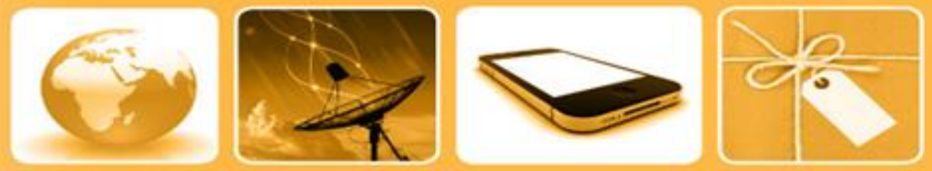
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

PRESENTATION TO THE DEPARTMENT OF TELECOMMUNICATIONS AND POSTAL SERVICES

ICASA Comments on Electronic Communications Amendment Bill, 2017

6 March 2018

Presentation Outline



ICASA Mandate

ICASA is established pursuant to section 192 of the Constitution and in terms of the ICASA Act of 2000

ICASA's primary mandate is to *amongst others*:

- **Regulate** electronic communications, broadcasting and postal sectors **in the public interest**
- Ensure **universal availability** of **high quality services**, including broadband services, for all South Africans at **affordable prices**

Introduction

- The Department of Telecommunications and Postal Services published the Electronic Communications Amendment Bill on 17 November 2017 for public comment.

- The Authority is thankful for being afforded this opportunity to comment and express its views and opinions on Electronic Communications Amendment Bill.

- This presentation deals on some of the general themes / issues identified by ICASA for comment on the proposed amendments. In its submission, the Authority made further comments to specific proposed amendments as contained in the Bill.

Independence of ICASA & Proposed Amendments to the ICASA Act

- We note that, save for the amendments relating to the B-BBEE Sector Code, the Bill purports to amend other provisions of the ICASA Act without listing same in the schedule of the repealed statutes.

- Given the intertwined relation between the ECA and the ICASA Act the processes to amend the ECA and ICASA Act should run parallel to ensure alignment thereof. This is particularly necessary in light of the real potential for conflict between the proposed amendments as set out in the Bill and the current provisions of the ICASA Act.

- 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.

Spectrum Management

- We note the proposal for the Authority's functions to be limited to administering, managing spectrum assignment, licensing, monitoring and enforcement of spectrum.

- We also note the proposal for the establishment of the National Radio Frequency Spectrum Planning Committee – to ensure fairness and equitable distribution of radio frequency spectrum.

- We further note the proposal of the establishment of the National Radio Frequency Spectrum Division within the Department – to coordinate the work of the National Radio Frequency Spectrum Planning Committee.

Spectrum Management cont.

- 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.

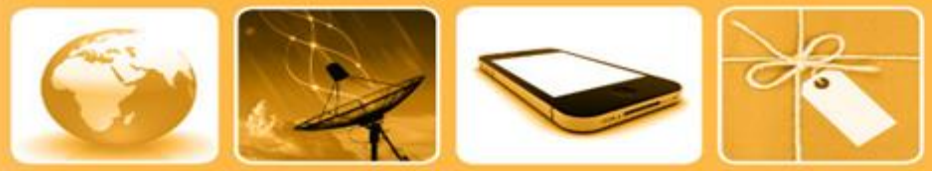
- Section 24 of the ICASA Act stipulates ***“in the event of any conflict between the provisions of this Act and any other law, except for the Constitution, relating to the regulation of broadcasting, electronic communications and postal service, the provisions of this Act prevail.”***

Spectrum Management cont.

- The Authority 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 (sec 192) and in its founding legislation (ICASA Act: sec 3).

Spectrum Management cont.



- 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.

- The proposed dilution of ICASA’s role in respect of spectrum planning, management and control is inconsistent with international best practice and potentially falls foul of the country’s international commitments.

Wireless Open Access Network

- 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 proposed creation of a monopolistic WOAN is contrary to the principles of fair competition, the stimulation of investment and technological advancement.
- 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.

Wireless Open Access Network cont.

- 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 and 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.

- 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.

Wireless Open Access Network cont.

- The Bill proposes that 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**.

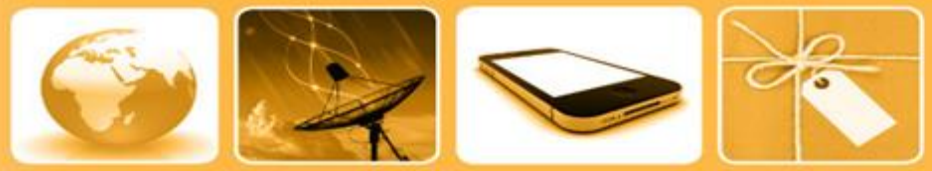
- The term “functional” has not been defined; it is not clear if it refers to the WOAN being licensed, profitable and/or operational.

Competition Matters

- 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.

Competition Matters cont.



- Although cooperation between the Authority and the Commission is supported, the decisions between the two bodies should not be aligned, as they each have different legislative mandates.

- The requirement that ICASA and the Competition Commission align their decisions and approvals will undermine the respective entities statutory mandates.

Collaboration With The Competition 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.
- 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.

Collaboration With The Competition Commission cont.

- 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.

- 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.

Rapid Deployment of ECNs and EC Facilities

- The Bill proposes that the Minister of Telecommunications and Postal Services must establish a Rapid Deployment National Coordinating Centre for 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.

Rapid Deployment of ECNs and EC Facilities cont.

- The Authority does not have any powers to regulate non-licensees or landowners. It would be ineffectual to require the Authority to develop and enforce dispute resolution regulations for landowners as regard rapid deployment as the Authority has no jurisdiction over non-licensees.

- It is our submission that the function of resolving disputes should be carried out by the National Co-ordinating Centre.

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

Thank you