



20 November 2018

Portfolio Committee on Telecommunications and Postal Services

Attention: Ms Hajiera Salie

Per email: hsalie@parliament.co.za

Submissions on the Electronic Communications Amendment Bill [B31-2018]

1. WAPA refers to the invitation of the Portfolio Committee for Telecommunications and Postal Services (“**the Committee**”) to make written submissions on the Electronic Communications Amendment Bill [B31-2018] (“**the Bill**”) and sets out its submissions below.

WISPs and WAPA’s interest in the Bill

2. WAPA, established in 2006, is a non-profit trade association acting as a collective voice for the wireless Internet service provider or WISP industry. WAPA’s primary objective is to promote the growth of the wireless industry by facilitating self-regulation, promoting best practices, and educating both members and the market about new wireless technologies and business models.
3. As suggested by our name, WAPA’s primary focus is on working towards more progressive and efficient spectrum management in South Africa and is focusing on the possibilities of TVWS spectrum for interference-free access.
4. What is a WISP? WISPs can be described as follows:
 - 4.1. They are providers of fixed wireless services which have found space to compete in the shadow of the mobile networks and Telkom and which now, collectively, have a national presence.
 - 4.2. WISPs self-provide their own electronic communications facilities and networks and provide electronic communications services such as broadband Internet access and voice services over their own networks.
 - 4.3. Most WAPA members are SMMEs operating outside of the major metropolitan areas.
 - 4.4. WISPs specialise in building networks and delivering services in challenging conditions.

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5. A typical WISP can be described in regulatory terms as follows:
 - 5.1. It holds an individual or class electronic communications network service (ECNS) licence which authorises it to make connectivity available on its electronic communications network to itself or third parties for the provision of electronic communications services such as Internet access and voice.
 - 5.2. It holds an individual or class electronic communications service (ECS) licence which authorises it to provide retail services such as Internet access and voice directly to consumers.
 - 5.3. It may hold licensed radio frequency spectrum assigned by ICASA or it may use licence-exempt spectrum. Licensed spectrum is either backhaul spectrum used for longer links or access spectrum which is used for “last-mile” connections.
 - 5.4. It will hold type approval certification in respect of the radio equipment it utilises.
 - 5.5. A WISP is generally vertically-integrated in the sense that there is a single entity that provides both the ECNS and the ECS.
6. With this in mind, WAPA members have a material interest in the following aspects of the Bill:
 - 6.1. Proposed amendments to Chapter 4 of the ECA relating to rapid deployment of electronic communications networks and electronic communications facilities and the interaction between landowners and ECNS licensees.
 - 6.2. Proposed amendments to the legislative framework for the management of radio frequency spectrum set out in Chapter 5 of the ECA.
 - 6.3. Proposed amendments to Chapter 8 of the ECA which introduce wholesale open-access obligations and seek to promote service-based competition.

Radio frequency spectrum

7. WAPA notes the need for the proposed amendments to Chapter 5 to be aligned with the policy direction process underway in respect of the licensing of the WOAN and high-demand spectrum. Section 31E in particular requires extensive revision.
8. Spectrum trading and sharing: WAPA welcomes the proposed insertion of sections 31B and 31C into the ECA. Allowing spectrum trading and sharing has the potential to improve the efficiency with which spectrum is used in South Africa. WAPA supports the decision taken to allow spectrum trading for both high-demand access spectrum as well as point-to-point backhaul spectrum.
 - 8.1. Subsection 31B(2)(a) refers to “spectrum trading application and notification processes”. A

notification process typically does not involve requiring ICASA's approval or permission. Is it intended that such a process will exist?

- 8.2. **WAPA submits that a notification process would be appropriate for radio frequency spectrum trading in spectrum which is not in high demand and where competitive concerns are unlikely to arise.** Licensees should be able to enter into a trading transaction for such spectrum on the basis of submitting all required information to ICASA but without requiring explicit approval. This would be analogous to registrations for class licences under Chapter 3 of the ECA.
 - 8.3. This is the approach taken under the proposed section 31C which expressly provides for an application process for high-demand spectrum and a notification process for non-high-demand spectrum.
 - 8.4. We therefore submit that the proposed section 31C(1) should be used with the necessary changes in place of section 31B(1).
9. Universal access and universal service obligations: Noting that these obligations are also imposed on ECNS and ECS licences which may be held in addition to radio frequency spectrum licences, WAPA wishes to raise the following for the consideration of the Committee:
- 9.1. Section 31A should oblige ICASA to take into consideration universal access and universal service access obligations already imposed on service licensing when considering such obligations in respect of radio frequency spectrum licensing.
 - 9.2. **WAPA submits that universal service and access obligations should only be imposed in respect of radio frequency spectrum licences for high-demand spectrum.** Coverage and network deployment obligations make sense when referring to access spectrum but less so when considering point-to-point spectrum.
 - 9.3. It has long been accepted that the imposition of universal access and universal service obligations were imposed on radio frequency spectrum licensees who were provided with a competitive advantage through being assigned high-demand radio frequency spectrum for access services, as was the case with Vodacom, MTN, Cell C, Telkom and Neotel.

Rapid deployment and the interaction between licensees and landowners

10. WAPA welcomes and supports the clarity introduced by proposed amendments to Chapter 4 of the ECA insofar as it relates to interaction between the holders of ECNS licences and landowners such as municipalities. In WAPA's understanding these amendments recognise the latest judicial interpretation of sections 22 and 24 of the ECA.

11. WAPA requests that the Committee carefully consider the jurisdictional implications of the proposed amendments, with particular regard to ICASA exercising jurisdiction over entities which are not the holders of licences issued under the ECA.
12. Access to high sites: WAPA welcomes and supports the proposed insertion of section 20E to facilitate the use of high site infrastructure for the deployment of radio-based systems and facilities which promote broadband.
13. Fees charges and levies: WAPA welcomes and supports the proposed insertion of section 20K and the clarity which this will bring to the contentious issues of charges made by some landowners for the situation of electronic communications facilities and networks.
 - 13.1. The Committee is requested to consider whether the term “access fee” as it used in this section is correct and what this term is intended to cover. Does reference to an “access fee” include administrative costs and ongoing rentals and other charges which may be levied in respect of the situation of a facility or network? From the wording of the section it appears that more than a fee for accessing a location or land is contemplated.
 - 13.2. WAPA is concerned about the impact of the proposed subsection 20K(6) insofar as this required that an ECNS licensee is prohibited from continuing with the deployment of a facility or network “while awaiting the resolution of the dispute by the Authority”. Notwithstanding that such resolution is required to take place on an expedited basis, it is our members’ experience that dispute resolution conducted by ICASA can take months if not years, after which there remains the option of either party approaching the courts.
 - 13.3. This would be contrary to the objectives of the Bill and run counter to the many provisions which seek to facilitate rapid deployment of electronic communications networks and facilities.
 - 13.4. A dispute around fees should be distinguished from a dispute regarding whether access and deployment will cause “significant interference with the land” as contemplated in section 20D(6). The courts recognise that disputes around compensation are not generally regarded as urgent and can be resolved in due course without the need to halt the activity which is the subject of the dispute.
 - 13.5. **In the circumstances WAPA requests that the Committee consider the following amendment to the proposed section 20K(6):**

“(6) An electronic communications network service licensee may ~~not~~ continue to deploy electronic communications networks and facilities while awaiting the resolution of the dispute by the Authority”.

14. "Adequately served": WAPA has no difficulty in principle with this concept but is concerned with the requirement for ICASA to prescribe wholesale rates in respect of adequately served premises.
- 14.1. Such a requirement ignores the reality of the different types of network media, topologies, technology and equipment which may be used in the provision of ECNS to an adequately served premises. Commercial wholesale pricing is a function of these factors and many more: what is the size of the premises? How many end-connections are required? What is the cost of deployment considering the nature of the land and landowner requirements?
- 14.2. It is difficult to see how the prescription of wholesale pricing in this context should work with reference to section 67 of the ECA. In essence each adequately served premises would need to be defined as a market and investigated, which is not feasible.
- 14.3. WAPA appreciates that such a network may be in a de facto monopoly position in respect of the provision of ECNS and that the drafters therefore believe that an *ex ante* pro-competitive remedy should be imposed.
- 14.4. Has it, however, been established that this is an issue in practice (it is not in the experience of WAPA members)?
- 14.5. **WAPA submits that a more appropriate remedy would be to require that a provider in respect of an adequately served premises has a reference wholesale offer which provides for benchmarking of pricing of wholesale services to the adequately served community against similar network developments.** This is already common practice in agreements entered into between fibre network providers and body corporates, home owners' associations and the like. This could be achieved through the wholesale open access regulations to be drafted under an amended Chapter 8 of the ECA.
- 14.6. **WAPA submits that prescribed wholesale rates should only apply to deemed entities in accordance with the proposed section 43(1B) to be inserted into Chapter 8 of the ECA.**

Open access and service-based competition

15. WAPA is an association of horizontal competitors that compete and cooperate within the bounds of the ECA and the Competition Act. As such our members support the introduction of detailed provisions around wholesale open access.
16. We welcome and support changes made to the previous version of the Bill which have the effect of excluding WISPs from being regulated as vertically-integrated entities.

Implementation

17. WAPA requests that the Committee consider providing for a period between publication of the Bill and the coming into force thereof which will allow ICASA to undertake the review of regulations and other steps required to align the current regulatory framework with the provisions of the finalised Amendment Act. Alternatively, to consider staggered implementation with certain sections commencing at later dates.
18. This would greatly assist ICASA in its implementation processes and reduce the uncertainty caused by a regulatory framework which is at odds with amended primary legislation.
19. We also request that the Committee give due consideration to the manner in which ICASA can be enabled and assisted to perform the numerous urgent and time-bounded obligations imposed on it by the Bill.

Conclusion

20. WAPA confirms that it wishes to participate in any public hearings conducted towards the finalisation of the Bill and we thank the Committee for its consideration of the above.

Regards,

Wireless Access Providers' Association (WAPA)