

## **2. Interim Report of the Portfolio Committee on Telecommunications and Postal Services on the Electronic Communications Amendment Bill [B 31 – 2018], dated 12 February 2019**

### **Introduction**

The Electronic Communications Amendment Bill (ECA Bill) was introduced in Parliament by the Department of Telecommunications and Postal Services (DTPS) and referred to the Portfolio Committee on Telecommunications and Postal Services Committee on 16 September 2018.

The directive from the Speaker of the National Assembly to the committee was that the Bill was of an urgent nature and the committee was directed to conclude the Bill by the end of 2018.

### **Background**

The committee received a briefing on the Bill from the Director-General (DG) and officials of DTPS on 9 October 2018. From this it became clear that the proposed Bill was of a very complex and technical nature.

Based on the assumption that the Bill would have been thoroughly consulted by DTPS with stakeholders and industry players, believing that there would be less public submission and few contractions, the committee proceeded with haste to publicise the **Bill for public comment**. The committee simultaneously arranged for public hearings and deliberations from 26 November 2018 to 30 November 2018.

During this period the committee requested the Parliament to avail a dedicated team of a content advisor, researcher, legal services and legal drafting team. Sadly, as the committee commenced with hearings, such dedicated services were not availed on a fulltime basis and in a dedicated manner.

**Method of Work**

The committee in adhering to the rule of law and the constitutional obligation to facilitate public participation in the law-making processes of parliament, advertised the Bill, inviting written submissions to the committee.

The committee had agreed that during the period of advertisement, members would thoroughly familiarise themselves with the content of the Bill and all other relevant documents, consult with their respective political parties on their policy positions and determine a stance on taking the Bill forward.

The committee also had agreed and directed the committee secretary, Ms. Hajiera Salie, to immediately dispatch to members written submissions as soon as they are received by her.

The submissions were also shared with the DTPS immediately after receipt thereof.

The committee extended the invitation to the Portfolio Committee on Communications and also circulated the proposed Bill and other documents to that committee.

The Telecommunications and Postal Services portfolio committee lodged an application with the House Chairperson, Mr. Cedric Frolick, requesting that he grant the committee the permission to sit outside its usual Tuesday schedule. The committee sittings would commence immediately after the deadline of the written submissions and would continue for a period of two weeks. The permission was granted.

The committee secretary telephonically contacted all stakeholders who submitted written submissions to establish whether they would like to make verbal submission to the committee and the amount of time each presenter would like to be granted. She then drafted a programme for the hearings.

**Purpose of the Bill**

The Bill seeks to amend the Electronic Communications Act, 2005, so as (i) to provide for transformation of the sector through enforcement of broad-based black economic empowerment; (ii) to provide for lowering of cost of communications; (iii) to reduce infrastructure duplications and encourage service-based competition through a wireless open access network service;

(iv) to provide a new framework for rapid deployment of electronic communications facilities; (v) to provide for new approaches on scarce resources such as spectrum, including the assignment of high-demand spectrum on open access principles; (vi) to create a new framework for open access; to provide for the regulation of international roaming, including SADC roaming to ensure regulated roaming costs, quality of service and transparency; (vii) to provide for regular market definition and review to ensure effective competition; (viii) to provide for improved quality of services, including for persons with disabilities; (ix) to provide for consumer protection of different types of end-users and subscribers, including persons and institutions; and (x) to provide for enhanced co-operation between the National Consumer Commission and the Authority, as well as the Competition Commission and the Authority; and to provide for matters connected therewith.

### **Literature considered for enactment of the Bill**

The committee working with DTSP officials, State Law Advisors and Legal Services of Parliament identified several documents that were relevant for members to familiarize themselves with in order for them to be ready to process the Bill after receiving public submissions. The following were documents circulated to committee members.

1. The proposed ECA Amendment Bill (B31-2018).
2. The ECA Act, 2005 (Act No 36 of 2005).
3. The ECA Act 2013 (Act 1 of 2014).
4. CSIR Report on the ECA Bill.
5. The Social Impact Assessment.
6. National Integrated ICT Policy White Paper Africa. Government Gazette 40325 Published 03 October 2016.
7. Africa Analysis Telecoms. IT. Media (National Integrated ICT Policy White Paper) January 2017.
8. Government Gazette No 1003. Invitation to provide written comments on proposed policy and policy directions to the authority on licensing of unassigned high demand spectrum.

9. Certificate from the Office of the Chief State Law Advisor (Dated 05 September 2018) confirming that the Bill is consistent with the Constitution.
10. The report to the Joint Tagging Mechanism (JTM) recommended for the Bill to be tagged as a Section 75 Bill.
11. Presentation by Mr. Eric Boskati (Content advisor to the Select Committee in the NCOP), dated 20 November 2018.

### **Constraints and concerns of committee**

The committee, from the onset, was concerned about a few things namely:

- Timing in presenting a complex and technical Bill on the eve of the end of the 5<sup>th</sup> Parliament's term with the expectation from the Executive that the Bill was priority, yet it was tabled only on 16 September 2018.
- The technical nature of the Bill, whilst some committee members lack sufficient exposure to the technical aspects of the Bill and digital economy, including the ICT landscape in general.
- That the committee was, and is, without the dedicated basic support in the form of competent content advisory, research and legal advisory services.
- The tagging of the Bill as a Section 75 Bill instead of Section 76 in terms of the Constitution.
- The substantial number of submissions received on the eve of the closing date.
- The extensive areas of contradictions between stakeholders including the telecommunication companies, the associated risks facing the committee to rush the Bill which could prompt a myriad of litigations and constitutional challenges.
- The limited time available for the committee to process the Bill before the end of 2018, as was directed by the Speaker of the National Assembly.
- The committee meeting sits once per week on a Tuesday from the morning till lunch time, as most afternoons are sittings and in the main those sittings are 3-line whips.

### **Risk Profiling by committee ahead of receiving written submissions**

The committee reflected on scenarios it faced at the 20 November deadline for written submissions, include:

- Assuming no submissions were made the committee would likely use the time of two weeks allocated to sit and process the Bill.
- In case of many submissions being made the committee would, in preparation for public hearings, need sufficient time to study the documents, and ready themselves to listen to verbal presentations and to ask relevant questions.
- Lastly what would happen to the work of the committee, come the last day of submissions and commencement of public hearings, if Parliament had not kept the promise of deploying a technically competent research and content advisory service.

### **Publication of the Bill for Public Comments**

The committee placed advertisements calling for comments to the Bill in all eleven official languages, giving a deadline of 16h00 on 20 November 2018, totaling four weeks. The advertisement was published in two national newspapers: The Sunday Times and Rapport which represented the English and Afrikaans languages. The local newspapers included Isolezwe leSixhosa, Isolezwe, Coal City, Thembisile News, Bushbuck Ridge News, Free State News, Business Ink and Seipone News. The local newspapers represented the other 9 official languages. Furthermore, the Parliament website also advertised the call for comments in all official languages.

### **Submission received from the call for comments on the Bill**

By the deadline the committee had received 25 submissions ranging from four pages to 200 pages. Of the 25 submissions received, 22 participants indicated that they wished to attend the public hearings and make oral submissions. The rest said they would not attend owing to their financial constraints, among other reasons.

Post the closure time, the committee received an additional three written submissions and thus the total written submissions were 28.

Two of the submissions were received during the hearing with requests to also appear before the committee and give oral evidence. The committee granted permission for the two presentations to be heard. Two submissions were received after the hearings

The following stakeholders submitted written submissions, some of whom appeared before the committee to give verbal presentations.

1. ABT Africa – Mr Muzi Makhaye: Chairperson.
2. Association for Black Securities Professionals – Mr Asief Mohamed: Member of the National Executive Council.
3. Acacia Economics – Mr Ryan Hawthorne: Consultant.
4. B-BBEE ICT Sector – Mr Andile Tlhoale: Chairperson.
5. Broadband Infraco – Mr Phatang Nkhereanye: Senior Manager.
6. Business Unity of South Africa (BUSA) – Mr Olivier Serrao: Director.
7. Cell C – Mr Graham Mackinnon: Chief Legal Officer.
8. Independent Communications Authority of South Africa (ICASA) – Mr Wellington Ngwepe: Chief Executive Officer.
9. Internet Services Providers Association (ISPA) – Mr Dominic Cull: Regulatory Advisor.
10. Liquid Telecoms – Mr Mike Silber: General Counsel.
11. Media Monitoring Africa/SOS Public Broadcasting – Mr Tsanga Mukumba.
12. Mr Gopalan Padayachee – An interested citizen.
13. Mr George Buthelezi – An interested citizen.
14. MTN – Mr Godfrey Motsa: Chief Executive Officer.
15. National Association of Broadcasters (NAB) – Mr Pillay Moilua: Chairperson.
16. Progressive Blacks in Information Communication Technologies – Mr Leon Rolls: President.
17. SABC – Mr Philly Moilwa: General Manager.
18. South African Communications Forum (SACF) – Ms Katrina Pillay: Managing Director.

19. South African Local Government Association (SALGA) – Ms Xanthea Limberg: Councillor.
20. SENTECH – Mr Zunaid Adams: Executive Legal and Regulatory.
21. SMILE – Ms Irene Charnley: Chief Executive Officer.
22. Ms Korobo – An interested citizen.
23. TELKOM – Mr Siphon Maseko: Chief Executive Officer.
24. Vodacom – Mr Shameel Joosub: Chief Executive Officer.
25. Western Cape Government: Ministry of Transport and Public Works – Ms Jacqui Gooch: Ministry of Transport and Public Works.
26. Wireless Access Providers Association of South Africa (WAPA) – Mr Dominic Cull: Regulatory Advisor
27. WOAN Forum: Convergence Partners – Mr Enver Fraser
28. Youth Economic Alliance (YEA) – Mr Afrika Mkhangala: President

### **Industry Experts Input**

The committee invited well-known scholar and a respected industry specialist Professor Alison Gillwald from Research ICT Africa to advise the committee on matters of the ICT industry, the cost to communicate, Wireless Open Access Networks (WOAN), capacity and constraints of the regulatory framework and environments and any other matter she deemed important for the committee to consider in processing the Bill.

### **Public Hearings**

The committee conducted the public hearings over four days: 26, 27, 29 and 30 November 2018.

The public hearings were well attended by various stakeholders, amongst them Mobile Network Operators, ICT small and medium enterprises, State Owned Entities, the sector regulator, Internet Services Providers (ISPs), Non-Governmental Organisations (NGOs), industry experts, the media and others.

**Post-hearing submission**

Post the public hearings the committee received two written requests to make written submission. The submissions were from:

1. eThekweni Metro and
2. ICT SMME Chamber.

The committee requested a legal opinion from the Parliament Legal Services (PLS) on how to deal with these late submissions.

The committee was informed that the processing of the Bill was still at its infancy stage with only the public hearings having been concluded and that the committee was yet to commence with deliberations on the Bill.

The advice further elaborated on a public participation process as ordained in a case law study example of the *Doctors for Life vs the Speaker of the National Assembly* amongst others.

The PLS advised that the test is that reasonable opportunity be afforded for meaningful participation, in this regard the committee would be complying with the minimum test and would not set a bad precedent.

It was in this regard that the committee accepted the explanation and subsequently the written submissions as they met the test of reasonable opportunity for participation and also that the timing of the submissions would not negatively affect the processing of the Bill.

The PLS stated that other committees in Parliament had considered late submissions, and thus they did not see any harm in the committee accepting these written submissions.

The committee thus decided to allow for the circulation of the written submissions to the committee members.

**Tagging of the Bill**

On 20 November 2018, before the committee's preliminary discussion on the Bill, the committee deliberated on the tagging and constitutionality of the Bill. DTPS, the parliamentary and state law advisers had posited that the Bill was correctly tagged as a Section 75 Bill.

On Tuesday 27 November 2018, the day after the committee started public hearings, Parliament's Announcements, Tablings and Committee Reports document (ATC) #177-2018 corrected the tagging to a Section 76 Bill.

Post the public hearings the Parliamentary Legal Advisor admitted that there was an error in the ATC #129-2018 of 19 September 2018, that tabled the Bill in the National Assembly as a Section 75 Bill.

The committee expressed its dissatisfaction at this anomaly as it could put the whole process of the committee to enacting this Bill into dispute.

The committee expressed a view that this anomaly had far reaching impacts on the credibility of the process, as in advertising for public comments on the Bill the committees may have mislead the public and thus the legitimacy of the process may be questionable.

### **Outcomes of the Public Hearings on the Bill**

The committee spent the four days listening to verbal submissions from the stakeholders. The committee has not conclusively deliberated on the outcomes of the public hearings owing to insufficient time.

There are, however, matters that have been brought to the attention of the committee. These include:

- i. The complaint by most stakeholders that the committee had rushed the processing of the Bill in Parliament. Other stakeholders felt the Bill was long overdue and Parliament should urgently conclude the processing of the Bill;
- ii. The divergent interpretation on access to both rural and urban lands by Electronic Communications Network Services (ECNS) licence holders for deploying the electronic communications networks or facilities;
- iii. The resourcing of the regulator to be able to carry out its constitutional and legislative mandate;
- iv. Divergent interpretations that the Bill transfers away powers from ICASA to the Minister;

- v. There were complaints about the capacity of ICASA to deliver on its mandate within the prescribed times;
- vi. The failures on ICASA to complete market reviews and to determine dominance in the market;
- vii. The agility of ICASA to manage tensions between policy objectives and consumer affairs;
- viii. Complaints that the Bill introduced structures that encroached on municipalities and private land owners' constitutional rights and legal mandates through the functions of the proposed Rapid Deployment Committee (RDC);
- ix. The unconstitutional encroachment into private and municipal lands and infrastructures and fixed structures including heritage sites envisaged in the Bill, by ECNS.
- x. That the Bill creates policy uncertainty and deviates from the agreed upon allocation of the high demand spectrum and thus may negatively impact on the planned investments in the South African economy on one hand;
- xi. There were conflicting views on whether it is the intention of the Bill to oblige MNOs to collectively or individually commit to buying 30% of the WOAN's spectrum capacity;
- xii. Whether the WOAN, or multiple WOANs, would compete in the open market or will be accorded disproportionate advantage over the other license holders;
- xiii. There were different views on the issue of spectrum re-farming;
- xiv. There were divergent views on the single trenching vs competition and the effect this will have on the cost to communicate;
- xv. The distinction between Broad-Based Black Economic Empowerment (B-BBEE) and Historically Disadvantaged Individual (HDI) needed clarity; and
- xvi. The publication of Government Gazette No 1003's invitation to provide written comments to the Independent Communications Authority of South Africa (ICASA) on proposed policy and policy directions to the authority on licensing of unassigned high demand spectrum, and the impact this would have on aspects of the Bill.

### **Deliberations in the committee**

- i. The committee has not had time to comprehensively discuss the Bill and thus it is far from ready to present a report to Parliament.
- ii. The real work of enacting legislation in the committee has thus far not occurred, the committee was only able to listen to the stakeholders' verbal submissions, receiving responses for clarity from stakeholders and the department.
- iii. The committee has, since the public hearings, received other written submissions and is yet to deliberate on these together with those received from the stakeholders that made verbal submission.
- iv. With the time at the committee's disposal ahead of the elections and prorogation of the 5<sup>th</sup> Parliament it is impossible for the committee to conclude processing the Bill.
- v. The committee has however advised the DTPS to engage stakeholders to find common ground on areas of varying divergent views expressed both in writings and in the verbal submissions or at least find general consensus.
- vi. The committee holds a view that various stakeholders are miles apart from agreement on several aspects of the Bill and thus further consultations are required.
- vii. The committee is of the view that the process was an attempt by DTPS to rush the parliamentary processing of the Bill and thus the committee runs the risk of presenting poorly crafted and inadequately interrogated legislation. The Bill is of a very complex and technical nature. The inadequate technical support from Parliament also put the work of the committee in an untenable situation.
- viii. It is clear to the committee that, should the Bill be enacted, there will be constitutional and other legal challenges.

**Conclusions**

- i. The committee has not finished its work on the Bill.
- ii. A common sentiment during deliberations was that any new legislation needs to be more forward-looking in order to anticipate a rapidly evolving communications technology environment.
- iii. The department, after reviewing the preliminary report of the Portfolio Committee, indicated that it has identified issues that require further deliberations between the department and the industry and therefore would conduct further deliberations with stakeholders.
- iv. In light of the above, on 12 February 2019, the department formally withdrew the Bill for further consultation, taking into consideration the deliberations emanating from the committee proceedings as enunciated in the deliberations of the committee above.
- v. The committee supports the withdrawal of the Bill on the basis of its deliberations.