

The Independent Communications Authority of South Africa
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Per Email: hdupreez@justice.gov.za

Dear Sir/Madam,

RE: COMMENTS: ELECTRONIC COMMUNICATIONS AMENDMENT BILL

1. Transnet welcomes the opportunity to provide comments on the Electronic Communications Bill, hereinafter referred to as "the Bill".

Ad definition: allocation

2. The above definition is amended to clarify that the allocation of frequency bands is the function of the Minister and not that of the Authority. Having regard to current Frequency Migration Spectrum Plans, which requires implementation by 2022, the Authority is still in the process of providing trial licenses to Transnet with regard to the new proposed spectrum. This process has to date taken approximately 18 months. Bearing in mind the approaching date of 2022, it is recommended that in order to continue with the current momentum with the license migration process and in order to streamline the allocation process, Transnet proposes that this function should reside with the Authority.

Ad definition: Wireless Open Access Network read with Ad Clause 19A

3. The Wireless Open Access Network is referred to as an entity contemplated in Clause 19A. Clause 19A does not specify the establishment of an entity known as the "*Wireless Open Access Network*", save to say that the Authority will have to ensure that an individual electronic communications network service license and a radio frequency spectrum license is issued to the Wireless Open Access Network. Neither the Electronic Communications Act, 2005 ("the ECA") nor the Bill provide for the establishment of an entity known as the *Wireless Open Access Network*. Transnet recommends that Clause 19A should include a clause for the establishment

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of the Wireless Open Access Network as an entity referred to in the definition clause or section.

Ad clause 12: Definitions

4. Some of the definitions in the Bill are contained in various clauses and not included in the "Definition" clause or section. For example, Clause 20 has two definitions which are '*Minister*' and '*land*'.

Definitions serve as an internal dictionary for the particular piece of legislation. Professor Mike Van Heerden from the University of South Africa, stated that definitions should not be placed at the end of the Act as it will require an entire Act to be read through before a reader is being alerted to the meaning of the Act which has already been perused. Transnet recommends that the definitions contained within the body of the Bill be included in Clause 1 of the Bill, which amends the definitions clause of the ECA.

It is further important to note that the above clause further provides for a definition of "*Minister*". "*Minister*" within the context of this clause is referred to as "*Minister for Telecommunications and Postal Services*", whilst Section 1 of the ECA currently defines "*Minister*" as the Minister responsible for Communications, which are two distinct governmental ministries. Transnet recommends that a distinction is made between the two Ministers and what purpose the two Ministers are going to serve within the context of the Bill or the ECA.

Ad clause 20C: Role of Authority

5. The above clause makes reference to landholder and landowner. The difference between the two phrases are unclear as they are not defined in the Bill. For example, clause 20(1)(d) makes reference to landowner whilst clause 20(1)(h) makes reference to landholder. For consistency purposes, Transnet recommends that the Bill makes reference to landowner throughout.

Ad clause 20E: Obligations of landowners at municipal, provincial and national government levels

6. The above clause provides for the obligations of the landowners which includes, amongst others, to provide information on existing and planned infrastructure

including ICT infrastructure to the Rapid Deployment National Co-ordinating Centre in a digitised format for inclusion into the geographic information system database.

Transnet seeks clarity on this aspect, as it appears that the obligations set out in the above clause may be meant to be obligations that ought to be imposed on the holder of an Electronic Communications Network Service ("ECNS") license, as the holder of a license will be best placed to provide advice on existing and planned future ICT infrastructure developments. In this regard, landowners are not necessarily the holders of ECNS licenses. In most instances agreements are entered into between landowners and ECNS license holders for use of such property. Transnet therefore recommends that this clause be reconsidered.

Ad clause 20G(5): ECNS right to enter and use property

7. Clause 20G(5)(e) provides that an electronic communications network service licensee must take all reasonable steps to ensure that the activity interferes as little as practicable with the operations of a "public utility". The phrase "public utility" is not defined in the Bill nor the ECA. Therefore, Transnet recommends that the Bill must provide for the definition of "public utility".

Ad clause 20K: Access to buildings

8. The above clause provides that the ECNS licensees may access any building with multiple tenants to inspect the building to determine whether it is suitable for deployment of electronic communications networks and facilities. Sight should not be lost of the fact that owners/residents of buildings have the constitutional rights of privacy. On the reading of the above clause, it appears that the ECNS licensees will have wide powers which may violate persons right of privacy as enshrined in Section 14 of the Constitution of the Republic of South Africa, 1996 since the licensees will have authority to access any building at any given time for purpose of determining the suitability of deploying electronic communications networks and facilities. Therefore the above clause must be reconsidered. Ideally, there should be access agreements in place between the ECNS licensee and the building owner and / or tenants to manage such arrangements.

Ad clause 20N: Emergency

9. The above clause provides that no entity may refuse access to any site or charge a fee for access to any site for the deployment of electronic communications network

or facilities during "emergency situations". It is not clear in the Bill as to what will constitute "emergency situations" for purposes of the above clause. Transnet recommends that "emergency situation" be defined in Clause 1 or definitions section.

Ad clause 31L: Radio Frequency Spectrum Trading

10. It appears that the Bill seeks to provide for radio frequency spectrum trading. It is trite that spectrum is a scarce resource in South Africa. Where there are entities who hold significant spectrum allocation, spectrum trading may open doors for unfair competition in view of the fact that monopolies will continue dominating in the telecommunication industry, as they will be able to sell spectrum at any given price. Transnet therefore recommends that the above clause be reconsidered.

Ad clause 31L: Radio Frequency Spectrum Sharing

11. It appears that the Bill seeks to encourage spectrum sharing. Transnet utilises radio frequency spectrum for rail and ports operations. In the context of these operations, the paramount consideration is that of safety. It is trite that if spectrum sharing is not properly coordinated, it will cause interference and this may result in Transnet's operations being severely impacted. Therefore, Transnet recommends that the above clause be reconsidered, and that consideration be given to the prescription of essential services which cannot be subject to radio frequency spectrum sharing. By way of example, aviation, port, rail, emergency response services, should not be subject to radio frequency spectrum sharing having regard to operational safety requirements and the services rendered.
12. We thank you for the opportunity to comment on the Electronic Communications Amendment Bill.

Kind Regards



Mr. Ndiphilwe Silinga
Acting Chief Corporate and Regulatory Officer

Date: 31/01/2018