

INVITATION TO PROVIDE WRITTEN COMMENTS ON ELECTRONIC COMMUNICATIONS AMENDMENT BILL

SENTECH SOC LTD SUBMISSION

31 JANUARY 2018



Head Office: Sentech Technology Park, ESTP, Okpara Street, Ikeja, Lagos, 2040
Postal Address: P.O. Box 500, Lagos, 2040
Telephone: 011 471 4300 | Call Centre: 0800 343 822 | International: +234 201 49901
Fax: 011 246 0253 | E-mail: sales@sentech.com | service@sentech.com



Table of Contents

1.	Introduction.....	4
2.	Executive summary.....	4
3.	Allocation definition.....	4
3.1.	Proposed ECA Amendment (section 1 definition)	4
3.2.	SENTECH's recommendation (Section 1 definition).....	4
4.	High demand spectrum definition.....	5
4.1.	Proposed ECA Amendment (section 1 definition)	5
4.2.	SENTECH's Recommendation	5
5.	Open access network definition	6
5.1.	Proposed ECA Amendment (section 1 definition)	6
6.	Objects of the Act	6
6.1.	Proposed ECA Amendment (section 2).....	6
6.2.	SENTECH's recommendation (Section 2).....	6
7.	Wireless Open Access Network ("WOAN")	7
7.1.	Proposed ECA Amendment (Section 19A).....	7
7.2.	SENTECH's recommendation (Section 19A)	8
8.	The Authority	10
8.1.	Amendment of section 4 of Act 36 of 2005.....	10
8.1.1.	Proposed ECA Amendment (Section 4).....	10
8.1.2.	SENTECH's recommendation (Section 4).....	10
8.2.	Amendment of section 8 (2) of Act 36 of 2005	11
8.2.1.	Proposed ECA Amendment Bill (Section 8)	11
8.2.2.	SENTECH's recommendation (Section 8).....	11
8.3.	Amendment of section 30 of the ECA	11
8.4.	Section 31A of the Bill.....	12
8.4.1.	SENTECH's recommendation 1 (Section 31A (2)).....	12
8.4.2.	SENTECH's recommendation 2 (Section 31A (3)).....	12

8.5. Amendment of section 34 of Act 36 of 2005.....	12
8.6. Amendment of section 43 of Act 36 of 2005.....	12
8.6.1. SENTECH's proposal (Section 43)	13
9. CONCLUSION.....	13

1. Introduction

SENTECH thanks the Minister of Telecommunications and Postal Services (“Minister”) for the opportunity to make a submission on the *Invitation to Provide Written Comments on Electronic Communications Amendment Bill (“Bill”) Government Gazette No. 41261, as published on 17 November 2017.*

2. Executive summary

SENTECH’s submission in the main addresses the issue of the WOAN, and proposals in the Bill that may face constitutional challenges with reference to the independence of the Authority and/or proposals that contradict particular sections in the ICASA Act. Secondary to the main issues raised, is the issue of separation of spectrum principles for terrestrial broadcasting and mobile broadband. The submission also indicates proposals from the Bill supported by SENTECH especially when they seek to strengthen the transparency and promote accountability of the Ministry, Authority and licensees issued with radio frequency spectrum.

3. Allocation definition

3.1. Proposed ECA Amendment (section 1 definition)

“allocation” in relation to a frequency band, means the entry in the Table of Frequency Allocations of a given frequency band for the purpose of its use by one or more terrestrial or space radio-communication services or radio astronomy service under specified conditions; that is the responsibility of the Minister of Telecommunications and Postal Services;”

3.2. SENTECH’s recommendation (Section 1 definition)

SENTECH is of the view that the current definition of allocation, as stated below, should not be revised:

“allocation”, in relation to a frequency band, means the entry in the Table of Frequency Allocations of a given frequency band for the purpose of its use by one or more terrestrial or space radio-communication services or radio astronomy service under specified conditions;

Section 34(2) of the ECA, as amended, enunciates that the Minister is responsible for the approval or rejection of the “national radio frequency plan developed by the Authority”. Section 34(2) read together with section 34(11) and (12), also states that the national radio frequency plan cannot be gazetted by the Authority without the expressed official

agreement or acceptance from the Minister. SENTECH submits that in the light of the aforementioned section, the proposed addition of the definition is not necessary.

4. High demand spectrum definition

SENTECH is of the view that that the proposed definition of “high demand spectrum” does not capture the crucial component of the National Integrated ICT Policy White Paper (October 2016) with regards to the responsibilities of the Minister of Communications. The Policy recognises the “distinction between broadcasting and telecommunications spectrum” and that “there is a need to continue to provide for allocation of adequate spectrum to broadcasting specifically to ensure that Government’s objectives for free-to-air and other broadcasting services are met”. The definition as it stands, without an exclusionary provision, has the unintended consequence of determining FM (87.5 – 108 MHz), VHF (174 – 238 MHz and 246 – 254 MHz) and UHF (470 – 862 MHz) radio frequency spectrum as high demand spectrum.

4.1. Proposed ECA Amendment (section 1 definition)

“high demand spectrum” – means spectrum where –

- (a) demand for access to the radio spectrum resource exceeds supply; or*
- (b) radio frequency spectrum is fully assigned,*

As determined by the Minister responsible for Telecommunications and Postal Services, by notice in the Gazette, after consultation with the Authority;”

4.2. SENTECH’s Recommendation

To ensure the intended separation of broadcasting and telecommunications radio frequency spectrum, SENTECH proposes the following addition and wording;

SENTECH’s proposal (Section 1 definition)

- (c) the spectrum referred to in (a) and (b) excludes radio frequency spectrum allocated to terrestrial broadcasting services in the National Frequency Table of Allocation;***

The exclusion of terrestrial broadcasting spectrum in the definition of high demand spectrum is also supported by section 2(i) of the Broadcasting Act of 1999 (as amended). Through section 2(i), the Broadcasting Act of 1999 (as amended) empowers the Minister responsible for broadcasting services to guarantee the “efficient use of the broadcasting frequency spectrum” through policy.

5. Open access network definition

5.1. Proposed ECA Amendment (section 1 definition)

“Wireless Open Access Network” means the entity contemplated in section 19A that must provide wholesale electronic communications network services on open access principles.”

SENTECH's Recommendation

It is our assumption that the open access network relates to the need for a policy and regulatory intervention in pursuance of SA Connect and ICT Policy White Paper objectives, to address social needs that have not been met by the private sector and are subsequently the responsibility of the government.

Taking the above into consideration, SENTECH proposes the addition of the following definition, Wireless Open Access:

“Wireless Open Access” means an effective wholesale access to wireless broadband infrastructure on transparent and non-discriminatory voluntary basis in urban areas and with obligatory licence conditions to service under-serviced areas.

6. Objects of the Act

6.1. Proposed ECA Amendment (section 2)

“The primary object of this Act is to provide for the regulation of electronic communications in the Republic [in the public interest] in line with the National Integrated ICT Policy White Paper, since ICTs play an essential role in socio-economic development and effective participation of all South Africans in the affairs of the Republic and for that purpose to -”;

6.2. SENTECH's recommendation (Section 2)

SENTECH supports the current wording preceding paragraph (a) of Section 2 of the ECA. SENTECH is of the view that the current wording is in line with the principle of the Constitution of the Republic of South Africa.

SENTECH is of the view that the reference to the National Integrated ICT Policy White Paper may create contradictions with other provisions of the law. The reference will result in legal challenges of validity in the event the policy is repealed, thus requiring amendment of the ECA. SENTECH submits that reference be made to Section 3(1A) of the ECA to

determine whether this section does not correctly cover the principle the Minister is seeking to introduce.

SENTECH submits that the proposed amendment controverts section 2(b) of the ICASA Act, thereby creating an environment of diverse of interpretation of legislation.

SENTECH supports the rest of the proposed amendments. SENTECH is in support of the principle that access to scarce and high demand spectrum should not be limited to ownership. The principle of shared use, voluntary open access and under-serviced area access through obligations justifies the proposed amendments in section 2(cA), (cB), (cC), (cD), (i) and (p) of the ECA.

SENTECH further proposes the following addition and wording to the amendments in section 2(1) after (i);

(iA) encourage increased participation rates; capacity; knowledge creation and innovation at higher education through ICT;

SENTECH is of the view that the proposed amendments support of the NDP's assertion that higher education is a crucial component in the country's objectives of sustainable increased and inclusive economic growth; poverty alleviation; and reduction in historic inequalities. The importance of ICT for education is noted in the *Heher Report of the Commission into the feasibility of making higher education and training fee-free in South Africa*. The Commission has recommended that the State investigate the use of technology when looking at alternative measures of addressing higher education challenges.

7. Wireless Open Access Network (“WOAN”)

7.1. Proposed ECA Amendment (Section 19A)

19A. (1) The Authority must ensure that an individual electronic communications network service licence and a radio frequency spectrum licence is issued to a Wireless Open Access Network.

(2) The Wireless Open Access Network must -

(a) provide wholesale open access to its electronic communications networks and facilities, upon request, to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of a wholesale open access agreement entered into between the parties, in accordance with the general open access principles;

1(b) in addition to the requirement in subparagraph (a), comply with the following open access principles on its electronic communications network:

(i) Active infrastructure sharing that includes but not limited to national roaming, radio access network sharing and enabling mobile virtual network operators, for voice and data based on the latest generation of technologies;

(ii) cost-based pricing;

(iii) access to its electronic communications network or electronic communications facilities as prescribed by the Authority; and

(iv) specific network and population coverage targets.

(3) The Minister may issue a policy direction to the Authority in terms of section 5(6) to issue an invitation to apply for the Wireless Open Access Network licences after—

(a) the Authority has made recommendations on the terms and conditions including universal service and access obligations which will apply to the Wireless Open Access Network as contemplated in section 31A and 31E; and

(b) the Minister has considered incentives that will apply as contemplated in subsection (4).

(4) The Minister must, for purpose of licensing the Wireless Open Access Network, consider incentives that may be granted to the Wireless Open Access Network including—

(a) reduced or waived spectrum fees as contemplated in section 3(2)(d) of the Act;

(b) access to rights of way, public infrastructure as well as public electronic communications facilities through government facilitation; and

(c) allocation of funds as contemplated in section 88 of the Act to construct or extend an electronic communications network in under-serviced areas."

7.2. SENTECH's recommendation (Section 19A)

In line with the definition of the Wireless Open Access Network, SENTECH proposes the substitution of section 19A of the amendments with the following wording:

19A. (1) The Authority must issue obligations on unassigned high demand spectrum based on the following principles;

(i) Prioritisation of under-serviced areas; and

(ii) Specific network and population coverage targets; and

(iii) At least 30% network capacity access at cost-based pricing to a WOAN.

- (2) The access capacity stated in sub-section (1) (iii) must be in under-serviced areas.**
- (3) The licensees with high demand radio frequency spectrum licences are required to operate on voluntary open access principles for network capacity not included in sub-section (1) (iii).**
- (4) Further to sub-section (3), licenses are required to operate based on the following guidelines;**
 - (i) Active infrastructure sharing that includes but not limited to national roaming, radio access network sharing and enabling mobile virtual network operators, for voice and data based on the latest generation of technologies;**
 - (ii) Fair and just pricing; and**
 - (iv) Access to electronic communications network or electronic communications facilities as prescribed by the Authority;**
- (5) The extent of the effectiveness of wholesale access to wireless broadband infrastructure must be determined by the Authority through a policy directive from the Minister taking the following, inter alia, into consideration: pricing of services; availability of infrastructure; licence obligations, etc.**
- (6) The Minister may, for purpose of the operation of Wireless Open Access Network, consider incentives that may be granted to licensees seeking access to unassigned high demand spectrum including—**
 - (i) Reduced or waived spectrum fees as contemplated in section 3(2)(d) of the Act; and**
 - (ii) Access to rights of way, public infrastructure as well as public electronic communications facilities through government facilitation;**

In support of the above recommendations on section 19A, SENTECH would like to propose two (2) further additions:

The first addition, stated below, pertains to sub-section 82(1) of the ECA in reference to the Agency:

- 1(a1) to promote access to electronic communications services in under-serviced areas through the WOAN;**

The ECA empowers the Agency to address issues relating to universal access to ECNS, ECS and universal services in relation to “computing, communications, content and human capacity”¹. It can therefore be interpreted that the Agency is empowered with diffusion of ICT. Therefore, the proposed addition empowers the Agency to consider the WOAN as one of the vehicles for universal access and universal service.

The second addition stated below pertains to sub-section 3(1A) of the ECA in reference to the Minister’s powers to make policies and provide policy direction:

1A(c) to impose obligations on unassigned high demand spectrum for under-serviced areas;

It is submitted that this addition is consistent with the Minister’s right to influence regulation of electronic communications in the public interest.

8. The Authority

8.1. Amendment of section 4 of Act 36 of 2005

8.1.1. Proposed ECA Amendment (Section 4)

Section 4 (1) paragraph (d)

(d) generally, the [control of the] use of the radio frequency spectrum, radio activities and the use of radio apparatus, in line with the National Radio Frequency Plan. “; and

(1A) (a) Any regulations prescribed by the Authority on radio frequency spectrum fees must be in accordance with any policy or policy directions issued by the Minister as contemplated in section 3(1) (e) and 3(2) (d).

(b) The Authority must amend any existing radio frequency spectrum fees regulations which are in force when the Minister issues a policy direction as contemplated in section 3(2) (d), within six months after the Minister issues such policy direction.”

8.1.2. SENTECH’s recommendation (Section 4)

SENTECH submits that some of the proposed amendments may be challenged on the basis of the Authority’s constitutional right to independence. There are proposed amendments in the Bill that have not taken into consideration the impact of the changes to existing statutes such as the ICASA Act. The ECA acknowledges section 192 of the

¹ ICT for Sustainable Development: Defining a Global Research Agenda

Constitution of the Republic of South Africa by referencing section 3 of the ICASA Act, taking into consideration section 3(3) of the ICASA Act.

The enforceability of the proposed amendments in section 3 of the ECA may prove challenging for both the Minister and the Authority. Section 3(4) of the ECA and section 4(3A) (a) of the ICASA Act empowers the Authority to consider policy and/or policy directive issues by the Minister in reference to electronic communications. Section 4(3)(c) of the ICASA Act further states that the "Authority must control, plan, administer and manage the use and licensing of the radio frequency spectrum".

Taking into consideration the above, SENTECH submits that the proposed amendments in section 4 of the Bill may not have the intended effect. SENTECH, therefore, advises that the current wording of the ECA be retained.

8.2. Amendment of section 8 (2) of Act 36 of 2005

8.2.1. Proposed ECA Amendment Bill (Section 8)

"Such standard terms and conditions must include, but are not limited to;"

8.2.2. SENTECH's recommendation (Section 8)

Section 8(2) of ECA reads as following:

"Such standard terms and conditions may include, but are not limited to;"

Section 8(2) of ECA as amended clothes the Authority with a discretion on the designation of licensees which may be designated as licensees to whom obligations may be applicable. The proposal in the Bill, as quoted above, removes the discretion and the Authority is required to designate licensees to whom universal service and universal access obligations are to be applied. The Bill requires the Authority to review the appropriateness of the obligations every five (5) years.

SENTECH proposes that the original wording in the ECA as amended be retained to allow the Authority the discretion to designate licensees. This will allow the Authority to consider the current obligations that licensees are servicing.

8.3. Amendment of section 30 of the ECA

SENTECH submits that the proposed amendments in sub-section 30(1), (2)(a) - (d) and (5) contradict section 4 of the ICASA Act, particularly sub-sections 4(c). The enforceability of the proposed amendments in sub-section 30(1), (2)(a) - (d) and (5) of the ECA may prove challenging for both the Minister and the Authority. It is for this consideration that SENTECH

advises the Minister to exclude the proposed changes in sub-section 30(1), (2)(a) - (d) and (5).

The proposed amendments in sub-sections 2(f)-(i) are welcome additions as they strengthen the transparency and promote accountability of the Ministry, Authority and licensees issued with radio frequency spectrum.

8.4. Section 31A of the Bill

SENTECH supports the addition of section 31A (4) and (5) as the wording is consistent with the objectives of the Minister. However, SENTECH has a challenge with section 31(A) (1), (2) & (3) of the Bill. It is submitted that section 31(A) (1) of the Bill does not take into consideration the issue of affordability for entities with existing obligations. The addition of section 8(4A) and 31A (4) and (5) of the Bill renders section 31A (1) excessive. Section 31A (3) assumes that entities assigned similar spectrum are similar in financial status, and this will have the unintended consequence of financially burdening some licensed entities.

8.4.1. SENTECH's recommendation 1 (Section 31A (2))

SENTECH proposes the following wording for section 31A (2):

Universal access and service universal obligations shall be applicable to existing and new radio frequency spectrum licensees whose radio frequency spectrum has been determined as high demand spectrum by the Minister of Telecommunications and Postal Services.

8.4.2. SENTECH's recommendation 2 (Section 31A (3))

SENTECH proposes the following wording for section 31A (3):

Radio frequency spectrum licensees assigned radio frequency spectrum in similar radio spectrum bands must be assigned access and universal service obligations equitably.

8.5. Amendment of section 34 of Act 36 of 2005

SENTECH is of the view that the proposed amendments of the Bill may face constitutional challenges. SENTECH submits that the text of the current section remain unchanged.

8.6. Amendment of section 43 of Act 36 of 2005

SENTECH supports the principle of access to facilities. The principles in the proposed amendments, section 43(1A) and (1B), can be effectively dealt with through chapter 10 of the

ECA. The proposed amendment of sub-section 43(7A) of the Bill is a duplication of sub-section 4(3)(g) and 4D of the ICASA Act and therefore SENTECH submits that it is not necessary to include in the Bill.

8.6.1. SENTECH's proposal (Section 43)

SENTECH proposes amendment of sub-sections 43 (1) of the ECA as per text below:

(1) Subject to section 44(5) and (6), an electronic communications network service licensee must, on request, lease active and/or passive components of the electronic communications facilities to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of an electronic communications facilities leasing agreement entered into between the parties, unless such request is unreasonable.

9. CONCLUSION

- 9.1. SENTECH hopes that its comments and proposals would contribute to the finalisation of the amendments process.
- 9.2. Though SENTECH may have raised challenges on some of the proposed amendments of the Electronic Communications Act, the company supports the spirit of the Bill and greatly appreciates the opportunity extended by the DTSPS for contribution to the amendment process.
- 9.3 SENTECH submits that the Government stake in the WOAN should be held by SENTECH on behalf of Government.