REPRESENTATIONS BY MULTICHOICE, M-NET AND ORBICOM ON THE DRAFT ELECTRONIC COMMUNICATIONS AMENDMENT BILL

31 JANUARY 2017

EXECUTIVE SUMMARY

1 M-Net, MultiChoice and Orbicom welcome the opportunity to comment on the Bill.

2 We have made a detailed submission which focusses on key issues which impact on broadcasting and broadcasting signal distribution. Our central submissions are highlighted in this executive summary.

Bill's application in the broadcasting context

3 The Bill has been introduced to give effect to the White Paper. However, a number of the Bill's provisions spill over to broadcasting, even though this does not accurately reflect the DTPS' policy position. These provisions were not considered or designed for the broadcasting context and are inappropriate and/or inapplicable and/or have problematic results when applied to broadcasting.

4 Our areas of concern include the provisions which undermine ICASA's independence, provisions on broadcasting spectrum (including high demand spectrum and the WOAN), open access provisions, and universal service and access obligations. The policy supporting these provisions was developed in a particular context in the White Paper, which did not contemplate broadcasting and broadcasting signal distribution.

5 We submit that the Bill's provisions which inappropriately impact on broadcasting should not apply to broadcasting licensees or ECNS licensees that provide broadcasting signal distribution. Broadcasting signal distribution falls within Chapter 9 of the ECA, which is administered by the Minister of Communications. This chapter deals with broadcasting signal distribution objectives, including universal access and licence conditions to ensure broadcasting signal distribution is open and interoperable. Sentech is the common carrier responsible for broadcasting signal distribution services on a non-discriminatory and non-exclusive basis.

6 There are a number of cross-cutting issues relevant to both Departments'/Ministers' respective spheres of administration, which require a

co-ordinated approach. In this regard, we urge the DTPS to bear in mind the context in which broadcasting services operate and the challenges broadcasters face. These include the need for regulatory parity with OTT services, net neutrality and anti-piracy measures. We suggest that the Bill and any future bills/proposed amendments emanating from either Department/Ministry be considered by both Departments/Ministries as well as both of the respective parliamentary portfolio committees.

Institutional framework and ICASA's independence

7 s192 of the Constitution and international best practice require ICASA to be independent.

8 Numerous provisions of the Bill undermine ICASA's independence and powers. These include: obliging ICASA to comply with certain policy and policy directions of the Minister of TPS; transferring some of ICASA's powers, functions and duties to the Minister and other bodies which are not independent; fettering ICASA's discretion in certain respects; and compelling ICASA to perform various functions.

9 We oppose those provisions which undermine ICASA's independence.

Spectrum issues

10 The Bill goes too far in seeking to transfer most of the powers, functions and duties regarding the control, planning, administration and management of the radio frequency spectrum away from ICASA. ICASA should continue to independently exercise most of the powers and perform most of the functions and duties currently assigned to it in Chapter 5 of the ECA. Furthermore, to the extent that ministerial involvement is appropriate, a greater role is required for the Minister of Communications in relation to broadcasting spectrum.

11 We do not support the proposal that spectrum licences will be renewable annually, despite the duration of the licence. A spectrum licence should endure commensurate with the associated service licence.

12 Our additional concerns about spectrum, including migration of existing users out of a band, use it or lose it provisions and the licensing of high demand spectrum are set out in detail in our submission.

Competition law issues

13 Significant changes are proposed to s67 of the ECA dealing with competition law issues. The Bill reduces ICASA's discretion and independence with regard to competition law issues and imposes extensive, onerous and resource-intensive obligations on ICASA.

14 Of particular concern is that the Bill essentially compels ICASA to deal with competition law issues in the broadcasting and electronic communications sectors by way of *ex ante* regulation of every market and market segment within those sectors. The Bill peremptorily –

14.1 requires ICASA to define all markets and market segments in the broadcasting and electronic communications sector, including certain ICT services;

14.2 requires ICASA to complete those market definitions within twelve months of the amended ECA coming into force;

14.3 thereafter, requires ICASA to conduct market reviews of all of those markets and market segments in an order of priority determined by factors specified in the Bill, which factors include markets relevant to policy directions issued by the Minister of TPS;

14.4 requires ICASA to complete each market review within twelve months; and

14.5 requires ICASA, at least every three years, to review and update the market definitions and schedule in terms of which it will conduct market reviews.

15 A further over-arching concern is that the Bill provides completely inadequate due process provisions for the process in terms of which ICASA will define

relevant markets and conduct market reviews. Nor does the Bill contain any provisions for the exercise and performance by ICASA of powers, functions and duties equivalent to those set out in s4B to s4D of the ICASA Act as regards these processes.

INTRODUCTION

1 MultiChoice, M-Net and Orbicom ("MultiChoice") are thankful for the opportunity to comment on the draft Electronic Communications Amendment Bill ("the Bill") gazetted by the Minister of Telecommunications and Postal Services ("the Minister of TPS") on 17 November 2017.

2 Although the Bill raises a number of issues which are critical to the future of the ICT sector, we have confined our submission to issues which impact on broadcasting and broadcasting signal distribution.

3 Our submission begins with preliminary comments regarding the scope of the Bill and our concern that some of the Bill's provisions spill over to broadcasting regarding matters which were not necessarily contemplated.

4 Thereafter, we make detailed comments on specific provisions of the Bill relevant to broadcasting and broadcasting signal distribution, namely

4.1 the institutional framework, including ICASA's powers, functions, duties and independence, and the roles of the Minister of TPS and the Minister of Communications;

4.2 radio frequency spectrum issues; and

4.3 competition law issues.

PART A: BILL'S APPLICATION IN THE BROADCASTING CONTEXT

Provisions which should not apply to broadcasting

5 Prior to commenting on the Bill's detailed provisions, we raise some concerns about the Bill's unintended impact on broadcasting matters.

6 We appreciate that the Bill is informed by the National Integrated ICT Policy White Paper[1] gazetted by the Minister of TPS on 3 October 2016 ("White Paper").

7 Although convergence was at the heart of the White Paper, it recognised "*that the cultural and freedom of expression objectives which have underpinned the policy and regulatory framework for broadcasting continue to require a specific policy focus*" and that matters such as "*content promotion and facilitating access by audiences to a diverse range of television and radio programming will, for example, remain essential objectives of broadcasting policy*".[2]

8 In this regard, the White Paper recognised[3] that Government – through the Ministry of Communications – "*is conducting a separate review on broadcasting and audio and audio-visual content services, including considering the implications of convergence and digitisation on the cultural and freedom of expression objectives underpinning that sector*". Broadcasting therefore largely fell outside the scope of the White Paper.

9 Despite this, a number of the Bill's provisions spill over to broadcasting, even though we do not understand this to have been the drafters' intention, nor to reflect the DTPS' policy.

10 Various provisions in the Bill had their genesis in the electronic communications context, viewed through the lens of the Ministry of TPS. As a result, certain provisions of the Bill were not considered or designed for the broadcasting context, and are inappropriate and/or inapplicable and/or have problematic

---

1 National Integrated ICT Policy White Paper published under Government Gazette number 40325, Notice number 1212, 3 October 2016

2 Para 1.1, pg 2 of the White Paper

3 Paras 1.1, 9.4 and 10.6.3.1 of the White Paper

results when applied in relation to broadcasting. We deal with some of these themes below.

Primary object of ECA

11 The primary object of the ECA is currently to provide for the "*regulation of electronic communications … in the public interest*". The Bill proposes replacing this with the object of "*regulation of electronic communications … in line with the National Integrated ICT Policy White Paper, 2016*[4] *and the public interest objectives in such White Paper*".

12 This overlooks the dual policy roles of the Ministries of TPS and Communications respectively. The primary object of the ECA should remain as is, namely to regulate electronic communications in the public interest.[5] This is both appropriate in the era of convergence and accords with s192 of the Constitution.

Provisions which undermine independent broadcasting regulation

13 We make detailed comments about ICASA's independence below. At this stage, we make the point that it is a Constitutional imperative that an independent authority (i.e. ICASA) must regulate broadcasting in the public interest.[6]

14 As we explain below, convergence, practical considerations and international best practice have (correctly, in our view) resulted in government policy and legislation which require ICASA to regulate both broadcasting and telecommunications independently.

15 However, even if this were to change to some extent in relation to telecommunications, such a change is unlikely to pass Constitutional muster in relation to broadcasting regulation, which must, in terms of s192 of the Constitution, be independent.

---

4 We also point out that it is inappropriate for legislation to refer to specific policy documents such as the White Paper or SA Connect

5 In any event, it is not appropriate to refer to a specific policy document, fixed at a specific point in time, in legislation, as policy and policy documents change over time

6 s192 of the Constitution of the Republic of South Africa, 1996

Broadcasting spectrum

16 Numerous provisions of the Bill apply to spectrum which is used in relation to broadcasting and broadcasting signal distribution. We raise our concerns about these provisions in Part B below. At this stage, we make the following points:

16.1 First, it is inappropriate for a minister to exercise powers and perform functions and duties in relation to broadcasting spectrum as the Bill proposes. The Constitutional imperative that broadcasting must be regulated by an independent authority in the public interest extends to the regulation of broadcasting spectrum, which is an inextricable aspect of broadcasting regulation.

16.2 Second, those functions which should properly be dealt with at the ministerial level in relation to broadcasting spectrum should be allocated to the Minister of Communications. A mere requirement for the Minister of TPS to coordinate with the Minister of Communications on issues related to spectrum that has already been allocated to broadcasting is not adequate.

High demand spectrum and the WOAN

17 As the Bill stands –

17.1 the Minister of TPS could determine that certain broadcasting spectrum constitutes "high demand spectrum" and must be assigned to the wireless open access network ("WOAN");

17.2 ICASA will be able to issue certain unassigned high demand spectrum only on condition that the WOAN is functional and the licensee procures a minimum 30% capacity (or such higher capacity determined by ICASA) in the WOAN for a period determined by ICASA;[7] and

[7] New s31E(5) proposed to be inserted by item 22 of the Bill

17.3 the WOAN will be an ECNS licensee which renders ECNS on a wholesale basis.[8]

18 However, the primary objectives of the WOAN relate to broadband. As the White Paper explains, "*the speedy licensing of the Wireless OAN is key to meeting the 2020 targets set out in South Africa Connect and the overall Vision 2030*"[9] – i.e. national broadband policy. The WOAN bears no relation to broadcasting.

19 Indeed, wholesale broadcasting signal distribution is already provided by Sentech, which is the state owned enterprise operating in the broadcasting signal distribution sector, responsible for providing broadcasting signal distribution services as a common carrier to broadcasting licensees. However, as the Bill stands, broadcasting spectrum is potentially subject to all of the restrictions associated with "high demand spectrum", even though the associated policy objectives and the Bill's provisions in relation to high demand spectrum and the WOAN are not connected to broadcasting.

20 It would be absurd for broadcasting spectrum to be assigned to the WOAN if the WOAN is not engaged in broadcasting signal distribution, thereby depriving broadcasters - and indeed the common carrier broadcasting signal distributor - of the ability to use broadcasting spectrum to achieve broadcasting policy objectives.

21 The Bill's provisions regarding high demand spectrum and the WOAN should therefore expressly exclude spectrum used in relation to broadcasting and broadcasting signal distribution.

---

8 Para 3 of the Bill's explanatory memorandum

9 Para 9.1.6, pg 71 of the White Paper

Open access

22 The Bill proposes an open access regime in terms of which ECNS licensees must provide access to their electronic communications networks and electronic communications facilities.[10]

23 The Memorandum on the Objects of the Bill ("Explanatory Memorandum") explains the rationale for these amendments as follows:

> "*In order to realise South Africa's developmental objectives, transform society and the economy, encourage broadband deployment and preserve and promote the open and inter-connected nature of the Internet, an open access regime will be implemented in South Africa along the entire infrastructure and services value chain*."[11]

24 It is apparent from both the White Paper and the Bill's Explanatory Memorandum that broadcasting signal distribution is not an infrastructure segment which the open access regime was intended to target. The White Paper highlighted that open access was needed to address various difficulties with the current infrastructure market so that broadband access could be improved. It stated:

> "*The [current] market structure and the policy approach that has enabled it, increases the costs of broadband provision and thus limits broadband access by end users. The key to overcoming these challenges is openness*."[12]

25 The White Paper also noted that:

> "*While openness is a theme, the problems present themselves differently in the different infrastructure segments – international, backbone, metro and last*

---

[10] The Bill proposes wide-ranging changes to Chapter 8 of the ECA, which is currently titled "*Electronic Communications Facilities Leasing*". The Bill proposes to change the title of Chapter 8 to "*Open Access*" and to amend s43 to 46 in order to facilitate an open access regime

[11] Pg 106 of the Gazette

[12] Pg 60 of the White Paper

mile – and thus a broad-brush approach would be inappropriate and ineffective".[13]

26 Notwithstanding the cautioning against a broad-brush approach to open access in the ICT White Paper, it appears that this is, unfortunately, precisely the approach which has been taken in the Bill.[14]

27 It is inappropriate for the Bill to impose an obligation on all ECNS licensees, (including broadcasting signal distributors) to provide wholesale open access upon request by another licensee, in circumstances where Chapter 9 of the ECA – which deals with broadcasting and is administered by the Minister of Communications - already provides for Sentech to provide broadcasting signal distribution as a common carrier to licensed television and radio broadcasters on an open and interoperable basis. Sentech is "*obliged to provide signal distribution for broadcasting services on a non-discriminatory and non-exclusive basis*".[15]

28 s62 of the ECA sets out broadcasting signal distribution objectives. It requires an ECNS licensee which provides broadcasting signal distribution to, amongst other things, be open and interoperable, and to provide universal access for all South Africans to broadcasting services.[16] Chapter 9 of the ECA deals specifically with "open access" type requirements in relation to ECNS licensees

---

13 Pg 60 of the White Paper

14 The ECA envisages that ECNSs can be provided for electronic communications services on the one hand, and for broadcasting services on the other hand. ECNSs for broadcasting are typically provided by broadcasting signal distributors. To our knowledge, most countries address issues of access to infrastructure in the broadcasting context through (i) the establishment of a common carrier broadcasting signal distributor; (ii) in some instances, requirements to share spare capacity on passive infrastructure; and (iii) infrastructure parastatals / infrastructure support. The experience internationally indicates that whilst infrastructure sharing in telecommunications is permitted (and may be actively encouraged in respect of passive infrastructure sharing), mandatory sharing usually only occurs once it is demonstrated that such facilities are bottlenecks. Active infrastructure sharing is not always encouraged because regulators are concerned that such arrangements may reduce the best long-term competitive outcome. We are not aware of mandated obligations to share active infrastructure in the broadcasting environment internationally

15 Definition of "common carrier" in s1 of the ECA

16 s62(1) of the ECA

which provide broadcasting signal distribution. As the common carrier, Sentech must –

28.1 subject to its technological capacity to do so, provide broadcasting signal distribution to broadcasting licensees upon their request and in accordance with the national radio frequency plan, on an equitable, reasonable, non-preferential and non-discriminatory basis;[17]

28.2 take specified matters into account when determining its tariffs;[18] and

28.3 carry public broadcasting services, including educational, commercial and community services.[19]

29 These provisions were updated as recently as 2014, when the ECA was amended by the Electronic Communications Amendment Act, 2014.

30 The open access regime should target only those parts of the infrastructure market where intervention is required, specifically those areas highlighted by the ICT White Paper and needed to accelerate broadband deployment.

31 We propose that the Bill be amended to clarify that the open access Chapter applies to ECNS licensees only in respect of electronic communications services - not in relation to broadcasting or broadcasting signal distribution.

Deemed entities

32 The Bill introduces the concept of "*deemed entities*" which must comply with the open access principles in s29(1A) and which are also referred to in those provisions of the Bill dealing with high demand spectrum.

33 Deemed entities will be identified by ICASA following the definition of markets in terms of s67. Any entity with significant market power or with an ECNS network that constitutes more than 25% of the total electronic communication infrastructure or which controls any essential facility or scarce resource (such as

[17] s62(3)(a) of the ECA
[18] s62(3)(b) of the ECA
[19] s62(3)(c) of the ECA

exclusively assigned radio frequency spectrum), will be regarded as a deemed entity.

34 The approach to identifying deemed entities is overly broad and may result in an unwieldy number of ECNS licensees, including broadcasting signal distributors, being earmarked as such.[20]

35 The concept of deemed entities should be revisited and the Bill revised accordingly.

Synergies and co-ordination between DTPS and DOC going forward

36 There are a number of cross-cutting issues relevant to both Departments'/Ministers' respective spheres of administration, which require close co-ordination between DTPS and DOC. This is particularly so as digitisation and the convergence of broadcasting, telecommunications and ICT services and products, across all elements of the supply chain, increases.

37 A key challenge to be addressed is that traditional television broadcasting services, which are heavily regulated, increasingly have to compete with over the top ("OTT") services (e.g. Hulu, Netflix, Amazon and Google) which offer audio-

[20] We are also concerned that the proposed open access principles are both vague and too far reaching and are crafted not as principles, but as obligations. For instance, they specify "*cost-based pricing*", "*access to…networks or….facilities*, *as prescribed*" and "*specific network and population coverage targets*" without actually detailing exactly what is required. International experience indicates that essential facility / open access regimes should be applied cautiously and with precision, ideally on a case by case basis. (See GSMA 2012, "Mobile Infrastructure sharing", and BEREC/RSPG report "Infrastructure and spectrum sharing in mobile / wireless networks" June 2011). They are often mandated only in exceptional circumstances. We are concerned that the approach taken in the Bill – wherein a large number of entities may be obligated to comply with vague and commercially intrusive open access requirements - could have unintended adverse effects on competition in the South African ICT sector. A balance should be found, when considering open access, between the potential for enhanced competition versus the possibility that it may actually diminish competition and investment in the long term. In this regard, the OECD in their document "The Essential Facilities Concept" has cautioned:

"*Any proposal to mandate access to an essential facility should be weighed against the implied distortions to the firms' incentives to invest and innovate. A basic element of these incentives in a well-functioning market economy is the full disposal of one's assets at each point in time, including the right to deal with whom one pleases. Consistent departures from this institutional context … may lead to serious inefficiencies and welfare losses in the long run, even though mandating access may have been motivated by the wish to enhance competition and benefit consumers in the short run*." (OECD (GD/96))

visual content through the open Internet[21]. It is a priority to bring OTT services into the licensing and regulatory framework in an appropriate manner. As recognised by the White Paper -

> "*The phenomenon of convergence heralds, further, the introduction of a range of new innovative content services such as video-on-demand (VOD) and Over-The-Top (OTT) service. Therefore the networks should enable the provision of these services at any given point in time. This poses challenges to the existing regulatory regimes for electronic communications network and content services that must be resolved through relevant policies*."[22]

38 This topic was (correctly) excluded from the White Paper, as it recognised that it should properly be dealt with as part of the DOC's broadcasting policy review.[23]

39 Net neutrality is another challenge that affects both broadcasting and electronic communications services. Broadcasters and other role players face the serious risk that some telecommunications operators might favour their own audio-visual content services above competitor services on their networks. A regime for net neutrality would ensure an even-handed approach by network operators to all content. However, such a regime will require co-ordination and consultation between the two departments and Ministers to align their respective policies so as to avoid any possible conflict.

---

[21] OTT TV services (which offer similar or identical content to that provided by traditional broadcasting services) for audiences, advertising revenue and subscription revenue. Yet these new media services are in a starkly different position: they are unlikely to require a licence or to be subject to the provisions of the ECA and the many regulations. Furthermore, those offered from outside of the country do not pay licence fees to ICASA, nor do they pay VAT or taxes in South Africa. In their competitive interaction, OTT TV services thus enjoy significant advantageous over traditional television broadcasting services

[22] Para 7.1, pg 41 of the White Paper

[23] Para 9.4 of the White Paper states:
"*As indicated in the introduction to this White Paper, Government is undertaking a separate review of the broadcasting policy framework, recognising the specific cultural and freedom of expression issues related to that sector (including the need to promote diversity of content). That process could affect what audio and audio-visual services are regarded as broadcasters and this section therefore does not deal with the licensing framework for broadcasting and/or broadcasting-like services in any detail*".

40 A further challenge faced by broadcasters is signal and content piracy, against which South African legislation does not afford broadcasters adequate protection. This is a critical area that needs to be addressed by both the Minister of TPS and the Minister of Communications. The Minister of Communications needs to ensure that signal and content piracy – including signal theft and circumvention of technological protection measures - is criminalised or declared illegal in broadcasting law. The intervention of the Minister of TPS is required in respect of dealing with online piracy and intermediary liability in the Electronic Communications and Transaction Act, 2002.

41 We raise these issues to highlight the dynamics and context in which broadcasting and broadcasting signal distribution services operate and to demonstrate the need for co-ordination between the two Departments/Ministries.

42 Whilst each Department/Ministry should focus on the matters which are primarily in its domain, we submit that the Departments/Ministries of TPS and Communications should work together to ensure a co-ordinated and consistent streamlined approach.

43 The Minister of Communications is due to publish a white paper this year, which will culminate in further amendments to the ECA. We suggest that the Bill and any future bills/proposed amendments emanating from either Department/Ministry be considered by both Departments/Ministries as well as both of the respective parliamentary portfolio committees.

44 Ideally, the proposed amendments to the ECA emanating from the DTPS and the DOC should be processed concurrently, to avoid amendments to the same statute emanating from different departments, at different points in time.

45 Against this background, we now comment on specific provisions of the Bill which are relevant to broadcasting and broadcasting signal distribution.

PART B: COMMENTS ON SPECIFIC PROVISIONS OF THE BILL

INSTITUTIONAL FRAMEWORK

ICASA's independence

46 The White Paper recognised that s192 of the Constitution stresses the need for independent regulation of broadcasting, but stated that the "*policy review process has … emphasised the very different Constitutional imperatives underpinning the regulation of content (broadcasting) and infrastructure and resources*", stating that "*Regulation of infrastructure and networks however needs to be underpinned by different Constitutional considerations, such as those related to equality of access to services, fair competition, consumer protection and administrative justice*".[24]

47 The independent regulation of broadcasting is enshrined in Chapter 9 of the Constitution of the Republic of South Africa ("the Constitution"). Numerous court decisions have considered the meaning of independence.

48 Over the years there have been unsuccessful attempts by the Minister of Communications / the Department of Communications / the legislature to introduce legislation which would undermine ICASA's independence. However, these initiatives have consistently been strongly opposed and ultimately have not succeeded.[25]

49 By 2000 it had become increasingly clear that the convergence of technologies, services and markets meant that it was no longer appropriate for separate authorities (i.e. the Independent Broadcasting Authority ("IBA") and South African Telecommunications Regulatory Authority ("SATRA")) to regulate broadcasting and telecommunications respectively. A single authority was required. As a consequence, the ICASA Act was passed, which replaced the

---

[24] Pg 155 of the White Paper

[25] The first such initiative was in 1998/1999, when the Broadcasting Bill was introduced in the National Assembly. The Bill, as initially passed by the National Assembly, contained provisions which would adversely impact on the independence of ICASA. Former President Mandela referred the Bill back to the National Assembly for reconsideration based on reservations about its constitutionality. The National Assembly eventually amended the Bill to accommodate those reservations.

IBA and SATRA with a single authority, namely ICASA. In the mid 2000s, the ECA replaced the Independent Broadcasting Authority Act, 1993 ("IBA Act") and the Telecommunications Act, 1996 ("Telecommunications Act"). Further amendments were made to the ICASA Act by virtue of the ICASA Amendment Acts of 2006 and 2014.

50 For present purposes, what was noteworthy about these extensive legislative changes was the fundamental decision which the National Assembly took concerning ICASA's independence. By virtue of s192 of the Constitution, the IBA, in regulating the broadcasting sector, had to do so independently, and this was clearly spelt out in the legislation. However, there was not the same constitutional provision in relation to the regulation of telecommunications. (For example, in the Telecommunications Act there were provisions which empowered the minister to issue policy directions to ICASA, to make regulations, and to determine the pace of the liberalisation of the telecommunications sector.) In deciding to create a single authority to regulate the electronic communications sector, and a single converged statute for that sector (i.e. the ECA), the National Assembly recognised that given convergence it would become increasingly difficult, if not impossible, to separate out the licensing and regulation of broadcasting services and of telecommunications services, and the associated infrastructure services, and that there therefore had to be a single and consistent approach in this regard. Given the constitutional imperative in s192 of the Constitution, it was decided that the approach had to be that of independent regulation for both broadcasting and telecommunications.

51 The passage of the ICASA Amendment Act, 2006 was particularly controversial by virtue of certain provisions in the Bill which undermined ICASA's independence. Despite various compromises, the ICASA Amendment Bill, as passed by the National Assembly, was sent to the President for his assent and signature. However, former President Mbeki refused to do so, and sent the Bill back to the National Assembly, citing concerns about the constitutionality of the Bill. As a consequence, the most controversial provisions of that Bill were amended.

52 This history has resulted in legislation in terms of which ICASA is required to regulate the entire electronic communications sector (i.e. both broadcasting and telecommunications services) independently. The regression to separate ministries of Communications and Telecommunications and Postal Services, should not change this imperative. Even if this were to change to some extent in relation to telecommunications, such a change would not be permissible in relation to broadcasting regulation, which must, in terms of s192 of the Constitution, be independent.

Provisions in draft Bill which undermine ICASA's independence

53 A number of the Bill's provisions undermine ICASA's independence and powers, including by obliging ICASA to comply with policies and policy directions of the Minister of TPS in certain respects and shifting some of ICASA's powers, functions and duties to the Minister of TPS and other bodies.

54 ICASA is currently mandated to regulate electronic communications "in the public interest".[26] s3 of the ECA currently empowers the Minister to make policy or policy directions relating to a closed list of issues specified in subsections (1), (1A) and (2). Whilst ICASA must consider those, it is not legally required to implement them. s3(4) of the ECA currently provides:

> "*The Authority…, in exercising its powers and performing its duties in terms of this Act and the related legislation must consider policies made by the Minister in terms of subsection (1) and policy directions issued by the Minister in terms of subsection (2)*." (our emphasis)

55 The Bill proposes departing from this position in significant respects, many of which are inextricably broadcasting-related:

55.1 The primary object of the ECA is proposed to be amended by deleting the object of "*regulation of electronic communications … in the public interest*" and replacing it with "*regulation of electronic communications*

[26] s2 of the ECA

… in line with the National Integrated ICT Policy White Paper, 2016[27] *and the public interest objectives in such White Paper*…"[28]

55.2 s3(2)(e) of the ECA is proposed to be amended to permit the Minister to issue to ICASA policy directions in relation to "*any other matter which may be necessary to give effect to ICT related national policy…*".[29] In other words, the issues which the policy directions may deal with are no longer specified in the legislation. Instead, they are infinitely broad and unspecified.

55.3 The Minister of TPS will be given the function and responsibility of "*issuing policies and policy directions in relation to radio frequency spectrum as contemplated in section 3*".[30]

55.4 The word "*guidelines for*" are proposed to be deleted from s3(1)(a) and 3(2)(d) of the ECA in relation to Ministerial policies and policy directions on licence fees and spectrum fees.[31]

55.5 ICASA will be obliged to amend existing radio frequency spectrum fees regulations within six months after the Minister issues a policy direction contemplated in s3(2)(d) of the ECA.[32]

55.6 ICASA will be prohibited from making any regulations on radio frequency spectrum fees which are not in accordance with any policies or policy directions issued by the Minister as contemplated in s3(1)(e) and 3(2)(d) of the ECA (as proposed to be amended).[33]

55.7 In performing its functions under s30(1) of the ECA (currently control of radio frequency spectrum, but proposed to be reduced to

---

[27] We also point out that it is inappropriate for legislation to refer to specific policy documents such as the White Paper or SA Connect

[28] Item 2 of the Bill amending s2 of the ECA

[29] Item 3 of the Bill amending s3(2)(e) of the ECA

[30] Item 19 of the Bill inserting s29A(c) of the ECA

[31] Item 3 of the Bill amending s3(1)(e) of the ECA

[32] Item 4 of the Bill inserting s4(1A)(b) of the ECA

[33] Item 4 of the Bill inserting s4(1A)(a) of the ECA

administration of use of radio frequency spectrum), ICASA will be obliged to "*comply with the … national radio frequency plan contemplated in section 34 and ministerial policies and policy directions as contemplated in section 3*".[34]

55.8 ICASA will be obliged to "*obtain the Minister's approval on the nature and form of all universal access and universal service obligations before they are imposed on any radio frequency spectrum licensees to ensure that the obligations are coordinated, relevant and aligned with national policy objectives and priorities*".[35]

55.9 The "*Minister may issue policy directions to ICASA on spectrum trading and spectrum use rights in order to fulfil specific national objectives*".[36]

55.10 ICASA must prescribe regulations on the criteria and conditions for spectrum trading, including that a spectrum trade transaction may not undermine policy objectives.[37]

55.11 Unassigned high demand spectrum determined by the Minister must be assigned to the Wireless Open Access Network following a policy direction issued by the Minister in terms of s5(6) and s19A of the ECA.[38]

55.12 Virtually all of ICASA's powers, functions and duties in relation to frequency spectrum are proposed to be transferred to the Minister of TPS and associated bodies, including developing the national radio frequency plan and determining the service allocation to be made in the national table of frequency allocations where there are competing services in a particular band.[39] In preparing the frequency plan, the Bill proposes that the Minister must "*take into account … the allocation and preservation of specific bands for broadcasting and audio visual*

---

[34] Item 20 of the Bill amending s30(1)(a) of the ECA
[35] Item 22 of the Bill inserting s31A(2) of the ECA
[36] Item 22 of the Bill inserting s31B(5) of the ECA
[37] Item 22 of the Bill inserting s31B(3)(e) of the ECA
[38] Item 22 of the Bill inserting s31E(5) of the ECA
[39] s30 and 31 of the ECA as proposed to be amended by items 20 and 21 of the Bill

services". We will elaborate on this below when we address spectrum issues.

55.13 Various provisions of the ECA which currently afford ICASA a discretion are proposed to be amended to remove that discretion and compel ICASA to perform various tasks. For example, ICASA will be obliged to do certain things which currently it <u>may</u> do, such as –

55.13.1 including certain standard licence terms and conditions;[40]

55.13.2 prescribing regulations designating licensees to whom universal service and access obligations are to apply, prescribing additional terms and conditions in respect of universal service and access obligations on designated licensees and reviewing those regulations at least every five years;[41]

55.13.3 referring matters to the Minister of TPS where the national radio frequency plan identifies occupied spectrum and requires the migration of users to another band;[42] and

55.13.4 prescribing the matters which an end-user and subscriber service charter must (currently may) include[43].

55.14 Certain functions which ICASA must currently perform "*<u>after</u> consultation*" with the Minister will have to be done "*<u>in consultation</u> with the Minister*".[44]

---

[40] s8(2) of the ECA as proposed to be amended by item 6 of the Bill
[41] s8(4) and proposed new s8(4A) of the ECA as proposed to be amended by item 6 of the Bill
[42] Item 23 of the Bill amending s34(16) of the ECA
[43] s69(5) of the ECA as proposed to be amended by item 37 of the Bill
[44] Item 23 of the Bill amending s34(16) of the ECA

55.15 Regulations to be prescribed by ICASA in terms of the proposed new s20C(1)[45] and (2)[46] of the ECA must provide for specified matters.

55.16 The Minister of TPS must "*provide oversight over the implementation*" of Chapter 4[47] of the ECA.[48]

55.17 ICASA must "*annually publish a market performance report in respect of the broadcasting, electronic transactions, postal and electronic communications sectors*", which report must "*include assessment of affordability of services, accessibility to services, quality of service, impact on users of market trends and compliance by licensees with conditions and obligations set*" and "*consider the effects of convergence, including monitoring of the extent and impact of horizontal and vertical integration and bundling of services*".[49] ICASA must submit the market performance report to the Minister of TPS and Parliament within 30 days of publication in order to "strengthen the oversight roles".[50]

56 These provisions individually and collectively erode ICASA's independence and undermine its ability to regulate the ICT sector, including broadcasting, independently and in the public interest.

57 In the two certification judgments[51], the Constitutional Court made it clear that an institution will be considered to be "*independent*" only if it enjoys a certain degree of protection from government control. In order to determine whether an

---

45 Rapid deployment regulations

46 Regulations for procedures and processes for resolving disputes between ECNS licensees and landowners

47 Rapid deployment of ECNS and electronic communications facilities

48 New s20A(1) proposed to be inserted by item 13 of the Bill

49 New s79C of the ECA proposed to be inserted by item 39 of the Bill

50 Memorandum on the objects of the Electronic Communications Amendment Bill, at pg 112 of the Gazette

51 *First Certification Judgment – Certification of the Constitution of the Republic of South Africa, 1996, In re: Ex parte Chairperson of the Constitution Assembly* 1996 (4) SA 744 (CC) and *Second Certification Judgment Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, In re: Ex parte Chairperson of the Constitution Assembly* 1997 (2) SA 97 (CC)

institution is dependent, regard must be had not only to the provisions concerning the appointment of officers in the institution and their tenure, but also institutional independence.

58 In *Independent Electoral Commission v Langeberg Municipality*[52] the Constitutional Court elaborated on the meaning of independence. It referred to "*financial independence*" and to "*administrative independence*". The latter "*implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The Executive must provide the assistance that the Commission requires 'to ensure (its) independence, impartiality, dignity and effectiveness'. The Department cannot tell the Commission how to conduct registration, whom to employ, and so on; … the Commission must be put in funds to enable it to do what is necessary*."

59 In *Altech Autopage Cellular (Pty) Ltd v The Chairperson of the Council of ICASA and Others*[53] the High Court declared invalid and set aside portions of a September 2007 Ministerial Policy Direction on the basis that the direction in question "*oversteps the line of interference and encroaches upon the [Authority]'s independence*".

60 The significant departure from the current ECA provisions and the substantial erosion of ICASA's independence which we highlighted in paragraph 55 above similarly overstep the line of interference and encroach upon ICASA's independence, and could infringe, *inter alia* -

60.1 s192 of the Constitution, which requires an independent authority to regulate broadcasting in the public interest; and

60.2 s181(4) of the Constitution, which provides that "No person or organ of state may interfere with the functioning of" Chapter 9 institutions.

---

52 2001 (3) SA 925 (CC)
53 [2008] JOL 22362 (T)

61 In addition to the Constitutional and practical imperatives, international best practice supports the general view that sector regulators must be independent. The international trend is to create independent regulatory institutions that are adequately resourced and insulated from political interference and undue influence. The OECD has stated the following in this regard:

> "*Regulators operate in a complex environment at the interface among public authorities, the private sector and end-users. As "referees" of the markets that provide water, energy, transport, communications, and financial services to citizens, they must balance competing wants and needs from different actors. This means that they must behave and act objectively, impartially, and consistently, without conflict of interest, bias or undue influence - in other words, independently. What distinguishes an independent regulator is not simply institutional design. Independence is also about finding the right balance between the appropriate and undue influence that can be exercised through the regulators' daily interactions with ministries, regulated industries and end-users*."[54]

62 By compelling ICASA to undertake certain tasks (which may in fact be unnecessary) and specifying the frequency at which it must conduct various tasks, the Bill, in addition to fettering ICASA's discretion, will burden ICASA's financial, human and other resources, and is likely to distract its focus and resources from more compelling matters.

63 For all these reasons, we oppose the Bill's proposals highlighted in paragraph 55 above. Those provisions, which undermine ICASA's independence and unduly fetter ICASA's discretion, should be removed from the Bill.

---

[54] OECD, *Being an Independent Regulator*, 19 July 2016

RADIO FREQUENCY SPECTRUM ISSUES

Control and management of radio frequency spectrum

64 In terms of the current ECA and ICASA Act, ICASA controls, plans, administers and manages the use and licensing of the radio frequency spectrum (except as provided for in s34 of the ECA).[55] s4(3)(c) of the ICASA Act provides that ICASA "*must manage the radio frequency spectrum in accordance with bilateral agreements or international treaties entered into by the Republic*". ICASA issues spectrum licences and deals more generally with the radio frequency spectrum.

65 The Minister of TPS currently exercises specified powers and functions in relation to the radio frequency plan.[56] Permitting the Minister of TPS to interfere in radio frequency spectrum licences is explicitly prohibited in terms of s3(3) of the ECA.[57] ICASA must, however, consult with the Minister on various matters.[58]

66 The Bill proposes giving the Minister of TPS virtually full control of frequency spectrum matters, including in relation to broadcasting spectrum. The Minister of Communications is relegated to the Minister of TPS co-ordinating with her on issues related to spectrum that has already been allocated to broadcasting.[59]

---

55 s30 of the ECA

56 The Minister of TPS and the Minister of Communications represent the Republic in international fora, including the ITU, in respect of the international allocation of radio frequency spectrum, the international co-ordination of radio frequency spectrum usage, and the co-ordination and approval of any regional radio frequency spectrum plans applicable to the Republic, in accordance with international treaties and multinational and bilateral agreements entered into by the Republic. It is only after the use of a band has been determined at ITU level and adopted by the Republic (represented by the Ministers) that ICASA may proceed to control, plan, administer and manage the use and licensing of that spectrum. ICASA must implement the plans adopted by the Republic (represented by the Ministers). ICASA's functions in controlling, planning, administering and managing the use and licensing of the radio frequency spectrum must accord with the bilateral agreements or international treaties entered into by the Republic

57 s3(3) of the ECA provides:

"No policy made by the Minister in terms of subsection (1) or policy direction issued by the Minister in terms of subsection (2) may be made or issued regarding the granting, amendment, transfer, renewal, suspension or revocation of a licence, except as permitted in terms of this Act.

58 s34(7)(c) of the ECA

59 New s29A(g) of the ECA proposed to be inserted by item 19 of the Bill

67 The Bill proposes making the Minister of TPS responsible for –

67.1 representing South Africa on radio frequency spectrum at international, multi-lateral and bi-lateral levels;

67.2 representing South Africa at the ITU, including spectrum planning, allocation and international co-ordination of radio frequency spectrum use;

67.3 issuing policies and policy directions in relation to frequency spectrum as contemplated in s3 (as proposed to be amended);

67.4 developing and approving the national radio frequency plan;

67.5 establishing a National Radio Frequency Spectrum Planning Committee and National Radio Frequency Spectrum Division;

67.6 co-ordination across government (including sector-specific agencies); and

67.7 co-ordination with the Minister of Communications on issues relating to spectrum that has been allocated to broadcasting services.[60]

68 No distinction is made between broadcasting and other frequency spectrum, and no role is given to the Minister of Communications, other than the Minister of TPS co-ordinating with her on issues related to spectrum that has been allocated to broadcasting, and a requirement for the National Radio Frequency Planning Committee to have representatives from Government Departments (presumably including the Department of Communications).[61]

69 Virtually all of ICASA's powers, functions and duties in relation to frequency spectrum are proposed to be transferred to the Minister of TPS (and to bodies under the control of the Minister of TPS), including developing the national radio frequency plan (currently ICASA's function) and determining the service

[60] New s29A of the ECA proposed to be inserted by item 19 of the Bill
[61] New s29A(g) of the ECA proposed to be inserted by item 19 of the Bill

allocation to be made in the national table of frequency allocations where there are competing services in a particular band.[62] In preparing the frequency plan, the Bill simply proposes that the Minister of TPS must "*take into account … the allocation and preservation of specific bands for broadcasting and audio visual services*".

70 ICASA's existing functions of controlling and planning spectrum are removed, with ICASA being relegated to a purely administrative role of administering and managing the assignment, licensing, monitoring and enforcement of the use of radio frequency spectrum, except as provided for in s34 (as proposed to be amended).[63] ICASA will be obliged to comply with the Minister of TPS' policies and policy directions and the National Radio Frequency Plan developed by the Minister of TPS.[64] ICASA must also ensure that spectrum licensees report to it and the Minister of TPS annually on their spectrum usage, including at least the information specified in s30(2)(i).[65]

71 We recognise that, for practical purposes, a single Minister ought to be responsible for South Africa's involvement in the International Telecommunications Union ("ITU") and South Africa's interaction with its neighbouring countries concerning spectrum.

72 However, the Bill goes too far in seeking to transfer most of the powers and functions regarding the control, planning, administration and management of the radio frequency spectrum (i.e. most powers and functions other than the administration and management of assignment of spectrum, licensing, monitoring and enforcement) away from ICASA.

73 The control, planning, administering, management and licensing of spectrum is integrally related to the regulation and licensing of electronic communication services, broadcasting services and electronic communications network services. If the regulation of broadcasting services in particular is to be

---

62 s30 and 31 of the ECA as proposed to be amended by items 20 and 21 of the Bill
63 s30 of the ECA as proposed to be amended by item 20 of the Bill
64 s30(1)(a) of the ECA as proposed to be amended by item 20 of the Bill
65 New s30(2)(i) proposed to be inserted by item 20 of the Bill

independent, ICASA must continue to independently exercise most of the powers and perform most of the functions currently dealt with in Chapter 5 of the ECA in general or at the very least in relation to broadcasting services. In our view, it is unlikely that the proposed transfer of most of these powers and functions away from ICASA will pass constitutional scrutiny. Furthermore, it is inappropriate for these powers and functions to be exercised by ICASA in relation to broadcasting services, and for a separate body such as the Minister or a body established by the Minister to exercise these powers and functions in relation to electronic communication services and electronic communications network services.

74 We also note the potential serious conflicts of interest that could arise, given that there are a number of major companies within the electronic communications sector which are wholly or partially owned by the State and to which a large amount of spectrum is licensed. This concern is exacerbated by the Bill's proposal that the national Radio Frequency Spectrum Planning Committee must "*include representation from relevant Government stakeholders*".[66] This is another reason why it is imperative that ICASA retain (i) its independence and (ii) its existing powers and functions regarding the control, planning, administration and management of the radio frequency spectrum, which ICASA is duty-bound to exercise in the public interest.

75 ICASA has a long history (going back as far as 1994) of controlling, planning, administering, managing and licensing the radio frequency spectrum. It has developed experience and expertise in this regard. Over time it has also invested in the necessary hardware and software to exercise these powers and perform these functions, which technology is expensive. The Bill contemplates the establishment of a National Radio Frequency Spectrum Planning Committee and National Radio Frequency Spectrum Division as contemplated in the new s34A of the ECA.

76 The creation of these entirely new structures duplicates human and technology resources. This duplication would be costly and is one which South Africa can ill-afford. Instead, if any further national resources are to be allocated to

---

[66] New s34A(2)(a) of the ECA proposed to be inserted by item 24 of the Bill

spectrum matters, it would be preferable to strengthen and expand ICASA's resources.

77 A splitting of certain powers and functions in respect of frequency spectrum is also likely to give rise to a range of significant practical difficulties. There is an ongoing integrated process between the control, planning, administration, management, assignment and licensing of spectrum. If ICASA is exercising and performing certain powers and functions, on the one hand, and the Minister of TPS and the Spectrum Committee and Division, on the other, there is likely to be confusion, duplication, inconsistencies and delays in these processes. ICASA's role as a converged regulator and its ability to regulate electronic communications effectively will be undermined if its powers, functions and duties in respect of frequency spectrum are removed by the Bill.

78 Exercising and performing the necessary powers and functions concerning spectrum is becoming an increasingly complex task, and spectrum is becoming an increasingly valuable resource. It is essential, in the interests not only of existing and potential spectrum licensees, but also of the wider South African society and economy, that a single body which is properly resourced deals with spectrum in an efficient manner.

79 For all these reasons we oppose the proposed s29A(c), (d), (e), (f) and (g), and the proposed amendments to s30, 31 and 34 of the ECA highlighted above. Any concerns about ICASA's ability and capacity to exercise its powers and perform its functions and duties in relation to frequency spectrum ought to be addressed by strengthening ICASA's capacity, skills and resources where necessary. Furthermore, to the extent that any role is to be played at the ministerial level, a greater role should be played by the Minister of Communications in relation to broadcasting spectrum.

National Radio Frequency Spectrum Planning Committee and National Radio Frequency Spectrum Division

80 The Bill requires the Minister of TPS to establish a –

80.1 National Radio Frequency Spectrum Planning Committee ("Spectrum Committee") that includes representation from "relevant Government stakeholders" to "ensure fairness and equitable distribution of radio frequency spectrum"[67]; and

80.2 National Radio Frequency Spectrum Division ("Spectrum Division") within the Department of Telecommunications and Postal Services to, amongst other things, coordinate the work of the Spectrum Committee[68].

81 In this regard the Explanatory Memorandum states that "*Planning will become the responsibility of the national radio frequency spectrum planning committee appointed by the Minister, as contemplated in section 34A*".[69]

82 The Spectrum Committee and the Spectrum Division are not an independent authority, and the Bill's proposals in that regard would undermine ICASA's independence, powers, functions and duties.

83 We note in this regard that the Department of Communications' prior proposal to establish a "Spectrum Management Agency"[70] was removed from previous draft Electronic Communications Amendment Bills because of strong opposition, for the same reasons we have highlighted above.

---

67 New s34A(2) proposed to be inserted by item 24 of the Bill

68 New s34A(3) proposed to be inserted by item 24 of the Bill

69 Pg 98 of the Gazette

70 The previous proposals by the DoC on the Spectrum Management Agency would have resulted in the transfer of most of the powers and functions regarding the control, planning, administration, management, use and licensing of the radio frequency spectrum (i.e. all the powers and functions other than the assignment and licensing of spectrum for non-government use) away from ICASA to the Spectrum Management Agency. The Spectrum Management Agency envisaged at that time was a portfolio within the Ministry of Communications

84 For the reasons set out in paragraphs 64 to 79 above, we reiterate our submission that ICASA should remain responsible for controlling, planning, administering, managing and licensing the radio frequency spectrum.

Insufficient role given to Minister of Communications in relation to broadcasting spectrum

85 The Bill proposes giving the Minister of TPS virtually full control of frequency spectrum matters, including in relation to broadcasting spectrum. The Minister of Communications is relegated to the Minister of TPS co-ordinating with her on issues related to spectrum that has already been allocated to broadcasting.[71]

86 The broadcasting sector needs spectrum in order to remain viable and to grow. Spectrum is necessary not only for radio and television broadcasting in the current broadcasting environment, but it is also crucial for broadcasters to evolve with new technologies and to drive innovation and meet audience expectations.

87 A viable future vision of the DTT platform in particular depends on broadcasting services having access to sufficient and appropriate spectrum now and in the future. If this is not done, a shortage of spectrum will result, which will lead to the decline of investment, development and innovation in the DTT platform. Given the important role of terrestrial broadcasting in providing citizens with information, education and entertainment, spectrum should be reserved for current and future broadcasting services in order to prevent the demise of terrestrial television broadcasting, and to rather attract and stimulate growth and development in the sector. This is critical given the wider social benefits of DTT, including support for public service broadcasting, platform plurality and pro-competitive gains. Sufficient spectrum is not a "nice-to-have". It is a critical resource which is essential for the existence and future growth of broadcasting services.

88 The White Paper recognised "*that there is a need to continue to provide for allocation of adequate spectrum to broadcasting specifically to ensure that*

---

[71] New s29A(g) of the ECA proposed to be inserted by item 19 of the Bill

Government's objectives for free-to-air and other broadcasting services are met"[72]:

> "*The Policy will continue to recognise that there is need for the allocation of adequate radio frequency spectrum to enable the provision of free to air and other broadcasting activities in recognition of the important role that broadcasting plays in a fostering democracy. This will be achieved through the allocation and preservation of specific bands for broadcasting and audio visual services. These bands will be identified and allocated in the National Radio Frequency Plan*."[73]

89 Despite this recognition, the Bill does not ensure that specific bands will be allocated and preserved for broadcasting and audio-visual services and insufficient role is given to the Minister of Communications in relation to broadcasting spectrum. The Bill merely requires the Minister to "*take into account … the allocation and preservation of specific bands for broadcasting and audio visual services*".[74] (our emphasis)

90 Terrestrial television broadcasters are required to migrate to lower bands to create the digital dividend to be used for the provision of broadband services. Whilst digital broadcasting brings with it the ability to use spectrum more efficiently, broadcasting technology has also changed to include bandwidth-hungry technologies such as 3D, HD and UHDTV. In addition, broadband technologies are capable of delivering audio-visual content, which enables those service providers to compete with broadcasters using the very spectrum which broadcasters are being forced to relinquish (and to carry the costs of digital migration). There is accordingly an inherent tension between the position of broadcasters and telcos in relation to frequency spectrum. This is another reason why it is imperative that the Minister of Communications is given a greater role in relation to broadcasting spectrum, and that the two Ministers co-operate in the public interest. Spectrum issues must ultimately be dealt with in the public

---

[72] Para 1.1, pg 3 of the White Paper

[73] Para 9.2.5.6, pg 89 of the White Paper

[74] s(34)(7)(c)(v) of the ECA, proposed to be inserted by item 23 of the Bill

interest with due regard to the vested interests and legitimate expectations of all stakeholders in all industries, and requires close co-ordination between both Departments and both Ministers. We note in this regard that the White Paper "*recognises that spectrum policy should also be linked closely with broadcasting policy objectives and therefore provides that the Minister of Telecommunication and Postal Services and Minister of Communications will work closely together*".[75] However, this position has not carried through sufficiently in the Bill.

91 Other than representation of the country at the international and multi-lateral level (where a single minister is required to represent the Republic), those functions which should properly be dealt with at the ministerial level in relation to broadcasting spectrum should be allocated to the Minister of Communications. A mere requirement for the Minister of TPS to coordinate with the Minister of Communications on issues related to spectrum that has already been allocated to broadcasting is not adequate. Specific provision needs to be made that broadcasting needs are sufficiently taken into account in relation to spectrum matters. We submit that the Bill should oblige the Minister of TPS, in consultation with the Minister of Communications, to ensure that adequate provision is made for existing and future broadcasting spectrum requirements. The Minister of TPS and the Minister of Communications ought to be required to agree a common national position in respect of broadcasting spectrum in the public interest, which will guide the Minister of TPS' interaction when representing the Republic.

Migration of existing spectrum users

92 The Bill proposes that if the National Radio Frequency Plan includes migration of existing users, the migration may not exceed five years (unless otherwise specified by the Minister) and the plan must indicate whether any licensee or another party is responsible for the migration costs.[76]

93 This proposal overlooks the complexity of migrating existing users in the broadcasting context and does not make adequate provision to manage the

---

[75] Para 7.3, pg 43 of the White Paper

[76] New s34(7A) proposed to be inserted by item 23 of the Bill

migration and to mitigate adverse consequences for users in the band, including cost implications.

94 ICASA will need to carefully consider issues such as whether migration out of the band is feasible, whether a co-primary allocation is feasible and how it would work, how long it would take, how much it will cost and who will bear the costs thereof.

95 For example, the migration from analogue terrestrial television to digital terrestrial television broadcasting ("digital migration") will take place in a phased manner and, during the dual illumination period, terrestrial television services are required to broadcast in both analogue and digital format. It is only at the end of the dual illumination period that analogue broadcasting will cease and the digital dividend be realised.

96 From the commencement of the dual illumination period until analogue switch off, there will be a shortage (rather than a surplus) of spectrum, given that broadcast transmissions will be duplicated in both analogue and digital formats.

97 Moreover, existing analogue terrestrial television services currently operating in the 700MHz and 800MHz bands have to be migrated to the sub-band below 694MHz. During the dual illumination period, as much spectrum as possible is required in order to allow maximum flexibility to move existing terrestrial television broadcasting services into the sub-band below 694MHz. This requires a full technical plan on how to move all of the existing terrestrial television broadcasting services below 694MHz.

98 It should be borne in mind in this regard that the movement of broadcasting services from one band to another is very disruptive.

99 The migration from one frequency to another in the broadcasting context is different from migrating a telecommunications service from one frequency to another. In the broadcasting context a change in frequency means that viewers could automatically lose reception when the change in frequency happens. It is incumbent on the viewer to rescan their television to be able to continue to view

the channel at the new frequency. In some cases consumers would require a new antenna to cover the new frequency band used.

100 The frequency change is therefore a very disruptive process that needs to be carefully managed to minimise the impact on viewers. Communication campaigns need to be launched to notify viewers/subscribers, new transmitters and new combiners have to be acquired and installed, and the migration to a different frequency could result in transmission disruptions lasting anything from two days to a week (depending on the transmitter affected), resulting in inconvenience to viewers and adversely impacting on advertisers.

101 In conducting frequency changes in the broadcasting context, a number of important issues need to be taken into account, such as -

101.1 the current frequency that transmits the analogue service, and the band it occupies;

101.2 the designated frequency for migration from analogue to digital;

101.3 the transmitting site antenna specification;

101.4 the receive antennas used by the viewing public and their ability to receive transmission at the new frequency;

101.5 the combiners specification and flexibility to retune to a different frequency;

101.6 the off-air period to retune transmitters and combiners to the new frequency;

101.7 the prior marketing required to educate and inform the public of the pending frequency changes in the area;

101.8 the number of households that would require a new antenna to be installed in order to receive transmissions at the new frequency;

101.9 the number of installers that would be required to assist households with installing new antennas, and the amount of time it will take to do the installation for the affected households;

101.10 the costs associated with the signal distribution network and the households and who bears responsibility for the funding of these costs; and

101.11 the impact on advertisers on the services that are effecting frequency changes, and who will bear responsibility for losses incurred from loss in advertising.

102 Prior to migrating existing users, and before allocating frequency in a broadcasting band to other services (e.g. allocation of UHF frequency for broadband), a complete re-plan of the national network, co-ordination of all sites within SADC and beyond, and the retuning of national transmission networks would be required. This requires orderly management and planning.

103 New services should not be introduced into an existing band pending the completion of the migration. The introduction of any other services into a sub-band (such as broadband into the UHF band) would disrupt the migration process, impede orderly spectrum management and hamper the migration to DTT.

104 The Bill makes no provision for the consideration of these issues, other than to state that "*the plan must indicate whether any licensee or another party is responsible for the migration costs*".

105 The migration out of a broadcasting band could potentially result in direct costs and revenue losses, both in vacating the existing band and using the new band. (For example, in the context of digital migration, broadcasters will migrate out of particular bands, return licensed spectrum to ICASA after the migration is complete and incur the costs of launching and promoting a new DTT platform. This proposal is clearly prejudicial to affected broadcasting licensees.)

106 The issue of compensation to migrating users for the release of spectrum should also be addressed, including for the expropriation of their rights to use the radio frequency spectrum licensed to them.

107 Consideration should also be given to the beneficiaries funding the migration, including contributing to the costs incurred by the migrating users.

108 Once ICASA has ensured that broadcasters' existing and future spectrum needs have been catered for, ICASA should then publish a detailed draft plan, specifying, for example, the proposed assignment plan, the duration of the migration period, how any possible interference is to be dealt with, the costs anticipated, and proposals on who will bear the costs, and invite comments from the public.

109 We highlight these issues to show the paucity of the proposed new s34(7A). At a minimum, the proposed new s34(7A) should –

109.1 provide a role for the Minister of Communications in relation to the migration of spectrum which directly or indirectly impacts on broadcasting services;

109.2 require ICASA to undertake management and planning to ensure that the migration takes place in an orderly manner and with minimal adverse impact on existing users;

109.3 ensure that migrating users' existing needs will continue to be met;

109.4 ensure adequate protection of existing services occupying a band to ensure that existing services in the band are not compromised and prevent interference, including prohibiting the introduction of new services into the existing band pending the completion of the migration;

109.5 require ICASA to assess the financial and other implications of a proposed migration for existing users, conduct a socio-economic impact assessment, and take measures to mitigate any adverse impact and ensure appropriate funding / compensation for existing users migrating out of the band. Incoming licensees should pay the full costs

of the migrating users and compensate for losses occurred in the migration of existing services.

Frequency licences

110 The Bill proposes that –

110.1 spectrum licences will be renewable annually, despite the duration of the licence;[77] and

110.2 renewal of a spectrum licence will be conditional on compliance with s30(2)(i) (submission of annual report on spectrum usage)[78] and compliance with universal service and access obligations.[79]

111 Whilst it is appropriate for certain spectrum licences (e.g. amateur communications and citizen band services) to endure for only one year, a different approach ought to apply to spectrum licences issued to individual service licensees for the provision of their services.

112 Those individual service licensees will have made significant investments relating to the provision of their service. In the interests of commercial certainty and in order to encourage investment in the communications sector, the period of the spectrum licence must run concurrently with that of the individual service licence.

113 All of the existing television broadcasters and broadcasting signal distribution licensees have made substantial investments, relying on legislative provisions currently in force. These include substantial investments in infrastructure, technology, employees, and, in the case of broadcasting licensees, content. Many, if not most, of these investments are long term. (For example, broadcasting equipment has a typical useful lifespan of approximately ten years.) Broadcasting licensees have made these investments relying on their licences, including spectrum licences, and the legitimate expectation that their spectrum

---

77 New s31(3A) proposed to be inserted by item 21 of the Bill
78 New s31(3A(b) proposed to be inserted by item 21 of the Bill
79 New s31A(5) proposed to be inserted by item 22 of the Bill

licences would continue to endure for at least as long as the associated service licences.

114 We therefore submit that in relation to individual service licences, spectrum licences should endure for as long as the associated service licences.

Use it or lose it principle

115 The Bill proposes that ICASA may withdraw spectrum if the assignee fails to use it for a period of one year, referred to as the "use it or lose it" principle.[80] [81]

116 A period of one year may not be sufficient in relation to certain services. We therefore propose that ICASA should have the discretion to extend the period, for all licensees, upon good cause shown.

117 Lastly, adequate provision should be made to ensure that spectrum is not withdrawn unless due process has been followed and the relevant licensee has had an opportunity to make representations to ICASA as to why the spectrum should not be withdrawn.

High demand spectrum

118 The Bill proposes a number of provisions to deal with "high demand spectrum," which it effectively defines as spectrum where demand exceeds supply or spectrum which is fully assigned, as determined by the Minister of TPS after consultation with ICASA[82].

---

80 s31(8) and new s31(8A) proposed by item 21 of the Bill

81 Subject to the proviso that SMMEs and new entrants (but not incumbents) may be exempt from the use it or lose it provisions upon good cause shown

82 Proposed new definition of "high demand spectrum" in s1 of the ECA proposed to be inserted by item 1(h) of the Bill

119 As regards high demand spectrum the Bill proposes that –

119.1 the Minister of TPS must determine – by notice in the Gazette - what constitutes high demand spectrum and which unassigned high demand spectrum must be assigned to the WOAN;[83]

119.2 ICASA must assign the unassigned high demand spectrum determined by the Minister of TPS to the WOAN in terms of an MTPS policy direction;[84]

119.3 ICASA must conduct a s4B inquiry and make recommendations to the Minister on the terms and conditions, and time frame, under which the exclusively/individually assigned high demand spectrum (except that assigned to the WOAN) must be returned to ICASA, taking into account policy, market developments and the extent of availability of open access networks;[85]

119.4 ICASA may issue other unassigned high demand spectrum only on condition that the WOAN is functional and the licensee procures a minimum 30% capacity (or such higher capacity determined by ICASA) in the WOAN for a period determined by ICASA;[86] and

119.5 the assignment of high demand spectrum will be subject to open access and non-exclusivity, subject to the National Radio Frequency Plan.[87]

120 We oppose these provisions for the following reasons:

120.1 First, for the reasons set out above, we oppose the interference in ICASA's powers, functions and duties, both in general and in relation to broadcasting in particular. The Minister's role should be limited to

---

83 New s31E proposed to be inserted by item 22 of the Bill
84 New s31E(3)(4) proposed to be inserted by item 22 of the Bill
85 New s31E(6) proposed to be inserted by item 22 of the Bill
86 New s31E(5) proposed to be inserted by item 22 of the Bill
87 New s31E(2) proposed to be inserted by item 22 of the Bill

making policy and policy directions which ICASA must consider, as is currently the statutory position.

120.2 Second, to the extent that there is to be ministerial involvement, it is the Minister of Communications which should be involved in relation to broadcasting spectrum. We object to the role of the Minister of TPS in regard to high demand broadcasting spectrum.

120.3 Third, it is not appropriate for the Minister of TPS to perform his functions in terms of s31E(1) "*by notice in the Gazette*". No provision is made for consultation with interested parties (other than ICASA). This falls short of the requirements of just administrative action required by s33 of the Constitution.

120.4 Fourth, we object to the proposal that ICASA may issue other unassigned high demand spectrum only on condition that the WOAN is functional and the licensee procures a minimum 30% capacity (or such higher capacity determined by ICASA) in the WOAN for a period determined by ICASA.[88] Whilst this may be appropriate in the electronic communications context, it is not appropriate in the broadcasting context.

120.5 Fifth, the proposal that the assignment of high demand spectrum is "*in line with the principle of non-exclusivity, subject to the provisions of the national radio frequency plan*" is not clear.[89] We are concerned that this provision could prevent ICASA assigning particular spectrum to only one licensee (e.g. if that licensee is the only applicant which has made out a technological or business case for the use of that spectrum, or is a leader in technological development). We submit that the statute should not fetter ICASA's discretion to assign high demand broadcasting spectrum on an exclusive basis.

---

[88] New s31E(5) proposed to be inserted by item 22 of the Bill

[89] New s31E(2) proposed to be inserted by item 22 of the Bill

120.6 Sixth, for the reasons set out above, we oppose the application of open access principles to broadcasting spectrum.

Universal access and service obligations for frequency spectrum

121 The Bill proposes that ICASA must –

121.1 impose universal access and universal service obligations on existing and new radio frequency spectrum licensees;[90]

121.2 obtain the Minister of TPS' approval on the nature and form of all universal access and universal service obligations before they are imposed on any radio frequency spectrum licensee to ensure that the obligations are coordinated, relevant and aligned with national policy objectives and priorities;[91] and

121.3 evaluate compliance with universal access and universal service obligations on an annual basis, as a condition of renewal of the radio frequency spectrum licence.[92]

122 Universal service and universal access obligations usually apply to individual ECS and ECNS licensees. The imposition of such obligations on spectrum licensees is inappropriate, and indeed, no motivation for the introduction of these obligations on spectrum licensees is provided.

123 If, however, the power to impose such obligations on spectrum licensees is retained (which we oppose) –

123.1 we reiterate our comments above objecting to the role of the Minister of TPS and the undermining of ICASA's independence, both in general and in relation to broadcasting in particular;

---

[90] New s31A(1) proposed to be inserted by item 22 of the Bill
[91] New s31A(2) proposed to be inserted by item 22 of the Bill
[92] New s31A(5) proposed to be inserted by item 22 of the Bill

123.2 the Bill ought to provide guidance as to the nature of the obligations which may be imposed; and

123.3 compliance with any such obligations must be assessed at the renewal of the spectrum licence, which ought to occur at the same time as the renewal of the related individual service licence.

PART C: COMPETITION LAW ISSUES

Introductory comments

124 Significant changes are proposed to s67 of the ECA dealing with competition law issues. The Bill reduces ICASA's discretion and independence with regard to competition law issues and imposes extensive, onerous and resource-intensive obligations on ICASA.

125 Of particular concern is that the Bill essentially compels ICASA to deal with competition law issues in the broadcasting and electronic communications sectors by way of *ex ante* regulation of every market and market segment within those sectors. The Bill peremptorily –

125.1 requires ICASA to define all markets and market segments in the broadcasting and electronic communications sector, including certain ICT services;

125.2 requires ICASA to complete those market definitions within twelve months of the amended ECA coming into force;

125.3 thereafter, requires ICASA to conduct market reviews of all of those markets and market segments in an order of priority determined by factors specified in the Bill, which factors include markets relevant to policy directions issued by the Minister of TPS;

125.4 requires ICASA to complete each market review within twelve months; and

125.5 requires ICASA, at least every three years, to review and update the market definitions and schedule in terms of which it will conduct market reviews.[93]

126 A further over-arching concern is that the Bill provides completely inadequate due process provisions for the process in terms of which ICASA will define relevant markets and conduct market reviews. Nor does the Bill contain any provisions for the exercise and performance by ICASA of powers, functions and duties equivalent to those set out in s4B to s4D of the ICASA Act as regards these processes.

Blanket *ex ante* regulation

127 As indicated above, the Bill essentially compels ICASA to deal with competition law issues in every market and market segment within the broadcasting and electronic communications sectors by way of *ex ante* regulation, and to do so on an ongoing basis. This is quite extraordinary and completely inappropriate for a range of reasons.

128 First, it removes any discretion which ICASA may have as to whether to contemplate *ex ante* regulation in relation to one or more markets, and interferes with and encroaches upon ICASA's independence – in contravention of s192 of the Constitution (refer to paragraphs 46 to 63 above, where this concern is dealt with in detail).

129 Second, compelling this blanket *ex ante* regulation is completely unwarranted, and indeed, the Memorandum provides no motivation for these amendments. Throughout the world, the regulation of competition law issues by way of *ex ante* regulation is the exception rather than the norm, and has been applied in limited circumstances. The legislation therefore ought to specify the characteristics which ought to be present in order to enable ICASA to identify markets which may be susceptible to *ex ante* regulation. This has been the approach adopted, for example, in the EU, where, since 2003, the European Commission ("the EC")

[93] New s67(3A) and (3B) of the ECA proposed to be inserted by item 35 of the Bill

has consistently specified the characteristics which may render certain markets susceptible to *ex ante* regulation. Those characteristics have been the following:

129.1 the presence of high and non-transitory structural, legal or regulatory barriers to entry. However, given the dynamic character and functioning of electronic communications markets, possibilities to overcome barriers to entry within the relevant time horizon should also be taken into consideration when carrying out a prospective analysis to identify the relevant markets for possible *ex ante* regulation.

129.2 the market structure does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based and other competition behind the barriers to entry; and

129.3 competition law alone is insufficient to adequately address the identified market failure(s).

It is important to note that these characteristics are accumulative – i.e. they must all be present within the market.[94]

130 It is noteworthy that since the inception of these Recommendations, only one broadcasting-related market was identified by the EC as being potentially susceptible to *ex ante* regulation. That was the wholesale market for broadcasting in transmission services to deliver broadcast content to end-users. That market was identified in the Recommendation of 2003, but was dropped in the Recommendation of 2007 in that it no longer met all three characteristics (there being an increasing range of platforms over which broadcasting/audio-visual content could be transmitted), and is also not in the latest Recommendation of 2014.

[94] Commission Recommendations on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, dated 2003, 2007 and 2014

131 Third, blanket *ex ante* regulation does not accord at all with international best practice: we are not aware of any jurisdiction where this approach has been adopted.

132 Fourth, this blanket *ex ante* regulation, and the fact that ICASA is compelled to complete all market definitions within 12 months of the amended ECA coming into force and to complete each market review within 12 months of commencing the review, will require that massive resources (financial, personnel and technical), will have to be provided to ICASA, since these are complex and labour-intensive exercises (we will elaborate on this point at a later stage in this submission). Given the demands currently being placed on the fiscus in South Africa, it is questionable whether these resources will be available. If ICASA were to have a discretion to determine which markets are potentially susceptible to *ex ante* regulation, with reference to characteristics set out in the legislation, this would result in a more appropriate and focussed use of ICASA's time and its limited resources.

Market definition

133 We have indicated in the preceding paragraphs our opposition to ICASA being compelled to define all markets and market segments in the broadcasting and electronic communications sector, including certain ICT services.

134 Any market definition process requires a rigorous factual investigation. It is heavily reliant on an evidence-based investigation and assessment of product or service substitutability and constraints. As the EC records in its market definition notice:

> "*The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from*

behaving independently of effective competitive pressure."[95] (emphasis added)

Given convergence and the extraordinarily dynamic nature of broadcasting services, electronic communications services and electronic communications network services, defining a market in this sector will be a particularly complex process.

135 Compelling ICASA to define all markets and market segments in this sector and to complete those market definition processes within 12 months of the amended ECA coming into force, with no possibility of an extension of that period, will place extraordinary pressure on ICASA and its resources.

136 Furthermore, by virtue of the proposed new subsection (13), in conducting each market definition process, ICASA must consult the Competition Commission.

137 The time pressures placed on ICASA will be aggravated by the fact that ICASA and the Competition Commission will require a period of time (up to three months) to amend the concurrent jurisdiction agreement between them to regulate consultation between them on market definition, market reviews and mergers.[96] The practical effect of this may mean that ICASA could have only nine months within which to complete its market definition processes for all markets in the sector and to consult with the Commission in regard to those market definitions.

138 A further major concern about the Bill is that it provides completely inadequate due process provisions for the market definition process. All that ICASA is required to do is to give notice of its intention to define a market in the Gazette and in such notice invite interested parties to submit their written representations to it within such period as may be specified in such notice.[97] Nor does the Bill make any provision for ICASA's powers, functions and duties in conducting these processes. This is because, as a consequence of the Bill, there would no longer

---

95 Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03) ("Market definition notice"), para 3

96 New s67A(1) and (2) of the ECA, proposed to be inserted by item 33 of the Bill

97 New s67(3C) of the ECA, proposed to be inserted by item 35 of the Bill

be any reference in s67 to *"an inquiry"*, which reference in the current Act permits ICASA to exercise and perform its powers, functions and duties as set out in s4B to s4D of the ICASA Act.

139 The adverse consequences which are likely to flow therefrom are as follows:

139.1 First, defining a market will constitute administrative action in terms of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"). Since the proposed amendments require that each market definition process must be followed by a market review, the market definition process will constitute administrative action which may materially and adversely affects the rights or legitimate expectations of persons within that market. By virtue of the Constitution and PAJA, each market definition process will have to be lawful, reasonable and procedurally fair, with reference to the requirements of PAJA and the case law which has developed as regards administrative action. The proposed amendments' failure to provide for proper due process, and ICASA being unable to exercise and perform the powers, functions and duties contained in s4B to s4D of the ICASA Act, will create uncertainty as regards each market definition process and is likely to lead to endless litigation in which ICASA's market definition processes are challenged. This will be most unfortunate, not only for affected persons within the market, but also for ICASA.

139.2 Second, a superficial process which fails to permit ICASA to engage substantially with the relevant persons within the market will detract from the likelihood of each market definition process being rigorous.

140 The time pressures that will be placed upon ICASA to complete all the market definition processes, the strain that will be imposed upon ICASA's resources in conducting those processes, and anticipated superficial engagement by ICASA with affected persons in those processes, will place ICASA in an invidious position and are likely to prejudice the quality and correctness of ICASA's market definitions. This will open up the possibility of those market definitions being reviewed.

141 Furthermore, arriving at a correct market definition is fundamental for the subsequent review of that market and any regulations which may follow. As noted by the EC, "*the definition of the relevant market in both its product and its geographic dimensions* *often has a decisive influence on the assessment of a competition case*."[98] A similar sentiment was expressed in the Commission Staff Working Document, accompanying the Commission's most recent Recommendation on Relevant Product and Service Markets, where it stated *"Market definition, for the purposes of the Recommendation, is the prerequisite for assessing whether a particular market is characterised by effective competition or should be subject to ex ante regulation. The market definition sets the boundaries within which to analyse competitive dynamics and to identify in a systematic way direct and indirect competition constraints faced by the undertakings that are present in the market in question."*[99] (Emphasis added). This is true also in the context of s67 of the ECA. The markets so defined will prescribe the scope of the market review which follows and the scope and content of any regulations which may follow. Furthermore, those regulations will apply on an *ex ante* basis and will have significant consequences for a market. Accordingly, if market definitions are arrived at incorrectly, the validity of any subsequent market review and regulations could be questionable and subject to challenge.

142 A final point concerns the use in Chapter 10 of the ECA of the phrase *"market segments"*, which phrase is retained in the Bill. The phrase *"market segments"* has little, if any, economic meaning. Sound economic principles and international best practice in competition law define markets, not market segments, and this phrase should therefore be abandoned.

143 In conclusion, we are opposed to the provisions of the Bill which compel ICASA to define all markets and market segments in the broadcasting and electronic communications sector, and to complete that within 12 months of the amended

---

98 Market definition notice, para 4, emphasis added

99 Commission Staff Working Document, Explanatory Note accompanying the Commission's Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, SWD (2014) 298, dated 9 October 2014

ECA coming into force. We are further opposed to the absence of adequate due process provisions as regards those market definition processes.

Market reviews

144 We have indicated in the preceding paragraphs our opposition to ICASA being compelled to conduct a market review in all markets and market segments in the broadcasting and electronic communications sector, and to complete each such review within 12 months, with no possibility of an extension of that period.

145 Market reviews will also require rigorous factual investigation, will raise complex issues, and will add to the pressures being placed on ICASA's resources.

146 Furthermore, the Bill provides completely inadequate due process provisions for market reviews, and makes no provision for ICASA's powers, functions and duties in conducting these processes.

147 All the adverse consequences outlined in paragraphs 138 to 140 above in relation to market definition processes, are likely to also flow in relation to market reviews.

148 Furthermore, the criteria for the prioritisation of market reviews will not result in the identification of markets where competition is most likely to be ineffective but, rather "*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*".[100] As we've indicated above, ICASA should be empowered to exercise its discretion in defining markets in which it ought to conduct a market review, with reference to characteristics specified in the legislation, and to thereafter prioritise the sequence in which to conduct those market reviews.

149 A final point is that the Bill fails to make it clear that the first process to be conducted in relation to any market is to define the market; thereafter, the market

[100] Item 35(a) of the Bill, introducing s67(3A)(b) of the ECA

review must be conducted; and thereafter ICASA, depending on the outcome of the market review, may make regulations.

Review and update of market definitions and schedule for market reviews

150 The Bill proposes the insertion into s67 of a new subsection (3B) which compels ICASA, at least every 3 years, to review and update the market definitions and the schedule in terms of which it will conduct market reviews. We are concerned that this will place even greater strain on ICASA's resources.

Periodic reviews

151 Given convergence and the extraordinarily dynamic nature of the sector, where there is *ex ante* regulation of a market, ICASA ought to conduct periodic reviews of that market definition and the regulations for that market. Currently this is provided for in s67(4)(e) and s67(8) of the ECA. (We note that in s67(4)(e) there is a reference to "subsection (9)". This ought to be a reference to "subsection (8)".) Unfortunately, the Bill proposes the deletion of s67(4)(e) and proposes extensive amendments to s67(8).

152 This deletion and these amendments will have undesirable consequences and create huge confusion. This needs to be addressed by ensuring the periodic reviews of the market definition, the determination of ICASA in the prior review, and of the regulations for that market.

Requirements that ICASA regularly advise the Minister

153 The Bill proposes the insertion of a new subsection (8A) into s67 of the ECA, compelling ICASA to regularly advise the Minister in "*on expected market trends in the industry and on the impact of policy and legislation*".

154 We comment as follows on this amendment:

154.1 First, there is nothing in this new subsection which relates to competition law, therefore, as a general duty being imposed on the Authority to regularly advise the Minister on expected market trends, it is accordingly misplaced in s67.

154.2 Second, we point out that there is already a similar provision in s4(3)(a) of the ICASA Act, which provides that ICASA "*may make recommendations to the Minister on policy mattes and amendments to this Act and the underlying statutes which accord with the objects of this Act and the underlying statutes to promote developments in the broadcasting, electronic transactions, postal and electronic communications sectors*". The proposed insertion therefore appears to be superfluous.

154.3 Third, compelling ICASA to identify expected market trends in a sector which is undergoing convergence and which is extraordinarily dynamic and complex, will require yet further significant resources on the part of ICASA. This is because, in order to prepare objective and informed advice to the Minister, it will be necessary for ICASA to engage in detail with developments in the industry in order to keep abreast of such developments and to properly analyse the impact of such developments on expected trends. If not prepared with rigour, the utility of the advices would be questionable. To the extent that these advices could inform policy, it is imperative that they also be published and made available to the industry.

Consultation on mergers

155 The Bill proposes the insertion of a new s67B dealing with mergers. Sub–section (1) requires that ICASA and the Commission co-ordinate and consult on mergers. We have no objection to s67B(1).

156 However, s67B(2) requires that, when so co-ordinating and consulting on mergers, ICASA and the Commission must "*align their decisions, approvals or recommendations to the extent possible*."

157 This provision is objectionable for a range of reasons, the most important being that this provision will encroach on ICASA's independence and the requirement that it fulfil its mandate according to the provisions of its empowering statutes. This provision is impermissible and unconstitutional.

158 Furthermore, ICASA and the Competition Commission review" mergers"[101] in different contexts and with different mandates.

158.1 For example, ICASA is a sector-regulator with a sector-specific mandate, while the Commission has a general competition law investigation and enforcement responsibility.

158.2 Furthermore, in terms of s13(1) and (2) of the ECA, no general parameters are provided for ICASA's approval for the transfer of a licence. The only framework is that contained in s13(3) in terms of which ICASA may set limits or restrict ownership or control where this promotes ownership and control of electronic communications services by historically disadvantaged groups or promotes competition in the ICT sector. On the other hand, the Commission considers whether a merger substantially lessens or prevents competition, and if so, whether technological, efficiency or other pro-competitive benefits can justify the approval of the merger and, separately, whether or not the merger can be justified on public interest grounds. The Commission does so in terms of detailed provisions in the Competition Act, the Commission's Rules, and case law. Textually, these are different considerations, which may necessitate different outcomes in terms of regulatory decision-making.

Key omissions in ECA which ought to be addressed relating to competition law issues

159 The Bill fails to take the opportunity of rectifying significant defects in the ECA.

<u>Ex post investigation of anti-competitive behaviour</u>

160 Chapter 10 of the ECA is concerned with *ex ante* regulation. However, the Bill proposes the retention of the provision currently contained in s67(4)(f) of the ECA

[101] A "merger" is defined in the Competition Act, but not the ECA. In relation to the ECA, ICASA's jurisdiction derives from s13 of the ECA, which requires its prior permission for the transfer of individual licences or a change of control of a licensee, and the new s31B proposed by the Bill

that ICASA's regulations must "*provide for monitoring and investigation of anti-competitive behaviour in the market or market segments*".[102]

161 This is completely inappropriate. The relevant tests for *ex ante* and *ex post* intervention are different. Furthermore, as a sector regulator, ICASA is not equipped with the necessary resources, expertise and experience to investigate and assess whether conduct is anti-competitive on an *ex post* basis. Nor does the ECA set out any statutory basis on which conduct is to be determined to be "anti-competitive". In contrast, the Commission has extensive resources, expertise and experience for such investigations, and the Competition Act, in conjunction with the relevant case law, sets out an appropriate and detailed basis for the assessment of anti-competitive behavior, which generally accords with international best practice.[103]

162 These provisions are also objectionable because they expose licensees to investigations for alleged anti-competitive conduct under two separate statutes, conducted by separate regulatory authorities (ICASA and the Commission).

163 Furthermore, these provisions will create significant uncertainty and investment disincentives.

Significant market power

164 The definition of "significant market power" in subsection (5) of s67 of the ECA does not accord with international best practice and sound economic principles, particularly the provision that a licensee –

164.1 is deemed to have significant market power where it has a market share of at least 45%, and is presumed to have significant market power where it has a market share of less than 45% but at least 35%.

---

[102] This would be contained in s67(4)(e) of the amended ECA

[103] Developed competition law and economics prescribes the type of conduct likely to be anticompetitive as well as the effects-basis assessment of conduct in order to determine whether it is anti-competitive, including relevant standards and approaches to conducting "rule of reason" analyses in which anti-competitive effects are weighed up against technological, efficiency or pro-competitive effects. Without any of those prescripts, s67(4)(e) is so broad and imprecise that ICASA could determine a wide range of conduct to be allegedly anti-competitive without any statutory parameters.

It is accepted in competition law and economics that market power is not simply a function of a firm's market shares. Rather it entails an assessment of the constraints on a firm in the exercise of market power. Indeed the Competition Act defines market power as "*the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers*." The current definition of significant market power is simplistic and does not permit of the consideration of the dynamics of competition and whether or not a firm with the specified market shares is capable of exercising market power.

164.2 may be considered to have market power where it "has a vertical relationship that the Authority determines could harm competition". It is unclear on what basis a vertical relationship could have anything to do with market power and, in any event, vertical relationships are generally regarded in economic terms as efficiency-enhancing, except in extraordinary circumstances.

165 The Bill should take the opportunity of changing the term to "market power" and to give it the same meaning given to the term in the Competition Act.

<u>Time periods for ICASA's consideration of transfer of a licence or change of control</u>

166 s13 of the ECA requires ICASA's prior permission for the transfer of a licence or a change of control over a licensee, but does not specify a time period within which ICASA must make this decision. This has led to significant delays concerning mergers within the electronic communications sector. Given the fast pace of development in this sector, this is damaging to investment and general merger and acquisition activity. s13 should be amended to incorporate a finite time period, namely 120 business days from the date of application for approval of any such proposed transfer or change of control.

CONCLUSION

167 Once again, MultiChoice, M-Net and Orbicom would like to thank the Minister and Department of TPS for this opportunity to comment on the Bill. We look forward to continuing to participate in this process as regards the issues which we have focussed on in our response.