



The Portfolio Committee on Telecommunications and Postal Services

PO Box 15

Cape Town

8000

Attention: Ms Hajiera Salie

Via email: hsalie@parliament.gov.za

Dear Portfolio Committee,

Below find the submission by the WOAN Forum on the Electronic Communications Amendment Bill [B31-2018] as per the notice issued by Parliament. We wish to confirm that we are available to make an oral submission on the Bill to the Portfolio Committee to provide further context to the submission.

Yours sincerely,

WOAN Forum

1. Introduction

The WOAN Forum supports the efforts of Government to radically transform the mobile market structure through the licensing of the Wireless Open Access Network (“**WOAN**”) which will provide wholesale services to existing and future innovative service providers. In this submission the WOAN Forum seeks to draw the attention of the Portfolio Committee to the many interrelated aspects of the Electronic Communications Amendment Bill [B31-2018] (“**ECA Amendment**”) to ensuring the sustainability and success of the WOAN. Most of the comments contained in this submission will be on the provisions pertaining to the WOAN and the legal and regulatory environment in which it will be established.

The introduction and establishment of the WOAN is in the national and public interest signalling the serious intent of Government to address universal services and access to modern mobile networks and services and facilitate competition in the sector. The objective of this being to lower the costs to communicate that have remained stubbornly high despite many promises by the incumbent operators. The WOAN Forum is therefore supportive of the policy and legislative interventions providing for the establishment of the WOAN.

The allocation of a significant portion of the unassigned high demand spectrum will facilitate the most efficient use of this scarce natural and national resource as it will enable many licensed entities to share the use of the spectrum as opposed to the traditional exclusive use of the spectrum by a few operators to the detriment of other licensed entities and future innovative service providers. The allocation of a limited scarce resource like spectrum on a shared basis is more efficient than the exclusive use of such scarce resource that leaves many without the possibility of entering the market to compete and provide innovative services.

The entry of a successful WOAN will enhance competition and innovation in the sector. More companies would be able to compete at a service level as opposed to needing to make large infrastructure investments before being able to attempt to compete in the market. Entry to compete on equal terms will be a real possibility for the more than 400 licenced entities who since 2008 were unable to enter the market to deliver competitive services as the spectrum was monopolised by a few companies.

The policy and regulatory conditions under which the WOAN will be licensed and in which it will operate will be fundamental to the sustainability and viability of the WOAN as a late entrant into the market. The WOAN is an intervention specifically decided upon in view of the many barriers to entry, dominance of the market by two mobile market players resulting in high communication costs and failure to reach 100% broadband penetration. Unless specific measures outlined in the current legislation and policy to shake up the mobile sector, the WOAN itself will face similar challenges and obstacles faced by the smaller market participants who are struggling to survive in the face of the dominant duopoly. Simply stated, the viability, and sustainability of the WOAN as a late entrant in a mature market that is dominated by two operators, who combined control more than 80% of the market, is not assured. The playing field must be levelled through the introduction of a pro-



competitive regulatory environment including the introduction of regulations to force active sharing of infrastructure and other asymmetrical regulations.

The WOAN Forum notes the lack of details concerning the competition policy and regulatory environment in the ECA Amendment. This submission seeks to point to the policy and regulatory measures that must be included in the proposed legislation for the licensing of the unassigned spectrum. Most of these policy and regulatory measures have been adopted as part of the Integrated National ICT White Paper and the changes to the market structure were predicated on the implementation of them.

2. The WOAN Forum

The WOAN Forum is a voluntary association of different organisations and entities dedicated to bringing about the most conducive policy and regulatory conditions for the establishment, licensing and operation of the WOAN. This would then facilitate universal access and increased competition in the market.

The WOAN Forum brings together Industry Associations, SMMEs, Youth organisations, Women, Business, Empowerment and Labour formations. The Forum seeks to unite these formations to speak with one voice concerning the advocacy for the WOAN and the bringing about of the necessary policy and regulatory conditions for a successful WOAN. All organisations united in the WOAN Forum support the establishment of the WOAN.

The WOAN Forum successfully convened a Colloquium on the 2nd of November to discuss the draft policy and policy direction on the licensing of the unassigned spectrum. The Colloquium attracted industry experts and participants. Recommendations were made that are incorporated in this submission as to how to strengthen the legislative and policy environment in order to achieve the outcomes envisaged in the Integrated National ICT White Paper.

3. Comments on the Draft ECA Amendment Bill [B31-2018]

The WOAN Forum believes the decision by government to forge ahead with the establishment of the WOAN, through the licensing of the WOAN and assignment of the IMT Spectrum, marks a watershed period in transforming the ICT sector to meet the economic and social needs of South Africa. The WOAN Forum therefore supports Government in its strides to change the ICT sector landscape.

The WOAN Forum departs from the understanding that the ICT Policy Review process, initiated in 2013, culminating in the adoption of the National Integrated ICT White Paper by Cabinet, correctly identified the bottlenecks and barriers to entry that have made the South African mobile landscape so uncompetitive and non-responsive to the transformational agenda to make the ICT sector one of the least transformed in terms of ownership and participation.

3.1 Sequencing the ECA Amendment and the Policy Direction

General Comments

3.1.1 Section 2(a) as amended provides that the primary objective of the Act is to provide for the regulation “ in line with the National Integrated ICT Policy White Paper”. National Policy changes from time to time and the National Integrated ICT Policy White Paper itself call for periodic review of policy for the country to deal with the rapid changes to the ICT industry. It is recommended that a reference to “national policy” instead of a specific policy would suffice.

3.1.2 The Bill is silent as to the many different time periods that may apply to the carrying out of obligations, policy directions or regulatory activities. Unfortunately, without time frames, delays in regulatory processes will most likely impact negatively on the implementation of the new legislation. Practically, not all the activities envisaged in the ECA Amendment can be carried out at the same time. This requires prioritisation taking into consideration the capacity and resources available to the Regulator.

3.1.3 The roles and responsibilities of the Minister, the Regulator and USASSA should be defined in a such a manner as to eliminate the overlaps and minimise the possibility of future challenges. The National Integrated ICT White Paper envisaged the establishment of a streamlined Sector Regulator as well as the Digital Development Fund. It is almost impossible to comment intelligently on the roles and responsibilities of the two critical structures without any idea of what is contained in the future legislation that will establish them. It would have been advantageous if the two other pieces of legislation would have been published simultaneously to inform meaningful discussion.

3.1.4 The Bill contains many instances in the which the Minister obliges the Regulator to impose cost-based pricing on the WOAN, OR THE Bill itself imposes this obligation on ICASA. There are many grounds that call for a review of this approach. It may fall foul of the competition regulation as due processes have yet to be undertaken to analyse the impact of the WOAN on competition. Secondly, the WOAN is entering the market as a smallest of the operators with no market share and no dominant position to warrant pro-competitive measures that should be reversed for dominant operators.

3.1.5 The many instances in which the Bill obliges cost-based prices for the WOAN is in sharp contrast to very few instances in which the Bill obliges competition measures for the current dominant operators.

3.1.6 The Integrated National ICT White Paper proposed many practical solutions to deal with the identified challenges. The Integrated National ICT White Paper pointed to the lack of effective regulation, as the kernel of challenges that has led to the domination of the mobile broadband market by a duopoly that controls more than 80% of the market.

3.1.7 The decision by government to undertake the amendment of the underlying statutes while going ahead with the licensing of the WOAN raises fundamental issues that need to be



considered before the finalisation of the Policy and Policy Direction to ICASA on the licensing of the unassigned spectrum high demand spectrum to the WOAN and to other operators.

3.1.8 This decision, to licence the WOAN prior to the finalisation of the amendments to the Electronic Communications Act, effectively means that the WOAN will be licensed under the repealed policy and current regulations that have not been updated to be in line with the new Integrated National Integrated ICT Policy. All the measures that are outlined in the National Integrated ICT Policy, to deal with the market dominance, will not be available to help protect the WOAN and other new entrants from the current dominant market behaviour.

3.1.9 The time tested policy and regulatory scheme that entails the review of the existing policy and regulations, followed by the adoption of a White Paper that underpins government policy statement, followed by the amendment of the underlying laws and statutes, followed by the review and amendment of regulations to reflect the new legal framework and then licensing on the basis of the new policy and regulation provide the best conditions for the introduction of changes and therefore certainty in the sector.

3.1.10 The best scenario would be to wait for the finalisation of the ECA Amendment Bill prior to the Regulator embarking on a major licensing initiative that is dependent on many measures that are not yet part of the law or regulations.

3.1.11 The Government and the Regulator, if they deem it important to proceed without the finalisation of the statutes, must at least indicate how and when the many new measures covering general open access principles, open access principles relevant to deemed entities, open access principles relevant to vertically integrated entities, passive and active infrastructure sharing will be implemented.

All of the above measures must be contained in amended regulations on facilities leasing, interconnection and roaming regulations.

3.2 The Regulator must be directed to ensure the creation of an Open Access environment

3.2.1 The Open Access environment envisaged in the Integrated National ICT White Paper must be the basis of the operations of the mobile market and be part of the conditions of licensing the unassigned high demand spectrum.

3.2.2 The Draft Policy and Policy Direction to ICASA on licensing the High Demand Spectrum does not unfortunately direct ICASA to establish a regulatory scheme to ensure that this important aspect of transforming the landscape is the basis of licensing going forward.

3.2.3 The basis of the Open Access regime is that the market and how it was regulated in the past, particularly in relation to broadband, has led to ineffective competition.

“The current Infrastructure market, particularly in relation to broadband, is characterised by fundamental market problems of ineffective competition, infrastructure sharing bottlenecks, unnecessary duplication of infrastructure and inefficient use of scarce resources...”

The market structure and the policy approach that has enabled it, increases the costs of broadband provision and thus limits broadband. The key to overcoming these challenges is “Openness” **Integrated National ICT White Paper**

3.2.4 The conditions and terms under which the WOAN will interface with the existing infrastructure providers is paramount to the success of the WOAN as a late entrant. These conditions and terms will have a direct bearing on the cost and extent of investment required to establish the WOAN.

3.2.5 At a minimum the WOAN must, at the very start and as a matter of policy , legislation and regulation, enjoy mandated open access to existing MNO infrastructure at incremental cost-based prices as well as cost-based interconnect, termination and roaming prices.

3.2.6 The Integrated National ICT White Paper already outlines the elements of the Open Access Policy which must be included in the Policy and Policy Directions to ICASA on the licensing of the unassigned High Demand Spectrum to achieve the above stated objectives. Regulations must be amended to ensure:

- **CORE NETWORKS** support, at a minimum, traditional open access principles of fairness, transparency and non-discrimination
- **Last Mile** infrastructure is built on open access core networks that are made available in a manner that will enable many users to co-exist on the same infrastructure or utilising the same spectrum bands.
- **Effective Access** to infrastructure is mandated through facilitating access by competitors to existing infrastructure in a manner that is easily obtainable in reasonable locations using standardised interfaces. This principle should be enforced by the Regulator through regulations or licence conditions requiring unbundling or facilities sharing and submission of [fair] service level agreements. In terms of the White Paper, section 2.2 (a) of the Policy Direction should apply to all networks, not only those who will be assigned the currently unassigned high demand spectrum. Section 2.2 (a) introduces confusion as it relates this requirement to only the licensees who will be assigned the unassigned high demand spectrum, leaving out the other operators who have already been licenced and who might not obtain the currently unassigned spectrum.
- **Transparency** in which this principle means the provision of access in a manner that is clear to all market players. Transparency should cover design offerings, pricing and their terms and conditions. Such information should be made available to interested parties upfront and implemented through the Regulator mandating Reference Offers. The policy direction is silent on this important aspect of WOAN leasing facilities from the existing players.
- **Non-discrimination** in which all access seekers must be granted access to networks in a non-discriminatory manner. A vertically integrated infrastructure provider cannot

favour services affiliated with its own company. The policy directive is again silent on this important aspect of non-discrimination and treatment of vertically integrated entities even though explicit provisions are outlined in policy as to how vertical integrated entities are to be treated.

3.3. Regulations for Open Access principles relevant to Vertically Integrated Entities and Deemed Entities

➤ **The Regulator must be required to regulate for accounting separation of Vertically Integrated Entities.**

The White Paper discussed in detail the possible effect and impact of vertical integration to competition and open access principles.

“To ensure that access providers (both fixed and mobile providers) cannot use their market power to restrict or distort competition or leverage such power in adjacent markets or related markets, where the access provider is vertically integrated, the regulator should require that they adhere to the principle of accounting separation.”

It should be a requirement that all existing access providers should observe account separation and ICASA to determine within 5 years if such measures have succeeded in order to consider if structural separation would be required.

➤ **The Regulator must be required to issue regulations pertaining to Open Access principles relevant to deemed entities**

The White Paper proposes a much more streamlined manner to deal with entities that control critical resources and have significant market power to the extent that they can influence the functioning of the market.

In this regard, an access provider will be deemed an open access network if it displays any of the following characteristics:

- ✓ It has significant market power in the relevant infrastructure market, or
- ✓ It controls an essential facility; or
- ✓ It has a network that constitutes more than 25% of the total infrastructure in that market; or
- ✓ It has a scarce resource, such as frequency spectrum, assigned to it for its exclusive use.

Importantly the White Paper, mandates the regulator to publish a list of deemed open access networks as soon as possible after the finalisation of the White Paper. Two years down the line, the Regulator has yet to publish a list of deemed entities as a precursor to meaningful regulation of these deemed entities.

The White Paper goes further to say that in order to ensure effective competition a deemed open access network operator should provide:



- **Cost based pricing:** The White Paper proposes measures to deal with the high cost of providing network services. The White Paper imposes cost-based pricing and observes that “in principle the wholesale price of a service should not exceed the minimum costs that an efficient firm would incur in the long run in providing the service”
The White Paper says the Minister will require the regulator to develop regulations on cost-based pricing following the adoption of the White Paper.
- **Active Sharing of current infrastructure:** The White Paper provides a framework in which currently assigned spectrum can be more efficiently used through active infrastructure sharing including national roaming and radio access network sharing. Even though the Draft Policy and Policy Direction provides for the leasing of the incumbent infrastructure it fails to extend access beyond the traditional boundaries and specifically leaves out the remedies contained in the Integrated ICT White Paper to deal with the current problems.

We hope that these comments will be helpful to the Portfolio Committee in the process of finalising the ECA Bill and ensuring the objectives of universal access to broadband by all South Africans irrespective of social standing and geographic location is achieved.

Ends....