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MEDIAMONITORING AFRICA

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Dear Ms Masemola

JOINT WRITTEN SUBMISSIONS BY THE SOS COALITION AND MEDIA MONITORING AFRICA ON THE ECA AMENDMENT BILL

1. INTRODUCTION

1.1. In Notice 1293 published in Government Gazette No. 41261 dated 17 November 2017, the Department of Telecommunications and Postal Services (DTPS) invited written submissions on the Electronic Communications Amendment Bill which was said to have been introduced to Parliament on the same date (the Bill). The date for submissions was extended to 31 January 2018 as a result of Notice 1390 published in Government Gazette No. 41312 dated 8 December 2017.

1.2. The SOS Coalition:

1.2.1. The SOS Support Public Broadcasting Coalition (SOS) is a civil society coalition that advocates for the presence of robust public broadcasting in the public interest to

deepen our constitutional democracy. The coalition represents trade unions, non-governmental organisations (NGOs), community-based organisations (CBOs), community media, independent film and TV production sector organisations; academics, freedom of expression activists and concerned individuals.

1.2.2. SOS campaigns for an independent and effective public broadcaster. We engage with policy makers, regulators, and law makers to secure changes to promote citizen-friendly policy, legislative and regulatory changes to broadcasting.

1.2.3. The Coalition campaigns for the above by:

1.2.3.1. Lobbying for transparency and accountability by all institutions governing public and community broadcasting: Parliament, the Ministry and Department of Communications, the Independent Communications Authority of South Africa (ICASA), the Media Development and Diversity Agency (MDDA), the SABC, the Universal Service and Access Agency of South Africa (USAASA) and also the Competition Commission;

1.2.3.2. Promoting a constructive, engaged role with all stakeholders, including industry bodies such as the National Association of Broadcasters (NAB) and the National Community Radio Forum (NCRF), as well as a range of NGOs, CBOs, campaigns and others; and

1.2.3.3. Researching international best practices to inform all aspects of our work and supporting evidence based policy making and regulatory practice by parliament, the executive and the various regulatory authorities and state agencies mentioned above.

1.2.4. As part of its lobbying work the Coalition writes submissions, commissions research, engages the media, organises public meetings and where appropriate pickets and protests. Our contributions in advocating for a public-interest-focused public broadcaster have been recognised by the broadcasting sector, the media, the courts, and Parliament as being immensely valuable.

1.2.5. Overall, the work that SOS does has helped to contribute to the growing public understanding of the SABC as "our" public broadcaster – one that must not be captured by commercial or special interests, the state or by a particular faction of the ruling party, and one that must service the information and entertainment needs of the citizens of the country.

1.3. Media Monitoring Africa:

1.3.1. MMA is Media Monitoring Africa is an NGO that has been monitoring the media since 1993. MMA aims to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are, media ethics, media quality and media freedom.

1.3.2. MMA's vision is a just and fair society empowered by a free, responsible and quality media.

1.3.3. In the last 25 years we have conducted over 200 different media monitoring projects – all of which relate to key human rights issues, and at the same time to issues of media quality. MMA has challenged, and continues to challenge the media on a range of issues always with the overt objective of promoting human rights and democracy through the media. In this time MMA has also been one of the few civil society organisations that has consistently sought to deepen democracy and hold media accountable through engagement in policy and law-making processes.

1.3.4. MMA has made submissions relating to Public Broadcasting, as well as numerous presentations to Parliaments Portfolio Committee on Communication as well as the National Council of Provinces. In addition, MMA has made submissions to broadcasters, the Press Council, the South African Human Rights Commission and the Independent Communications Authority of South Africa (ICASA). MMA also actively seeks to encourage ordinary citizens to engage in the process of holding media accountable through the various means available – all of which can be found on MMA's website. (www.mediamonitoringafrica.org)

1.4. MMA and SOS thank the DTPS for the opportunity of making these written submissions and respectfully request a joint opportunity to make oral submissions at any hearings that the DTPS and/or the Parliamentary Portfolio Committee on Telecommunications and Postal Services holds on the Bill.

2. NATURE OF THIS SUBMISSION

2.1. SOS and MMA have extensive experience in acting in the public interest on matters of freedom of expression and specifically public service broadcasting. Both organisations have extensive experience in contributing to ICASA and Department of Communications-processes with regard to broadcasting.

2.2. Further, as the DTPS is aware, SOS and MMA are concerned about the electronic communications environment as a whole, even though traditionally their area of focus has been on broadcasting and, in particularly, on the public broadcaster, the SABC. MMA has over the last year held a series of multi-stakeholder workshops dealing with critical issues relating to internet governance, from the Hate Speech Bill, the Film & Publications Bill and Internet Regulation to the Copyright Amend Bill and the Cyber Crimes and Cyber Security Bill. Accordingly, MMA and SOS are well placed to offer informed input on this Bill.

2.3. In responding to the issues raised in the Bill, SOS and MMA do not necessarily deal with all the issues raised in the Bill or in the order in which they arise in the Bill, nor do they confine themselves to the issues canvassed in the Bill.

2.4. In making these submissions, SOS and MMA are attempting to assist the DTPS and the Portfolio Committees in realising:

2.4.1. the depth and breadth of the challenges facing the electronic communications sector;

2.4.2. the need for a legislative framework that recognises the reality of convergence; and

2.4.3. the need to ensure independent regulation of electronic communications, including as provided for in section 192 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

3. LEGAL, POLITICAL AND CONSTITUTIONAL FRAMEWORK WITHIN WHICH THE BILL IS BEING INTRODUCED

3.1. As the DTPS is aware, the Bill is the culmination of a policy development process that began in 2012:

3.1.1. The National Integrated ICT Policy Review Process was launched in 2012 by the then still-consolidated Department of Communications (DOC);

3.1.2. In Notice 429 published in Government Gazette No. 36408 dated 24 April 2013, the DOC published a set of guiding principles for the ICT Policy Review Process ("the Framing Paper") for public notice and comment;

3.1.3. The National Integrated ICT Policy Green Paper was published by the DOC in Notice No. 44, Government Gazette No. 37261 dated 24 January 2014 (the Green Paper) for public notice and comment;

3.1.4. In 2014, the DOC was, suddenly and inexplicably, divided into two: the DOC and the DTPS, as a result of Cabinet Reshuffle in 2014 as was provided for in: Proclamation No.47 published in Government Gazette No.37839 dated 15 July 2014; Proclamation No.67 published in Government Gazette No.38037 dated 26 September 2014 and Proclamation No.79 published in Government Gazette No.38280 dated 2 December 2014. What critics of the split found explicable was the fact that this fundamental "reorganisation of the state", as the Department of Public Service and Administration labelled it, was effected before the finalisation of the ICT policy review and the release of the White Paper, even though the very purpose of the policy review was to review and propose legislative, regulatory and administrative reforms. The motives behind the splitting of the DOC were viewed by many with suspicion, and even those government officials tasked with effecting the changes necessitated by the proclamations were hard pressed to provide rational reasons for the haste with which the proclamation was issued in light of the pending release of the final review. Indeed, the final ICT review and White Paper re-emphasised the reality of convergence and made no proposals regarding the creation of new departments but rather changes to the regulatory environment;

3.1.5. In Notice No. 1003 published in Government Gazette No. 38206 dated 12 November 2014 (Broadcasting Policy Issues Notice), the Minister of Communications invited the public to make written representations on eight different policy issues itemised in the Broadcasting Policy Issues Notice. No mention was made of the previous iterations of the ICT Policy Review Process, and to date no policy has been forthcoming from the DOC , despite repeated promises that an audio-visual and digital content policy was imminent;

3.1.6. In Notice No. 902 published in Government Gazette No. 38203 dated 14 November 2014, the Minister of Telecommunications and Postal Services ("the Minister) invited the public to make written representations on the National Integrated ICT Policy Discussion Paper ("the Discussion Paper);

3.1.7. Thereafter, the National Integrated ICT Policy Review Report, containing over 170 specific recommendations from the ICT Policy Review Panel,was published by the DTPS in March 2015 (the Review Report); and

3.1.8. The National Integrated ICT Policy White Paper was published in Notice No. 1212, Government Gazette No. 40325 dated 3 October 2016 (the White Paper).

3.2. Throughout this process, which was conducted at a time of a great deal of turbulence in the Executive as regards electronic communications (no fewer than five Communications Ministers as well as a new Minister of Telecommunications and Postal Services in the five years since the launch of the ICT Policy Review Process), a number of the major policy decisions which are contained in the White Paper do not appear in any of the earlier iterations of the ICT Policy Review Process documentation, including: the Framing Paper, the Green Paper, the Discussion Paper, or the Review Report. Perhaps most alarming, key aspects of White Paper bear no relation to the detailed policy recommendations contained in the Review Report developed in just the previous year. In this regard:

3.2.1. The Review Report talks about the importance of open access to networks and gives content as to the principles of access, transparency and non-discrimination that would characterise an open access network[1]. However, it makes no specific mention

[1] At page 35.

of the licensing of a Wireless Open Access Network which is the lynch pin of the White Paper.

3.2.2. While the White Paper appears to rely heavily on South Africa Connect: Creating Opportunities, Ensuring Inclusion: South Africa's Broadband Policy contained in Notice No. 953, Government Gazette No.37119 dated 6 December 2013 (SA Connect), it is clear that the open access network envisaged therein was to be a voluntary public-private venture involving existing licensees[2].

3.2.3. Further, it is important to note that SA Connect was itself a significant departure from the Draft Policy published for public notice and comment in Notice 350, Government Gazette No. 36332, dated 3 April 2013, which specifically provided that: "this policy advocates for the development of wholesale backbone networks by the public and private sector players. The wholesale networks will be operated on open access and non-discriminatory principals to allow innovation and competition by service providers in the provision of services to consumers…. Telkom will provide the bulk of the core backbone infrastructure. Telkom will be supported by other state-owned companies and the private sector"[3]. The clear implication here is that policy adopted in the White Paper, and indeed in SA Connect, was not properly canvassed or consulted on. Instead, the ultimate policy decisions taken were never stated upfront and so the public was never given appropriate notice of what was in fact intended.

3.2.4. Similarly, the Review Report also has a significant section on spectrum which provides for a number of new policy developments including anti-hoarding principles, but does not include the sweeping new powers for the Minister of Telecommunications and Postal Services which are provided for in the White Paper and which, in our view, do not comply with the provisions of section 192 of the Constitution requiring that broadcasting (which would obviously include radio-frequency spectrum matters related thereto) be regulated by an independent authority. A member of the Executive branch of government, such as the Minister of Telecommunications and Postal Services, is not such an independent authority. In fact, sections 4(1)(d) and 4(2)(b) of the ECA vest exclusive control and management of the radio-frequency spectrum as an exclusive competency of ICASA , with the

[2] At page 44
[3] At page 12.

Minister having the powers only to approve the radio frequency spectrum plan and to ensure adequate spectrum is made available to the security services of the republic (section 34 (7)(c)(i) of the Act). Section 30(1) of the ECA goes further to state that "in carrying out its functions under this Act, and the related legislation, the Authority controls, plans, administers and manages the use and licensing of the radio frequency spectrum except as provided for in section 34".

3.2.5. Indeed, one of the oddest features of the Bill is that it makes no amendments to the provisions of the Electronic Communications Act, 2005 (the ECA) and Independent Communications Authority of South Africa Act, 2000 (the ICASA Act) regarding ICASA itself. The reason why this is anomalous is because the White Paper makes it clear that ICASA is intended to be replaced, at least in respect of its ICT (that is non-content related) functions by an entirely new regulator. This has been confirmed by the DTPS in its presentation to Parliament on proposed legislation emanating from the White Paper dated 10 October 2017. In this regard:

3.2.5.1. one can assume that the DTPS and Parliament are cognisant of the constitutional imperative of an independent broadcasting regulator as is required in section 192 of the Constitution;

3.2.5.2. we are aware that yet more amendment Bills are in the pipeline to give effect to the policy pronouncements in the White Paper with regard to a new regulator. MMA and SOS strongly submit that it is not appropriate to deal with the re-legislating of the ICT sector in a piecemeal manner such that neither the public nor Parliament itself, is able to obtain a bird's eye view of the proposed ICT landscape as a whole; and

3.2.5.3. we call upon Parliament to stand the Bill down until such time as all proposed legislative amendments in respect of the ICT sector are before it so that it can benefit from a unified and coherent amendment process, including being able to obtain unified submissions from the public on such proposed amendments.

3.3. Besides these policy, legal and constitutional anomalies and process concerns, SOS and MMA are of the view that the entire ICT Policy Review Process which was looking

comprehensively at the electronic communications sector as a whole, was thrown into disarray by President Zuma's unilateral cabinet reshuffle in April 2014. In this regard:

3.3.1. This resulted in the splitting of the DOC into the DOC and the DTPS. The overall effect was shattering on the ICT Policy Review Process because it effectively stymied the development of policy for the electronic communications sector as a whole. The split between the departments flew in the face of technological developments worldwide, particularly the reality of convergence – that is the provision of content over a range of platforms and the intermeshing of telecommunications, computing and broadcasting. Convergence is a technological and economic reality. We all use our tablets and smartphones to watch audio-visual content and traditional broadcasters stay in touch with audiences through a variety of social media platforms. Indeed, the reality of an integrated, complex ICT ecosystem is precisely the departure point for the recommendations set out in the Review Report, and indeed the ECA itself with one of its key objectives being the promotion of convergence[4]. Convergence is an egg that cannot be unscrambled. And yet the President's actions, in splitting the DOC into two, appear designed precisely to attempt to force such unscrambling with dire consequences for the electronic communications sector in its entirety and the public interest as a whole.

3.3.2. We think it particularly noteworthy that we understand that the ruling party, at its 2017 December Policy Conference resolved to unify the DOC and DTPS once again. We have been unable to track down a copy of such resolutions but doubtless members of the ruling party who sit on the Parliamentary Portfolio Committees on Communications and of Telecommunications and Postal Services will be able to do so.

3.3.3. We are of the view that Parliament must use the opportunity presented by its consideration of the Bill to review the failures occasioned by the splitting of the DOC and to make recommendations to the President for a re-uniting of the two departments in the interests of the South African people and so as to ensure that their ICT needs are met in a holistic and integrated fashion to promote convergence and the development of the sector as a whole. In particular, we are extremely

[4] See the preamble to the Act and at section 2(a): "to promote and facilitate the convergence of telecommunications, broadcasting, information technologies and other services contemplated in this Act"

concerned that the excellent and detailed provisions of Chapter 5 of the Discussion Paper, setting out the Policy Options for Audio and Audio Visual Content Services appear to have been left languishing. No attempt by the new DOC has been made to develop these into a new Broadcasting Policy since the publication thereof in 2014, save for the clearly problematic and unconstitutional SABC-related Broadcasting Amendment Bill of 2015 published in Notice No. 1155, Government Gazette No. 39413 dated 13 November 2015 which has itself gone nowhere.

3.3.4. MMA and SOS are also deeply concerned by the absence any rights-based framing for the ECA. Neither the memorandum on the objects of the Bill[5] nor the presentation by DTPS on engagement [6] made reference to South Africa's rights based constitutional framework, or any other associated human rights. Given the stated objects of the Bill[7] which include transformation, open access, cutting the cost of communication, provision of quality services to peoples with disabilities, and given South Africa's role in the Open Government Partnership, the omission of any framing and indeed reference to our rights-based framework is astonishing. It is also a missed opportunity that as we seek to bring stability and clarity to our sector that no mention or reference is made to the African Declaration on Internet Rights and Freedoms[8] or the African Platform on Access to Information[9] These and other declarations, would have ensured that the rights of the marginalised, and also principles of open access and other internet rights would have been foregrounded.

3.3.5. As the critiques below illustrate, if we are to develop coherent continent-leading policy and law relating to ICT it is critical that it is both framed, by our own rights-based obligations but also draws on the knowledge and existing declarations of our continent and indeed other rights-based declarations and instruments.

4. WIRELESS OPEN ACCESS NETWORK (WOAN)

[5] See: https://www.ellipsis.co.za/wp-content/uploads/2017/11/Memorandum-on-Objects-of-EC-Amendment-Bill-2017.pdf accessed on 25/01/2018
[6] See: https://www.ellipsis.co.za/wp-content/uploads/2017/11/Presentation-ECA-Bill-Final-04122017.pdf accessed 25/01/2018
[7] Government Gazette 17 November 2017, pg 83 clause 2.,
[8] See: http://africaninternetrights.org/articles/ accessed 25 January 2018
[9] See: http://www.africanplatform.org/apai-declaration/ Accessed 25 January 2018

4.1. Section 10 of the Bill proposes to insert a new Section 3A into the ECA, providing for the awarding of a Wireless Open Access Network licence. SOS and MMA consider this proposal highly problematic, for the reasons set out below, and call for the withdrawal of this entire proposal and section in the Bill.

4.2. No Basis in ICT Policy Review Process

4.2.1. Whilst the formal recommendations of the national ICT Policy Review process[10], gave extensive consideration to questions of ICT infrastructure (from undersea cables to last-mile connectivity)[11] and open access[12], nowhere does it recommend the awarding of a circumscribed new licence to a single Wireless Open Access Network operator.

4.2.2. Further, whilst SA Connect, South Africa's national broadband policy, makes extensive reference to 'open access' and an 'open access network', this was clearly conceptualised as an arrangement between existing licensees, a "voluntary public-private venture" for those "operators and investors who choose to participate"[13].

4.2.3. Whilst the Panel does recommend the enforcement of an "open access regime in which all players with significant market power (SMP) are required to offer services in line with open access principles and to interconnect with other networks"[14], this is a far cry from a new Individual Electronic Communications Network Service (I-ECNS) licence as envisaged in the 2016 White Paper and specified in the Bill.

4.2.4. Similarly, the majority recommendation for government to undertake last mile "network construction… on an open access basis… in areas that are not

[10] Which was launched in 2012 under the then single Ministry of Communications, and which tabled its final report and comprehensive set of recommendations (172 of them, covering broadcasting, telecommunications, e-commerce, institutional arrangements and more) in early 2015.
[11] DTPS (2015) National Integrated ICT Policy Review Report, pp 26 – 35.
[12] Ibid, pp 35 – 37.
[13] DOC (2013, December 6) 'South Africa Connect: Creating Opportunities, Ensuring Inclusion - South Africa's Broadband Policy', Government Gazette, No 37119, Department of Communications, Pretoria, p44.
[14] [14] DTPS (2015) National Integrated ICT Policy Review Report, Recommendation 27(d), p 31.

commercially viable for the private sector" [15] does not translate into a recommendation for the WOAN.

4.2.5. It is, therefore, clear that Section 10 of the Bill has no proper or substantial basis in the formal recommendations of the ICT Policy Review Panel, and should therefore be withdrawn.

4.3. Public Sector Investment

4.3.1. The Bill is extremely vague on who is to get the licence for the WOAN and whether or not existing I-ECNS licensees will forgo their existing licences (including spectrum) to participate in such a licence.

4.3.2. We are of the view that given the provisions of the Broadband Infraco Act[16], the Post Office Act[17] and the Sentech Act[18] which make provision for the state-owned Broadband Infraco, Telkom SA Limited, and Sentech Limited, respectively, the state is sufficiently empowered to develop electronic communications backbone and network infrastructure in rural and other under-served areas.

4.3.3. SOS and MMA are of the opinion that the state, given the failed experiment of granting Telkom a services and infrastructure monopoly in return for roll out, and given the failure of Broadband Infraco to make inroads into the market, needs to invest properly, alongside the private sector, to ensure that South Africans have access to affordable, fast and quality electronic communications infrastructure, services and content.

4.3.4. What is needed is not another licence. What is needed is appropriate and effective regulation of existing licensees by ICASA, and a commitment by the state to invest properly, through existing state-owned entities such as Broadband Infraco, Telkom and Sentech which have all the necessary licences, in rolling out infrastructure.

[15] Ibid, Recommendation 28(c)(i), p 32. A minority recommendation held that government did not have the requisite "resources, capacity or expertise" and argued for such rollout to be funded from the Digital Development Fund.
[16] Act 33 of 2007.
[17] Act 44 of 1958.
[18] Act 63 of 1996.

4.4. An Untried Experiment

4.4.1. The establishment of a WOAN has no sound basis in international good practice, unlike the enforcement of effective interconnection, facilities leasing, and open access regulations (including local-loop unbundling), and is thus a highly risky, untried experiment.

4.4.2. Several reports by the international GSM Association (GSMA) have cast doubt on the viability of the single wholesale network model as opposed to competition[19] (both network and services) and on its limited track record anywhere in the world[20]. Whilst it is true that network deployment is under way in Rwanda (with the contract awarded to Korea Telecom) and belatedly in Mexico (with the contract awarded to Nokia), the viability of the model is still to be tested. Several other independent researchers share this scepticism[21].

4.4.3. It is, therefore, the view of SOS and MMA that South Africa would be ill-advised to embark on such a single wholesale open access network experiment in the face of considerable international scepticism as to its workability and prospects for success. This is particularly, so when our own network licensees have already rolled-out an infrastructure that is arguably among the best on the Continent. What is required is a strong regulatory commitment to providing affordable universal access and service to infrastructure, services and content so that South Africans may reap the social, economic benefits and cultural benefits of the broadband Internet, including the informational benefits of broadcasting.

[19] GSMA (2014) 'Assessing the case for Single Wholesale Networks in mobile communications', a report prepared for the GSMA by Frontier Economics Ltd, London, GSM Association, London, available online at https://www.gsma.com/publicpolicy/wp-content/uploads/2014/09/Assessing_the_case_for_Single_Wholesale_Networks_in_mobile_communications.pdf.

[20] GSMA (2017) 'Wholesale Open Access Networks', GSM Association, London, available online at https://www.gsma.com/spectrum/wp-content/uploads/2017/07/GSMA_SWN-8-pager_R3_Web_Singles.pdf.

[21] For example: Gillwald, A, Odufuwa, F, Rademan, B, Esselaar, S (2016) 'An evaluation of open access broadband networks in Africa: The cases of Nigeria and South Africa', researchICTafrica, Cape Town, available online at http://researchictafrica.net/publications/Other_publications/2016_Integrated_Policy_Paper_-_Open_Access_Broadband_Networks_in_Africa.pdf and Houpis, G, Rodriguez, J, Serdarević, G & Ovington, T (2016) 'The Impact of Network Competition in the Mobile Industry', *Competition and Regulation in Network Industries*, Volume 17 No 1.

4.5. No Feasibility Study

4.5.1. We are concerned that no feasibility or market study appears to have been undertaken before embarking on the wholesale network model. One would have thought that the introduction of a major new licence and licence category would have required a proper, detailed feasibility study. The required Socio-Economic Impact Assessment System (SEIAS) report on the White Paper does not go nearly far enough, and gives scant attention to the market feasibility of the WOAN[22].

4.5.2. Even in previous cases where such studies have been undertaken - such as with the 2001 introduction of a third mobile operator - the recipient of the licence has struggled to find traction and to break into the market. Other major licensees, such as what is now NeoTel and Broadband Infraco, have also struggled. The case of the under-serviced area licensee (USAL), later converted to the provincial under-serviced area licensee (PUSAL), both a failed experiment, must be considered a cautionary tale. Despite research and recommendations, all but one (EastTel) of the 24 USAL licensees have collapsed and sunk without trace.

4.5.3. SOS and MMA thus caution against embarking on an experiment of this nature and magnitude without proper market analysis and research.

4.6. Implications for Broadcasting

4.6.1. The ECA is a technology-neutral piece of legislation, and was heralded as such when Parliament passed it in 2005. This is particularly so for the networks and infrastructure necessary to deliver electronic communications services, including both telecommunications and broadcasting.

4.6.2. There is no longer a licence category for so-called signal distribution. This is now a network service requiring an Individual or a Class – ECNS.

4.6.3. To take away any of ICASA's powers in respect of licensing infrastructure has both direct and indirect implications for broadcasting.

[22] DPME (2016) 'Socio-Economic Impact Assessment System (SEIAS) for the Draft National Intergrated [sic] ICT Policy White Paper: Final Impact Assessment (Phase 2)', Department of Planning, Monitoring and Evaluation, Pretoria.

4.6.4. Signal distribution and spectrum allocation (specifying which frequency bands may be used for which services) and assignment (licensing spectrum to a particular licensee) issues are foundational and fundamental to the regulation of broadcasting. They cannot be side-lined or dismissed as a non-content issue.

4.6.5. The effect of this is that section 192 requires an independent body, that is, not part of the Executive, to regulate these issues as they pertain to broadcasting. Given the reality of convergence and the impossibility of separating electronic communications spectrum and infrastructure from broadcasting spectrum and infrastructure, section 192 essentially requires that ICASA, and not the Minister, be responsible for all aspects of spectrum and infrastructure regulation too. To do otherwise is an impermissible violation of section 192 of the Constitution, sections 30 and 34 of the ECA and a fatal undermining of a Chapter 9 institution by the Executive.

4.7. Licensing Framework and Process

4.7.1. It is also important to note that introducing a wireless open access network licence, undermines the service and technology neutral nature of the ECS and ECNS licensing regime[23] that lies at the heart of the ECA by restricting the range of services that the WOAN may offer to that of wholesale access only.

4.7.2. The licensing process contemplated in Section 10 of the Bill is highly problematic and indeed is unconstitutional in respect of the independence of ICASA in terms of Section 192 of the Constitution.

4.7.3. The wording of the section is such that it is extremely unclear as to who, in fact, will be conducting the licensing process, ICASA or the Minister. For example, proposed subsection 19A(4) specifically requires the Minister "for the purposes of licensing the [WOAN] to consider incentives such as reduced or waived spectrum fees". This flies in the face of our settled law (for over a decade now) that ICASA is entirely independent of Executive interference or indeed of any role at all for the Executive in respect of licensing.

[23] This is not entirely true because broadcasting licences are retained as a technology-specific licensing category in the ECA because of the imperatives of content diversity, and the constitutional guarantees of freedom of expression and of the media.

4.7.4. Currently the only Ministerial limitation on ICASA's independence in respect of licensing lies in the requirement that a Policy Direction precede the issuing of an ITA by ICASA for one or more individual I-ECNS licences in section 5(6) of the ECA.

4.7.5. The proposed new Section 19A(3)(a) of the ECA will now require ICASA to propose to the Minister both draft licence terms and conditions and draft special "incentives" applicable to the licence - before issuing a Policy Direction calling for an ITA. This constitutes unwarranted Ministerial interference in the licensing process, and has the effect of undermining the independence of ICASA when it comes to determining the content of the licence to be issued, and the use of the radio frequency spectrum. Further, the proposed section 19A(3) is entirely unclear as to whether or not the Minister or ICASA is to license the WOAN, as this appears to be a *sui generis* type of licence set apart from all the other licence categories provided for in the ECA, which otherwise remain unchanged as a result of the proposals in the Bill.

4.7.6. The process set out in the proposed Section 19A(3) and (4) is therefore, in the view of SOS and MMA, both procedurally flawed and constitutionally invalid.

4.8. Special Incentives

4.8.1. SOS and MMA are further concerned by the special nature of the terms and conditions that will apply to the licence for the WOAN. Section 19A(3)(b), as proposed, implies that these may differ from ICASA's standard terms and conditions for I-ECNS licensees, as published, which state that the aim of the regulations is that they apply equally to all licensees. Worse, the draft licence is required to include a series of special "incentives", including a privileged spectrum fee dispensation, rights of way privileges[24], and financial support from the Universal Service and Access Fund (USAF). Further, existing licensees will be forced to utilise the services of the WOAN for at least 30% of their bandwidth requirements, no matter what quality of service they receive, if they intend to apply for any high-demand spectrum[25].

[24] The WOAN will also be granted access to "public infrastructure" and "public electronic communications facilities", but neither term is defined, making it unclear what is being referred to. It is also unclear whether this access will be charged for, and subject to any terms and conditions.
[25] In terms of proposed Section 31E(5)(b).

4.8.2. The special nature of these provisions is, on the face of it, anti-competitive, and fly in the face of the legislative prescripts of the ECA. Specified incorrectly, they will either result in no bidders for the licence, or force existing licensees out of the market. In the long term, they may also result in a licensee whose continued viability is entirely dependent upon the existence of a playing field permanently tilted in its favour.

4.9. Creating a Monopoly

4.9.1. We note with concern that the proposed insertion of Section 19A into the ECA will have the effect of creating a monopoly wholesale provider of broadband infrastructure with all the attendant potentially negative implications for the market. Pricing, albeit "cost-based", may remain inflated in the absence of competition[26]. Service levels, quality of service and customer-centricity may be de-incentivised and thus suffer in the absence of competition. We also need to note that costs saved through avoiding unnecessary duplication of infrastructure come at the price of a lack of network redundancy and of susceptibility to network failure.

4.10. Open Access

4.10.1. One of the major arguments in favour of the WOAN put forward in the White Paper and in the Bill (see explanatory memorandum thereto) is to ensure that the public has more access to services through making affordable infrastructure available to service providers.

4.10.2. However, the WOAN is not the only way to do this. Indeed, the ECA already grants ICASA significant powers to enforce open access through its provisions of facilities leasing which are contained in Chapter 8 of the ECA. These powers have been significantly developed through the various regulations that ICASA has enacted as a result of Chapter 8.

4.10.3. ICASA has, to the best of our knowledge, never approached either the Minister or Parliament expressing its inability to regulate facilities leasing appropriately, such that a WOAN would be required.

[26] International ICT regulatory expert, Bill Melody, famously opined in a seminar that "cost-based pricing leads to price-based costing".

4.10.4. Indeed, the proposed wording changes to sections 43 to 47 in the Bill make it clear the term “wholesale open access agreement” is, essentially, just a synonym for facilities leasing as is currently used in the ECA.

4.10.5. The provisions of sections 29-34 in the Bill (which amend or substitute sections 43-47 in the ECA) are often repetitious of powers that ICASA already has, or, worse, make such powers unworkable, and give the impression that the Executive seeks to claw back powers vested exclusively in ICASA. To cite but one example: the Bill proposes to leave untouched the provisions regarding exemptions from the requirement of facilities leasing to small licensees (that is, licences that have less than 25% market share). But the corresponding cross-references in sections 43(1), which allow for such exemptions to the obligation to lease facilities, have been deleted in the substituted proposed section 43(1) in the Bill. This poor drafting establishes a conflicting obligation. Proposed section 43(1) appears to be a direct obligation imposed on all licensees without exception, while existing sections 44(5) and 44(6) (which provisions are untouched by the Bill) provide for such exceptions.

4.10.6. In our view, ICASA’s facilities leasing regulatory regime appears to be working well and requires no amendment, particularly not amendments that introduce confusion and conflicting obligations. What is required, if anything, is for Parliament to ask more searching questions regarding ICASA’s capacity requirements for the task of overseeing its facilities leasing regime, including in respect of imposing pricing terms.

4.11. In conclusion, SOS and MMA are of the view that the insertion of the proposed Section 19 into the ECA in order to provide for a wireless open access network licence to be awarded is fundamentally flawed in approach and problematic in specification. Accordingly, we call for Section 10 of the Bill to be withdrawn in its entirety.

5. SPECTRUM

5.1. The Bill proposes to introduce numerous changes to the spectrum management regime, some relatively technical in nature or in accordance with changes in the spectrum market, others fundamental and, in our view, incorrect in principle or unconstitutional or both. The

optimum and effective management of spectrum is an essential underpinning of a properly functioning, converged and integrated ICT ecosystem in which broadcasting and broadcasting-like communications services (such as Over-the-Top services) form part of the full dynamic range of ICT infrastructure, services and content. SOS and MMA, therefore, approach the questions of spectrum set out below with concern and attention. Our view is informed and determined by our reliance on a rights-based approach to the issues, that seeks to ensure our policies help us realise and protect the rights in our Constitution.

5.2. Ministerial Control

5.2.1. SOS and MMA are deeply concerned by the extent to which the Bill proposes to undermine the role of ICASA in respect of the management of spectrum in South Africa and to arrogate overall control of spectrum into the hands of the Minister, in contravention of sections 30 and 34 of the ECA.

5.2.2. Under the ECA, as currently in force, the section on spectrum asserts from the outset that it is ICASA that "controls, plans, administers and manages the use and licensing of the radio frequency spectrum"[27] with the subsequent limitation in respect of the role reserved for the Minister in respect of representing South Africa at "international fora" and in respect of approving the national band plan[28].

5.2.3. The Bill proposes to reverse this order of precedence by the proposed upfront insertion in the chapter on Spectrum of a Section 29A, which asserts a pre-emptive role for the Minister in respect of spectrum, and amends Section 30 to downgrade the role of ICASA to that of mere "administration".

5.2.4. There are a number of further areas of Ministerial assumption of control over spectrum in this section of the Bill. These include:

5.2.4.1. The proposed re-delegation of the development of the national frequency band plan to the Minister, in terms of the proposed new Section 29A(d) and the proposed amendment to Section 34(2);

[27] RSA (2005) Electronic Communications Act, No 36 of 2005, as amended, Republic of South Africa, Pretoria, Section 30(1).
[28] Ibid, Section 34.

5.2.4.2. The proposed insertion of a requirement into Section 30(2)(a) of the ECA to the effect that ICASA must "comply with… ministerial policies and policy directions" in respect of spectrum;

5.2.4.3. The ability of the Minister to "exempt SMMEs and new entrants from the 'use it or lose it' principle'", albeit "upon recommendation by the Authority" (new Section 31(8A)(b);

5.2.4.4. The proposed requirement under Section 31(2) of the Bill for advance Ministerial "approval on the nature and form of all universal access and universal service obligations before they are imposed" on licensees;

5.2.4.5. The proposed right of the Minister under new Section 31E(1) to "determine – (a) what constitutes high demand spectrum; and (b) which unassigned high demand spectrum must be assigned to the Wireless Open Access Network.

5.2.5. In the view of the SOS and MMA, the assumption of control over the management and regulation of spectrum by the Minister serves to undermine the independence of the regulator, would amount to a clawing back of powers vested exclusively in ICASA and is therefore unconstitutional.

5.2.6. It is hard to see what such a major realignment of policy and regulatory competencies and authority in this area would achieve in the absence of regulatory failure. Indeed, where ICASA has been hamstrung over spectrum, this has been while it was waiting for government policy directions that never came[29] or responding to government litigation when they acted ahead of or in the absence of policy and policy directives.

5.2.7. The undermining of ICASA's constitutionally enshrined regulatory independence and the assumption under Ministerial control of functions hitherto and more correctly

[29] Draft Policy Directions, issued in late 2011, forced to put on hold its plans to license high-demand spectrum. When it finally moved again to auction high-demand spectrum in 2016, it was halted by a Ministerial court injunction.

placed under the control of the regulator is an undercurrent that runs through many of the provisions of the Bill as has been set out above.

5.2.8. SOS and MMA accordingly call for the withdrawal of all the above new provisions from the Bill, in particular sections 19 and 20 of the Bill.

5.3. Unconstitutional

5.3.1. It is the view of SOS and MMA that most, if not all, of the proposed provisions dealt with above are in violation of Section 192 of the Constitution.

5.3.2. Section 192 of the Constitution requires that broadcasting be regulated by an "independent authority", and the Preamble to the ICASA Act makes it clear that ICASA is established as an "independent body to regulate broadcasting, postal services and electronic communications".

5.3.3. It is the considered view of SOS and MMA that the arrogation of so many functions in respect of spectrum into the hands of the Minister, constitutes a fundamental abrogation of the independence of ICASA. Those provisions of the Bill are, therefore, unconstitutional and should be withdrawn.

5.3.4. Even if ICASA is dismembered into the proposed ICT Sector Commission and Tribunal and relieved of its powers to regulate broadcasting as is proposed in the White Paper - even were that possible in the face of our earlier argument in support of control and regulation of the broad ICT sector in a converged environment - it is still proposed in the White Paper for the ICT Sector Commission and Tribunal to retain control of the regulation of spectrum. Crucially, that includes spectrum allocation and assignment for broadcasting services. Even if the proposed ICT Sector Commission and Tribunal no longer fall under the provisions of Section 192 of the Constitution, Ministerial interference in spectrum matters will fundamentally undermine the independence of the regulation of broadcasting because of the centrality of spectrum allocations and assignments for converged networks and services and the broadcasting sector as a whole.

5.4. Capacity and Co-ordination

5.4.1. The establishment of two new structures is required in terms of proposed Sections 29A(d) and 34A(1), *viz*: a National Radio Frequency Spectrum Planning Committee and a National Radio Frequency Spectrum Division within the Department. SOS and MMA have a number of concerns about this proposal.

5.4.2. There is already a shortage of spectrum expertise within both the Department and ICASA. The splitting of control over spectrum between ICASA and the Department, along with the creation of the proposed structures can only serve further to exacerbate these skills constraints.

5.4.3. Further, the establishment of separate spectrum regulatory competencies will serve to introduce further structural fragmentation in the regulatory arena, of the kind that has bedevilled USAASA, and which could potentially lead to problems of concurrent jurisdiction between ICASA and the Department. This would seem to be a recipe for unnecessary regulatory tensions and co-ordination delays, further delaying the ability to deal with the current shortage of spectrum crisis.

5.5. Use it or Lose it Principle

5.5.1. SOS and MMA welcome the formal introduction of the 'Use it or Lose it' principle in spectrum management via the proposed amendment to Section 31(8).

5.5.2. We further welcome the proposed provisions covering spectrum trading, sharing and re-farming. We believe that these will encourage both effective use of and innovation in respect of the available spectrum in the public interest.

5.5.3. We agree that spectrum fees alone are an insufficient incentive to ensure optimum utilisation of the available spectrum.

5.5.4. It is unclear, however, whether the regulator has the necessary resources to audit and monitor compliance with this provision beyond the required annual reporting from licensees.

5.5.5. We are, however, extremely concerned by the proposed Section 31E(6) which requires the regulator to embark on a process to confiscate "exclusively/individually assigned high demand spectrum" that has not been assigned to the WOAN.

5.5.6. We view this provision as fundamentally undermining the rights of existing spectrum licensees. It will further de-incentivise the utilisation of such spectrum and undermine competitive roll-out of infrastructure and services. In addition, by discriminating between the WOAN and existing licensees, it is anti-competitive.

5.5.7. We are also concerned at the proposed pre-conditions in Section 31E(5) governing new assignments of high-demand spectrum. Making such assignment conditional on the WOAN being "functional", introduces, in our view, unnecessary and risky dependencies that may have the effect of stymying market development. In addition, requiring new high-demand spectrum licensees to procure a minimum amount of their capacity from the WOAN, is, in our view, anti-competitive.

6. COMPETITION

6.1. Section 67 of the ECA deals with issues of competition. Section 67 was extensively amended in 2014 and has now again been largely redrafted.

6.2. SOS and MMA note that the Bill calls for ICASA to play a key regulatory role in terms of competition. It is not clear how section 67 will operate when ICASA is split. We are of the view that section 67 requires a converged regulator in order to be effective and indeed even operational. This points again to the confusion that has been created by DTPS releasing Bills in a piecemeal and *ad hoc* fashion.

6.2.1. As discussed above, SOS and MMA are fundamentally opposed to the splitting of ICASA. We have called for a single, strong, independent, converged regulator. We have in fact argued for a constitutional amendment to ensure ICASA plays its role as a fully-fledged Chapter 9 institution whose independence is constitutionally protected. We believe that this is what is required to ensure effective regulation of the broadcasting and electronic communications sectors, including competition issues.

6.3. SOS and MMA believe that there are serious competition challenges within the broadcasting and electronic communication sectors. In this regard, it is important to be

aware of the submission made by SOS and MMA to ICASA in December 2017 as regards competition issues in the subscription broadcasting television market. SOS and MMA point to the near-monopoly control by MultiChoice of the subscription broadcasting market and the impact this has had, and continues to have, on subscription and free-to-air broadcasting markets. SOS and MMA believe that some of the amendments to section 67 will begin to remedy this situation. In this regard:

6.3.1. The Bill proposes that new subsections 3A, 3B and 3C be inserted into Section 67. These subsections require that ICASA defines all the markets and market segments relevant to broadcasting and electronic communications within 12 months of the Amendment Act coming into operation. Further to this, the subsections require that such market definitions be reviewed every three years to address technological advancements. In terms of these subsections, the definition of markets will now become a critical activity for ICASA, and a role ICASA must continuously perform. Proposed subsection 13 then states that ICASA must perform its duties of defining markets 'in consultation' with the Competition Commission. SOS and MMA believe that these provisions will result in endless litigation and delays over definitional matters. We are of the view that detailed market definitions are not necessarily required. We believe that the regulator should be empowered through law to address concerns where there is evidence of market dominance and abuse thereof.

6.3.2. Proposed subsections 3A, 3B and 3C of section 67 also require that ICASA set out a schedule for the review of markets, prioritising 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'. Proposed subsection 13 calls for market definitions and reviews to be undertaken by ICASA after consultation with the Competition Commission. SOS and MMA are in agreement with this amendment.

6.3.3. SOS and MMA note that subsection 4 is to be amended. This is to remove the requirement for an inquiry in the market review process. SOS and MMA are in agreement with this amendment. We believe that it is essential that competition reviews are streamlined, and that ICASA continue to publish an annual sector review, although more comprehensive than it has done in the past, in accordance with the ICASA Act. These functions include undertaking research to support its regulatory

functions such as providing essential information about the status and dynamics of the sector, including contribution to GDP, fixed capital formation, investment and income trends, demand and supply of infrastructure and services, pricing and all other information and indices compiled annually by the International Telecommunications Union (ITU).

6.3.4. SOS and MMA note that proposed subsection 4B is to ensure that ICASA can request information from any person, in addition to licensees, during market review processes. SOS and MMA are in agreement with this amendment. We believe that this will substantially strengthen the market review process.

6.3.5. SOS and MMA note that a proposed new paragraph (d) is to be inserted into subsection 8 of section 67 to ensure that where, on the basis of a review, ICASA determines that a market or market segment has changed, it must revoke the applicable pro-competitive conditions applied and conduct a market review. SOS and MMA believe that this clause should be deleted. SOS and MMA believe that the process of market definitions is too onerous and will create unnecessary litigation and delays, instead ICASA should focus on ensuring compliance by licensees and maintaining up to date sector data (which it is required to obtain annually form licensees) so as to inform its regulatory functions.

6.3.6. Proposed subsection 8A is inserted to mandate ICASA regularly to advise the Minister on market trends in the industry and on the impact of policy and legislation on competition. SOS and MMA are in agreement with this proposed amendment.

6.3.7. Subsection 13 of section 67 is inserted to deal with issues of consultation between ICASA and the Competition Commission as regards the definition of markets and market review proceedings. We believe that this amendment will facilitate better cooperation between the two and that this is critical to deal with competition challenges, whether these arise in respect of pro-competitive licence conditions, or conditions imposed on licensees during the term of their licence and in respect of interventions by the Competition Commission to address issues of market failure, lack of or absence of competition and harmful business practices.

6.3.8. SOS and MMA note that proposed section 67A is to be inserted to formalise the requirement for a concurrent jurisdiction agreement between the Authority and the

Competition Commission. Section 67A calls for consultative mechanisms to strengthen the market definition and market review processes. SOS and MMA are in agreement with this amendment.

6.3.9. SOS and MMA note that proposed 67B has been inserted to strengthen consultation between the Authority and the Competition Commission in the case of certain mergers. SOS and MMA are also in agreement with this amendment.

7. CONCLUSION

7.1. In the light of all of the above submissions, SOS and MMA accordingly call for the withdrawal of the entire Bill notwithstanding the fact that certain proposed amendments might have been beneficial, particularly in respect of competition matters.

7.2. Finally, the Constitution requires the National Assembly to "facilitate public involvement in the legislative…processes of the Assembly and its committees" – s59(1)(a). There is a similar obligation on the National Council of Provinces in terms of s72(1)(a) of the Constitution. We are of the view that it is imperative that Parliamentarians be provided with all public submissions made on a Bill introduced in Parliament and it is for this reason that we have sent copies of these submissions not only to the DTPS but also directly to the Parliamentary Portfolio Committees of both Telecommunications and Postal Services and of Communications. We urge these Committees to consider the fundamental issues that we are raising, to ensure that the public interest, as well as the future of the broad ICT sector as an integrated ecosystem, are placed ahead of fragmented, poorly thought-through and uncanvassed agendas.

8. SOS and MMA trust that these submissions will be of assistance to the DTPS and to the relevant Parliamentary Portfolio Committees.

9. Please do not hesitate to contact SOS and/or MMA should the DTPS or the Portfolio Committees have any queries or require any further information.

Thank you

Yours Sincerely

Duduetsang Makuse

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cc.

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