



31 January 2018

**The Director-General, Department of Telecommunications and Postal Services  
Attention: Ms Masemola, Acting Deputy Director-General, ICT Policy and Strategy Development**

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**WAPA SUBMISSIONS ON THE DRAFT ELECTRONIC COMMUNICATIONS AMENDMENT BILL 2017**

1. WAPA refers to the Draft Electronic Communications Amendment Bill 2017 (“**the Draft Bill**”) published by the Department of Telecommunications and Postal Services (“**the Department**”) for public comment and sets out its submissions below.
2. WAPA’s members are wireless fixed broadband providers and equipment vendors, with a collective national coverage. WAPA and its members accordingly have a direct interest in the Draft Bill.

**General Comments**

3. WAPA understands that the purpose of the Draft Bill is to implement national policy and its submissions are therefore limited to the interaction between the ICT Policy White Paper and the Draft Bill and issues of drafting and implementation.
4. WAPA supports much of what is in the Draft Bill. Its key concern relates to implementation and the need to develop the capacity to implement the Draft Bill before it is enacted. The interaction between the Draft Bill and the ICT Sector Commission and Tribunal Bill is massively important in determining the “how” and the “how long” of implementation.
5. Implementation of the ECA to date has allowed the members of WAPA to develop sound robust businesses that address connectivity problems in many parts of South Africa. In general, however, timeframes for implementation of regulatory interventions can be improved.
6. Implementation therefore must be a fundamental starting place for how the Draft Bill is conceived. Who is going to implement these interventions and why should anyone anticipate that history will not repeat itself?

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## Specific submissions

### Division of functions between the Minister and ICASA/the regulator

7. The Draft Bill contains many provisions which individually and collectively diminish the 'independence' of the regulator.
8. For this reason, the Draft Bill in its current form cannot be implemented until the proposed new regulator is established without any jurisdiction over broadcasting.
9. It is also the case that certain amendments proposed in the Draft Bill would need related amendments to the ICASA Act or the enactment of a replacement Act to be effected before they could come into force.
10. WAPA submits that the proposed ICT Sector Commission and Tribunal Bill should be published alongside the Draft Bill to allow proper comment.

### Insertion of section 2(cB)

11. WAPA supports the insertion of this object into the ECA, noting that the promotion of service-based competition and sharing of infrastructure are key principles in the White Paper.
12. The restriction of the application of this object to "urban areas" is, however, not supported. If anything, there is a greater need for sharing of infrastructure in rural areas to underpin sustainable affordable access in these areas.
13. WAPA proposes the following alternative amendments:

*(cB) promote serviced-based competition and avoid concentration and duplication of electronic communications infrastructure ~~in urban areas~~;*

or

*(cB) promote serviced-based competition and avoid concentration and duplication of electronic communications infrastructure in urban and rural areas;*

### Open Access

14. WAPA and its members support the focus on open access and the broad intent of the revisions proposed to Chapter 8 of the ECA.
15. In particular, WAPA welcomes the explicit provisions in the Draft Bill aimed at ensuring that there is an effective split between the provision of electronic communications network services (ECNS) and the provision of electronic communications service (ECS) providers<sup>1</sup>.

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<sup>1</sup> Simply put: ECNS is where a licensee makes available capacity on its network to itself or to a third party for the provision of ECS. ECS involves using this capacity to deliver Internet access, voice and other services.

16. WAPA understands that open-access obligations will apply in tiers as follows:
  - 16.1. **all ECNS licensees** must provide wholesale open access to their networks and facilities upon request to another licensee / licence-exempt person, with the relationship to be governed by a wholesale open-access agreement complying with “**general open-access principles**”;
  - 16.2. ECNS licensees determined by ICASA to be **vertically-integrated operators** must also undertake accounting separation between their ECNS and ECS divisions; and
  - 16.3. ECNS licensees determined by ICASA to be **deemed entities** must also (a) allow for active infrastructure sharing (including national roaming, RAN sharing and enabling MVNOS, for voice and data based on the latest generation of technologies, (b) use cost-based pricing, (c) allow access to its network and facilities as prescribed by ICASA, and (d) comply with network and population coverage targets.

#### Vertically-integrated operators

17. The Draft Bill provides that the regulator is to finalise wholesale open-access regulations which will, amongst other things, set out:
  - 17.1. a list of vertically-integrated entities including the criteria used to determine vertically-integrated entities;
  - 17.2. accounting separation procedures for vertically-integrated entities;
18. WAPA’s members are typically SMMEs which hold both ECNS and ECS licences and which provide fixed wireless services over their own electronic communications networks.
19. WAPA is concerned that such members will be determined to be vertically integrated and subjected to the same level of regulatory compliance obligations imposed on far larger entities such as the MNOs. This would be both unnecessary having regard to the relative simplicity of members’ financial arrangements as well as a disincentive and added cost to service provision.
20. WAPA has noted that the Draft Bill does set out in some detail the process to be followed before the regulator can determine an entity to be a deemed operator. We submit that the position of SMMEs and rural service providers could be better protected by the Draft Bill providing more explicit guidance to the regulator on the criteria to be used to determine vertically-integrated entities.
21. WAPA proposes the following amendment to subsection 44(3)(ii)(c) as set out in the Bill:

*(c) a list of vertically integrated entities including the criteria used to determine vertically integrated entities, which should include size and socio-economic importance of the entity as well as whether it has access to scarce resources;*

## Transformation

22. The Draft Bill makes it mandatory for ICASA to make regulations which apply the B-BBEE ICT Sector Code to existing and new licences, exemptions or other authorisations including spectrum assignments, to promote broad-based black economic empowerment within 12 months of the promulgation of the Electronic Communications Amendment Act 201x.
23. WAPA is aware of the process which ICASA is engaged in around ownership and control of licences and that transformation of the sector through ICASA's jurisdiction over licensees has been largely ineffective.
24. WAPA submits that its members and other licensees have taken steps to ensure they are compliant with the current HDI equity ownership requirement. At the same time, some of its members and many of the larger licensees would welcome the opportunity to comply with industry transformation requirements through the ICT Sector Code.
25. In the circumstances WAPA requests that the Department consider amending the proposed provisions to allow the regulator to provide for compliance with the existing requirement or the ICT Sector Code. Note that reference to the "existing requirement" recognises that ICASA is contemplating increasing this requirement.
26. A dual approach appears to be contemplated in section 9(2)(b) which – as it is to be amended by the Draft Bill – would require ICASA to specify a minimum percentage equity ownership to be held by persons from historically disadvantaged groups when making application to ICASA for an Individual licence.
27. WAPA believes that such an approach would obviate potential legal difficulties relating to the basis on which licences were originally granted.

## Amendments to Chapter 4 of the ECA

28. WAPA supports the amendments proposed to Chapter 4 of the ECA to the extent that they clarify the inter-relationship between licensees and landowners.
29. Provisions targeting exploitative practices by landowners are particularly welcome as this is an everyday issue faced by WAPA members.
30. WAPA refers to the proposed section 20H to be inserted into the ECA:
  - 30.1. WAPA is in strong support of infrastructure sharing as a means of reducing the cost to communicate at ECNS level. WAPA believes that this support is shared by the vast majority of ECNS providers and there is ample evidence that it is trend which is occurring irrespective of legislation / regulation.
  - 30.2. WAPA is concerned that this section does not distinguish clearly enough between high sites which were not specifically erected for the location of electronic communications facilities and those which were (and which themselves constitute electronic communications facilities).

- 30.3. If this provision is intended to apply to high sites such as masts erected by licensees or specifically to allow for colocation of equipment, then it conflicts with the Bill's provisions on open access and the obligations on ECNS licensees to provide access to their electronic communications networks and facilities on a wholesale open access basis.
- 30.4. Chapter 4 deals with the interaction between ECNS licensees and landowners (non-licensees); it should not be able to be interpreted as applying to the interaction between ECNS licensees in respect of wholesale access to a facility.
- 30.5. The proposed subsection 20H(3) provides that an owner of a high site may not refuse access thereto to an ECNS licensee for the installation of electronic communications networks and facilities that promote broadband. Is this intended to apply where the owner of the high site is an ECNS licensee? Further, WAPA submits that technical feasibility should be a consideration in whether or not to allow the installation of an electronic communications network or facilities.

#### The WOAN

31. WAPA's primary difficulties with the WOAN are the lack of information as to how it will operate, the nature of the services it will provide and the amount of energy and focus this issue consumes at the expense of other pressing requirements.
32. It is clear from the process outlined in the Draft Bill for the licensing of the WOAN that this is going to be a lengthy and contentious process.
33. WAPA understands that the provisions in the Draft Bill around establishing the WOAN and the parameters within which it will operate reflect the position of the White Paper, but urges the Department to recognise that there are more attainable avenues to the objectives of lowering the cost to communicate and transforming the industry which should receive the same priority and resources.

#### Spectrum

34. WAPA welcomes the position that assignments of high-demand spectrum will be subject to the open-access provisions in the new Chapter 8 proposed by the Bill.
35. WAPA is not aware of any its members seeking to trade in non-high-demand spectrum (typically spectrum used for backhaul links) and is unconvinced as to the utility of providing for such a process.
36. WAPA welcomes the proposal to exempt SMMEs and new entrants from the application of the "use it or lose it" principle on good cause shown. This is an example of the type of concession which recognises the difficulty SMMEs and new entrants have in rolling out electronic communications networks to utilise such spectrum.
37. As argued in relation to the WOAN, the focus should not be exclusively on high-demand spectrum as a bone of contention between incumbents, the Ministry, the regulator and the future WOAN. There is massive opportunity to empower SMMEs and new market entrants through broadband fixed wireless access (BFWA) allocations and new management techniques

such as geolocation-database-managed dynamic spectrum assignment in television white spaces (TVWS) and light-licensing.

**Conclusion**

38. WAPA trusts that the above is of assistance and looks forward to what will be an exciting and interesting year of reshaping the industry.

Regards,

WAPA