COMMENTS BY THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ON THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL, 2018

November 2018

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1. INTRODUCTION

The Independent Communications Authority of South Africa (the "**Authority**" or "**ICASA**") is grateful to the Portfolio Committee of Telecommunications and Postal Services ("Portfolio Committee") and the Department of Telecommunications and Postal Services (the "**Department**" or "**DTPS**") for developing the Electronic Communications Amendment Bill, 2018 (the "**Bill**") and for affording the Authority the opportunity to comment and express its views and opinions on the Bill.

In the ensuing paragraphs, we set out our comments on the Bill, structured in two parts:

Part A – General Comments; and

Part 2 – Specific Comments on the Bill.

A. GENERAL COMMENTS

THE INDEPENDENCE OF THE REGULATOR

Section 3(3) of the Independent Communications Authority of South Africa Act (Act No. 13 of 2000) (the "**ICASA Act**") clearly stipulates that *"the Authority is independent and only subject to the Constitution and the law…"*.

Section 3(4) of the Electronic Communications Act (Act No. 36 of 2005) ("**ECA**") stipulates that *"the Authority or the Agency, as the case maybe, in exercising its powers and performing its duties in terms of this Act and the related legislation must consider policy made by the Minister in terms subsection (1) and policy directions issued by the Minister in terms of subsection (2)."* Section 4(3A) of the ICASA Act places the same requirement on the Authority.

The Authority is therefore compelled to consider the provisions of the Constitution of the Republic of South Africa, 1996 (the "**Constitution**"), ICASA Act, underlying statutes and other laws of general application prior to executing or not executing

a policy direction. The Authority is a creature of statute and subject only to the law.

In the case of *Minister of Telecommunications and Postal v Acting Chairperson, ICASA*,[1] the court established that the Authority is an independent body created by the ICASA Act to be governed by it and other underlying statutes and as an independent body it had to "consider" the policy and policy directions when performing its functions and exercising its power within the ambit of its empowering legislation. The court held that the Authority has a duty to take national policy into account when considering its own decisions but that the Minister's substantive ideas in a policy or policy direction do not bind the Authority. In this regard, though the Authority is not bound to act on the policy direction, it is duty bound to consider such policy. More importantly, the Court held that the Authority's failure to consider the Minister's policies was plainly at odds with the statute as such both parties are compelled to be open to the idea of the other.

In relation to the binding nature of a policy, the Constitutional Court in *Electronic Media Network Limited and Others v E.tv (Pty) Limited and Others* held that –

> *"…The same law that binds both the Minister and the relevant agencies provides essentially that USAASA may "consider" the impugned policy. It is known not to be binding in terms of the law that gives ICASA or USAASA the power to be exercised with reference or due regard to that policy. In other words, before they can have regard to or apply the impugned policy in terms of their statutory powers, the agencies must first determine what that self-same statute says about the binding effect of that policy. <u>And the statute makes it abundantly clear that they need only consider the policy</u>"*[2] (own emphasis).

With regard to the independence of ICASA, the Constitutional Court held that –

> "*Section 192 of the Constitution has got very little, if anything, to do with the Minister's exercise of her policy-making powers. <u>It explains the existence of ICASA, the constitutional obligations it bears and the guarantee</u>*

[1] Case No 2016/59722, para 31, 32.
[2] [2017] ZACC 17, para 34

of its independence. Properly understood, this provision informs us that ICASA is an independent authority whose mandate is to regulate broadcasting for the good of the public. When unfair reporting or a biased or inexcusable exclusion of some views happens, it is to ICASA that any aggrieved party may turn to lodge a complaint for possible intervention. ICASA is also constitutionally enjoined to level the broadcasting playing-field so that a diversity of views that broadly reflects the thinking of South African people, as opposed to one-sided propaganda-like narratives, may find expression"[3] (own emphasis).

It is our submission that any proposal which purports to require the Authority to implement policies and policy directions, without requiring the Authority to think carefully before making a decision on same, infringes on the Authority's independence and therefore, unconstitutional and in contravention of section 192 of the Constitution and section 3(3) of the ICASA Act.

The Authority submits that the independence of the regulator in this sector is of cardinal importance, to not only give the policy credibility, or because it is the right thing to do (constitutionally), but also to honour the country's international commitments and the highest law of the land. In this regard, it is necessary to consider South Africa's commitments to the international world, through multilateral trade agreements as well as bi-lateral investment agreements. Accordingly, any legislative provisions which seek to afford the executive powers over the functioning of the regulator should be guided by, *amongst others*, the WTO Fourth protocol to the General Agreement on Trade in Services ("**WTO Fourth Protocol**")[4]. According to the said Reference Paper, the regulatory agency must be "separate from, and not accountable to, any supplier of basic telecommunications services". Furthermore, ITU Best Practice Guidelines regarding the independence of regulators stipulates that the regulator must be independent:

[3] *Ibid*, para 70.
[4] The Fourth protocol to the General Agreement on Trade in Services is available on: https://www.wto.org/english/tratop_e/serv_e/4prote_e.htm (last accessed on 2018/10/05).

- from operators and industry players
- from any other industrial interests
- from the state and political actors like Ministers in relation to day to day activities and operations related to their mandates.

It is the Authority's view that the independence of the regulator extends not only to broadcasting matters, but to all ICT related matters in the broad sense. In our view, the term ICT includes broadcasting. We have taken note of the parallel process relating to *A Comprehensive Review of the South African Broadcasting*.[5] Therefore, we are of the view that the Bill should encompass issues relating to broadcasting.

SPECTRUM MANAGEMENT

With regard to spectrum management, we have noted the proposal for the Authority's functions to be limited to administering, managing spectrum assignment, licensing, monitoring and enforcement of spectrum. We have also noted the proposal for the establishment of the National Radio Frequency Spectrum Planning Committee[6] – to ensure fairness and equitable distribution of radio frequency spectrum; and National Radio Frequency Spectrum Division within the Department – to coordinate the work of the National Radio Frequency Spectrum Planning Committee.

In our understanding of the ECA, spectrum management consists of spectrum planning, spectrum engineering, licensing and monitoring.

The Authority strongly submits that it is best situated to continue to manage spectrum, as an independent regulator. The independence of ICASA is provided for in the Constitution (section 192) and in its founding legislation (the ICASA Act). Furthermore, a range of international agreements and protocols to which South Africa is a signatory, including the agreements reached in the World Trade Organisation ("**WTO**") confirm the need for regulatory independence. South Africa

[5] The documents available on: file:///C:/Users/SManentsa/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/065TC79A/Comprehensive%20review%20of%20South%20African%20Broadcasting%20Policy%20(004).pdf

[6] The Committee will be established by the Minister of Telecommunications and Postal Services who is a government shareholder representative in licensees that are utilising spectrum.

submitted a final schedule of telecommunication sector commitments in 1998 under the WTO Fourth Protocol to the General Agreement on Trade in Services ("**GATS**"). In terms thereof, South Africa made certain commitments including the establishment of an independent regulator that will amongst others manage scarce resources. The proposed amendments - to the extent that they seek to diminish the Authority powers in relation to management and control of radio frequency spectrum - are inconsistent with and in breach of, the country's international commitments in this regard.

WIRELESS OPEN ACCESS NETWORK AND HIGH DEMAND SPECTRUM

The Bill proposes that unassigned high demand spectrum must be assigned to the Wireless Open Access Network ("**WOAN**") following a policy direction issued by the Minister. The Bill also requires the Authority to ensure that a wireless open access network service licence and a radio frequency spectrum licence is issued to a WOAN.

The Authority notes with concern the contents of section 31E of the Bill which basically requires the following:

(a) a licensee/prospective bidder would have to incur millions of Rands to participate in the auction process to be commenced by the Authority;

(b) a licensee/prospective bidder must lease its electronic communications network and electronic communications facilities to the WOAN;

(c) a licensee/prospective bidder to procure capacity in the WOAN; and

(d) a licensee/prospective bidder to have universal access and universal service obligations.

The concern by the Authority is that the obligations proposed therein are numerous and financially onerous. This would require a licensee/prospective bidder to invest huge sums of money without deriving any incentive for doing so. As the clause is currently worded, it may deter any licensee/prospective bidder from participating in the licensing process to be initiated by the Authority with regard to unassigned high demand spectrum not reserved for the WOAN.

RAPID DEPLOYMENT OF ELECTRONIC COMMUNICATIONS NETWORKS AND ELECTRONIC COMMUNICATIONS FACILITIES

The Bill proposes that the Minister must establish a Rapid Deployment National Coordinating Centre, which must support and facilitate rapid deployment of electronic communications networks and interface with local municipalities to fast track rights of way and way-leave approvals. The Bill also requires the Authority to prescribe the regulations which provide for procedures and processes for resolving disputes that may arise between an electronic communications network service licensee and any landowner.

The Authority does not have any powers to regulate non-licensees or landowners. Therefore, it becomes difficult to develop and enforce dispute resolution regulations for persons that are not licensees. It is our submission that the function of resolving disputes should be carried out by either the National Co-ordinating Centre.

B. SPECIFIC COMMENTS ON THE BILL

In the ensuing paragraphs, we consider certain sections of the Bill *seriatim*.

AD SECTION 1 (DEFINITIONS):

General open access principles:

The difficulty herein is that there is no universal accepted definition of "open access". Therefore, the Bill needs to define "open access" to avoid ambiguity and confusion. Furthermore, the definition incorporates the term "effective"; it is not clear what effective means and who is responsible for determining effectiveness.

High demand spectrum:

The ECA as is currently worded, empowers only the Authority to be the responsible institution to assign radio frequency spectrum. The Authority will therefore be in

a better position to determine whether radio frequency spectrum is in demand or whether radio frequency spectrum is fully assigned.

Consequent to the above, we propose that the definition be reworded to read as follows:

*"**High demand spectrum"** means spectrum where*

(a) *demand for access to the radio frequency spectrum resource exceeds supply; or*

(b) *radio frequency spectrum is fully assigned, as determined by the Authority;"*

Radio Frequency Spectrum Refarming:

In the ITU table of entry of Allocations and South African National Frequency Band Plan, radio frequency spectrum is allocated for services and not applications. We therefore recommend that the word "application", in the definition of "Radio Frequency Spectrum Refarming", be substituted with the word "services".

Radio Frequency Spectrum Trading:

It is important to note that in terms of the proposed definition the rights under a licence can be transferred to a third-party. However, the word "third-party" is not defined in the Bill and can therefore be construed to include non-licensees. The Authority does not have the mandate to regulate non-licensees.
The Authority recommends that the words "a third party" should be substituted with the words "any other person licensed in terms of this Act".

Wholesale open access:

The proposed new definition of "wholesale open access" is problematic as it regurgitates the definition of "wholesale", and the difference between "wholesale" and "wholesale open access" is not clearly distinguished.

AD SECTION 2 (OBJECT OF ACT):

Section 2 (cA):

There is a change from "ownership and control of economic and scarce resources" to "access by a few to economic and scarce resources". In our view, the shift from "ownership and control" to "access" implies that the Department seeks to encourage participation in the sector rather than ownership.

Section 2 (cC):

As already alluded to in paragraph 1 above, it is unclear what the term "effective" means and it's also not clear who is responsible for determining effectiveness.

Section 2 (cD):

The word "dominance" is defined in the Competition Act; however, the word "control" is not defined. It is unclear to us what the word "control" means in the context of "market dominance". The Authority proposes that the word "control" be defined in this regard.

Section 2 (p):

It is our considered view that by virtue of developing and promoting SMMEs, one is actually facilitating their market entry. Therefore, the proposed insertion is a duplication of what is already stated or provided for.

AD SECTION 4 (REGULATIONS BY AUTHORITY):

Section 4(1A):

Section 3(4) of the ECA stipulates that *"the Authority or the Agency, as the case maybe, in exercising its powers and performing its duties in terms of this Act and the related legislation must consider policy made by the Minister in terms subsection (1) and policy directions issued by the Minister in terms of subsection (2)"* (own emphasis).

The term "consider" means to think about something, especially in order to make a decision.[7] The Authority is therefore duty bound to consider all applicable policies and laws and more specifically the policy directions made in terms of section 3(4) in executing its mandate. Such consideration by the Authority must - by necessity and in line with the principle of legality - also take into account the provisions of the Constitution, the ICASA Act, underlying statutes and other laws of general application.

It is therefore our considered view that subsection (1A), in requiring the Authority to blindly follow policy directions issued by the Minister, is in fact unconstitutional and is in contravention of section 192 of the Constitution and section 3(3) of the ECA.

It is our recommendation that subsection (1A) be removed in its entirety.

AD SECTION 9(2)(b):

The issues relating to ownership by Historically Disadvantaged Groups are regulated in section 9(2)(b) of the ECA (in relation to the application, amendment, renewal and transfer of control of individual licences). One of the objects of the ECA is to promote broad-based black economic empowerment, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities.[8]

In terms of section 4(3)(k) of the ICASA Act, the Authority may make regulations on empowerment requirements to promote broad-based black economic empowerment.

In terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) ("**B-BBEE Act**") the transformational measures extend beyond ownership by historically disadvantaged groups.[9] Therefore, we propose that there should be an alignment between the ECA and the B-BBEE Act.

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[7] Oxford Advanced Learner's Dictionary 5th Ed p 245.

[8] Section 2(h) of the ECA.

[9] **"broad-based black economic empowerment"** means the viable economic empowerment of all black people, in particular women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies that include, but are not limited to- (a) increasing the number of black people that manage, own and control enterprises and productive assets; (b) facilitating ownership and management of enterprises and productive assets

AD SECTION 10(1) (i):

Section 10(1)(i) is a new insertion in the 2018 Bill. It is not clear how implementing rapid deployment will necessitate an amendment to a licence since the obligations will be contained in the regulations to be developed in terms of Chapter 4 of the Bill. The Authority proposes that this paragraph be removed entirely.

AD NEW INSERTION - CHAPTER 3A (LICENSING FRAMEWORK FOR WIRELESS OPEN ACCESS NETWORK SERVICE):

Section 19A:

Initially in the 2017 Bill there was no application criteria for a wireless open access network (see section 19A (1) – (2)).

The 2017 Bill proposed that the Minister must consider incentives to be granted to the WOAN. In our comments to the DTPS on the 2017 Bill, we suggested that the Authority should be empowered to prescribe incentives. The DTPS has taken our view into consideration and amended the relevant provision for the Authority to prescribe incentives.

The application criteria as stipulated in section 19A (1) is the same as the conditions that must apply to the WOAN listed in the proposed policy and policy directions to the Authority on licensing of unassigned high demand spectrum issued by the DTPS, submitted to the Authority on 21 September 2018 (the "**proposed policy and policy directive on the WOAN**").

With regard to the application requirements listed in (c) and (e), reference to the word "control" should be defined to give context to these two provisions. It is unclear what is meant by "control".

by communities, workers, co-operatives and other collective enterprises; (c) human resource and skills development; (d) achieving equitable representation in all occupational categories and levels in the workforce; (e) preferential procurement from enterprises that are owned or managed by black people; and (f) investment in enterprises that are owned or managed by black people;

Further, we have noticed that the applications requirements in (e) and (f) read as though the Authority has a discretion to determine whether or not the applicants must comply with these requirements, due to the use of the word "may". In our view, to the extent that it is not the intention of the DTPS to grant the Authority with a discretion, the word "must" should be used to reflect the intention.

The meaning of "control"

The Authority is of the view that control should be defined. As this will be one of the criteria that will be assessed in the licensing of the WOAN. As this will assist in developing an assessment model and or guideline of the control criteria over and above the WOAN.

In the ensuing paragraphs, we briefly set out our analysis of the term "control" in terms of the South African legal and regulatory framework.

Section 12 (2) of the Competition Act No. 89 of 1998 ("**Competition Act**") states that a person is said to be in control of a *firm* if the following criteria are met:

- Beneficially owns more than half of the issued share capital of the firm;
- Is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes of a majority of those votes, either directly or through a controlled entity of that person;
- Is able to appoint or veto the appointment of a majority of the directors of the firm;
- Is a holding company, and the *firm* is a subsidiary of that company as contemplated in section 1(3) (a) of the Companies Act, 1973 (Act No. 61 of 1973); and
- Has the ability to materially influence the policy of the *firm* in a manner comparable to a person who, in the ordinary commercial practice, can exercise an element of control.

Notably, the list provided above is not an exhausted list of the conditions that are outlined in section 12(2) of the Competition Act.

Section 1(3) (a) of the Companies Act, 1973 in defining subsidiary relationships states that, a company is:

- a subsidiary of another juristic person if that juristic person, one or more other subsidiaries of that juristic person, or one or more nominees of that juristic person or any of its subsidiaries, alone or in any combination-

  (i) is or are directly or indirectly able to exercise, or control the exercise of, a majority of the general voting rights associated with issued securities of that company, whether pursuant to a shareholder agreement or otherwise; or

  (ii) has or have the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board.

IFRS 10 Consolidated Financial Statements provides guidance on applying a control model. At the heart of IFRS 10 is the requirement that in order for an investor to have control over an investee, the investor must have all three of the following criteria:

- Power over the investee;
- Exposure or rights to variable returns from its involvement with the investee; and
- The ability to use its power over the investee to affect the amount of the investor's returns.

Moreover, IFRS 10 goes to provide guidelines to be followed to determine and or test as to whether a company is a subsidiary and or controlled by an entity.

Section 19 (1) (c) and (e) refer to ownership and the Bill does not seek and or attempt to define control. The Limitations of Ownership and Control of Telecommunications Services of 2003 offered a definition of what is control; there is a view that the Regulation was repealed with the enactment of the Electronic Communications Amendment Act, 2004.

AD CHAPTER 4 (RAPID DEPLOYMENT OF ELECTRONIC COMMUNICATIONS NETWORKS AND ELECTRONIC COMMUNICATIONS FACILITIES):

Section 20C:

As the Department is already aware, the Authority does not have any powers to regulate non-licensees; we therefore do not see the value of developing dispute resolution regulations for persons that are not licensees.

It will thus be difficult, if not impossible to implement the envisaged regulations herein as any decision or recommendation by the Authority will not be binding on a non-licensee or landholder.

Further to the above, the Authority will require additional experts in dispute resolution and additional financial resources to establish a division for the purposes of performing this function prior or subsequent to the development of the envisaged regulations.

It is thus our proposal that the function of resolving disputes herein be that of the Rapid Deployment National Co-ordinating Centre, to be established.

Sections 20D (6) and 20K (3)

The Authority would like to reiterate the fact that it does not regulate land owners, and as such it will be difficult to resolve disputes between licensees and landholders.

The Authority therefore proposes that the function of resolving disputes herein be that of the newly established Rapid Deployment National Co-ordinating Centre.

AD SECTION 24 (PIPES UNDER STREETS):

Section 24(1):

The Authority advises that the Portfolio Committee should consult with the local authority to establish whether the proposed deletion of the 30-day time period is acceptable.

In our view, the consequence of removing the 30 days prior written notice is that a licensee may give an unreasonably short notice to the local authority. If this is not the intention of the DTPS, perhaps it should consider providing a longer time period.

AD SECTION 25 (REMOVAL OF ELECTRONIC COMMUNICATIONS NETWORK FACILITIES):

Section 25(8):

The Authority would like to reiterate that it does not regulate land owners, and as such it will be difficult to resolve disputes between licensees and landholders.

The Authority therefore proposes that the function of resolving disputes herein be that of the newly established Rapid Deployment National Co-ordinating Centre.

AD NEW INSERTION - SECTION 29A (FUNCTIONS OF THE MINISTER OF TELECOMMUNICATIONS & POSTAL SERVICES):

The new insertion borrows provisions from sections 30 and 34 of the ECA. It is thus our view that instead of inserting a new section, that sections 30 and 34 of the ECA be amended accordingly to incorporate the new provisions or proposed amendments.

The Authority has further noted that the new insertion does not indicate the role of the Authority in developing the National Radio Frequency Plan.

Section 29A(d) of the Bill indicates that the Minister is responsible for the development and approval of the Plan. It is our view however that since the Minister is the one responsible for developing the Plan, it therefore stands to reason that the approver thereof ought to be a different functionary (perhaps

Cabinet or Parliament). The aforementioned principle is further entrenched in the current legislative framework, section 34(2) of the ECA.

Currently, in terms of section 34(2) of the ECA, the Authority develops the Plan in consultation with the Department and the Department of Communications for the Minister's approval. Therefore, the Minister still has oversight and control in the development of the Plan.

It is therefore our recommendation that:

- Section 29A(d) be amended to the extent that Cabinet must approve the Plan; or
- Section 29A(d) of the Bill be deleted in its entirety since section 34(2) of the ECA already affords the Minister oversight and control in the development of the Plan.

AD SECTION 30 (CONTROL OF RADIO FREQUENCY SPECTRUM):

Section 30(1):

This section makes reference to section 34 (Radio Frequency Plan) of the ECA, whereas this issue is now being proposed to be dealt with under section 29A of the Bill. It therefore stands to reason that the proposed amendment to section 34(1) is contrary to the provisions of section 29A of the Bill.

Consequent to the above, we refer the Department to our recommendation as contained in section 29A (d) above.

Section 30(2)(a):

The Authority would like to reiterate its submission as indicated above; the term "consider", as per section 3(4) of the ECA, means to think carefully about (something), typically before making a decision. The Authority is therefore compelled to consider the provisions of the Constitution, ICASA Act, underlying statutes and other laws of general application prior to executing or not executing a policy direction. As already alluded to above, the Authority is a creature of statute and subject only to the law.

Section 30(2)(d) and (h):

In light of the Department's recommendation that the Authority not be involved in the development of the National Radio Frequency Plan, it is not clear what type of planning is envisaged by the Department with regard to the planning that the Authority must undertake in so far as it relates to conversion of analogue uses of the radio frequency spectrum to digital, including the migration to digital broadcasting, in other words what is the objective of the envisaged planning?

The Authority recommends that the section or amendment be expanded on to clarify the type of planning envisaged herein to ensure the enforceability of this section or proposed amendment.

AD SECTION 31(RADIO FREQUENCY SPECTRUM LICENCE):

Section 31(8A) (a):

The Authority recommends that the term "passive science services" be defined to enable the Authority to implement the section.

Section 31(11):

The Authority believes this aspect in the Bill is an operational issue and must not be included in a national legislation.

The Authority does not have nor, could it have the capability and resources to develop such a system. In the 2016/17 financial year, the Authority procured an automated spectrum management system which performs the following functions:

(a) Spectrum licensing;
(b) Spectrum assignments;
(c) Technical analysis;
(d) Interference analysis;
(e) Radio frequency propagation models; and

(f) Type approval licensing, amongst others.

Consequent to the above, the Authority recommends that the subsection be deleted in its entirety.

AD NEW INSERTION - SECTION 31A (UNIVERSAL ACCESS AND UNIVERSAL SERVICE OBLIGATIONS OF RADIO FREQUENCY SPECTRUM LICENCES):

As the section currently reads, it applies to all spectrum licensees incl. aeronautical, maritime, alarms systems, private and community radio repeaters, fixed services, satellite services, amateur radios, community broadcasting radio and television stations, etc. majority of which are held by individuals.

Currently, there are over fifty (50) thousand radio frequency spectrum licensees on the Authority's data base.

In terms of section 31(3A) (a) of the Bill, licensees are required to renew their radio frequency spectrum annually. However, the Bill fails to take into account, on average, that about twenty (20) thousand licensees fail or choose not to renew their radio frequency spectrum licences. It would therefore be difficult for the Authority to impose Universal access and Service obligations that would have long term socio-economic benefit on such licensees. It is the Authority's view that the obligations only be imposed on specific categories of licensees taking into account market conditions and dynamics.

In the 2018 Bill the condition of renewal of the radio frequency spectrum licence in section 31A (5) was removed. The Authority supports the deletion of the condition because the validity period of the service licence should be the same as the spectrum licence.

AD SECTION 31B (RADIO FREQUENCY SPECTRUM TRADING)

Section 31B (2)

Section 31B (2) specifies the time period within which the Authority must prescribe spectrum trading regulations, which is a period of 12 months of the commencement of this section.

The Authority advises that the 12-month period is inadequate due to the lengthy regulation-making process in general. The Authority proposes a 24-month period to prescribe regulations.

Section 31B (5)

The Authority advises that there is no link between the proposed 12-month timeframe for prescribing spectrum trading regulations and the policy directions that may be issued by the Minister. A possible delay in issuing a policy direction could have detrimental effect on the Authority's mandate to prescribe regulations.

AD SECTION 31C

In 2018 Bill, the approval from the Authority is only required in cases of high demand spectrum; whereas in the 2017 Bill there was no differentiation between high and non-high demand spectrum. The Authority supports this new provision as it lessens the administrative burden, and the Authority can now focus its resources on high-demand spectrum.

Further, subsection (3) in the 2018 Bill requires the Authority to prescribe spectrum sharing regulations within 12 months of the commencement of this section. The Authority advises the proposed 12 months is inadequate due to the lengthy regulation-making process in general. In our view, we propose a period of 24 months.

AD SECTION 31E (HIGH DEMAND SPECTRUM)

The Authority notes that this provision on high demand spectrum was drafted prior to the publication of the proposed policy and policy direction and has been superseded by the policy direction.

In our view, it is not necessary to duplicate the provisions of the draft policy in the Bill.

AD NEW INSERTION - SECTION 42A (INTERNATIONAL ROAMING REGULATIONS):

Section 42A seems to expand on the application of this subsection, by including other international jurisdictions, which may be interpreted to mean that the Authority must develop other regulations to deal with other international roaming agreements.

AD SECTION 43 (OBLIGATION TO PROVIDE WHOLESALE OPEN ACCESS):

In the 2017 Bill, all electronic communications network service licensees, had to provide wholesale open access; however in the 2018 Bill electronic communications network service licensees that provide broadcasting signal distribution or multi-channel distribution services, do not have to provide wholesale open access. The Authority support this change.

AD SECTION 44

Section 44(1)

The Authority advises the proposed 18 months is inadequate due to the lengthy regulation-making processes in general. The Authority proposes a period of 24 months to prescribe regulations.

Section 44 (3A) (a)

In terms of section 44(3A) (a), an entity will be classified as a deemed entity "*… if any, has significant market power in such market or has an electronic communications network that constitutes more than twenty-five percent of the total electronic communication infrastructure in such market …"* (own emphasis).

It is not clear how the Authority is expected to calculate the total communications infrastructure market and the parameters to be considered in its calculations e.g. which infrastructure (active or passive) is used to calculate the size of the

infrastructure market? It will be difficult, if not impossible, to calculate, for example, mobile operator's share of mobile infrastructure.

AD SECTION 67 (COMPETITION MATTERS):

Section 67(3A):

Section 67(3A) of the Bill stipulates –

> *"The Authority must, within 12 months of the coming into operation of the Electronic Communications Amendment Act …; define all the relevant markets and market segments relevant to the broadcasting and electronic communications sectors, including ICT services dependent on the use and provision of the Internet, including internet exchange points, hosting and data centre services, by Notice in the Gazette. The Notice must set out a schedule in terms of which the Authority will conduct market reviews of the defined markets and market segments, prioritizing those markets with the most significant impact on consumer pricing, quality of service and access by users to a choice of services and markets relevant to policy directions issued by the Minister."*

The Authority is of the view that the 12-month period within which the Authority is required to define markets in the broadcasting and electronic communications sectors is not adequate given the lengthy consultation process required in conducting a market inquiry (in terms of section 4B of the ICASA Act read with section 67 of the ECA) to define markets. The consultation process entails the following:

(a) Publication of a notice advising that an inquiry will be conducted in due course and commencing pre-inquiry preliminary information gathering. This would take a minimum of 30 working days;

(b) One-on-one meetings with relevant stakeholders;

(c) Formal commencement of the inquiry in terms of the ICASA Act and publication of a Discussion Document for public comment. The ICASA Act requires this to be published for a minimum period of 45 working days;

(d) Second session of one-on-one meetings with relevant stakeholders;

(e) Publication of a Draft Position Paper for public comment for a minimum period of 45 working days;

(f) Holding of public hearings 30 working days after receiving written submissions on the Draft Position Paper;

(g) Publication of the final draft Position Paper for final comments; and

(h) Publication of the final position paper.

It is not clear to the Authority why these markets to be defined should include *"ICT services dependent on the use and provision of the Internet, including internet exchange points, hosting and data centre services*". This appears to be presumptive or prejudging the outcome of this process.

It is our recommendation that the Department define what "significant impact on consumer pricing, quality of service and access by users" is in order to avoid confusion or ambiguity.

In light of our comments in paragraphs 77 to 80, the Authority proposes that section 67 (3A) be reworded as follows:

> *"(3A) The Authority must, within 24 months of the coming into operation of the Electronic Communications Amendment Act …; define all the relevant markets and market segments relevant to the broadcasting and electronic communications sectors by Notice in the Gazette. The Notice must set out a schedule in terms of which the Authority will conduct market reviews of the defined markets and market segments taking into consideration the policy directions issued by the Minister."*

Section 67 (3A) (b):

The Authority advises that it is not clear what the Department means by prioritising those markets with the most "significant impact on consumer pricing, quality of service and access by users". The Authority requires clarification in order to avoid confusion or ambiguity.

Section 67 (3B):

In the 2018 Bill our suggestion to remove the requirement to assess the impact of convergence was considered. The Authority advises that the word "update" should be removed, as it presupposes that there will be changes to the market definitions.

Section 67 (4B):

The Authority notes that its powers have been extended herein to include non-licensees. However, the provisions herein will be difficult to implement without a penalty provision. We therefore propose that section 74 of the ECA be amended to include the following new insertion after subsection (5):

> *"(6) Failure or refusal, by any person -other than a licensee- to provide information as required in terms of section 67(4B), constitutes an offence and the person is liable to imprisonment for a period of not less than 3 weeks and not exceeding 3 months."*

Section 67 (4C):

Section 67(4C) stipulates that "A market review under this Chapter shall not take longer than 12 months." As outlined in paragraph 78 above, the processes required in undertaking a market review process would take more than 12 months depending on the complexity of the market under review. The Authority therefore proposes that section 67(4C) be reworded to read as follows:

"(4C) A market review under this Chapter shall not take longer than 24 months."

Section 67 (8)(d):

It is not clear to the Authority what the purpose of this section is as it appears to be a repetition of sections 67(8)(b) and (c). We therefore propose that section (8)(d) of the Bill be deleted in its entirety as all elements of the section have been catered for in section 67(8)(b) and (c) of the Bill.

Section 67 (13):

In terms of section 67(13) *"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, 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.

Ad section 74C (6)

The Authority supports the proposed penalty provision to the extent that it only applies to a licensee in terms of section 67(4B), as the Authority does not regulate non-licensees.

AD SECTION 79C:

The Authority proposes that the DTPS should define the term "electronic transactions", to provide certainty.

2. CONCLUSION

The Authority trust that the Portfolio Committee will consider our inputs on the Bill, and advises that it would like to make oral representations to the Portfolio Committee regarding its submission.