



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

## PRESENTATION TO THE PORTFOLIO COMMITTEE ON TELECOMMUNICATIONS AND POSTAL SERVICES

ICASA Comments on Electronic Communications Amendment Bill, 2018

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# Presentation Outline



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# Introduction



- ❑ ICASA thanks the Committee for the opportunity to provide its input on the Electronic Communications Amendment Bill [B31-2018]
- ❑ ICASA also acknowledges that some of its input has been taken into account by the Department of Telecommunications and Postal Services in the preliminary consultative process prior to tabling of the Bill to Parliament



# Organisational Mandate



ICASA's mandate is derived from:

- The Constitution, 1996
- ICASA Act, 2000
- EC Act, 2005
- Broadcasting Act, 1999
- Postal Services Act, 1998
- ECT Act, 2002

ICASA's role and responsibilities include:

- Developing licence conditions and issuing of licences
- Management of scarce resources
- Compliance monitoring and enforcement
- Market reviews and regulation
- Tariffs and price regulation
- Setting of rules, guidelines and codes

ICASA is established pursuant to section 192 of the Constitution and in terms of the ICASA Act of 2000; and mandated to regulate electronic communications, broadcasting and postal sectors in the public interest



## Independence of ICASA

[In context of proposed amendments & the ICASA Act]



- ❑ ICASA's independence is enshrined in terms of section 192 of the Constitution. Consequently, Section 3(3) of the ICASA Act clearly stipulates that “the Authority is independent and only subject to the Constitution and the law...”
- ❑ The ECA and the ICASA Act impose a duty on ICASA to consider policies and policy directions issued by the Minister in exercising its powers and performing its duties (sections 3(4) and 4(3A), respectively)
- ❑ ICASA is concerned that the ECA Amendment Bill purports to undermine ICASA's independence i.e. by requiring that ICASA should ‘blindly’ implement policies or and policy directions without objectively assessing same in line with its mandate to regulate in the public interest.



## Independence of ICASA

[In context of proposed amendments & the ICASA Act]



- ☐ It further should be noted that the undermining of ICASA's independence would violate RSA's international commitments
- ☐ The independence of the sector regulator is of cardinal importance to ensure objectivity and safeguard against potential conflict of interest in regulation-making (particularly in light of government's role as shareholder in ICT sector SOEs)
- ☐ More importantly, ICASA's constitutionally guaranteed independence should extend to both broadcasting and telecommunications regulation



## Alignment of the ECA & the B-BBEE Act



- ☐ Section 4(3)(k) of the ICASA Act empowers the Authority to make regulations to promote broad-based black economic empowerment
- ☐ Conversely, the ECA requires that the Authority promote participation by **historically disadvantaged persons / groups** in the ICT sector
- ☐ However, in terms of the Broad-Based Black Economic Empowerment Act, 2003 the transformational measures seek to (a) increase the number of black people that manage, own and control enterprises/productive assets; (b) facilitating ownership and management of such assets by black people; and (c) human resource and skills development
- ☐ ICASA submits that the sector specific transformational / empowerment measures (as set out in the ICASA Act and ECA) should be aligned to the generic economy wide measures as set out in terms of the B-BBEE Act



❑ The Bill proposes that:

- ICASA's functions be limited to administering and managing spectrum assignment (licensing, monitoring and enforcement of spectrum)
- A National Radio Frequency Spectrum Planning Committee ("NRFSP") be established to ensure fairness and equitable distribution of radio frequency spectrum
- The work of the NRFSP Committee be coordinated by the DTPS (National Radio Frequency Division)

❑ It is ICASA's submission that the proposed amendments which seek to dilute ICASA's powers to manage radio frequency spectrum are not in line with best practice and are inconsistent with South Africa's international commitments





## Spectrum Management cont.



❑ The function of spectrum management consists of:

- spectrum planning
- spectrum assignment
- spectrum licensing
- Spectrum monitoring

❑ In terms of the current legislative framework (section 4(3)(c) of the ICASA Act) ICASA is mandated to **control, plan, administer and manage the use and licensing** of the radio frequency spectrum. The proposed amendments (to s4(3)(c) of ICASA Act and s30 of the ECA) seek to exclude the spectrum planning and control from the jurisdiction of the ICASA

❑ ICASA submits that the decoupling of the spectrum management mandate undermines regulatory certainty

❑ Furthermore, ICASA submits that it is best situated to continue to manage spectrum, as an independent regulator (and in line with international best practice)



### ☐ The Bill proposes that:

- unassigned high demand spectrum reserved for assignment to the Wireless Open Access Network (WOAN), must be assigned following a policy direction issued by the Minister
- a wireless open access network service licence and a radio frequency spectrum licence is issued to a WOAN

### ☐ However, these amendments now appear to be unnecessary

### ☐ On 27 September 2018, the Minister (DTPS) published the draft policy and policy directions – in terms of the current ECA - to initiate the process for release of spectrum to the WOAN (and to other licensees)



## RFS Licence Conditions / Obligations



- ❑ ICASA submits that there should be a clear delineation of roles between the policy-maker and the regulator in respect of licensing matters:
  - The Minister should set policy/guidelines but should have no role in prescribing licence conditions
  - The Regulator should prescribe licence terms and conditions including universal service obligations
- ❑ The licence conditions / obligations are by their very nature a matter of regulatory discretion and should not be prescribed in the law. However, the framing and imposition of any such licence conditions, must be aimed at attaining national policy objectives



- Section 67(13) of the Bill requires that “the Authority must perform the market definition and market review proceedings under this Chapter, after consultation with the Competition Commission”
- The Authority is of the view that this section is superfluous as the Authority may ask for and receive from the Competition Commission (“the Commission”), assistance or advice on relevant proceedings of the Authority in terms of section 67(11) of the ECA
- Additionally, the Authority is of the view that this would further lengthen the market review consultation process



## Collaboration with the Competition Commission



- ☐ There have been challenges in the interaction and/or collaboration between the Authority and the Commission
- ☐ The Authority supports the proposal in the Bill that the Authority and the Commission expand on the agreement that governs the exercise of concurrent jurisdiction (sharing of information, management of complaints etc.)
- ☐ ICASA further submits that either regulatory institution should be able to use the findings of the other only to the extent of assisting it in its inquiry



## Rapid Deployment of ECNs and EC Facilities



- ☐ The Bill proposes that the Minister of Telecommunications and Postal Services must establish a Rapid Deployment National Coordinating Centre for rapid deployment of electronic communications networks and interface with local municipalities
- ☐ The Bill further requires ICASA to prescribe regulations which provide for procedures and processes to resolve disputes between ECN licensees and landowners
- ☐ However, the Authority does not have any powers to regulate non-licensees or landowners. It would therefore be ineffectual to require the Authority to develop and enforce dispute resolution regulations for landowners as regard rapid deployment
- ☐ It is our submission that the function of resolving disputes should be carried out by the National Coordinating Centre



- ☐ The Authority trusts that the Committee will consider its inputs on the Bill.
- ☐ The Authority remains available to assist and work with the Committee in finalising the Bill.



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**Thank you**