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Consultation on the proposed new Licensing Framework for Satellite Services

1. INTRODUCTION

- 3.1.1 The South African Communications Forum (the SACF) is a voluntary member-funded industry association and represents members across the ICT ecosystem and includes members across the ICT ecosystem. We primarily participate in advocacy in the policy and regulatory environment to contribute to an inclusive sector that is capable of attracting and sustaining investment to the benefit of all stakeholders.
- 3.1.2 We thank ICASA for the opportunity to provide comments on the Consultation on the proposed new Licensing Framework for Satellite Services.
- 3.1.3 The SACF confirms that the positions set out below are based on our members' understanding of ICASA's request for their general position on the subject matter in this particular request. Should ICASA institute any further specific processes and procedures our members reserve their rights to respond as appropriate to the circumstances.

2. CONTEXT:

- 2.1 The context that underpins the SACF's written submission is threefold
- (1) there needs to be an understanding of what aspects of the existing technology neutral licensing framework is found not to be adequate to allow for satellite licensing,
 - (2) there needs to be agreement that there always must be regulatory parity in the market between all competitors offering the same or similar services, and

(3) there must be acknowledgement of competition principles specifically considered in the ECA that are applicable to the market.

2.2 As a starting point, to ensure a uniform understanding of the concepts referred to in this submission, we list some relevant definitions from the Electronic Communications Act, Act No 36 of 2005 (ECA) below:

“**electronic communications facility**” includes but is not limited to any—

- (a) wire;
- (b) cable (including undersea and land-based fibre optic cables);
- (c) antenna;
- (d) mast;
- (e) satellite transponder;
- (f) circuit;
- (g) cable landing station;
- (h) international gateway;
- (i) earth station; and
- (j) radio apparatus or other thing,

which can be used for, or in connection with, electronic communications, including where applicable—

- (i) collocation space;
- (ii) monitoring equipment;
- (iii) space on or within poles, ducts, cable trays, manholes, hand holds and conduits; and
- (iv) associated support systems, sub-systems and services, ancillary to such electronic communications facilities or otherwise necessary for controlling connectivity of the various electronic communications facilities for proper functionality, control, integration and utilisation of such electronic communications facilities;

“**electronic communications network**” means any system of electronic communications facilities (excluding subscriber equipment), including without limitation—

- (a) satellite systems;
- (b) fixed systems (circuit- and packet-switched);
- (c) mobile systems;
- (d) fibre optic cables (undersea and land-based);
- (e) electricity cable systems (to the extent used for electronic communications services); and

- (f) other transmission systems, used for conveyance of electronic communications;

“**electronic communications network service**” means a service whereby a person makes available an electronic communications network, whether by sale, lease or otherwise—

- (a) for that person's own use for the provision of an electronic communications service or broadcasting service;
- (b) to another person for that other person's use in the provision of an electronic communications service or broadcasting service; or
- (c) for resale to an electronic communications service licensee, broadcasting service licensee or any other service contemplated by this Act,

and “network services” is construed accordingly;

“**electronic communications network service licensee**” means a person to whom an electronic communications network service licence has been granted in terms of section 5(2) or 5(4);

“**electronic communications service**” means any service provided to the public, sections of the public, the State, or the subscribers to such service, which consists wholly or mainly of the conveyance by any means of electronic communications over an electronic communications network, but excludes broadcasting services;

“**electronic communications service licensee**” means a person whom an electronic communications services licence has been granted in terms of section 5(2);

“**private electronic communications network**” means an electronic communications network used primarily for providing electronic communications for the owner's own use;

2.3 Chapter 3 of the ECA, addresses licensing and authorises ICASA to grant individual and class ECS and ECNS licences, as well as grant exemptions. It states in section 5(3), that electronic communications network services, broadcasting services and electronic communications services that require an individual licence, include, but are not limited to—

- (a) electronic communications networks **of provincial and national scope operated for commercial purposes**;
- (b)

(c) electronic communications services consisting of voice telephony utilising numbers from the national numbering plan;

(d) & (e) ...

2.4 The chapter contains some constraining provisions such as section 5(8) which requires a local presence, section 7 which prohibits the provision of a service without a licence and section 9(1)(b) which requires a minimum of 30% ownership by historically disadvantaged groups or such other conditions or a higher percentage as prescribed in terms of section 4(3)(k).

2.5 Chapter 5 of the ECA addresses radio frequency spectrum specifically stating in section 31 that no person may transmit any signal or use radio apparatus to receive any signal by radio except under and in accordance with a radio frequency spectrum licence. However it goes further to state that a radio frequency spectrum licence on its own is not sufficient and that it is required in addition to any network service licence contemplated in Chapter 3, where the provision of such service entails the use of radio frequency spectrum.

2.6 The SACF has made a number of submissions during the course of 2023 and 2024, wherein we highlighted the need for a legislative refresh. It would be in the best interest of the market, to have a more flexible and investor friendly legislative environment. It is undeniable that there has been changes in the market that requires the legislation to cast its net broader to also include market players such as Over the Top (OTT) players. However, until the required policy and legislative reviews have taken place, ICASA, as a creature of statute, is bound by the requirements set out in the legislation as it stands, which we refer to in the rest of this submission. In any event, in the present case, ICASA has not clearly identified the lacuna related to satellite services in the current regulations, that warrants its intervention.

2.7 The second aspect of the context that the SACF would like to highlight to ICASA, is grounded in the Objectives of the ECA, section 2(b) in particular which states that "*The primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to – promote and facilitate the development of interoperable and interconnected electronic networks, the provision of the services contemplated in the Act and to create a technologically neutral licencing framework*".

2.8 The consultation document does not adequately clarify why there is a need for a separate licensing framework specifically for satellite services, considering that satellite services have been available for many years, subject to the same regime as other players in the market. Instead, it loosely suggests through the context and background that the Authority provides, that it wishes to amend the rules of the

game to provide even more favourable conditions for certain market players offering broadband services.

2.9 Lastly, the way in which the drafters of the ECA considered satellite related facilities in section 43 provides good insight to guide this process. It regards satellite earth stations as essential facilities, required to be leased by an electronic communications network service licensee in subsection 8(b). This means that even though it has not been declared as such, it cannot be regarded as a PECN, as it would not be able to offer services primarily for own use. Secondly, both the wording in 8(b) and the access obligations set out in subsection 10 anticipates it to be offered by an electronic communications network service licensee:

“An electronic communications network service licensee may not enter into any agreement or other arrangement with any person for access to, or use of, any international electronic communications facilities, including submarine cables and satellites, that—

- (a) contains an exclusivity provision;*
- (b) contains provisions that create undue barriers to access to and use of such international communication facilities; or*
- (c) otherwise restricts any party to such agreement or other arrangement from—*
 - (i) leasing;*
 - (ii) selling; or*
 - (iii) otherwise entering into an agreement with any licensee under this Act or person providing services pursuant to a licence exemption for access to, and use of, such international electronic communications facilities.*

(11) Any exclusivity provision contained in any agreement or other arrangement that is prohibited under subsection (10) is invalid from a date to be determined by the Minister after consultation with relevant parties.”

2.10 Section 43 of the ECA therefore recognises the importance of creating a level playing field in access to satellite services, which starts at access to Gateway Earth Stations.

2.11 The SACF will frame its responses to the specific questions posed by ICASA in the consultation document with the context above as a baseline.

3. **QUESTIONS** - Below, we will address each of the questions posed by ICASA in the consultation document:

3.2 QUESTION 1 - These are the policy principles from the ATU that ICASA seeks to align with. Kindly provide comment(s) on the proposed policy principles and any further recommendations listed in the above section?

- 3.2.1 The principles set out in the ATU satellite licensing framework should be considered within the prevailing policy and regulatory framework in South Africa. It can be considered but not blindly adopted and implemented.
- 3.2.2 Considering the context provided in paragraph 2, it is unclear if this has been endorsed by the Minister as anticipated in section 3(1) which addresses the Minister's prerogative to make policies, including on matters related to radio frequency spectrum, the application of new technologies and the Republic's obligations and undertakings under bilateral, multilateral or international treaties and conventions and 3(2) which talks to the undertaking of section 4B inquiries or the determination of priorities for the development of ECNS and ECS contemplated in Chapter 3 of the ECA.
- 3.2.3 It is furthermore submitted that the existing licensing framework set out in the ECA, cannot simply be ignored as part of a section 4B Inquiry process, but that each proposed deviation from the current process must be explained as part of ICASA's duty as an administrative body subject to the Promotion of Administration of Justice Act in order for the sector to be in a position to meaningfully engage with the process.
- 3.2.4 It is unclear what gap/s ICASA sees in the current policy, legislative and regulatory. This has not been clearly articulated in the document. Furthermore, regulatory processes are subordinate legislation and therefore cannot supersede the primary legislative framework.

3.3 QUESTION 2 - Do you agree with the exclusions of radio navigation satellite services, amateur satellite services, earth exploration, space research satellite services and radio astronomy services indicated above and others if applicable? If not, please explain your reasoning and propose an alternative to this proposal.

- 3.3.1 The new satellite licensing framework document does not provide sufficient information to the sector, to be in a position to critically assess the basis upon which the proposals for exemptions are being made. ICASA is requested to clearly provide all the principles that informed its approach to these services.
- 3.3.2 As an example, it would be helpful if ICASA could confirm that it considered factors such as:

- whether it is anticipated that these services would only be licence exempt if it is not offered on a commercial basis; and
- that the technology neutral approach in the ECA would accordingly require these principles to be applied across all technologies and not just satellite.

3.4 QUESTION 3 - Do you agree with the proposed approach of having a separate licence/authorisation (where applicable) for each segment of the Satellite Communication value chain? Please elaborate.

3.4.1 It is submitted that the ECA already provides for a licensing framework for satellite, and without understanding why ICASA does not regard the existing framework to be suitable, we are not in a position to comment on a proposed new licensing approach. The four categories available to ICASA as a creature of statute, is individual and class ECNS licences, individual and class ECS licences, licence exemptions (including PECNs) and frequency spectrum licences.

3.5 QUESTION 4 - Please provide your comments on the proposals in the preceding paragraph and the duration of the Gateway Earth Station licences.

3.5.1 The ECA incorporates a gateway as part of the definition of electronic communications facilities. The ECA goes further to clarify that a system of electronic communications facilities constitutes an electronic communications network. Moreover, section 43 provides further guidance as to how Gateway Earth Stations are to be regarded, and explicitly includes it as essential facilities mandated to provide access to other licensees. Unless an electronic communications network is used primarily for providing electronic communications for the owner's own use which would classify it as a PECN, an electronic communications network service licence is required.

3.5.2 Therefore, the ECA as it stands does not allow Gateway Earth Stations to be regarded as PECNs, which would fall under licence exempt services, but requires a Gateway Earth Station to be regarded as an element (per ECA definition) of a licensed ECNS service.

3.5.3 For the sake of clarity, a network operator that commercially sells wholesale services to other networks, requires its own ECNS licence, it cannot be done in terms of a PECN as it would not be providing services primarily for its own use (please consider the Broadband Infracore licence for further clarity). Should it wish to provide services to end users it would additionally require an ECS licence.

3.5.4 ICASA's proposal as it stands does not align with the ECA. Consequently in order for the SACF (and other interested and affected parties) to assist ICASA with the achievement of its objectives, we request ICASA to elaborate and clarify the intention behind its proposed approach on Gateway Earth Stations.

3.6 QUESTION 5 - Please comment on the above-mentioned alternative proposals to levy the spectrum fees for Gateway Earth Stations and indicate your preferred option. The Authority understands that there are other spectrum fee calculation methodologies used elsewhere in the world. Please give details of the methodologies which you believe would be most suitable for South Africa.

3.6.1 SACF members supports a review of spectrum fees subject to two principles:

- The current spectrum pricing model for satellite spectrum bands is Geo-stationary satellite (GSS) based and has not evolved to include Non- Geo- stationary satellites (NGSS). It is doubtful that the envisaged spectrum pricing model for NGS can be extended to terrestrial spectrum bands. If technical equivalence can be achieved in respect of spectrum bands and operating models then the provision of these services should be subject to the same spectrum fee calculations (there should not be a specific regime just for satellite); and
- The pricing principles should scale linearly across all spectrum bands to the extent possible, otherwise ICASA risks creating an unfair competitive advantage to some market players.

3.7 QUESTION 6 - Kindly comment on the section above and on the proposal for blanket licensing with a fee for a set number of terminals under a new proposed licence regime to be referred to as "Satellite User Station Network Licence". If possible, please provide a breakdown of the number of terminals with the corresponding spectrum fee values in South African Rands.

3.7.1 To understand ICASA's proposal, the SACF and other interested and affected parties commenting on ICASA's proposals require further clarity on the reasons for the framework document introducing a definition for terminal (the equipment used by customers to access the licensed service), whilst the ECA uses the term subscriber equipment (this means any device which is used by a subscriber to access, use or receive the services of a licensee referred to in Chapter 3 or the services of a person providing a service pursuant to a licence exemption, including without limitation, a telephone, regardless of technology such as IP (internet protocol) phones, mobile phones, publicly available phones; a handset, a computing device such as a personal digital assistant or a personal computer; a device for receiving a sound radio

broadcasting service and a television; or other device or equipment, and any associated software).

- 3.7.2 The framework document indicates that ICASA seeks to introduce a licence type (Satellite User Terminals Network Licence), that would authorise access to spectrum for user terminals to communicate with satellites. As a creature of statute, ICASA is constrained by the wording of the ECA, and it is not clear which licence category in Chapter 3, ICASA is relying upon to propose to issue a satellite user terminal network licence. ICASA in the circumstances would be advised to use the existing reference in the ECA to “subscriber terminal equipment” to achieve the stated objective of blanket licensing, which the ECA allows for.
- 3.7.3 ICASA is requested to provide the section in the ECA that it expects to rely upon to issue this licence, as well as its rationale for proposing this approach, and its assessment on the market impact of such a proposal. It is of critical importance that regardless of the basis of licensing, that the sector be protected against the potential of increased interference, as well as an unfair regulatory advantage to certain market players.

3.8 QUESTION 7 – Kindly comment on the appropriateness of using regulation 37 of the ICASA radio regulations (“Recognition of licences issued by other countries”) to recognize ESIM licences issued by other countries.

- 3.8.1 It is important to recognise that ESIM licences should only ever recognised on a temporary use basis as a transit and landing facility. They would remain bound to the ECA and radio regulations like any other licensee operating in the country and this should be explicitly provided for in the approach followed by ICASA.
- 3.8.2 Regulation 37, states for your ease of reference, that *“Notwithstanding provisions to the contrary in these regulations, the Authority may issue a radio frequency spectrum licence as required by the Act or these Regulations to a person who, in the opinion of the Authority, possesses a similar licence issued by an authority in another country despite the fact that such person does not satisfy specific requirements stipulated by these regulations for the acquisition of the licence or certificate.* It is submitted that ICASA, as a creature of statute cannot regulate through opinion. Therefore, the wording in regulation 37 should be amended and tightened to stipulate that ICASA would establish principles that would guide its decisions and in line with its obligation to regulate in a transparent manner, make the criteria it would consider to recognise another country’s licences publicly available.

3.8.3 The regulation 37 process cannot be used to circumvent local licencing requirements, especially if holders of this licences would be allowed to compete against local licensees. We therefore request ICASA to be explicit in providing a clear more elaborated explanation of its intention behind this indulgence. It should furthermore amend regulation 37 to include the guardrails that would be necessary in order to not compromise the South African legislative and regulatory regime.

3.9 QUESTION 8 - Please provide your comments and details of the best practices in other jurisdictions to fulfil the intentions of the Authority as indicated in the above section. Furthermore, considering the provision set out in the Astronomy Geographic Advantage (AGA) Act of 2007, and the requirements of the Radio Quiet Zone, what measures and techniques do you propose to be employed in mitigating the possible interference that may be caused by the satellites within the Astronomy radio frequency bands in South Africa?

3.9.1 The intention of ICASA in regulating the market, should always be guided by its obligation to protect the integrity of the ICT sector in South Africa. It is submitted that any RICA related matters, do not fall within the jurisdiction of ICASA.

3.9.2 Furthermore, it is useful to consider global measures implemented to protect the highly sensitive radio astronomy bands from interference. These include allocating specific frequency bands exclusively for radio astronomy and designating "passive-only" bands. Geographic zoning, like Radio Quiet Zones (RQZs) and buffer zones around observatories, minimizes local interference. Furthermore, strict power limits and control of spurious emissions are often imposed on nearby transmitters.

3.9.3 Coordination with local transmitters through licensing and cooperative agreements help to manage interference, while filtering and shielding technologies protect sensitive equipment. Lastly, time-based restrictions allow quiet periods for observations.

3.10 QUESTION 9 – Please provide proposals on the role the Satellite operators can play in ensuring that broadband connectivity reaches the areas of the country in terms of community networks with Satellite connectivity as a backhaul. Kindly provide a regulatory solution that can be applied by Satellite operators to address the shortcomings of terrestrial networks in providing to unserved and underserved areas of the country. This may include collaboration with

government programs to reach out to those unserved and underserved areas of the country.

- 3.10.1 It is submitted that any universal service related interventions that relate specifically to satellite services, in line with ECA licensing provisions, would have to be preceded by a thorough Social and Economic Impact Assessment (SEIA) and incorporated in ECNS and ECS license terms.
- 3.10.2 The scope of the SEIA should not be limited to satellite, but include a review of the entire universal service and access landscape, in particular the scope, reach and cost of services provided in accordance with the existing licensing framework) in order to come to a meaningful conclusion.
- 3.10.3 Terrestrial mobile operators have for several years asked government to assist with subsidies to deal with the rural access deficit. Before considering how a new entrant would fare with such subsidies, it may be more efficient for government to consider how subsidies would further leverage the scale of terrestrial operators.

The SACF thanks ICASA for the opportunity to make this submission and trusts that its contribution would be taken into consideration.

Sincerely,

Katharina Pillay
Managing Director