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By email: [ecabill@dtps.gov.za](mailto:ecabill@dtps.gov.za)

Attention: Ms M Masemola, The Acting Deputy Director – General  
ICT Policy and Strategy Development

Dear Ms Masemola,

## **INVITATION TO PROVIDE WRITTEN COMMENTS ON THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL**

1 On 17 November 2017, the Department of Telecommunications and Postal Services (DTPS) published in the government gazette number 41261 an invitation for the public to comment on the Electronic Communications Amendment Bill (Bill). Interested persons were initially given 30 (thirty) calendar days from the date of publication to submit their written comments. The due date was subsequently extended to 31 January 2018. The National Association of Broadcasters (NAB) wishes to thank the DTPS for this extension.

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*The NAB is a voluntary industry association funded by its members*





- 2 The NAB is the leading representative of South Africa's broadcasting industry, comprising all three tiers of broadcasters -public, commercial and community, as well as signal distributors, training institutions and industry associates. The members of NAB include commercial radio media groups; Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, as well as independents, Classic FM, Kaya FM, YFM, and Smile FM; all the licensed commercial television broadcasters e.tv, Multichoice, M-Net, and StarSat-ODM; a host of community radio broadcasters and community television broadcaster, Faith Terrestrial. The NAB membership also extends to training institute, NEMISA and the broadcast signal distributors, Sentech and Orbicom

## **BACKGROUND CONTEXT**

- 3 The public process leading up to the publication of the Bill began with the National Integrated ICT Policy Review, under the former Department of Communications (DoC) in 2013. This process culminated in the Integrated ICT White Paper which was approved by Cabinet on 28 September 2016 and published on 3 October 2016. The White Paper outlines the policy framework for the transformation of South Africa into an inclusive and innovative digital and knowledge society.
- 4 The Bill was developed to align the Electronic Communications Act 36 of 2005, as amended (ECA) with the White Paper. Broadly speaking, the Bill seeks to *inter alia* provide for transformation of the sector, reduce infrastructure duplications, and encourage service based competition through a wireless open access network.



- 5 The Bill also addresses the critical issue of spectrum and the national frequency plan - this includes new approaches to the administration of spectrum, spectrum assignment, spectrum allocation, as well as the determination and allocation of high demand spectrum on open access principles.
- 6 The Bill is notably silent on Chapter 9 (the broadcasting section) of the ECA, and it is understood that matters specific to the broadcasting and the audio-visual sector will be addressed by the DoC. However, many elements of the Bill have an impact on the broadcasting sector, although they may be inappropriate for the sector.
- 7 The NAB is concerned with key issues that require further consideration and policy harmonisation between the DTSPS and DoC. These are addressed below and focus on institutional arrangements, the administration of spectrum and two other parallel government processes which we believe will impact on the Bill in its current form –namely, the legislative review in respect of competition matters and the regulation of audio-visual content.
- 8 Although this submission focuses primarily on matters that affect the broadcasting sector, the NAB wishes to spell out the following observations that may assist the DTSPS in taking this process forward.
  - 8.1 The Bill seems to address both policy and regulatory matters interchangeably. In principle a policy sets out the government's broader objectives on specific issues such as the establishment of the Wireless Open Access Network (WOAN). Once the policy and objectives thereof have been defined, legislative and regulatory instruments are then developed separately in order to implement the policy.

8.2 Importantly, legislation and regulations must be developed with due consideration of and alignment with *existing* statutes. To do otherwise would create a conflict of laws and legal uncertainty. In this instance, the Bill not only establishes the WOAN, but goes on to direct that the Independent Communications Authority of South Africa (ICASA) must licence the WOAN, whereas there are processes for the granting of licences, which must be complied with. We therefore recommend that DTSPS delete the proposed new section 19A(1) in its entirety as the licensing of the WOAN must be subject to existing regulations administered by ICASA - as may be amended from time to time. This would also ensure that there is clarity on the processes applicable to entities seeking licences from ICASA and therefore uniform application of legislation.

8.3 The spectrum issues seem to have been the result of some consultation with incumbent telecommunications providers as alluded to during an engagement on the Draft Bill by the DTSPS on 4 December 2017. The NAB is concerned with the apparent lack of similar consultation with incumbent broadcasters, who will also be affected as they are preparing for digital migration. We therefore advise the DTSPS to provide for consultation with broadcast service licensees and broadcasting signal distributors to ensure coordination and harmonisation in relation to the allocation and use of spectrum. The NAB is of the view that greater harmonisation and concurrence between the DTSPS and DoC regarding spectrum matters is necessary to enable the Bill to be taken forward. To assist the DTSPS in this regard, the NAB sets out the few spectrum issues, concerns and practical considerations in this submission under paragraphs 12 to 21.

8.4 The NAB is aware of the public process leading up to the Bill, however it is unclear whether a socio-economic impact assessment was conducted as part of the drafting exercise of the Bill, and whether such assessment took into account a cost-benefit analysis (from a budget, technology and human resource perspective) especially given the concerns expressed by government on the need for greater efficiencies and austerity across all state-owned entities and parastatals. We are especially concerned with whether ICASA and some of the entities to be established pursuant to the Bill will have the capacity to deliver on the various tasks within the stipulated time periods. It is the view of the NAB that these provisions seem to be premised on the assumption that these entities will be operating optimally within these timeframes. However, given the interdependencies of some of these provisions, any delays may cause disruptions in the implementation of other provisions of the Bill.

8.5 The memorandum on the objects of the Bill alludes to the establishment of a new ICT Sector Commission and Tribunal. Furthermore, the inter-related amendments to the ICASA Act 13 of 2000 as amended (ICASA Act), as well as other key legislation required to give full expression to the White Paper are still in development – these include the Postal Service Amendment Bill, the Digital Development Fund Bill, the ICT Sector Commission and Tribunal Bill, the Electronic Communications and Transactions Bill and the recently published i-Nesi Bill. The timing of when/whether these pieces of legislation will be made public is still unknown (except for the i-Nesi Bill which has already been published) and will impact on the comments made by the public in this first round of written submissions on this Bill.



8.6 Finally, there is need for certainty and role definition regarding the mandate and functions of the B-BBEE ICT Sector Council vis-à-vis ICASA with reference to section 42 of the Bill.

8.7 The NAB welcomes the opportunity to make submissions on the Bill. The NAB further requests an opportunity to make oral submissions, should hearings be held.

## **INSTITUTIONAL ARRANGEMENTS**

### *The independence of ICASA - s30*

- 9 Section 192 of the Constitution of the Republic of South Africa provides for the independent regulation of broadcasting in the public interest, to ensure fairness and a diversity of views broadly representing South African society. Currently, the independent regulator for broadcasting services (as well as telecoms and postal) is ICASA. The main legislative instruments through which the broadcasting industry is regulated are the ECA and the ICASA Act.
- 10 The independence of the regulator and regulation is further safeguarded by section 3(4) of the ECA which provides that ICASA in exercising its powers and performing its duties in terms thereof, must *consider* (our own emphasis) policies made by the Minister in terms of sections 3(1) and 3(2). ICASA is therefore not bound by these ministerial policies although it must take due consideration thereof. We note that whilst section 3(4) of the ECA has not been amended in the Bill, the Bill does however introduce a new provision in terms of which ICASA must now comply with ministerial policies and policy directions in its administration and management of spectrum. The Bill further defines this spectrum management by ICASA as the technical term for the process of regulating the spectrum.



- 11 This amendment weakens the independent regulation of broadcasting and on this point alone we are concerned that the Bill will not pass constitutional muster in its current form. Whilst the intention of the DTSPS may be to address matters pertaining to ministerial policies and policy direction for purposes of regulating telecommunications operators, this new provision also impacts on broadcasters. The NAB strongly recommends that the Bill be revised to give meaningful effect to ICASA's independence.

## **SPECTRUM MANAGEMENT**

### Administration of spectrum - s30

- 12 As the DTSPS is aware, spectrum is assigned for services including broadcasting services in accordance with the National Radio Frequency Plan. However, the effect of the proposed amendments is that assignment of all spectrum is now placed squarely within the purview of the Minister of Telecommunications and Postal Services. Although the Bill provides for coordination between the two ministers on issues of broadcasting spectrum allocation, we submit that a far greater role is needed for the Minister of Communications on issues related to broadcasting spectrum.

### Spectrum sharing – s31C

- 13 In recognition of the importance of efficient use of spectrum, the Bill proposes provisions for spectrum sharing subject to the approval of ICASA. The NAB supports spectrum sharing as contemplated in the Bill as it will ensure that licensees who have the right to use the band will collaborate and consent to sharing the band as opposed to such sharing being decided on a unilateral basis and imposed upon the rightful users of





the band. However, this type of capacity sharing is not practical for broadcasters.

- 14 The provisions of the Bill are more suitable for telecommunications operators as the network of a particular service provider can be shared with subscribers of a different network operator. The most practical kind of 'capacity sharing' for the broadcasting industry is infrastructure sharing wherein antennas and combiners are shared following engineering consideration and careful tuning thereof.
- 15 Following from the paragraph above, spectrum sharing must be approved only after it has been determined that such sharing will not cause any harmful interference. We therefore propose an additional subsection in section 31C(2) which reads as follows:

*The Authority may not approve spectrum sharing if it will -  
(d) cause harmful interference.*

#### Spectrum re-farming – s31D

- 16 The NAB understands that the demand for new technological services is growing so fast that it has resulted in spectrum re-farming. Whilst the NAB supports the proposed legislative framework for spectrum re-farming, it is important to ensure that the impact of spectrum re-farming on the broadcasting industry, particularly television broadcasters is given due regard to ensure that licensed broadcasters are not squeezed out as a result of competition for limited frequencies on the radio spectrum over which they broadcast. To this end, the DTPS must ensure that the band 470 – 694 MHz remains protected for terrestrial television broadcasting services.





## **HIGH DEMAND SPECTRUM - IMPLICATIONS FOR BROADCASTING**

### *High demand spectrum - s31E*

- 17 The Bill seeks to enable the licensing of the WOAN which shall provide wholesale electronic communications networks and facilities on open access principles as defined in the Bill. Furthermore, within 6(six) months of the promulgation of the Bill, the Minister shall determine what constitutes high-demand spectrum as well as which unassigned high demand spectrum must be assigned to the WOAN. In addition, the Bill provides that ICASA shall within 12 (twelve) months of the promulgation thereof, make recommendations on the terms and conditions which shall be applicable to the WOAN.
  
- 18 The NAB notes that the Bill stipulates timelines within which ICASA is to develop regulations pursuant to specific sections. Furthermore, the Bill proposes substantial tasks for ICASA without any indication of whether there has been consideration of ICASA's capacity to deliver thereon especially when considering that its founding legislation is yet to be reviewed. Furthermore, in the event that the DTSPS was to revise these timelines, it would have to initiate another legislative review process which requires time and resources. Therefore, NAB respectfully cautions the DTSPS against this approach.
  
- 19 Broadcasters have a number of digital terrestrial television (DTT) transmitters operating in the 700 MHz and 800 MHz bands. After analogue switch-off, these transmitters need to be migrated to below 694 MHz following a process of restacking. In the absence of a clear indication of what constitutes high demand spectrum, the NAB can only assume that the high demand spectrum will include the 700 MHz and 800 MHz bands. If our assumption is correct, then it must be noted that any assignment and



use of these bands while aforementioned transmitters are still in operation will result in serious interference and prejudice to broadcasters. This is especially so as the WOAN is concerned with broadband, not broadcasting. It is therefore irregular for broadcasting spectrum to be assigned to the WOAN.

- 20 The above-mentioned restacking process will require radio frequency transmission equipment to be re-tuned to the designated frequency at the various transmitter sites or new transmitters and combiners to be pre-tuned and installed at the affected sites. This exercise needs to be done carefully and within a short space of time to prevent disruptions to viewers.
- 21 The NAB therefore respectfully submits that the timelines for the determination, assignment and ultimate use of the high demand spectrum should take into account the Broadcasting Digital Migration and the restacking processes as well as the spectrum needs of broadcasters.

## **FREQUENCY LICENCES**

- 22 The Bill proposes that spectrum licences will be renewable annually. While this could be appropriate for some licensees, individual service licensees – who make substantial long-term investments in their infrastructure and networks – require a different approach. We propose that the spectrum licence should be for the same period as the service licence.

## **B-BBEE COMPLIANCE (S42)**

- 23 The Broad-Based Black Economic Empowerment Act 53 of 2003, as amended (B-BBEE Act) empowers the Minister of Trade and Industry to issue codes of good practice in respect of black economic empowerment in order to advance the objectives of the B-BBEE Act. The code for the ICT sector is administered by the B-BBEE ICT Sector Council.

- 24 In terms of the Bill, ICASA must ensure that it promotes and advances the objects of the ICT Sector Code when granting a license pursuant to section 5 of the ECA. Whilst the Bill requires ICASA to promote the B-BBEE ICT Sector code, it is not clear whether non-adherence to the ICT Sector Code will be dealt with by ICASA, or whether ICASA is to refer the matter to the ICT Sector Council. The Bill therefore does not clearly provide for ICASA's role in enforcing the sector code as it does not unequivocally empower ICASA to deal with any instances of non-adherence to the sector code. The NAB submits that this *lacuna* can best be addressed through engagements between the Ministers concerned on the role of ICASA and the B-BBEE ICT sector council respectively.
- 25 Furthermore, the incorporation B-BBBEE ICT sector code or the B-BBEE Act is not consistently carried through in the Bill as the reference to “historically disadvantaged groups” (HDG) in section 9 of the ECA has not been amended. The NAB raised a similar point in its previous submission on the Draft Amended Broad-Based Black Economic Empowerment ICT Sector Codes, which were published on 24 February 2016 in the government gazette number 397226. This continued application of the concept of empowerment of HDG exacerbates the difficulty and challenge faced by broadcasters seeking to comply with B-BBEE reporting and their licence conditions.
- 26 The Bill further directs ICASA to develop regulations to apply the B-BBEE ICT sector code to *inter alia* existing licensees within 12 months of the Bill being promulgated. In line with our submission in the preceding paragraphs, the NAB respectfully advises against this proposal, and urges the DTPS to rather facilitate engagements between ICASA and the B-BBEE ICT Sector council and to remand any timelines to regulations as may be published from time to time.



## **INTER-GOVERNMENTAL POLICY PROCESS LIKELY TO IMPACT ON THE BILL**

### *Parallel legislative review processes*

- 27 The Bill also seeks to address competition related matters within the sector. Subsequent to the publication of the Bill, on 1 December 2017 the Department of Economic Development (DoED) published the Competition Amendment Bill (Competition Bill). The Competition Bill seeks to address the structural challenges in the South African economy which have been identified by the DoED as the concentration and the racially-skewed spread of ownership of firms in the economy. Furthermore, the Competition Bill seeks to promote institutional and procedural efficiency in order to improve the effectiveness of the Competition Commission and Tribunal as well as the Competition Appeal Court. We trust that the DTSPS and DoED will engage and coordinate with each other on cross-sectoral matters of mutual interest to ensure coherence in the regulatory and policy framework of competition related matters in South Africa.
- 28 The NAB attended a briefing session on the Bill at the DTSPS on 4 December 2017 during which attendees were informed that the DoC will be publishing a Green Paper on Audio-visual Content. This Green Paper will no doubt have implications on the institutional arrangements as proposed in the Bill, as well as critical issues regarding frequency spectrum assignment, allocation and management. In addition, the regulation of audio-visual content will affect all licensees in the broader ICT industry. This will include both service based competitors (without spectrum licences) as well as those that hold both spectrum and service licenses.
- 29 The DTSPS is no doubt aware of the potential for the Bill to be drawn out over a substantial period of time should the policy pronouncements from



the DTI and DoC not be aligned with the objects of the Bill. We therefore urge the respective departments to align their approaches.

## **CONCLUSION**

30 In conclusion, the NAB thanks the DTPS for the opportunity to make this written submission and we look forward to the next step in the process. The NAB strongly recommends that the DTPS engage broadcasting spectrum licensees who are preparing for DTT migration so that they can better understand the future spectrum management process.

31 The NAB trusts that the DTPS will continue to engage the broadcasting industry in working towards an enabling environment for the growth and development of the ICT sector.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Nadia Bulbulia', written over a horizontal line.

Nadia Bulbulia

**Executive Director**

