COMMENTS BY ICASA ON THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL 2017

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A. Introduction

The Authority is grateful to the Department of Telecommunications and Postal Services ("the Department") for their tireless efforts in developing the Electronic Communications Amendment Bill (the "Bill"). Further, the Authority is thankful for being afforded this opportunity to comment and express its views and opinions on Electronic Communications Amendment Bill (the "Bill").

We set out below our comments in this regard structured in two parts:

Part A – General Principle Comments

Part B – Specific Comments on the proposed amendments.

PROPOSED AMENDMENTS TO ICASA ACT

We note that, save for the amendments relating to the B-BBEE Sector Code, which in our view should be spearheaded by the Minister of Communications, the Bill purports to amend other provisions of the ICASA Act and ICASA's functions without listing same in the schedule of the repealed statutes.

To this end, it is our submission that the processes to amend the ECA and ICASA Act should run parallel to ensure alignment thereof.

INDEPENDENCE OF THE REGULATOR

Section 3(3) of the Independent Communications Authority of South Africa Act (Act No. 13 of 2000) ("the ICASA Act") clearly stipulates that ***"the Authority is independent and only subject to the Constitution and the law…"***

Section 3(4) of the Electronic Communications Act (Act No. 36 of 2005) (ECA) stipulates that ***"the Authority or the Agency, as the case maybe, in exercising its powers and performing its duties in terms of this Act and the related legislation must consider policy made by the Minister in terms subsection (1) and policy directions issued by the Minister in terms of subsection (2)."*** Section 4(3A) of the ICASA Act places the same requirement on the Authority.

The Authority is therefore compelled to consider the provisions of the Constitution, ICASA Act, underlying statutes and other laws of general application prior to executing or not executing a policy direction. The Authority is a creature of statute and subject only to the law.

In **Minister of Telecommunications and Postal v Acting Chairperson, ICASA**,[1] the court established that the Authority is independent body created by the ICASA Act to be governed by it and other underlying statutes and as an independent body it had to "consider" the policy and policy directions when performing its functions and exercising its power within the ambit of its empowering legislation. The court held that the Authority has a duty to take national policy into account when considering its own decisions but that the Minister's substantive ideas in a policy or policy direction do not bind the Authority. In this regard, though the Authority is not bound to act on the policy direction, it is duty bound to consider such policy. More importantly, the Court held that the Authority's failure to consider the Minister's policies was plainly at odds with the statute as such both parties are compelled to be open to the idea of the other.

In relation to the binding nature of a policy, the Constitutional Court in **Electronic Media Network Limited and Others v E.tv (Pty) Limited and Others** held that "…The same law that binds both the Minister and the relevant agencies provides essentially that USAASA may "consider" the impugned policy. It is known not to be binding in terms of the law that gives ICASA or USAASA the power to be exercised with reference or due regard to that policy. In other words, before they can have regard to or apply the impugned policy in terms of their statutory powers, the agencies must first determine what that self-same statute says about the binding effect of that policy. **And the statute makes it abundantly clear that they need only consider the policy**."[2] (own emphasis)

Regarding the independence of ICASA, the Constitutional Court held that "Section 192 of the Constitution has got very little, if anything, to do with the Minister's exercise of her policy-making powers. **It explains the existence of ICASA, the constitutional**

[1] Case No 2016/59722, para 31, 32.
[2] [2017] ZACC 17, para 34

obligations it bears and the guarantee of its independence. Properly understood, this provision informs us that ICASA is an independent authority whose mandate is to regulate broadcasting for the good of the public. When unfair reporting or a biased or inexcusable exclusion of some views happens, it is to ICASA that any aggrieved party may turn to lodge a complaint for possible intervention. ICASA is also constitutionally enjoined to level the broadcasting playing-field so that a diversity of views that broadly reflects the thinking of South African people, as opposed to one-sided propaganda-like narratives, may find expression."[3] (own emphasis)

It is our submission that any proposal which purports to require the Authority to implement policies and policy directions, without requiring the Authority to think carefully before deciding on same, infringes on the Authority's independence and therefore, unconstitutional and in contravention of section 192 of the Constitution and section 3(3) of the ICASA Act.

The Authority submits that the independence of the regulator in this sector is of cardinal importance, to not only give the policy credibility, or because it is the right thing to do (constitutionally), but also to honour the country's international commitments and the highest law of the land. In this regard, it is necessary to consider South Africa's commitments to the international world, through multilateral trade agreements as well as bi-lateral investment agreements. Accordingly, any legislative provisions which seek to afford the executive powers over the functioning of the regulator should be guided by, *amongst others*, the WTO Fourth Protocol[4]. According to the Reference Paper, the regulatory agency must be "separate from, and not accountable to, any supplier of basic telecommunications services". Furthermore, ITU Best Practice Guidelines regarding the independence of regulators stipulates that the regulator must be independent:

- from operators and industry players
- from any other industrial interests

[3] *Ibid*, para 70.
[4] https://www.wto.org/english/tratop_e/serv_e/4prote_e.htm

- from the state and political actors like Ministers in relation to day to day activities and operations related to their mandates.

It is the Authority's view that the independence of the regulator extends not only to broadcasting matters, but to all ICT, which is inclusive of broadcasting related matters in the broad sense.

We would therefore like to re-emphasise that South Africa has obligations imposed on it in terms of WTO agreements as a signatory and that the Authority is an independent institution in terms of section 192 of the Constitution.

SPECTRUM MANAGEMENT

Regarding spectrum management, we have noted the proposal for the Authority's functions to be limited to administering, managing spectrum assignment, licensing, monitoring and enforcement of spectrum. We have also noted the proposal for the establishment of the National Radio Frequency Spectrum Planning Committee[5] – to ensure fairness and equitable distribution of radio frequency spectrum; and National Radio Frequency Spectrum Division within the Department – to coordinate the work of the National Radio Frequency Spectrum Planning Committee.

In our understanding of the ECA, spectrum management consists of spectrum planning, spectrum assignment, licensing and monitoring. Section 4(3)(c) of ICASA Act stipulates that "the Authority **must control, plan**, administer and manage the use and licensing of the radio frequency spectrum in accordance with bilateral agreements or international treaties entered into by the Republic." (own emphasis) Section 24 of the ICASA Act stipulates ***"in the event of any conflict between the provisions of this Act and any other law, except for the Constitution, relating to the regulation of broadcasting, electronic communications and postal service, the provisions of this Act prevail."***

The Authority strongly submits that it is best situated to continue to manage spectrum, as an independent regulator. The independence of ICASA is provided for in the Constitution (section 192) and in its founding legislation (the ICASA Act). Furthermore, a range of international agreements and protocols to which South Africa is a signatory, including the agreements reached in the World Trade Organisation ("WTO") confirm the need for regulatory independence. South Africa submitted a final schedule of telecommunication sector commitments in 1998 under the WTO Fourth Protocol to the General Agreement on Trade in Services ("GATS"). In terms thereof, South Africa made certain commitments including the establishment of an independent regulator that will amongst others manage scarce resources. The proposed amendments - to the extent that they seek to diminish the Authority powers

[5] The Committee will be established by the Minister of Telecommunications and Postal Services who is a government shareholder representative in licensees that are utilising spectrum. Further, it is to be noted that it would not be legally sound for the Minister to act as a player in the ICT Sector while being a referee at the same time.

in relation to management and control of radio frequency spectrum - are inconsistent with and in breach of, the country's international commitments in this regard.

WIRELESS OPEN ACCESS NETWORK, HIGH DEMAND SPECTRUM AND RETURN OF SPECTRUM

The Bill proposes that unassigned high demand spectrum must be assigned to the Wireless Open Access Network (WOAN) following a policy direction issued by the Minister. The Bill also requires the Authority to ensure that an individual electronic communications network service licence and a radio frequency spectrum licence is issued to a WOAN. The Bill further requires the Authority to conduct an inquiry and make recommendations to the Minister on the terms and conditions under which the individually assigned high demand spectrum will be returned to the Authority.

The National Integrated ICT White Paper states that "Spectrum, in this market, constitutes a bottleneck. It is therefore important that, in line with the principle of openness, a shared approach to spectrum use is taken. This approach reduces duplication and the inefficiency that arises from the building and operation of multiple networks. It also encourages service based competition in a way that the current oligopoly does not."[6] The establishment of the WOAN and the re-assignment of all high demand spectrum to the WOAN is aimed at addressing the Minister's concern over an oligopoly – a highly concentrated market where only a few firms dominate. It is our submission that the WOAN would not be the appropriate vehicle to address these concerns. In our view, this is particularly important when considering that one of the objects of the ECA is to promote competition within the ICT Sector.[7]

The Authority recommends that other alternatives to the WOAN model such as infrastructure sharing to enhance competition and increase broadband coverage in South Africa, should be considered.

Although the Authority can see the value in creating a WOAN as one of many licensees in the market, the creation of a monopolistic WOAN as envisaged, is contrary to the principles of fair competition, the stimulation of investment and

[6] National Integrated ICT Policy White Paper, Gazette No. 40325 of 3 October 2016, p70.
[7] Section 2(f) of the ECA.

technological advancement. Again, the concern regarding an independent regulator being responsible for licensing arises. In substance, the Bill seeks to appropriate the powers to licence the WOAN to the Minister with the Authority merely being the conduit to give effect to such licensing[8]. In licensing a WOAN, the Authority is obliged to adhere to the legislative process as outlined in section 9 of the ECA, which includes the publication of an Invitation to Apply (ITA).

Section 25 of the Constitution protects private property from expropriation and requires any confiscation be compensated by the state. Expropriation of the property must be authorised by the law and must be rational. As indicated above, the Bill requires the Authority to conduct an inquiry and make recommendations to the Minister on the terms and conditions under which the individually assigned high demand spectrum must be returned to the Authority. In our view, the requirement that the individually assigned spectrum be returned (with the Authority merely required to stipulate the terms, conditions and time frames for such return) amounts to expropriation of the licensee's rights to or rights of use of the assigned spectrum. In terms of section 25(2) of the Constitution, expropriation may only take place in terms of a law of general application for a public purpose or in the public interest and on payment of compensation. The Bill does not provide for the compensation. Unless legislation is enacted which provide adequate compensation as a condition for the return of spectrum, any attempt to enforce the return of high demand spectrum, prior to the expiry of the licence period, would amount to unlawful expropriation of property.

COMPETITION MATTERS

The Authority notes that the Bill proposes that the Authority and the Competition Commission should **"*align their decisions, approvals or recommendations to the extent possible*."**

The Authority believes that it should make its *ex ante* market decisions and determinations independently. To this end, although cooperation between the Authority and the Commission is supported, the decisions between the two bodies

[8] See section 19A (1) read with 19A (4)

should not be aligned, as they each have different mandates. The proposed insertion infringes on the Authority's independence and is therefore, unconstitutional as it is a contravention of section 192 of the Constitution and section 3(3) of the ICASA Act.

COLLABORATION WITH THE COMPETETION COMMISSION

In its interaction and/or collaboration with the Competition Commission ("the Commission"), the Authority has experienced some challenges when assessing mergers and acquisitions over which the Authority has concurrent jurisdiction with the Commission.

The first issue is that of duplication of resources when the Authority conducts a competition assessment and the Commission has assessed same relying on documents and information that is not available to the Authority. To this end we are of the view that either regulatory institution should be able to use the findings of the other only to the extent of assisting it in its inquiry.

A second but related issue is that of forum shopping by applicants seeking approvals relating to mergers and acquisitions falling within the jurisdiction of the Authority and the Commission. Should the party applying for an approval from the Commission deem the documents in the possession of the Commission as confidential, the Authority undergoes a lengthy process to attempt to obtain the documents. In most instances, the Authority ultimately does not gain access as the applicant's claims of confidentiality supersedes a request for access. This can be addressed by making it mandatory for the Commission to avail information to a regulatory body when that body is also considering the same transaction and would therefore rely on the same information that may be in the possession of the Commission.

Although the Authority is required to make an independent determination on any matter, access to the relevant information should be made available to the Authority where it is established that both the Authority and the Commission are assessing the same transaction, without having to refer the matter to the parties first for them to waive confidentiality. In our view, a request for confidentiality that has been made to the Commission, if granted, should not have the scope to exclude the Authority. This

will also ensure that the competition assessment is done promptly without any delays by the Authority.

OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUPS AND THE APPLICATION OF THE ICT SECTOR CODE IN THE ICT SECTOR

The Authority is committed to promoting ownership by Historically Disadvantaged Groups, as well as broad-based black economic empowerment. The Authority notes that the Bill seeks to compel the Authority to develop regulations regarding the implementation of the BBBEE ICT Sector Codes while section 4(3)(k) of the ICASA Act affords the Authority the discretion on whether to develop such regulations.

Section 24 of the ICASA Act stipulates ***"in the event of any conflict between the provisions of this Act and any other law, except for the Constitution, relating to the regulation of broadcasting, electronic communications and postal service, the provisions of this Act prevail."***

Therefore, it is our submission that the proposed section 8A of the Bill should be revised to confer discretionary powers to the Authority to prescribe the regulation envisaged therein.

RAPID DEPLOYMENT OF ELECTRONIC COMMUNICATIONS NETWORKS AND ELECTRONIC COMMUNICATIONS FACILITIES

The Authority notes that the Bill proposes that the Minister of Telecommunications and Postal Services must establish a Rapid Deployment National Coordinating Centre, which must support and facilitate rapid deployment of electronic communications networks and interface with local municipalities to fast track rights of way and way-leave approvals. The Bill also requires the Authority to prescribe the regulations which provide for procedures and processes for resolving disputes that may arise between an electronic communications network service licensee and any landowner.

The Authority does not have any powers to regulate non-licensees or landowners. Therefore, it becomes difficult to develop and enforce dispute resolution regulations

for persons that are not licensees. It is our submission that the function of resolving disputes should be carried out by the National Co-ordinating Centre.

B. Specific Comments on the Bill

We now turn to deal with certain sections of the Bill *seriatim*.

AD SECTION 1 (DEFINITIONS):

We would like to make a recommendation to the Department that it should were possible, align its definitions to those of the ITU definitions for purposes of consistency and to avoid confusion.

Allocation:

1. The purpose of a definition is to describe what is meant by a word. The proposed new definition simply attempts to grant the Minister powers through a definition, to which such powers the Minister already has as per section 34(1)(a) of the ECA.

2. We therefore propose that the definition of "allocation", as currently reflected in the ECA, not be amended.

Broadband:

3. The proposed definition effectively requires the Authority to make a recommendation to the Minister of Telecommunications and Postal Services ("the Minister") about minimum download speed.

4. To develop recommendation(s) to the Minister, the Authority would have to engage in a consultation process with the relevant stakeholders, which would probably take a period of about 6 months to conclude.

5. It is therefore our recommendation that the word "annually" be substituted with the word "periodically" or "biennially"[9].

[9] Every 2nd year

Essential facility:

6. In the revised Bill it states that the Authority is responsible for prescribing international standardisation organisation open system interconnection model layers 2 or 3; this is not possible since this is an international standard (ISO) and cannot be prescribed by the Authority.

General open access principles:

7. The difficulty herein is that there is no universal accepted definition of "open access". Therefore, the Bill needs to define "open access" in order to avoid ambiguity and confusion.

8. Furthermore, the definition incorporates the term "effective"; it is not clear what effective means and who is responsible for determining effectiveness.

High demand spectrum:

9. The Act as is currently worded, empowers only the Authority to be the responsible institution to assign radio frequency spectrum. The Authority will therefore be in a better position to determine whether radio frequency spectrum is in demand or whether radio frequency spectrum is fully assigned.

10. Consequent to the above, we propose that the definition be reworded to read as follows:

    "High demand spectrum" *means spectrum where demand for access to the radio frequency spectrum resource exceeds supply, or radio frequency spectrum is fully assigned, as determined by the Authority;"*

Persons with disabilities:

11. Currently there is still a debate as to whether the word "ICT" includes broadcasting. To create certainty in the Bill or amended ECA, we propose that the definition be reworded to read as follows:

"***"persons with disabilities"*** *means persons with long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers hinder their full and effective use of electronic communications and broadcasting devices, services and technologies on an equal basis with others;*"

Radio Frequency Spectrum Sharing:

12. The ECA defines "assignment" as ***"authorisation given by the Authority for a radio station to use a radio frequency or radio frequency channel under specified conditions…"***

13. We therefore recommend that the word "allocated", in the definition of "Radio Frequency Spectrum Sharing", be substituted with the word "assigned".

Radio Frequency Spectrum Trading:

14. It is important to note that no licensee can transfer ownership or control, sell, lease or sub-let radio frequency spectrum as it is national asset which it does not own. However, a licensee can transfer, sell, lease or sub-let rights held under a radio frequency spectrum licence.

15. We therefore propose that the definition be reworded to read as:

    ""***radio frequency spectrum trading"*** *means the transfer, by a licensee, of ownership or control of the rights, in full or in part, held under a radio frequency spectrum licence by way of a sale, lease or sub-letting to a third party;*"

Radio Frequency Spectrum Refarming:

16. In ITU table of entry of Allocations and South African National Frequency Band Plan, Radio Frequency Spectrum is allocated for services and not technologies.

17. We therefore recommend that the word "technology", in the definition of "Radio Frequency Spectrum Refarming", be substituted with the word "services".

AD SECTION 2 (OBJECT OF ACT):

Section 2 (a):

18. The proposed amendment/insertion to section 2(a) is a policy statement, we thus recommend that the wording in the ECA be left unchanged.

Section 2 (cC):

19. As already alluded to in paragraph 8 above, it is unclear what the term "effective" means and it's also not clear who is responsible for determining effectiveness.

Section 2 (i):

20. In this regard, we would like to reemphasise our submission in paragraph 11 regarding the debate as to whether broadcasting is included in the term "ICT". We believe that the definition of the term "ICT" is inclusive of broadcasting.

21. The section as is currently proposed, gives the impression that innovation is limited to services and that research and development is separate from services. We therefore recommend that the objective read as follows:

"*(i) encourage research, development and innovation within the ICT sector;*"

Section 2 (p):

22. It is our considered view that by developing and promoting SMMEs, one is facilitating their market entry. Therefore, the proposed insertion is a duplication of what is already stated or provided for.

AD SECTION 3 (MINISTERIAL POLICIES AND POLICY DIRECTIONS):

Section 3(2) (bB):

23. The proposed section as it currently reads creates confusion using the word "or" twice. We thus propose that the section reads as follows:

> *"(bB) universal service or universal access obligations, having identified any access gaps;"*

AD SECTION 4 (REGULATIONS BY AUTHORITY):

Section 4(1A):

24. Section 3(4) of the ECA stipulates that ***"the Authority or the Agency, as the case maybe, in exercising its powers and performing its duties in terms of this Act and the related legislation must consider policy made by the Minister in terms subsection (1) and policy directions issued by the Minister in terms of subsection (2)."***

25. The term "consider" means think carefully about (something), typically before deciding.[10] The Authority is therefore duty bound to consider all applicable policies and laws and more specifically the policy directions made in terms of section 3(4) in executing its mandate. Such consideration by the Authority must - by necessity and in line with the principle of legality - also consider the provisions of the Constitution, the ICASA Act, underlying statutes and other laws of general application.

26. It is therefore our considered view that subsection (1A), in requiring the Authority to blindly follow policy directions issued by the Minister, is in fact unconstitutional and is in contravention of section 192 of the Constitution and section 3(3) of the ECA.

27. It is our recommendation that subsection (1A) be removed in its entirety.

AD SECTION 9 (BROAD-BASED BLACK ECONOMIC EMPOWERMENT):

[10] https://www.google.co.za/?gws_rd=ssl#safe=active&q=consider+meaning&spf=1500217747096

28. Section 4(3)(k) of the ICASA Act does not prescribe an applicable percentage for BBB-EE, but allows the Authority to develop Regulations with respect to BBB-EE. We suggest a rewording of section 9 as follows:

"*(b) include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as prescribed by Regulations contemplated under section 4(3)(k) of the ICASA Act.*"

AD NEW INSERTION - CHAPTER 3A (WIRELESS OPEN ACCESS NETWORK):

Section 19A:

29. Subsection (1) of section 19A of the Bill proposes that the Authority must ensure that a WOAN is licensed, whereas subsection (3) stipulates that the Minister may issue a policy direction to the Authority in terms of section 5(6) of the ECA. In our view, the aforementioned subsection is contradictory to one another in that one subsection makes it peremptory for ICASA to licence a WOAN, whereas the other subsection gives the Minister a discretion to issue a policy directive.

30. Further to the above, subsection (1) and (3) seems to create the impression that the Authority must licence a WOAN irrespective of whether the regulatory and legislative requirements have been complied with by the respective applicant(s).

31. The licensing of an individual ECNS (IECNS) licence is undertaken by the Authority in terms of section 9 of the ECA. Section 5(6) of the ECA provides that the Authority may only issue an ITA for an IECNS licence in response to a policy directive from the Minister.

32. Since the Authority is the licensing authority, it stands to reason that the Authority would be the one to consider incentives that may be granted in licensing the

WOAN, considering the Minister's policy directives in this regard. We therefore recommend that section 19A be amended considering our comments above.

33. We have also noted the provisions of subsection (2)(b)(i) which refers to "active infrastructure sharing" and "radio access network sharing". We recommend that the aforementioned terms be defined.

AD CHAPTER 4 (RAPID DEPLOYMENT OF ELECTRONICCOMMUNICATIONS NETWORKS AND ELECTRONIC COMMUNICATIONS FACILITIES):

Section 20C:

34. As the Department is already aware, the Authority does not have any powers to regulate non-licensees; we therefore do not see the value of developing dispute resolution regulations for persons that are not licensees.

35. It will thus be difficult, if not impossible to implement the envisaged regulations herein as any decision or recommendation by the Authority will not be binding on a non-licensee or landholder.

36. Further to the above, the Authority will require additional experts in dispute resolution and additional financial resources to establish a division for the purposes of performing this function prior or subsequent to the development of the envisaged regulations.

37. It is thus our proposal that the function of resolving disputes herein be that of the Rapid Deployment National Co-ordinating Centre, to be established.

Section 20P:

38. As already alluded to above, the Authority does not regulate land owners, as such it will be difficult to resolve disputes between licensees and landholders.

39. It is thus our proposal that the function of resolving disputes herein be that of the newly established Rapid Deployment National Co-ordinating Centre.

AD SECTION 24 (PIPES UNDER STREETS):

Section 24(1):

40. The consequence of removing the 30 days" prior written notice is that a licensee may give an unreasonably short notice to the local authority. It is thus our recommendation that the current wording in the ECA be retained.

AD SECTION 25 (REMOVAL OF ELECTRONIC COMMUNICATIONS NETWORK FACILITIES):

Section 25(8):

41. The Authority would like to reiterate the submission already made in paragraphs 34 to 39 above.

AD NEW INSERTION - SECTION 29A (FUNCTIONS OF THE MINISTER OF TELECOMMUNICATIONS & POSTAL SERVICES):

42. The contents of the new insertion/section are noted. The new insertion borrows provisions from sections 30 and 34 of the ECA. It is thus our view that instead of inserting a new section, that sections 30 and 34 of the ECA be amended accordingly to incorporate the new provisions or proposed amendments.

43. The Authority has further noted that the new insertion does not indicate the role of the Authority in developing the National Radio Frequency Plan.

44. Section 29A(d) of the Bill indicates that the Minister is responsible for the development and approval of the Plan. It is our view however that since the Minister is the one responsible for developing the Plan, it therefore stands to reason that the approver thereof ought to be a different functionary (perhaps Cabinet or Parliament). The aforementioned principle is further entrenched in the current legislative framework, section 34(2) of the ECA.

45. Currently, in terms of section 34(2) of the ECA, the Authority develops the Plan in consultation with the Department and the Department of Communications for

the Minister's approval. Therefore, the Minister still has oversight and control in the development of the Plan.

46. It is therefore our recommendation that:

    (a) Section 29A(d) be amended to the extent that Cabinet must approve the Plan; or

    (b) Section 29A(d) of the Bill be deleted in its entirety since section 34(2) of the ECA already affords the Minister oversight and control in the development of the Plan.

AD SECTION 30 (CONTROL OF RADIO FREQUENCY SPECTRUM):

Section 30(1):

47. This section refers to section 34 (Radio Frequency Plan) of the ECA, whereas this issue is now being proposed to be dealt with under section 29A of the Bill. It therefore stands to reason that the proposed amendment to section 34(1) is contrary to the provisions of section 29A of the Bill.

48. Consequent to the above, we refer the Department to our recommendation as contained in paragraph 46 above.

Section 30(2)(a):

49. The Authority would like to reiterate its submission in paragraphs 24 to 25 above; the term "consider", as per section 3(4) of the ECA, means to think carefully about (something), typically before deciding. The Authority is therefore compelled to consider the provisions of the Constitution, ICASA Act, underlying statutes and other laws of general application prior to executing or not executing a policy direction. As already alluded to above, the Authority is a creature of statute and subject only to the law.

Section 30(2)(d) and (h):

50. In light of the Department's recommendation that the Authority not be involved in the development of the National Radio Frequency Plan, it is not clear what type of planning is envisaged by the Department with regard to the planning that the Authority must undertake in so far as it relates to conversion of analogue uses of the radio frequency spectrum to digital, including the migration to digital broadcasting, in other words what is the objective of the envisaged planning?

51. The Authority recommends that the section or amendment be expanded on to clarify the type of planning envisaged herein to ensure the enforceability of this section or proposed amendment.

Section 30(5):

52. This new insertion is vague and ambiguous. In our understanding of the ECA, spectrum management consists of spectrum planning, spectrum assignment, control, licensing and monitoring.

53. The Authority recommends that this new insertion be removed or be expanded on to remove the vagueness and ambiguity thereof.

AD SECTION 31(RADIO FREQUENCY SPECTRUM LICENCE):

Section 31(8A) (a):

54. The Authority recommends that the term "passive science services" be defined to enable the Authority to implement the section.

Section 31(11):

55. The Authority believes this aspect in the Bill is an operational issue and must not be included in a national legislation.

56. The Authority does not have nor, could it have the capability and resources to develop such a system. In the 2016/17 financial year, the Authority procured an automated spectrum management system which performs the following functions:

    (a) Spectrum licensing;
    (b) Spectrum assignments;
    (c) Technical analysis;
    (d) Interference analysis;
    (e) Radio frequency propagation models; and
    (f) Type approval licensing, amongst others.

57. Consequent to the above, the Authority recommends that the subsection be deleted in its entirety.

AD NEW INSERTION - SECTION 31A (UNIVERSAL ACCESS AND UNIVERSAL SERVICE OBLIGATIONS OF RADIO FREQUENCY SPECTRUM LICENCES):

58. As the section currently reads, it applies to all spectrum licensees incl. aeronautical, maritime, alarms systems, private and community radio repeaters, fixed services, satellite services, amateur radios, community broadcasting radio and television stations, etc. majority of which are held by individuals.

59. Currently, there are over fifty (50) thousand radio frequency spectrum licensees on the Authority's data base.

60. In terms of section 31(3A) (a) of the Bill, licensees are required to renew their radio frequency spectrum annually. However, the Bill fails to consider, on average that about twenty (20) thousand licensees fail or choose not to renew their radio frequency spectrum licences. It would therefore be difficult for the Authority to impose Universal access and Service obligations that would have long term socio-economic benefit on such licensees. It is the Authority's view that the obligations only be imposed on specific categories of licensees considering market conditions and dynamics.

AD NEW INSERTION – 31E (5) (HIIGH DEMAND SPECTRUM)

61. According to section 31E (5)(a) of the Bill, the Authority may issue radio frequency spectrum licences for unassigned high demand spectrum not assigned to the WOAN on condition that the WOAN is functional.

62. The first concern that the Authority would like to point out is that the term "functional" has not been defined; it is not clear if it refers to the WOAN being licensed, profitable and/or operational?

63. Secondly, section 2 of the ECA stipulates that the primary object of the ECA is to provide for the regulation of electronic communications in the public interest and for that purpose to –

    (a) encourage investment and innovation in the communications sector;
    (b) ensure efficient use of the radio frequency spectrum;
    (c) promote competition in the ICT sector; and
    (d) promote an environment of open, fair and non-discriminatory access to services.

64. It is our view that sub-section (5)(a) has the effect of defeating the above objectives of the ECA in that its implementation may result in limited investment in the ICT sector, inefficient use of the radio frequency spectrum, promotion of a

monopoly and be detrimental to an environment of open, fair and non-discriminatory access to communications services.

AD NEW INSERTION - SECTION 34A ("NATIONAL RADIO FREQUENCY SPECTRUM PLANNING COMMITTEE AND NATIONAL RADIO FREQUENCY SPECTRUM DIVISION):

65. In terms of section 34A(2)(a) of the Bill, the Minister will establish a Radio Frequency Spectrum Planning Committee comprising of relevant Government stakeholders. The proposed section fails to indicate the criteria that the Minister will use when determining the relevant Government stakeholders.

66. It is our recommendation that the section be expanded to at least specifically indicate or mention the Government entities that will be participating in the committee; alternatively, outline the objective criteria that will be utilised by the Minister in choosing the relevant Government stakeholders to participate in the committee.

AD NEW INSERTION - SECTION 42A (SADC ROAMING):

67. Section 42A (1) of the Bill indicates that any licensee that provides international roaming to and from any other SADC country must comply with the SADC Roaming Policy Guidelines agreed to by the SADC Ministers. The question that arises however is whether there will be a legislative amendment every time when the Guidelines are amended?

68. It is our recommendation that the SADC Roaming Policy Guidelines be rather mentioned or made accessible on the website of the Department. The Authority thus recommends that the section be amended to read as follows:

"*(1) An electronic communications service licensee that provides international roaming to or from any other SADC country must adhere to the SADC Roaming Policy Guidelines agreed to by the SADC Ministers responsible for Telecommunications, Postal Services and ICTs, which must be published in a notice and also displayed on the website of the Department of Telecommunications and Postal Services."*

69. Section 42A (7) of the Bill stipulates that ***"this section applies mutatis mutandis to international roaming to any other jurisdiction"***. This section is however ambiguous and difficult to implement as section 42A is specific to its application, which is international roaming obligations of licensees with regard to SADC countries.

70. Subsection (7) seems to expand on the application of this subsection, by including other international jurisdictions, which may be interpreted to mean that the Authority must develop other regulations to deal with other international roaming agreements.

71. The Authority recommends that subsection (7) be amended to eliminate ambiguity and reflect the true intention of the Department.

AD CHAPTER 8 (ELECTRONIC COMMUNICATIONS FACILITIES LEASING):

72. The Authority notes that in Chapter 8 of the Bill, the term "electronic communications facilities leasing" is substituted for the term "open access". It further notes that the terms "open access" and "wholesale open access" are used interchangeably throughout this chapter. It is however unclear:

    (a) What the terms "open access" and "wholesale open access" mean, as neither is defined;
    (b) Whether the terms "open access" and "wholesale open access" have the same meaning for the purposes of this Bill; and
    (c) Whether the terms "open access" and "wholesale open access" have the same meaning as "electronic communications facilities leasing".

73. The Authority therefore proposes that the terms "open access" and "wholesale open access" be defined, and that their use throughout Chapter 8 of the Bill be reviewed to ensure consistency and provide clarity.

74. It is not clear whether the general access principles referred to in section 43(1) of the Bill are the same as the open access principles referred to in section 43(1B) of the Bill. We therefore propose that the wording in subsections (1) or (1B) be expanded on in order to provide the necessary clarity.

75. In terms of section 44(3A) (a), an entity will be classified as a deemed entity ***"… if any, has significant market power in such market or has an electronic communications network that constitutes more than twenty-five percent of the total electronic communication infrastructure in such market …"*** own emphasis.

76. It is not clear how the Authority is expected to calculate the total communications infrastructure market and the parameters to be considered in its calculations e.g. which infrastructure (active or passive) is used to calculate the size of the infrastructure market? It will be difficult, if not impossible, to calculate, for example, mobile operator's share of mobile infrastructure.

AD SECTION 67 (COMPETETION MATTERS):

Section 67(3A):

77. Section 67(3A) of the Bill stipulates "The Authority must, within 12 months of the coming into operation of the Electronic Communications Amendment Act …; define all the relevant markets and market segments relevant to the broadcasting and electronic communications sectors, including ICT services dependent on the use and provision of the Internet, including internet exchange points, hosting and data centre services, by Notice in the *Gazette*. The Notice must set out a schedule in terms of which the Authority will conduct market reviews of the defined markets and market segments, prioritizing those markets with the most significant impact on consumer pricing, quality of service and access by users to a choice of services and markets relevant to policy directions issued by the Minister."

78. The Authority is of the view that the 12-month period within which the Authority is required to define markets in the broadcasting and electronic communications sectors is not adequate given the lengthy consultation process required in conducting a market inquiry (in terms of section 4B of the ICASA Act read with section 67 of the ECA) to define markets. The consultation process entails the following:

(a) Publication of a notice advising that an inquiry will be conducted in due course and commencing pre-inquiry preliminary information gathering. This would take a minimum of 30 working days;

(b) One on one meetings with relevant stakeholders;

(c) Formal commencement of the inquiry in terms of the ICASA Act and publication of a Discussion Document for public comment. The ICASA Act requires this to be published for a minimum period of 45 working days;

(d) Second session of one on one meetings with relevant stakeholders;

(e) Publication of a Draft Position Paper for public comment for a minimum period of 45 working days;

(f) Holding of public hearings 30 working days after receiving written submissions on the Draft Position Paper;

(g) Publication of the final draft Position Paper for final comments; and

(h) Publication of the final position paper.

79. It is not clear to the Authority why these markets to be defined should include "ICT services dependent on the use and provision of the Internet, including internet exchange points, hosting and data centre services". This appears to be presumptive or prejudging the outcome of this process.

80. It is our recommendation that the Department define what "significant impact on consumer pricing, quality of service and access by users" is to avoid confusion or ambiguity.

81. In light of our comments in paragraphs 77 to 80, the Authority proposes that section 67 (3A) be reworded as follows:

"*(3A) The Authority must, within 24 months of the coming into operation of the Electronic Communications Amendment Act …; define all the relevant markets and market segments relevant to the broadcasting and electronic*

communications sectors by Notice in the Gazette. The Notice must set out a schedule in terms of which the Authority will conduct market reviews of the defined markets and market segments taking into consideration the policy directions issued by the Minister."

Section 67 (3B):

82. Section 67(3B) stipulates "The Authority must thereafter at least every three years review and update the market definitions and schedule in terms of which the Authority will conduct market reviews by Notice in the Gazette to among other things assess the impact of convergence on existing market definitions."

83. It is not clear why the Department singled out or selected assessment of "the impact of convergence on existing market definitions" as the review of the defined markets will in any event consider, among other, changes in technological developments, demand and supply substitutes, etc.

84. The Authority therefore proposes that section 67 (3B) be reworded to read as follows:

"(3B) *The Authority must thereafter at least every three years" review and update the market definitions and schedule in terms of which the Authority will conduct market reviews by Notice in the Gazette."*

Section 67 (4B):

85. The Authority notes that its powers have been extended herein to include non-licensees. However, the provisions herein will be difficult to implement without a penalty provision. We therefore propose that section 74 of the ECA be amended to include the following new insertion after subsection (5):

"*(6) Failure or refusal, by any person -other than a licensee- to provide information as required in terms of section 67(4B), constitutes an offence and the person is liable to imprisonment for a period of not less than 3 weeks and not exceeding 3 months."*

Section 67 (4C):

86. Section 67(4C) stipulates that "A market review under this Chapter shall not take longer than 12 months."

87. As outlined in paragraph 78 above, the processes required in undertaking a market review process would take more than 12 months depending on the complexity of the market under review. The Authority therefore proposes that section 67(4C) be reworded to read as follows:

"*(4C) A market review under this Chapter shall not take longer than 24 months."*

Section 67 (8)(d):

88. In terms of section 67(8)(d) stipulates "Where, on the basis of such review, the Authority determines that the appropriate market or market segment have changed as contemplated in subsection (3A) or (3B) the Authority must revoke the applicable pro-competitive conditions applied to that licensee and conduct a market review of the changed market or market segment in accordance with the Schedule contemplated in subsection (3A)."

89. It is not clear to the Authority what the purpose of this section is as it appears to be a repetition of sections 67(8)(b) and (c). We therefore propose that section (8)(d) of the Bill be deleted in its entirety as all elements of the section have been catered for in section 67(8)(b) and (c) of the Bill.

Section 67 (8A):

90. In terms of section 67(8A) "The Authority must regularly advise the Minister on expected market trends in the industry and on the impact of policy and legislation."

91. The Authority recommends that the Department specify the time period in order for the Authority to make provision for this "advice" in its annual plan. We therefore propose that section 67(8A) of the Bill be reworded to read as follows:

" *(8A) The Authority must advise the Minister annually on expected market trends in the industry and on the impact of policy and legislation.*"

Section 67 (13):

92. In terms of section 67(13) ***"the Authority must perform the market definition and market review proceedings under this Chapter, after consultation with the Competition Commission."***

93. The Authority is of the view that this section is superfluous as the Authority may ask for and receive from the Competition Commission, assistance or advice on relevant proceedings of the Authority in terms of section 67(11) of the ECA. Additionally, the Authority is of the view that this would further lengthen the market review consultation process.

Section 67B (2):

94. The Authority notes the proposed insertion requiring the Authority and the Competition Commission to ***"align their decisions, approvals or recommendations to the extent possible."***

95. The Authority is concerned that this section creates a perception of bias and collusion between the Authority and the Competition Commission. This could result in the parties to transactions envisaged in this section of the Bill, not having confidence in the objectivity of the decisions taken by the Competition Commission and/or the Authority. We further note that the alignment of the processes and decisions envisaged in this section, would be catered for in the agreement of concurrent jurisdiction required in terms of section 67A (2) of the Bill.

96. We therefore propose the deletion of section 67B (2) of the Bill in its entirety.

AD SECTION 69 (CODE OF CONDUCT, END-USER AND SUBSCRIBER SERVICE CHARTER):

97. We note in terms of the proposed amendments that, in terms of subsections (1) and (3), the Authority is required to review and update the Regulations every two years. We are of the view that the two years is too short to undertake a review of the impact of the Regulations. The Authority therefore proposes that the review period be at least three years.

98. Further to the above, it is important to note that a review does not necessarily result in a new Regulation or amendment of a Regulation. We therefore recommend that the word "update" be deleted in section 69(1) and (3).

AD NEW INSERTION - SECTION 69A (QUALITY OF SERVICE):

99. The Authority would like to reiterate its submission made in paragraphs 97 and 98 above.

AD PARAGRAPH 32 OF THE BILL:

100. We note that the Bill seeks to insert and amend certain provisions in the ICASA Act. We are of the view that the proposed method is procedurally flawed and will result in confusion in the application and interpretation of the proposed insertion and amendments.

101. The Authority proposes that the Minister rather liaise with the Minister of Communications, whose Department is responsible for the implementation of the ICASA Act, and request the latter to amend the Act to the extent required by the Minister of Telecommunications and Postal Services.

C. Conclusion

The Authority trust that the Department will consider our inputs on the Bill. The Authority remains available to make any further representation to the Department if necessary.