obligations:
- The mandate of the fund (USAF) should be changed to focus on the development of black-owned companies and SMMEs to drive the universal access obligations of the different players within the sector. The sources of funds shall be from:
  - the licensing fees of the operators within the sector,
  - the fines for not meeting the USO obligations and
  - Grants from government
- The application of the sourced funds shall be ring-fenced within the sector. The precedent set for this arrangement stems from the construction sector where the fines arising from collusion between the construction companies in the build-up to the 2010 World Cup was ring-fenced into a fund for the development of the SMMEs and for transformation of the sector.
- Transparency is critical for the accountability of how these funds are used to meet the policy needs of government. The BBC would like the regulations to detail the transparency requirements in detail, and ensure that the proposed ECA will anchor and give teeth to such transparency requirement.



## 2. COMPLIANCE WITH UNIVERSAL SERVICE OBLIGATIONS

### BBC Proposal on USOs

- Enforcement of the universal service obligations is a critical part of achieving the objects of the ECA and driving radical economic transformation in South Africa. It is therefore critical to provide the regulators with the following
  - clarity of determining and quantifying these obligations,
  - Monitoring the implementation of these obligations by the licence holders
  - Mechanisms of enforcing deviations from the licencing conditions
  - The levying of significant fines and penalties that relate to the non-performance, violation or not meeting targets relating to the USOs



## 2. UNIVERSAL SERVICE OBLIGATION PROPOSALS

ECA Bill Elements	Current amendment	Proposed Amendment
<p><b>Amendment of section 8 of Act 36 of 2005</b></p>	<p>(d) by the insertion of the following subsection after subsection (4):            "(4A) The Authority must review the regulations contemplated in subsection (4) at least every five years and the review must include an assessment of—            (a) the appropriateness of target levels set in universal service and universal access obligations;            (b) the timelines set for achieving such targets;            (c) the level of service to be provided; and            (d) mechanisms to enforce compliance, including reporting frameworks.";</p>	<p>(d) by the insertion of the following subsection after subsection (4):            "(4A) The Authority must review the regulations contemplated in subsection (4) at least every five years and the review must include an assessment of—            (a) the appropriateness of target levels set in universal service and universal access obligations;            (b) the timelines set for achieving such targets;            (c) the level of service to be provided; <del>and</del>            (d) mechanisms to enforce compliance, including reporting Frameworks;  <u>(e) The socio-economic and transformation impact of the universal services and universal access obligations;</u>  <u>and</u>  <u>(f)The penalties and sanctions to applied in cases of non-compliance."</u></p>



### 3. FUNDING ISSUES WITHIN THE SECTOR

Funding challenges faced by black businesses in the sector

- Funding remains a perennial barrier to entry in the sector due to the infrastructure investment required to participate in the different parts of the value chain. The lack of funding instruments from the private sector sources to allow new entrants, black owned companies, and SMMEs results in the monopolistic status quo being maintained. Furthermore the lack of market access for new entrants makes their entry into the sector non-bankable from investors and other funders thus delaying the levelling of the playing field. The capital-intense nature of the ICT sector and the lack of funding for new entrants, black-owned companies and SMMEs leaves them relegated to providing support services but not the services within the core value chain of the sector.
- The BBC welcomes the ECA Bill's open access principles as they would alleviate the hoarding of infrastructure by the existing dominant players. This then ensures that supply of services and infrastructure is not artificially manipulated to entrench the existing players.
- The use it or lose principle is welcomed, along with the principled exceptions granted for its relaxation.



## 3. FUNDING ISSUES WITHIN THE SECTOR

Proposal to address the funding challenges faced by black businesses in the ICT sector

- The ECA must be amended to give rise to a fund focusing on the facilitation of entry for new entrants, 51% black-owned companies and SMMEs, in the same way that the Universal Service Obligations were housed in a fund to expand universal access.
- The focus of the fund would include the following:
- Funding of infrastructure in the areas where there is none, and where no duplication of infrastructure is likely to occur.
- Subsidization of the cost of services provided by 51% black-owned companies in order to widen access to people in areas where they may be underserved and where they may not have the economic ability to pay for services.
- Providing financial and operational capacity to black companies in order to allow them to access the previously un-accessible parts of the ICT sector value chain.
- Funding of skills development, both soft and core, for the black entrepreneurs in order to participate across the ICT sector value chain
- Provide a collective vehicle for licensees to contribute to their enterprise and supplier development funds for black-owned companies in the ICT sector
- Provide a link towards the establishment of Black Industrialists within the value of the ICT sector.



## 4. WIRELESS OPEN ACCESS NETWORK

### Establishment of the Wireless Open Access Network

- The establishment of the Wireless Open Access and the allocation of the individual electronic communications network service licence and a radio frequency spectrum licence is welcomed.
- As the ECA Bill empowers the Minister to provide policy direction to the Authority to issue an invitation to apply for the Wireless Open Access Network licences, it is imperative for the key terms and conditions to include the 51% black ownership requirement.



## 4. WIRELESS OPEN ACCESS NETWORK PROPOSALS

ECA Bill Elements	Current amendment	Proposed Amendment
<b>"CHAPTER 3A WIRELESS OPEN ACCESS NETWORK</b>	<p>(3) The Minister may issue a policy direction to the Authority in terms of section 5(6) to issue an invitation to apply for the Wireless Open Access Network licences after—</p> <p>(a) the Authority has made recommendations on the terms and conditions including universal service and access obligations which will apply to the Wireless Open Access Network as contemplated in section 31A and 31E; and</p> <p>(b) the Minister has considered incentives that will apply as contemplated in subsection (4).</p>	<p>(3) The Minister may issue a policy direction to the Authority in terms of section 5(6) to issue an invitation to apply for the Wireless Open Access Network licences after—</p> <p>(a) the Authority has made recommendations on the terms and conditions including <b>51% black-ownership requirement</b>, universal service and access obligations which will apply to the Wireless Open Access Network as contemplated in section 31A and 31E; and</p> <p>(b) the Minister has considered incentives that will apply as contemplated in subsection (4).</p>



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# SECTION B: ISSUES REQUIRING CLARITY



## ISSUES THAT REQUIRE CLARITY

Issues requiring Clarity	Analysis of the above scenario
<b>SMMEs</b>	<ul style="list-style-type: none"><li>• The definition of SMMEs is seemingly not found in the Bill nor the ICT Sector Code. This may make it difficult to determine how the objectives of the ECA are measured, monitored and achieved.</li><li>• The ICT Sector Code also does not provide SMME thresholds to be applied to SMMEs, which therefore means that provides for<ul style="list-style-type: none"><li>• Exempted Micro-Enterprises that have less than R10 million revenue;</li><li>• Qualifying Small Enterprises that have less than R50 million revenue and greater than R10 million revenue</li></ul></li></ul>
<b>Powers of the Authority</b>	<ul style="list-style-type: none"><li>• One of the objectives of the ECA is to enforce transformation within the sector. The challenge in the past was the lack of teeth from regulators in enforcing transformation.</li><li>• The power of the Authority to enforce the ICT Sector Code implementation versus the BBBEE ICT Sector Council role needs to be clarified in order to avoid duplication of powers.</li><li>• The BBC's view is that the Authority should have power that supersedes the BBBEE ICT Sector Council if there is confusion on the application of transformation provision or initiatives.</li></ul>
<b>Alignment to other legislations</b>	<ul style="list-style-type: none"><li>• The provisions of the ECA bill will have consequences on other existing legislation under the control of the department in light of the other amendment bills in the pipeline such as the Digital Development Fund, the SMME Strategy, etc. How are the principles going to be aligned in order to avoid inconsistencies require an engagement</li></ul>



## Proposed addition

Page 70, Subsection 4. Addition of paragraph (f) as follows “The authority to publish the periodic market review findings against international norms and standards in relation to end consumer prices including any findings regarding anticompetitive behaviours identified”



## CONCLUSIONS

- The BBC appreciates the opportunity to engage with the Department of Telecommunications and Postal Services and respond to the issues that affect the transformation of the ICT Sector.



**BLACK BUSINESS COUNCIL**

THANK YOU