11 October 2018

**Portfolio Committee on Telecommunications and Postal Services**

Attention: Ms Hajiera Salie

Per email: hsalie@parliament.co.za

**ELECTRONIC COMMUNICATIONS AMENDMENT BILL [B31-2018]**

1. The South African Local Government Association (**SALGA**) has noted the invitation to comment on the Electronic Communications Amendment Bill [B31-2018] (“**the Bill**”) issued by the Portfolio Committee on Telecommunications and Postal Services (“**the Committee**”) and sets out its submissions below.

# **ABOUT SALGA**

1. SALGA is an autonomous association of all 257 South African local governments. Membership of SALGA is voluntary.
2. SALGA has set out its role to represent, promote and protect the interests of local governments and to raise the profile of local government, amongst other objectives.
3. SALGA accounts to its members in terms of its Constitution and Governance Framework, which regulate its structures and mandating processes. A National Executive Committee made up of elected councillors (primarily mayors and office bearers in municipalities) is responsible for the affairs of the organisation between National Conferences and Members’ Assemblies, which are the highest and second highest decision-making bodies of the association respectively. Its administration is headed by a Chief Executive Officer.
4. As a full partner in government, SALGA is expected to be an active participant in the intergovernmental relations (IGR) system, to provide common policy positions on numerous issues and to voice local government interests, as well as provide solutions to the challenges facing local government more generally.
5. Please note that due to the limited time available for this submission, these inputs only form initial part of a SALGA National Office submission and that greater consultation across all the SALGA provinces and mandating structures will still need to take place, before a SALGA NEC

position can be tabled.

# **SALGA’S INTEREST IN THIS BILL**

1. Local government in its capacity as owner and custodian of land and land development has a clear and direct interest in aspects of the Bill relating to the interaction between landowners and the holders of electronic communications network service (ECNS) licences.
2. Further, from a local government perspective it is imperative that all municipalities are enabled and empowered through:
   1. frameworks which promote the self-provision of broadband and related services for their own internal use; and
   2. access to spectrum and other inputs to allow them to support efficient service delivery and to allow broadband to function as a socio-economic enabler within their local communities and economies.
3. We believe that SALGA and municipalities have a great deal of experience and practical knowledge to impart, aside from controlling and operating their own electronic communications networks and facilities.

# **SCOPE OF APPLICATION OF THE BILL**

1. The Principal Act regulates the transmission of electronic communications through the regulation of holders of licences issued by ICASA.
2. Municipalities are not holders of ECNS or ECS licences, although certain municipalities do hold private electronic communications network (PECN) licence exemptions. A PECN licence exemption allows the holder to provide ECNS for its own internal purposes as well as authorising it to sell additional capacity on that network to third parties.
3. For the purposes of these submissions, however, it is assumed that references to municipalities mean municipalities which do not hold any licence or licence exemption issued by ICASA.
4. ICASA has no jurisdiction over municipalities.
5. This raises practical and legal difficulties regarding the regulation of electronic communications facilities and in situating ICASA as an arbiter of disputes between municipalities and ECNS licensees regarding access to public land. The same infrastructure – such as a tower – may be regulated as an electronic communications facility in the hands of a licensee, but not when it is in the hands of a municipality.
6. The Committee is requested to consider the extent to which provisions of the Bill purport to establish jurisdiction on the part of ICASA over municipalities and whether this is permissible in law.

# **RADIO FREQUENCY SPECTRUM**

1. We submit that access to dedicated spectrum is essential in allowing municipalities to achieve their mandate and objectives as set out in Chapter 7 of the Constitution. This includes enhanced service delivery, greater community involvement, socio-economic development and the movement towards smart cities, the Internet of Things (IoT) and the fourth industrial revolution.
2. Many SALGA members are running projects to bring the benefits of broadband and Wi-Fi access to underserviced and poorer communities, briding the digital divide through empowering people and preparing them for the future.
3. Technology and the connectivity which enables it are critical to the development and sustainability of local government and the communities it serves.
4. We submit that it is an oversight that the Bill does not recognise the role of local government in delivering broadband services as a “fifth utility”.
5. Dedicated access spectrum could greatly expand this role by allowing municipalities to leverage fibre networks to provide public Wi-Fi and other services over a far greater area. It will allow greater control over quality of service and improve network redundancy.
6. It would furthermore secure the ability of municipalities to provide a robust communications network independent of the commercial networks to underpin Public Protection and Disaster Relief (PPDR).
7. In the interest of robust service delivery, SALGA proposes that part of the unassigned high demand spectrum intended to be made available to the WOAN licensee be dedicated for the local government and even the other state entities.

# **INTERACTION BETWEEN LOCAL GOVERNMENT AND ECNS LICENSEES**

1. Municipalities make up a significant percentage of affected landowners and are distinguishable from most other landowners in terms of the Constitutional mandate and obligations which they are required to discharge / observe.
2. SALGA has noted the extensive revisions proposed to Chapter 4 of the Principal Act and welcomes the attempt made by the drafters to clarify the law applicable to the interaction between landowners and entities holding electronic communications network services (ECNS) licences issued under Chapter 3 of the Principal Act.
3. We note that interpretation of section 22 of the Principal Act has been developed through a number of court decisions subsequent to the decision of the Constitutional Court in the Link Africa matter.
4. We have set out below a paragraph from the recent decision of the Western Cape High Court in the matter of Telkom SA Soc Ltd v Kalu NO and Another[[1]](#footnote-1), which we submit is a clear and accurate statement of the current position:

*[48] The Applicants submitted that Section 22 has been authoritatively interpreted so as to trump the fundamental right of ownership. I do not agree with this contention. It is my view that the Applicants are misinterpreting the Link Africa decision.* ***Section 22 cannot operate in a vacuum****. I agree with the Respondent’s contention that* ***it has to co-exist in a web of other laws including municipal by-laws****.  I am therefore of the view that the Respondent’s zoning requirements do not conflict with Section 22(1) because before a licensee may exercise its right in terms of Section 22(1) of the ECA, the licensee must comply with all applicable law, including laws enacted by the municipality.* ***As Section 22(2) clearly provides that “due regard must be had to applicable law and the environmental policy of the Republic”, it follows that apart from the municipality’s consent, which is required in terms of the By-law, the licensee is still required to obtain all other permits, licenses and authorisations required by law which do not constitute a ‘municipality’s consent’, such as rezoning or departure, building plan approval or exemption (which the First Applicant concedes is required), environmental authorisations, heritage authorisation, and civil aviation permits, amongst others****. It is for these reasons that I am not in agreement with the Applicants’ contention that the By-law and the Mast Policy exceed the boundaries between spheres of planning law****.  I am not persuaded that it is the intention of the legislature to grant a licensee unqualified rights to conduct activities on land without obtaining any permit, license or authorisation required by any law from any authority. If this were so, the public would be without the protection of a range of constitutionally compliant laws which serve the public interest***.

1. We welcome, therefore, the proposed section 20D of the Bill, with particular reference to subsections 20(5)(b) and (e), which qualify the right of ECNS licensees to enter upon and use public and private land for the deployment of electronic communications networks and facilities. These provisions for the most part give effect to the judgement quoted above:

*20D(5) An electronic communications network service licensee must, for the purposes of subsection (1)—*

*(a) give 30 calendar days’ notice, in writing, of its proposed property access activity to an owner and, if applicable, occupier of the affected land, which must—*

*….*

*(b) provide all information required by the application process, if any, and obtain a wayleave certificate from the relevant authority, noting that the exercise of rights by the electronic communications network service licensee is subject to by-laws that regulate the manner in which a licensee should exercise its powers, though the by-law may not require the municipality’s consent;*

*…..*

*(e) take all reasonable steps to ensure the activity does not compromise or impede a public utility’s ability to exercise its powers or perform its functions;*

(our emphasis)

1. We request that the Committee carefully consider whether the underlined phrase in the proposed subsection 20D(5)(b) which stipulates that a by-law which regulates the manner in which a licensee exercises its powers “may not require the municipality’s consent”.
   1. In the Telkom matter cited above, the City of Cape Town’s Telecommunications Mast Infrastructure Policy explicitly required that the consent of the City be obtained prior to the erection of telecommunication mast infrastructure. Telkom argued that this was in direct conflict with and effectively negated its rights under section 22, in terms of which consent was not required.
   2. The High Court rejected this argument, holding that this consent was only one of many permissions and approvals to be obtained from multiple authorities. It is only once these have been obtained that the right to enter onto public land commences.
2. Further we request that the Committee consider whether the proposed section 20B(2) should not also be made explicitly subject to 20(B)(5):

*20D. Right to enter and use property*

*(1) Electronic communications network service licensees have the right to enter upon and use public and private land for the deployment of electronic communications networks and facilities, subject to subsection (5).*

*(2) Electronic communications network service licensees are entitled to select appropriate land and gain access to such land for the purposes of constructing, maintaining, altering or removing their electronic communications networks or facilities, subject to subsection (5).*

## Single trenching

1. We welcome and support the proposed section 20D regarding single trenching. We note that implementation of this provision will fall to ICASA and that the practicalities of enforcing a single trench policy will be set out in the proposed rapid deployment regulations.
2. As noted above, there are difficulties with holding a position that municipalities will be subject to these rapid deployment regulations, which will impose obligations on licensees. Nevertheless, municipalities are critical stakeholders and role-players in designing, implementing and enforcing a single trench policy.
3. Several SALGA members have already implemented such policies, with varying degrees of success.
4. As such SALGA will engage with ICASA – as it has done before regarding proposed rapid deployment guidelines or regulations – on the need to align municipal processes and procedures with the obligations to be imposed on ECNS licensees.
5. As regards the text of the proposed section 20F and taking into account the autonomy of local government in respect of, *inter alia*, land planning, SALGA submits that the Committee consider deletion of the reference to ICASA having the power to decide which geographic locations single trenching obligations will be implemented. This is properly a power to be exercised by municipalities.
6. We submit that the same considerations apply to technical feasibility. Decisions regarding the desirability or technical feasibility of single trenching are surely best left to the municipal authority responsible for the land in question?
7. The following amendment is proposed:

*20F. The Authority must, in order to ensure a single trench for fibre ~~in each geographic location where it is technically feasible to do so~~, prescribe the processes and procedures that enable a single trench for fibre under the rapid deployment regulations.*

## Access to high sites

1. The proposed section 20E seeks to facilitate access to high sites – which includes buildings used for public purposes that are suitable for the deployment of radio equipment – with the objective of promoting broadband.
2. Further, it will not be open to the owner of a high site to refuse access to an ECNS licensee for the installation of electronic communications networks and facilities that promote broadband, provided that “such installation must be in accordance with any reasonable requirements of the owner”.
3. The rights of ECNS licensees to access high sites for this purpose is subject to an exception in respect of high sites that are not technically feasible for this purpose, “as may be prescribed by the Authority”.
4. We request that the Committee take the following into consideration in its deliberations on this provision:
   1. Access to high sites which are owned by a municipality is analogous to access to land owned by a municipality.
   2. In the case of the latter – as seen above – the proposed section 20D sets out detailed requirements which ECNS licensees are subject to before they can access public land.
   3. Where access to a high site is concerned, however, there is no qualification on the right of access, only a qualification that the installation must be in accordance with the reasonable requirements of the owner.
   4. The factors to be taken into account in determining technical feasibility are to be prescribed by ICASA.
   5. We submit that access to high sites owned by municipalities should be handled in the same manner as access to land. At the least access to municipal high sites by ECNS licensees should be subject to compliance with the steps proposed in subsections 20D(5)(b) specifying that such access is subject to applicable by-laws which regulate how such access can be exercised.

## Fees, charges and levies

1. We wish to raise the following regarding the proposed section 20K, which seeks to govern the charging of fees, charges and levies relating to an exercise of rights under section 20D:
   1. The Committee is requested to consider that there are a number of different types of fees which may be applicable. Is it the intention of this clause through its reference to “access fees” to also regulate the ability of municipalities to set tariffs in respect of the use of their infrastructure? Can administrative costs be recovered? Are damage deposits and other mechanisms employed by municipalities to safeguard the future integrity of their infrastructure covered by “access fees” notwithstanding that the courts have made it clear that these are allowable? Does the term “access fee” include monthly rental charges and fees that may relate to using, for example, a road to access a high site?
   2. Is it correct in law that a municipality should submit to the jurisdiction of ICASA regarding disputes over the reasonableness of compensation?

## Implementation

1. Finally, in this regard, we urge recognition of the diversity in SALGA’s membership as regards the resources and capacity available to implement “rapid deployment”. This manifests in a lack of consistent systems and process to manage applications.
2. While there is a focus on rapid deployment (and sharing) of electronic communications network infrastructure, Government, especially local governments, are expected to make it easier to build infrastructure, especially fibre-optic networks, by removing red tape and fast-tracking the necessary approvals and permits.
3. The responsibility within a municipality for telecommunications infrastructure is cross-cutting and made more complex where the municipality itself has invested in connectivity initiatives.
4. Telecommunications is moreover only one of a number of competing imperatives for local government.

# **CONCLUSION**

1. We thank the Committee for its consideration of the above comments and confirm that we would welcome the opportunity to participate in public hearings towards the finalisation of the Bill.

Regards

1. Telkom SA Soc Ltd v Kalu NO and Another (10354/2017) [2018] ZAWCHC 53 (10 May 2018), http://www.saflii.org/za/cases/ZAWCHC/2018/53.html [↑](#footnote-ref-1)