

SENTECH'S WRITTEN COMMENTS ON THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL

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Head Office: Sender Technology Park (STP), Octave Street, Honeydew, 2040
Postal Address: Private Bag X06, Honeydew, 2040
Telephone: 011 471 4400 | Call Centre: 0860 736 832 (International: +2711471 4595)
Fax: 011 246 2610 | E-mail: support@sentech.co.za | www.sentech.co.za



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1. Introduction

- 1.1. SENTECH thanks the Portfolio Committee on Telecommunications and Postal Services (“Committee”) for the opportunity to make a written submission on the Electronic Communications Amendment Bill.
- 1.2. SENTECH has commented on the Electronic Communications Amendment Bill (“Bill”) prior to the tabling thereof before Cabinet and Parliament.
- 1.3. There have since been further developments related to this process with the publication of policy directions on the *licensing of the unassigned High Demand Spectrum*, which SENTECH has provided comments thereon. This will probably influence the nature and extent of the amendments to the Electronic Communications Act, 2005 (“EC Act”), at least in so far as the licensing of the WOAN is concerned.
- 1.4. SENTECH intends on making oral presentation in the event the Committee decides to hold public hearings

2. Amendment of the EC Act

- 2.1. The proposed amendment of the EC Act seeks to introduce, amongst other things, a licensing framework for the Wireless Open Access Network Service (“WOAN”). Meanwhile, the Minister of DTSP has published policy directions on the licensing of unassigned High Demand Spectrum. This is indicative of the fact that the publication of the policy directions is an acknowledgement that the EC Act, in its current form does empower the Minister to license the WOAN without the need for it to be amended. Hence the amendment relating to policy directions seem superfluous.
- 2.2. It is also the intention of the Bill to provide for transformation of the sector through enforcement of broad-based black economic empowerment. SENTECH believes that the licensing of the WOAN should be used as a vehicle to ensure proper broad-based economic empowerment as explained in section 6 below.
- 2.3. SENTECH will address a few sections of the Bill that may not be necessary to introduce through the Bill or amend the EC Act given the publication of the Policy and Policy Directions on assignment of High Demand Spectrum. SENTECH will also comment on other sections that are proposed in the Bill.

3. Definitions

- 3.1. SENTECH is of the view that the proposed definition for “radio frequency spectrum refarming” does not capture the full extent or reasoning advocating for refarming of spectrum. The ITU-R SM.1603-2 provides a more holistic definition of spectrum refarming. SENTECH therefore proposes that the definition be revised as follows:

radio frequency spectrum refarming (spectrum refarming) is a combination of administrative, financial and technical measures aimed at removing users or equipment of the existing frequency assignments either completely or partially from a particular frequency band. The frequency band may then be allocated to the same or different service(s). These measures may be implemented in short, medium or long time-scales.¹

4. Regulations by Authority (EC Act)

- 4.1. SENTECH in principle does not oppose the proposed amendment to subsection 4(1)(d) of the EC Act, as the changes do not necessarily contradict the provisions stated in section 4 of the ICASA Act, particularly subsection 4(3)(c);

(3) Without derogating from the generality of subsections (1) and (2), the Authority—

(c) must control, plan, administer and manage the use and licensing of the radio frequency spectrum in accordance with bilateral agreements or international treaties entered into by the Republic;

5. Licensing of wireless open access network service

- 5.1. As mentioned above, the publication of the Policy and Policy Directions on the licensing of Unassigned High Demand Spectrum also has a bearing on the Electronic Communications Amendment Bill. SENTECH submits that the policy directions were properly published within the ambit of the EC Act. The EC Act empowers the Minister to issue policy directions and this negates the need to amend the EC Act.
- 5.2. In line with this understanding, SENTECH proposes that section 19A (5) and (6) of the Bill be omitted from the Bill. In support hereof, SENTECH believes that sections 5 (6) and (3) read together with section 9 of the EC Act empowers the Minister to proceed with the licensing process of the WOAN as evidenced by the publication of the policy

¹ https://www.itu.int/dms_pubrec/itu-r/rec/sm/R-REC-SM.1603-2-201408-!!!PDF-E.pdf

directions on high demand spectrum and hence does not need to amend the EC Act with regard hereto.

6. Empowerment credentials of the WOAN

- 6.1. To ensure proper empowerment credentials of the WOAN and its individual members, SENTECH proposes that each member of the consortium have some level of empowerment for participation in the WOAN as proposed under paragraph 6.3 below. This will help to achieve section 19A (c), (d), (e), and (g) of the Bill dealing with diversity of ownership and control, effective participation by targeted groups, non-domination by a single entity and non-possession of a market share of more than 50% in electronic communication service.
- 6.2. SENTECH is concerned that the proposed section 19A (1) (b) of the Bill does not go far enough to address the issue of equity ownership as intended in section 9(2)(b) of the EC Act.
- 6.3. SENTECH proposes that compliance to section 9(2)(b) of the EC Act should not only be confined to the WOAN as an entity but also to individual persons (natural or juristic) making up the consortium. SENTECH proposes the following revision:

b) and individual persons (natural or juristic) making up the consortium must comply with the empowerment requirements contemplated in section 9(2)(b) of the EC Act;

7. Incentives for the WOAN versus Competition

- 7.1. Section 19A (7) (b) of the Bill proposes as one of the incentives the deferment of the charging of wholesale rates by the WOAN. THE EC Act empowers the Authority to prescribe the wholesale rates in terms of section 47 read with section 67 of the same Act. SENTECH submits that this will subject the WOAN to competition processes in the form of prescribing wholesale rates too early in the commencement of business by the WOAN.
- 7.2. SENTECH proposes that the Authority be empowered to institute section 67 of the EC Act only from the fifth (5th) anniversary of the licencing of the WOAN. In the interest of ensuring that objectives of the National Integrated ICT Policy are met, section 67 should not only be applicable to the WOAN.

- 7.3. The proposal is also informed by the fact that Bill is silent on the methodology of prescribing wholesale rates, e.g. cost-recovery/benchmark/rate-of-return/hybrid regime the Authority should or would consider when prescribing wholesale rates. A challenge would arise as to how the Authority will be able to determine the appropriate price regulation methodology for the consortium with regards to access to IECNS services whilst at the same time striving to promote service-based competition and ensure the long-term viability of the WOAN.
- 7.4. The proposal to introduce section 67 of the EC Act only in the fourth anniversary of the WOAN is further informed by a need to ensure its viability. Given that the WOAN will be a new entity time should be afforded to the WOAN to find its feet in the ICT landscape. Hence the proposal in the Bill giving the entity some incentives. SENTECH submits that the section 67 competition process may work against these incentives if instituted earlier.
- 7.5. Taking the above into consideration, SENTECH is proposing the institution of section 67 of the EC Act from the five (5th) anniversary of the licencing of the WOAN instead of instituting the section 67 with the WOAN's commencement of its business.

8. State Owned Entity (“SOE”)

- 8.1. The rationale behind SOEs relates to the need for Government to create societal value through focused, integrated and holistic socio-economic interventions. Figure 1 below illustrates the SOE framework for public value creation.
- 8.2. Dependent of the form of the SOE, the relationship with Government is based on the former's business strategy being informed by and aligning with the Medium Term Strategic Framework (MTSF) objectives and goals of the State for the same period, as well as the company's internal objectives as adopted by the Board from time to time. The relationship is also based on Parliament's effective and continuous oversight role, in ensuring that objectives are fulfilled as outlined in the corporate plan.
- 8.3. Parliament's oversight role ensures cooperation amongst SOEs to ensure that socio-economic citizenry benefits from activities of these entities. The Constitution empowers Parliament to ensure accountability, transparency, trust, monitoring and reporting, through the assistance of Chapter 9 institutions created to support constitutional democracy.
- 8.4. The internal management of SOEs is tasked with the responsibility of ensuring that the companies comply with relevant legislation, policy and regulations. The management is entrusted to ensure that SOE are self-sufficient and sustainable, by

enabling future-proof, agile, efficient and effective operational models. Management is tasked to consider the impact of external influence and how SOEs can leverage partnerships to full its objectives and goals.

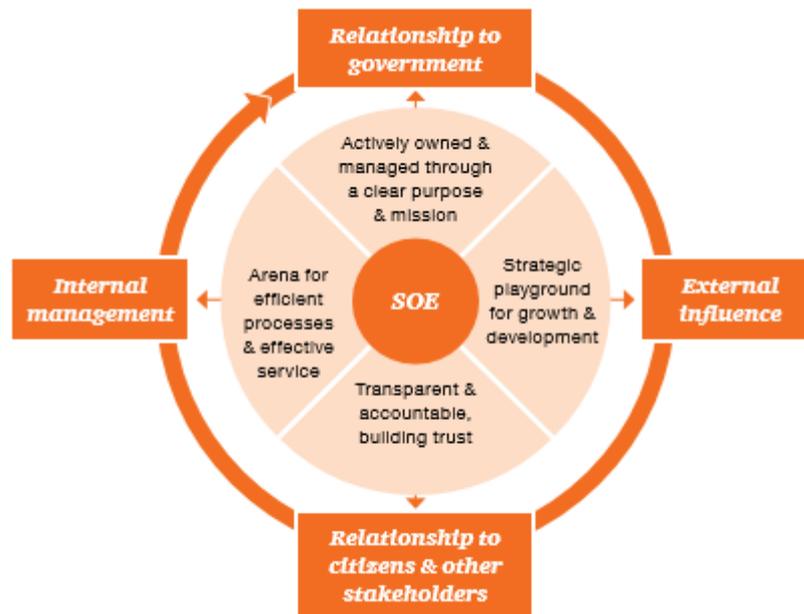


Figure 1: SOE framework (courtesy: PWC²)

- 8.5. Taking the above into consideration, SENTECH is of the view that subsection 19A(f) is not in the best interest of SOEs licensed under the EC Act. SENTECH therefore proposes the deleting of subsection 19A(f).

9. Functions of Minister responsible for Telecommunications and Postal Services

- 9.1. SENTECH proposes the removal of the word “and” after subsection 29A(g), to inserted at the end of subsection 29A(h). The following addition is suggested after subsection 29A(h);

29A(i) driving State’s ICT developmental goals and subsequently reserving the right to allocate a portion of the USAF funding to mandated entities to ensure fulfilment of mandates and achievement of state objectives.

² PWC’s State-Owned Enterprises: Catalysts for public value creation? (2015)

10. Universal access and universal service obligations of radio frequency spectrum licences

- 10.1. SENTECH supports the addition of section 31A (4) and (5) as the wording is consistent with the objectives of the Minister. SENTECH does not support inclusion of section 31(A) (1), (2) & (3) of the Bill.
- 10.2. Section 31(A) (1) of the Bill does not take into consideration the issue of affordability for entities with existing obligations. Section 31A (3) assumes that entities assigned similar spectrum are similar in financial status, this may have the unintended consequence of financially burdening some licensed entities.
- 10.3. SENTECH proposes the following inclusion in the Bill;

31A (2) *Universal access and service universal obligations shall be applicable to existing and new radio frequency spectrum licensees whose radio frequency spectrum has been determined as high demand spectrum by the Minister of Telecommunications and Postal Services.*

31A (3) *Radio frequency spectrum licensees assigned radio frequency spectrum in similar radio spectrum bands must have similar access and universal service obligations commensurate to the entities market's size.*

11. Radio frequency spectrum trading

- 11.1. SENTECH is concerned that the proposed section 31B of the Bill will have unintended consequences that may activate the inclusion of other agencies such as the Competition Commission. The EC Act, particularly section 32, clearly state that possession of radio apparatus requires a radio frequency spectrum licence or exemption from the Authority. The principle of spectrum trading falls within the reality of licensee/s in possession of radio frequency spectrum licence.
- 11.2. SENTECH is of the view that both the spectrum and spectrum dependent- equipment are viewed as assets whose acquisition may translate to a merger or linked with mergers procedures. Section 12 of the Competition Act defines mergers as following: 12 (1) (a) *..., a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.*
- (b) A merger contemplated in paragraph (a) may be achieved in any manner, including through – (i) purchase or lease of the shares, an interest or assets of the other firm in question; or (ii) amalgamation or other combination with the other firm in question.*

11.3 SENTECH is concerned that the proposed section 31B(2) of the Bill does not provide the Authority sufficient scope to manoeuvre when considering spectrum trading. SENTECH proposes the following inclusion in the Bill;

31B(4) the regulations contemplated in subsection (2) may;

(a) Authorise a partial transfer taking into consideration subsection (3)(a);

(b) May restrict the following;

i. Circumstances of the transfer;

ii. The extent of the transfer;

iii. The manner of the transfer;

(c) Prescribe additional conditions for the approval of the transfer; and

(d) Conditions that will allow the holder of the licence to confer the benefit of the licence on another in respect of any station or apparatus to which the licence relates, taking into consideration other affected legislation,

11.4 The above proposal takes into consideration a variety of scenarios such as the situation where spectrum proposed for trading is still under a spectrum leasing agreement. The Authority will have to take into consideration subsection 2(y) of the EC Act. Subsection 2(y) states the following;

2 The primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to—

(y) refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public;

11.5 The proposed subsection 31B (4) will also take into consideration operational model and purpose of the WOAN in the event the consortium is affected by the spectrum trading application. The Authority will also be able to determine whether the transferee is capable of meeting obligations attached to the spectrum licence. Additionally, the Authority will be enabled to consider a scenario where the obligations must be apportioned in the event of partial transfer.

11.6 Chapter 10 of the EC Act empowers the Authority to impose *ex post* regulations (remedial intervention) subject to the processes prescribed. The EC Act is not clear how the Authority should be dealing with *ex ante* (anticipatory intervention) regulatory processes to enable addressing the proposed subsection 31B(3)(a) of the Bill. SENTECH therefore proposes that the regulations contemplated in subsection 31B(2)

must include factors that may be considered to distort competition (*ex ante* factors). The following wording is proposed:

2(c) *factors identified as likely to distort competition as part of the notification process;*

11.7 To ensure consistency with the spirit of the EC Act, spectrum trading regulations contemplated in subsection 31B(2) of the Bill must speak to issues of broad-based and equitable ownership. The following wording is proposed:

2(d) *persons or groups of persons from a diverse range of communities in the Republic; and*

2(e) *the promotion of broad-based black economic empowerment including the empowerment of women and the youth and persons with disabilities;*

12. Radio frequency spectrum sharing

12.1. SENTECH is concerned that the proposed section 31C(1)(b) of the Bill unintentionally intimates that non-high demand spectrum is not subject to provisions of Chapter 5 of the EC Act. All spectrum usage is subject to approval of the Authority. In situations where the Authority has chosen soft-regulation approach, guidelines are published and the Authority is included in the dispute resolution processes. SENTECH therefore, proposes the deletion of the subsection 31C(1)(a) and (b), and be replaced by the following wording;

31C (1) *Radio frequency spectrum licensees may share licenced spectrum, subject to – approval from the Authority;*

12.2 To ensure consistency with the spirit of the EC Act, spectrum sharing regulations contemplated in subsection 31C(3) of the Bill must speak to issues of broad-based and equitable ownership. The following wording is proposed:

2(d) *persons or groups of persons from a diverse range of communities in the Republic; and*

2(e) *the promotion of broad-based black economic empowerment including the empowerment of women and the youth and persons with disabilities;*

13. Radio frequency spectrum refarming

- 13.1. SENTECH advocates for the deletion of the entire subsection 31D, taking into consideration the proposed revised definition;

radio frequency spectrum refarming (spectrum refarming) is a combination of administrative, financial and technical measures aimed at removing users or equipment of the existing frequency assignments either completely or partially from a particular frequency band. The frequency band may then be allocated to the same or different service(s). These measures may be implemented in short, medium or long time-scales.³

- 13.2. The above definition illustrates that spectrum refarming is neither an allocation nor assignment issue, but an operational method of addressing functional challenges and/or opportunities. Spectrum refarming does not change the allocation as stated in the National Frequency Plan nor does it affect assignment.

14. Section 43 (EC Act): Obligations to lease electronic communications facilities

- 14.1. The proposed subsection 43(1B) (b) of the Bill can only be implemented as *ex post* regulatory measure and not *ex ante*.
- 14.2. Section 67(4) of the EC Act only empowers the Authority to prescribe wholesale rates in the event an inquiry has determined markets and market segments with ineffective competition. Additionally, the Authority must also determine if those market and market segments have licensees with significant market power.
- 14.3. The EC Act does not specifically empower the Authority to develop *ex ante* regulations.
- 14.4. Therefore, proposed additions in section 43 of the Bill, particularly subsection 43(5), (6) and (7), may not include issues of wholesale rates, unless a new section empowering *ex ante* regulations is included Chapter 10 of the Bill.

15. Wholesale open access regulations

- 15.1. SENTECH supports the proposed additions in the Bill in relation to section 44 of the EC Act, bar subsection 44(3)(h).

³ https://www.itu.int/dms_pubrec/itu-r/rec/sm/R-REC-SM.1603-2-201408-!!!PDF-E.pdf

- 15.2. SENTECH is not opposed to subsection 44(3)(h), as stated previously the company will like to further highlight the processes (Chapter 10 of the EC Act) required to effect this subsection.

16. Concurrent jurisdiction agreement between Authority and Competition Commission

- 16.1. SENTECH supports the proposed additions in the Bill in relation to section 67A. The proposal provides clarity in relation to the concurrent jurisdiction agreement referred to in subsection 4B(8)(a) of the ICASA Act.
- 16.2. SENTECH is also of the view that the proposal will heighten the Chapter 10 processes contemplated in the EC Act.

17. Section 74 (EC Act): Offences and penalties

- 17.1. SENTECH in principle supports the proposed additions in the Bill in relation to subsection 74(6). Chapter 10 processes of EC Act are crucial in ensuring fair and equitable competition in relevant markets and market segments. Therefore, non-compliance of licensees in respect to cooperation with Chapter 10 processes must be viewed in a serious light.
- 17.2. The proposed monetary penalty in subsection 74(6) does not instil the seriousness of the offence.
- 17.3. SENTECH therefore proposes that the monetary value be a percentage of the licensed revenue. The following wording is therefore proposed;

74(6) A person who fails to comply with the notice issued under section 67(4B) is guilty of an offence and liable, upon conviction, to a fine not exceeding 5% of licensed revenue.

18. Market performance report

- 18.1. SENTECH supports the proposed additions in the Bill in relation to section 79C.
- 18.2. Taking into consideration the proposed additional research-intensive administrative processes for the Authority, SENTECH advocates for the review of the funding model for ICASA to empower the agency to effectively pursue the objectives of the EC Act.

19. Section 88(EC Act): Application of money in Universal Service and Access Fund

19.1. SENTECH welcomes the inclusion of subsection 88(4A) as proposed in the Bill.

19.2. SENTECH advocates for urgency in dealing with issues as referenced in the proposed subsection 88(4A) as proposed in the Bill. The company therefore proposes the following additions;

88(4B) taking into consideration subsection (4A), where deemed necessary, the Agency must prioritise needs of persons with disabilities.

20. Conclusion

20.1. SENTECH supports the proposed amendment of EC Act, save for sections highlighted above and believes that its written comments would assist the Committee with the finalisation of thereof