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## GENERAL NOTICE

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### NOTICE 782 OF 2011

#### DEPARTMENT OF COMMUNICATIONS

#### ELECTRONIC COMMUNICATIONS AMENDMENT BILL

The Department of Communications has prepared the proposed Electronic Communications Amendment Bill in the Schedule that the Department wishes to submit to Parliament during the course of the 2012 Legislative Programme.

Interested persons are invited to provide written comments on the proposed Bill, within 30 working days of the date of publication of this notice at any of the following addresses:

|                |   |
|----------------|---|
| Post:          | For Attention:<br>Ms M Mphahlele<br>The Chief Director: Economic Policy Development<br>ICT Policy Development<br>Department of Communications;<br>Private Bag x860<br>Pretoria<br>0001; |
| or deliver to: | First Floor, Block A3<br>iParioli Office Park<br>1166 Park Street<br>Hatfield, Pretoria;  |
| or email to:   | lerato@doc.gov.za   |

Please note that comments received after the closing date may be disregarded.

Please contact Lerato Monareng at (012) 427 8217 or Mameetse Mphahlele at (012) 420 7707 for any enquiries.

**REPUBLIC OF SOUTH AFRICA**

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# **ELECTRONIC COMMUNICATIONS**

## **AMENDMENT BILL**

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*(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill  
published in Government Gazette No. of 2011)  
(The English text is the official text of the Bill)*

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(Minister of Communications)

[B -2011]

**GENERAL EXPLANATORY NOTE:**

[     ]     Words in bold type in square brackets indicate omissions  
          from existing enactments.

\_\_\_\_\_     Words underlined with a solid line indicate insertions in  
          existing enactments.

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**BILL**

**To amend the Electronic Communications Act, 2005, so as to clarify and strengthen the role, powers and functions of the Minister and the Authority; to improve turn-around times for consultative processes; to make provision for policy on ownership and control; to revise the role of the Minister and the Authority in respect of frequency spectrum management; to refine licensing issues; to improve the competition provisions; to remove regulatory bottlenecks; and to provide for matters connected therewith.**

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

**Amendment of section 1 of Act 36 of 2005**

Section 1 of the principal Act is hereby amended-

- (a) by the insertion of the following definition after the definition of "Authority":

"broadband' means an always available, multimedia capable connection with a minimum download speed as determined by the Minister from time to time by Notice in the Gazette;"

- (b) by the substitution for the definition of "broadcasting service radio frequency bands" of the following definition:

"broadcasting service radio frequency bands' means that part of the electromagnetic radio frequency spectrum which is allocated for the use of broadcasting services by the Authority, taking into account the ITU table of **[allotment] allocation**, in so far as such allocation has been agreed to or approved by the Republic;"

- (c) by the substitution for the definition of "common carrier" of the following definition:

“**common carrier**’ means Sentech Limited, a public company established in terms of the Sentech Act, 1996 (Act No. 63 of 1996) and any other [a] person licensed to provide an electronic communications network service who is obliged to provide signal distribution for broadcasting services on a non-discriminatory and non-exclusive basis;”;

(d) by the substitution for the definition of “community” of the following definition:

“**community**’ [**includes a geographically founded community or**] means any group of persons or sector of the public having a specific, ascertainable common interest;”;

(e) by the substitution for the definition of “community broadcasting service” of the following definition:

“**community broadcasting service**’ means a broadcasting service which—

(a) is fully controlled by a non-profit entity and carried on for non-profit purposes;

(b) serves a particular geographically defined community;

(c) encourages members of the community served by it or persons associated with or promoting the interests of such community, to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service; and

(d) may be funded by donations, grants, sponsorships or advertising or membership fees, or by any combination of the aforementioned;”;

(f) by the deletion of the definition for “days”;

(g) by the substitution for the definition of “end-user” of the following definition:

“**end-user**’ means a subscriber and persons who use the services of a licensed service or use a service pursuant to a licence exemption referred to in Chapter 3;”;

(h) by the substitution for the definition of “electronic communications service licensee” of the following definition:

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

(i) by the insertion of the following definition after the definition of “harmful interference”:

“**historically disadvantaged person**’ means—

(a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect;

(b) any association, a majority of whose members are persons contemplated in paragraph (a);

(c) any juristic person other than an association, in which persons contemplated in paragraph (a) own and control a majority of the issued capital or members' interest and are able to control a majority of the members' votes;";

(j) by the deletion of the definitions for "ICT Charter", "existing licences" and "transition period";

(k) by the substitution for the definition of "ITU" of the following definition:

"ITU' means International Telecommunication[s] Union;"

(l) by the substitution for the definition of "licensee" of the following definition:

"licensee' means a person issued with a licence to provide services in terms of Chapter 3 or authorising the holder to use the radio frequency spectrum in terms of Chapter 5 of this Act;"

(m) by the deletion of the definition for "public entity";

(n) by the substitution for the definition of "radio frequency plan" of the following definition:

"radio frequency plan' means a national plan that includes, but is not limited to—

(a) a table of frequency allocations for all bands below 3000 GHz taking into account the ITU table of **[allotments] allocations**, in so far as such **[allotments] allocations** have been adopted and agreed upon by the Republic, which may include designations of certain utilisations; and

(b) a plan, as applicable, for the migration of systems and equipment of existing users within specific radio frequency bands, including radio frequency bands for security services, to different frequency bands;"

(o) by the substitution for the definition of "radio frequency spectrum" of the following definition:

"radio frequency spectrum' means the portion of the electromagnetic spectrum used as a transmission medium for electronic communications and broadcasting;"

(p) by the substitution for the definition of "radio station" of the following definition:

"radio station' means one or more transmitters or receivers or a combination of transmitters and receivers, including the accessory equipment, necessary at one location for carrying an electronic communications service,

broadcasting service or any electronic communications authorised by the authority;”;

(q) by the substitution for the definition of “registered political party” of the following definition:

“**[registered]** political party’, for the purposes of Chapter 9, means—

(a) any registered party defined in section 1 of the Electoral Act, 1998; or

(b) any alliance of such registered parties, as the case may be, which, for the purpose of any particular election, has, before the commencement of the relevant election period, submitted its list of candidates for the National Assembly or any other legislature contemplated in the Constitution;”;

(r) by the substitution for the definition of “reseller” of the following definition:

“reseller’ means a person who—

(a) acquires, through lease or other commercial arrangement, **[by]** any electronic communications network service or electronic communications service; and

(b) makes such electronic communications network service or electronic communications service available to subscribers for a fee, whether or not such electronic communications network services or electronic communications services made available by the reseller—

(i) are identical to the electronic communications network service or electronic communications service acquired;

(ii) are packaged, bundled or otherwise re-grouped to form new or varied service offerings;

(iii) are combined, linked or used in connection with electronic communications networks or electronic communications facilities owned by the reseller; or

(iv) add value to such electronic communications network services or electronic communications services, and “resale” is construed accordingly;”;

(s) by the substitution for the definition of “service charter” of the following definition:

“service charter’ means a document, developed by a licensee after consultation with its staff, subscribers and end-users which sets out the standards of service subscribers and end-users can expect and is a performance measurement and accountability tool that focuses on subscriber and end-user service outcomes;”;

(t) by the substitution for the definition of “universal service” of the following definition:

“universal service’ means the universal provision of electronic communications network services, electronic communications services and broadcasting services as determined from time to time in terms of Chapter 14;”.

**Amendment of section 2 of Act 36 of 2005**

Section 2 of the principal Act is hereby amended by the substitution for paragraph (b) of the following paragraph:

“(b) 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 licensing framework meaning an electronic communications network service licensee can make available any electronic communications network and an electronic communications service licensee can provide any electronic communications service;”.

**Amendment of section 3 of Act 36 of 2005**

Section 3 of the principal Act is hereby amended -

(a) by the insertion in subsection 1 after paragraph (a) of the following paragraph:

“(aA) ownership and control of individual licences in order to substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the ICT sector;  
(aB) foreign ownership and control of individual licences;”

(b) by the deletion of subsection (1A);

(c) by the substitution for subsection 2 of the following subsection:

“(2) The Minister may, subject to subsections (3) and (5), issue to the Authority or subject to subsection (5), issue to the Agency policy directions consistent with the objects of this Act, national policies and of the related legislation in relation to—

(a) the undertaking of an inquiry in terms of section 4B of the ICASA Act on any matter within the Authority’s jurisdiction and the submission of reports to the Minister in respect of such matter;

(b) the determination of priorities for the development of electronic communications networks and electronic communications services or any other service contemplated in Chapter 3;

(c) the consideration of any matter within the Authority’s jurisdiction reasonably placed before it by the Minister for urgent consideration[.];

(d) guidelines for the determination by the Authority of spectrum fees;

(e) the facilitation of any radio frequency spectrum licence or service licence contemplated in Chapter 3;

(f) any other matter which may be necessary for the application of this Act or the related legislation.”;

(d) by the substitution for subsection 4 of the following subsection:

“(4) The Authority or the Agency, as the case may be, in exercising its powers and performing its duties in terms of this Act and the related legislation must **[consider]** exercise its powers and perform its duties in accordance with the policies made by the Minister in terms of subsection (1) [and], policy directions issued by the Minister in terms of subsection (2).”;

(e) by the substitution for subsection 5 of the following subsection:

“(5) When issuing a policy direction under subsection (2) the Minister—  
(a) must consult the Authority, or the Agency as the case may be;  
and  
(b) must, in order to obtain the views of interested persons, publish the text of such policy direction by notice in the Gazette—  
(i) declaring his or her intention to issue the policy direction;  
(ii) inviting interested persons to submit written submissions in relation to the policy direction in the manner specified in such notice in not less than 30 calendar days from the date of the notice;  
(c) must publish a final version of the policy direction in the Gazette.”;

(f) by the addition of the following subsection:

“(10) If it is reasonable and justifiable in the circumstances, as contemplated under the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), the Minister may depart from any of the time periods specified in this section.”.

#### **Amendment of section 4 of Act 36 of 2005**

Section 4 of the principal Act is hereby amended -

(a) by the substitution in subsection 1 for paragraph (d) of the following paragraph:

“(d) generally, the **[control]** use of the radio frequency spectrum, radio activities and the use of radio apparatus.”;

(b) by the substitution for subsection (3) of the following subsection:

“(3) Any regulation made by the Authority in terms of subsection (1) may declare a contravention of that regulation to be an offence, provided that any such regulation must specify the penalty that may be imposed in respect of such contravention taking into account, amongst others, section 17H of the ICASA Act.”.

(c) by the substitution for subsections (4) and (5) of the following subsections:



"(4) The Authority must, not less than **[thirty (30)] 30 calendar** days before any regulation is made, publish such regulation in the Gazette, together with a notice—

- (a) declaring the Authority's intention to make that regulation; and
- (b) inviting interested parties to make written representations on the regulation.

(5) The Authority must, not less than 30 calendar days prior to making regulations, inform the Minister in writing of its intention and **[the subject matter of the] provide a copy of the proposed regulations.**";

(d) by the addition of the following subsection:

"(8) If it is reasonable and justifiable in the circumstances, as contemplated under the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), the Authority may depart from any of the time periods specified in this section."

#### **Amendment of section 5 of Act 36 of 2005**

Section 5 of the principal Act is hereby amended –

(a) by the substitution in subsection 3 for paragraph (b) of the following paragraph:

**“(b) commercial broadcasting and public broadcasting of national and [regional] provincial scope whether provided free-to-air or by subscription;”;**

(b) by the substitution in subsection 3 for paragraph (c) of the following paragraph:

**“(c) electronic communications services [consisting of voice telephony utilising numbers from the national numbering plan] of provincial and national scope operated for commercial purposes;”;**

(c) by the deletion in subsection 3 for paragraph (d).

(d) by the substitution in subsection 5 for paragraph (b) of the following paragraph:

**“(b) community broadcasting [and] or low power services whether provided free-to-air or by subscription;”;**

(e) by the renumbering of paragraph (c) in subsection 5 to paragraph (d);

(f) by the addition of the following paragraph in subsection 5:

**“(c) electronic communications services of district municipality or local municipal scope operated for commercial purposes;”;** and

(g) by the insertion after subsection 8 of the following subsection:

“(8A) The provisions of subsection (8) apply *mutatis mutandis* to licence exempt service contemplated in section 6.”;

(h) by the substitution in subsection 9 for paragraph (b) of the following paragraph:

“(b) promote the empowerment of historically disadvantaged persons including women and the youth and people with disabilities[, **in accordance with the requirements of the ICT charter**].”.

#### **Amendment of section 6 of Act 36 of 2005**

Section 6 of the principal Act is hereby amended –

(a) by the deletion in subsection (1) of paragraph (d);

(b) by the substitution for subsection (2) of the following subsection:

“(2) The electronic communications services, electronic communications networks[,] **and** electronic communications network services [**and radio frequency spectrum**] contemplated in subsection (1) may include, but are not limited to—

(a) electronic communications services provided on a not-for-profit basis;

(b) electronic communications services that are provided by resellers;

(c) private electronic communications networks used principally for or integrally related to the internal operations of the network owner. Except that where the private electronic communications networks' additional capacity is resold, the Authority may prescribe terms and conditions for such resale;

(d) small electronic communications networks such as local area networks; **and**

**[(e) uses of the radio frequency spectrum that were permitted without a licence prior to the coming into force of this Act and uses of the radio frequency spectrum that the Authority finds would not cause harmful interference with radio frequency spectrum licensees such as low power uses; and]**

(f) such other services considered to be exempted, as may be prescribed by the Authority.”;

(c) by the substitution for subsection (3) of the following subsection:

“(3) Any regulations prescribed by the Authority in terms of this section may contain terms and conditions applicable to the exempted electronic communications services, electronic communications networks[,] **and** electronic communications network services [**and radio frequency spectrum use**] and declare contravention of the regulation an offence, subject to section 17H of the ICASA Act.”.

**Amendment of section 8 of Act 36 of 2005**

Section 8 of the principal Act is hereby amended –

(a) by the substitution for subsection 2 of the following subsection:

“(2) Such standard terms and conditions may **[take into account]** include, but are not limited to –

(a) whether the service is intended for the public generally or a limited group, such as the provision of electronic communications network services or electronic communications services to other licensees contemplated under this Act;

(b) the licence area of the authorised service;

(c) the duration of the licence;

(d) the protection of the interests of the subscribers and end-users, including, but not limited to—

(i) the handling and resolution of complaints and disputes;

(ii) the provision of appropriate remedies and redress in respect of such complaints and disputes;

(iii) the transparency of information about services, tariffs and the rights of subscribers; and

(iv) any other matter the Authority determines to be necessary in order to achieve the effective protection of subscribers;

(e) the public interest in ensuring service interoperability, non-discrimination and open access, interconnection and facilities leasing;

(f) the public interest in securing the efficient functioning of electronic communications networks including but not limited to preventing or restricting harmful interference within the radio frequency spectrum;

(g) any universal access and universal service obligations;

(h) the public interest in the provision, availability and use, in the event of a disaster, of electronic communications networks and electronic communications services;

(i) the public interest in ensuring the protection of public health for the prevention or avoidance of the exposure of natural persons to electromagnetic fields created in connection with the operation of electronic communications networks and the provision of broadcasting and electronic communications services;

(j) the international obligations of the Republic, including compliance with relevant international standards adopted by the Republic;

(k) the public interest in ensuring the distribution of broadcasting services;

(l) the public interest in facilitating the dissemination and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater for all language and cultural groups and provide entertainment, education, news and information;

(m) the public interest in facilitating and maintaining a competitive electronic communications environment and in regulating and controlling anti-competitive practices; and

(n) the efficient use of the radio frequency spectrum and migration to digital use of such radio frequency spectrum.”;

(b) by the substitution for subsection 3 of the following subsection:

“(3) The Authority may **[prescribe]** impose additional terms and conditions that may be applied to any individual licence or class licence taking into account the provisions of Chapter 10.”;

(c) by the substitution for subsection 4 of the following subsection:

“(4) The Authority may by regulation make provision for the designation of licensees to whom universal service and universal access obligations are to be applicable and may impose additional terms and conditions in respect of the relevant universal service and universal access obligations on such designated licensees.”.

#### **Amendment of section 9 of Act 36 of 2005**

Section 9 of the principal Act is hereby amended –

(a) by the substitution for subsection (1) of the following subsection:

“(1) Any person may, **[upon invitation by the Authority,]** subject to the provisions of this Act, apply for an individual licence in the prescribed manner provided that an individual broadcasting service licence may only be applied for upon invitation by the Authority.”;

(b) by the substitution in subsection 2 for paragraph (b) of the following paragraph:

“(b) include the percentage of equity ownership to be held by **[persons from]** historically disadvantaged **[groups] persons**, which must not be less than 30%, or such higher percentage as may be prescribed;”;

(c) by the substitution in subsection 6 for paragraph (b) of the following paragraph:

“(b) may impose such additional terms and conditions as **[may be prescribed in terms of section 8(3)]** contemplated in sections 8(3) and 8(4).”.

#### **Amendment of section 10 of Act 36 of 2005**

Section 10 of the principal Act is hereby amended by the substitution in subsection 1 for paragraph (h) of the following paragraph:

“(h) if the amendment is **[in pursuance of and]** in accordance with **[the regulations made under]** Chapter 10.”.

#### **Amendment of section 13 of Act 36 of 2005**

Section 13 of the principal Act is hereby amended –

(a) by the substitution for subsection (1) of the following subsection:

“(1) An individual licence may not be assigned, ceded or in any way transferred, and the control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority.”;

(b) by the substitution for subsection (2) of the following subsection:

“(2) An application for permission to assign, cede or in any way transfer an individual licence, or transfer control of an individual licence may be made to the Authority in the prescribed manner.”;

(c) by the deletion of subsections (3) to (5).

#### **Insertion of section 13A in Act 36 of 2005**

The following section is hereby inserted in the principal Act after section 13:

“13A. Limitations on ownership and control.—(1) The Authority may by regulation, set a limit on, or restrict, the ownership or control of an individual licence for electronic communications network services and electronic communications services, in order to—

\_\_\_\_\_ (a) promote the ownership and control by historically disadvantaged persons; or

\_\_\_\_\_ (b) promote competition in the ICT sector.

(2) The Authority may, subject to Chapter 9, by regulation, set a limit on, or restrict, the ownership or control of an individual licence for broadcasting services in order to—

\_\_\_\_\_ (a) promote the ownership and control by historically disadvantaged persons;

\_\_\_\_\_ (b) promote competition in the ICT sector; or

\_\_\_\_\_ (c) promote a diversity of views and opinions.

(3) Regulations contemplated in subsection (1) and (2) must be made—

\_\_\_\_\_ (a) with due regard to the objectives of this Act, the related legislation and where applicable, any other relevant legislation; and

\_\_\_\_\_ (b) after the Authority has conducted an inquiry in terms of section 4B of the ICASA Act, which may include, but is not limited to, a market study.”.

#### **Amendment of section 16 of Act 36 of 2005**

Section 16 of the principal Act is hereby amended –

(a) by the substitution for subsection 1 of the following subsection:

“(1) The Authority may, upon receipt of a written registration in the manner prescribed and satisfying the conditions provided for in section 5 (8), [grant] issue a class licence, provided that no person may have more than two class licences simultaneously.”;

(b) by the substitution for subsection 2 of the following subsection:

“(2) Registration for a class licence may be submitted **[at any time]** in the manner prescribed by the Authority.”.

(c) by the substitution for subsection 6 of the following subsection:

“(6) **[No class licence may be ceded or transferred without the prior written approval of the Authority]** A person who intends to transfer a class licence to any other person must notify the Authority in writing at least thirty days prior to such transfer.”.

#### **Amendment of section 17 of Act 36 of 2005**

Section 17 of the principal Act is hereby amended by the substitution for subsection 3 to 5 of the following subsections:

“(3) Subject to section 18, the Authority must, within **[sixty (60)] ten (10)** days after receipt of a registration notice, **[grant] issue** the class licence and update its internal records by including the—

- (a) the name of the accepted registrant;
- (b) the nature of the service that the registrant proposes to provide;

and

- (c) the licence conditions applicable to the class licence.

(4) If the Authority delays the **[grant] issue** of a class licence beyond the **[sixty (60)] ten (10)** day period, the Authority must give written notice of the delay and of the reasons for the delay, to the registrant.

(5) In any case where—

(a) the Authority fails to give notice of a delay to the registrant and fails to **[grant] issue** the class licence within the **[sixty (60)] ten (10)** days as required in terms of subsection (4);

(b) the registrant has complied with the regulations prescribed in terms of section 5 (7) applicable to class licenses;

(c) the registrant satisfies the conditions provided for in section 5 (8); and

(d) the Authority has not declined to accept the registration notice for the class licence in terms of section 18,

the class licence is considered to have been **[granted] issued** by the Authority on the **[61<sup>st</sup>] 11<sup>th</sup>** day after receipt of the registration notice by the Authority.”.

#### **Amendment of section 20 of Act 36 of 2005**

Section 20 of the principal Act is hereby amended

(a) by the substitution for subsection (1) of the following subsection:

“(1) This Chapter applies only to specific electronic communications network service licensees as prescribed by the Authority.”;

(b) by the insertion after subsection 2 of the following subsection:

“(3) The Authority must prescribe how electronic communications network service licensees must exercise their rights and obligations under this Chapter and may impose conditions and obligations on licensees in the exercise of such rights and obligations, in accordance with the policy and policy directions, if any, contemplated in section 21, within eighteen (18) months of the coming into operation of the Electronic Communications Amendment Act, 2010.”.

**Amendment of section 21 of Act 36 of 2005**

Section 21 of the principal Act is hereby amended -

(a) by the substitution for the heading of the following heading:

“21. **[Guidelines for rapid]** Rapid deployment of electronic communications facilities.—”;

(b) by the substitution for subsections 1 and 2 of the following subsections:

“(1) The Minister must, in consultation with the Minister of **[Provincial and Local Government]** Cooperative Governance & Traditional Affairs, the Minister of **[Land Affairs]** Rural Development & Land Reform, the Minister of Water and Environmental Affairs, the Authority and other relevant institutions, develop **[guidelines]** a policy and policy directions for the rapid deployment and provisioning of electronic communications facilities, following which the Authority must prescribe regulations.

(2) The **[guidelines]** regulations must provide procedures and processes for—

(a) obtaining any necessary permit, authorisation, approval or other governmental authority including the criteria necessary to qualify for such permit, authorisation, approval or other governmental authority; and

(b) resolving disputes that may arise between an electronic communications network service licensee and any landowner, in order to satisfy the public interest in the rapid rollout of electronic communications networks and electronic communications facilities.”;

(c) by the insertion after subsection 2 of the following subsection:

“(3) The policy and policy directions contemplated in subsection (1) must be made within twelve (12) months of the coming into operation of the Electronic Communications Amendment Act, 2010.”.

**Amendment of section 30 of Act 36 of 2005**

Section 30 of the principal Act is hereby amended –

(a) by the substitution for subsection (1) of the following subsection:

“(1) The Minister as the custodian of the radio frequency spectrum on behalf of the people of South Africa, is responsible for the planning and management of the radio frequency spectrum [In carrying out its functions under this Act and the related legislation,] and the Authority [controls, plans,

**administers and manages] is responsible for licensing** the use **[and licensing]** of the radio frequency spectrum except as provided for in section 34.”;

(b) by the substitution for subsection (2) of the following subsection:

“(2) In **[controlling, planning, administering, managing and]** licensing the use of the radio frequency spectrum, the Authority must—

(a) comply with the applicable standards and requirements of the ITU and its Radio Regulations, as agreed to or adopted by the Republic;

(b) take into account modes of transmission and efficient utilisation of the radio frequency spectrum, including allowing shared use of radio frequency spectrum when interference can be eliminated or reduced to acceptable levels as determined by the Authority;

(c) give high priority to applications for radio frequency spectrum where the applicant proposes to utilise digital electronic communications facilities for the provision of broadcasting services, electronic communications services, electronic communications network services, and other services licensed in terms of this Act or provided in terms of a licence exemption; and

**[(d) plan for the conversion of analogue uses of the radio frequency spectrum to digital, including the migration to digital broadcasting in the Authority’s preparation and modification of the radio frequency spectrum plan; and]**

(e) give due regard to the radio frequency spectrum allocated to security services.”.

#### **Amendment of section 31 of Act 36 of 2005**

Section 31 of the principal Act is hereby amended –

(a) by the substitution for subsection 2 of the following subsection:

“(2) A radio frequency spectrum licence is required in addition to any service licence contemplated in Chapter 3, where the provision of such service entails the use of radio frequency spectrum and a service licence is required in addition to any radio frequency spectrum licence where the provision of such service entails the use of radio frequency spectrum.”;

(b) by the substitution for subsection 3 of the following subsection:

“(3) The Authority may, taking into account the objects of **[the] this** Act, prescribe procedures and criteria for –

**(a) [awarding] radio frequency spectrum licences [for competing applications or] in** instances where there is insufficient spectrum available to accommodate demand; and

(b) the amendment, transfer, transfer of control, renewal, suspension, cancellation, and withdrawal of radio frequency spectrum licences.”.

#### **Amendment of section 33 of Act 36 of 2005**

Section 33 of the principal Act is hereby amended by the insertion after subsection (3) of the following subsections:



“(4) The Minister is responsible for all international radio frequency spectrum matters pertaining to South Africa, including Regional and sub-Regional spectrum planning, all matters concerning international harmful interference and international frequency co-ordination.

(5) The Minister is responsible for the co-ordination and approval of any Regional radio frequency spectrum plans applicable to South Africa.”.

**Amendment of section 34 of Act 36 of 2005**

Section 34 of the principal Act is hereby amended -

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) the international **[allotment]** allocation of radio frequency spectrum; and”;

(b) by the substitution for subsection (2) of the following subsection:

“(2) The Minister **[must approve]** is responsible for the development of the national radio frequency plan [developed by the Authority], after consultation with the Authority, which must set out the specific frequency bands designated for use by particular types of services, taking into account the radio frequency spectrum bands allocated to the security services.”;

(c) by the deletion of subsections (4);

(d) by the substitution for subsection (7) of the following subsection:

“(7) In preparing the national radio frequency plan as contemplated in subsection **[(4)] (2)**, the **[Authority] Minister** must—

(a) take into account the ITU’s international spectrum **[allotments] allocations** for radio frequency spectrum use, in so far as ITU allocations have been adopted or agreed upon by the Republic, and give due regard to the reports of experts in the field of spectrum or radio frequency planning and to internationally accepted methods for preparing such plans;

(b) take into account existing uses of the radio frequency spectrum and any radio frequency band plans in existence or in the course of preparation; and

(c) **[consult with the Minister to] duly—**

(i) incorporate the radio frequency spectrum allocated **[by the Minister]** for the exclusive use of the security services into the national radio frequency plan; and

(ii) take account of the government’s current and planned uses of the radio frequency spectrum, including but not limited to, civil aviation, aeronautical services and scientific research[; and

(iii) **co-ordinate a plan for migration of existing users, as applicable, to make available radio frequency spectrum to satisfy the**

requirements of subsection (2) and the objects of this Act and of the related legislation].”;

(e) by the insertion of the following subsection after subsection (7):

“(7A) The Authority must co-ordinate a plan for migration of existing users, as applicable, to make available radio frequency spectrum to satisfy the requirements of subsection (2) and the objects of this Act and of the related legislation.”;

(f) by the substitution for subsection (8) of the following subsection:

“(8) The **[Authority] Minister** must give notice of **[its] his or her** intention to prepare a national radio frequency plan in the Gazette and in such notice invite interested parties to submit their written representations **[to the Authority]** within such period as may be specified in such notice.”;

(g) by the substitution for subsection (9) of the following subsection:

“(9) The **[Authority] Minister** may, after the period referred to in subsection (8) has passed, hold a hearing in respect of the proposed national radio frequency plan.”;

(h) by the substitution for subsection (10) of the following subsection:

“(10) After the hearing, if any, and after due consideration of any written representations received in response to the notice mentioned in subsection (8) or tendered at the hearing, **[the Authority must forward the national radio frequency plan to the Minister for approval] the Minister must publish the plan in the Gazette.**”;

(i) by the deletion of subsections (11), (12), (13), (14) and (15).

#### **Insertion of section 34A in Act 36 of 2005**

The following section is hereby inserted in the principal Act after section 34:

**“34A. National Radio Frequency Management Committee.—(1) The Minister must appoint a National Radio Frequency Management Committee to advise him or her on –**

**(a) matters relevant to the radio frequency spectrum;**

**(b) the management of the Republic’s use of the radio frequency spectrum; and**

**(c) any other function of the Minister in respect of the radio frequency spectrum under this Act.**

**(2) The Committee shall be made up of representatives from relevant government departments identified by the Minister and one or more representatives of the Authority.**

(3) The terms and conditions of allowances, if any, composition and meetings applicable to the Committee by virtue of its appointment in terms of subsection (1) must be as determined by the Minister in concurrence with the Minister of Finance.

(4) The Department must provide secretarial services to the Committee.”.

**Amendment of section 35 of Act 36 of 2005**

Section 35 of the principal Act is hereby amended –

(a) by the substitution for the heading of the following heading:

“35. **[Approval of type]** Type approval.—”;

(b) by the substitution for subsection 1 of the following subsection:

“(1) No person may possess, use, supply, sell, offer for sale or lease or hire any type of electronic communications equipment or electronic communications facility, including radio apparatus, used or to be used in connection with the provision of electronic communications, unless such equipment, electronic communications facility or radio apparatus has, subject to subsection (2), been approved by the Authority.”.

**Amendment of section 37 of Act 36 of 2005**

Section 37 of the principal Act is hereby amended –

(a) by the substitution in subsection (3) for paragraph (a) of the following paragraph:

“(a) is technically and **[financially]** economically feasible; and”.

(b) by the substitution for subsection (6) of the following subsection:

“(6) The interconnection agreement entered into by a licensee in terms of subsection (1) must, unless otherwise requested by the party seeking interconnection, be non-discriminatory as among comparable types of interconnection and not be of a lower technical standard and quality than the technical standard and quality provided by such licensee to itself or to an affiliate or in any other way discriminatory compared to the comparable network services provided by such licensees to itself or an affiliate.”.

**Amendment of section 38 of Act 36 of 2005**

Section 38 of the principal Act is hereby amended –

(a) by the substitution for subsection (1) of the following subsection:

“(1) The Authority must prescribe regulations to facilitate the conclusion of interconnection agreements by stipulating interconnection agreement principles. The regulations may include any regulations referred to in sections 39 and 41.”;

(b) by the substitution in subsection (3) for paragraph (k) of the following paragraph:

“(k) the requirement that a licensee negotiate and enter into an interconnection agreement with an applicant for an individual licence or registrant of a class licence; and”;

(c) by the substitution for subsection (5) of the following subsection:

“(5) The interconnection regulations may exempt (in whole or in part) licensees from the obligation to interconnect under section 37 (1) **[where the Authority has not found such licensees to have significant market power in the relevant market or market segment in terms of Chapter 10].**”;

(d) by the substitution for subsection (6) of the following subsection:

“(6) Where a licensee is exempt from the obligation to interconnect in terms of subsection (5) and such exempted licensee enters into an interconnection agreement with another exempted licensee, or a person providing services pursuant to a licence exemption, sections 37 (6) and **[39 (3) and (4)]** 39 (2) and (7) do not apply to such an interconnection agreement.”.

#### **Amendment of section 39 of Act 36 of 2005**

Section 39 of the principal Act is hereby amended by the substitution for the following section:

**“39. Filing of interconnection agreements.—**(1) An interconnection agreement must be in writing and must be submitted to the Authority.

**[(4)] (2)** The Authority—

**(a)** may review a proposed interconnection agreement at the request of any party to the agreement, at any time prior to its submission in terms of subsection (1); and

**(b)** must review an interconnection agreement submitted in terms of subsection (1),

to determine whether the agreement is consistent with the regulations prescribed.

**[(5)] (3)** Where the Authority determines that any term or condition of an interconnection agreement is not consistent with the regulations, the Authority must in writing—

**(a)** notify the parties of the non-complying terms and conditions; and

**(b)** direct the parties to agree on new terms and conditions consistent with the regulations.

**[(6)] (4)** The parties must, upon reaching agreement and amending the non-complying terms and conditions of the interconnection agreement, submit the amended agreement to the Authority for consideration and review.

**[(7)] (5)** The provisions of subsections **[(4)] (2)** and **[(5)] (3)** apply, with the necessary changes, to the consideration and review of the amended agreement by the Authority.

**[(2)] (6)** An interconnection agreement becomes effective and enforceable upon filing with the Authority in the prescribed manner, unless—

(a) an order of a court of competent jurisdiction is granted against such agreement; or

(b) the Authority provides the parties with written notice of non-compliance in terms of subsection **[(5)] (3)**.

**[(3)] (7)** The Authority must, at the request of any person and on payment of such fee as may be prescribed, furnish that person with a copy of any interconnection agreement and the rates and charges contained in such agreement.”.

#### **Amendment of section 41 of Act 36 of 2005**

Section 41 of the principal Act is hereby amended by the substitution for the following section:

“The Authority may prescribe regulations establishing a framework of wholesale interconnection rates to be charged for interconnection services or for specified types of interconnection and associated interconnection services **[taking into account the provisions of Chapter 10]**.”.

#### **Amendment of section 42 of Act 36 of 2005**

Section 42 of the principal Act is hereby amended by the substitution for the first sentence in subsection 2 of the following sentence:

“(2) The framework contemplated in subsection (1) (b) must **[be in force not later than 1 July 2006 and]** ensure that—”.

#### **Amendment of section 43 of Act 36 of 2005**

Section 43 of the principal Act is hereby amended –

(a) by the substitution in subsection (4) for paragraph (a) of the following paragraph:

“(a) is technically and **[financially]** economically feasible; and”.

(b) by the substitution for subsection (7) of the following subsection:

“(7) The lease of electronic communications facilities by an electronic communications network service licensee in terms of subsection (1) must, unless otherwise requested by the leasing party, be non-discriminatory as among comparable types of electronic communications facilities being leased and not be of a lower technical standard and quality than the technical standard and quality provided by such electronic communications network service licensee to itself or to an affiliate or in any other way discriminatory compared to the comparable network services provided by such licensees to itself or an affiliate.”.

(c) by the insertion after subsection 8 of the following subsection:

"(8A) Requests for essential facilities are deemed to be reasonable and all electronic communications network services licensees receiving such requests are required to agree on non-discriminatory terms and conditions of a facilities leasing agreement within ten days of receiving the request, failing which the Authority will impose terms and conditions consistent with this Chapter within five days of receiving notification that the licensee has failed to conclude an agreement."

(d) by the substitution for subsection (11) of the following subsection:

"(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] three years after the commencement of this Act."

#### **Amendment of section 44 of Act 36 of 2005**

Section 44 of the principal Act is hereby amended –

(a) by the substitution for subsection (5) of the following subsection:

"(5) The electronic communications facilities leasing regulations may exempt (in whole or in part) electronic communications network service licensees from the obligation to lease electronic communications facilities in terms of section 43 (1) **[where the Authority has not found, in terms of Chapter 10, such electronic communications network service licensees to have significant market power in the relevant market or market segment].**";

(b) by the substitution for subsection (6) of the following subsection:

"(6) Where a licensee is exempt from the obligation to lease electronic communications facilities in terms of subsection (5) and such exempted licensee enters into a electronic communications facilities leasing agreement with another exempted licensee, or a person providing services pursuant to a licence exemption, section 43 (7) and section **[45 (3) and (4)]** 45 (2) and (7) do not apply to any such electronic communications facilities leasing agreement."

#### **Amendment of section 45 of Act 36 of 2005**

Section 45 of the principal Act is hereby amended by the substitution for the following section:

**"45. Filing of electronic communications facilities leasing agreements.—**(1) An electronic communications facilities leasing agreement must be in writing and must be submitted to the Authority.

**[(5)] (2)** The Authority-

(a) may review a proposed electronic communications facilities leasing agreement at the request of any party to the agreement, at any time prior to its submission in terms of subsection (1); and

(b) must review an electronic communications facilities leasing **[agreements] agreement** submitted in terms of subsection (1), to determine whether **[such] the [agreements are] agreement is** consistent with the regulations prescribed.

**[(6)] (3)** Where the Authority determines that any term or condition of an electronic communications facilities leasing agreement is not consistent with the regulations, the Authority must in writing—

(a) notify the parties of the non-complying terms and conditions; and

(b) direct the parties to agree on new terms and conditions consistent with the regulations.

**[(7)] (4)** The parties must, upon reaching agreement and amending the non-complying terms and conditions of the electronic communications facilities leasing agreement, submit the amended agreement to the Authority for consideration and review.

**[(8)] (5)** The provisions of subsections **[(5) and (6)] (2) and (3)** apply, with the necessary changes, to such consideration and review of the amended agreement by the Authority.

**[(2)] (6)** Electronic communications facilities leasing agreements are effective and enforceable upon being filed with the Authority in the prescribed manner unless an order of a court of competent jurisdiction is granted against such agreement or the Authority provides the parties with written notice of non-compliance in terms of subsection **[(6)] (3)**.

**[(3) The Authority must publish electronic communications facilities leasing agreements submitted in terms of subsection (1).]**

**[(4)] (7)** The Authority must, at the request of any person and on payment of such fee as may be prescribed, furnish that person with a copy of any electronic communications facilities leasing agreement.”.

#### **Amendment of section 47 of Act 36 of 2005**

Section 47 of the principal Act is hereby amended by the substitution for the following section:

“The Authority may prescribe regulations establishing a framework for the establishment and implementation of wholesale rates applicable to specified types of electronic communication facilities and associated services **[taking into account the provisions of Chapter 10]**.”.

#### **Substitution of section 55 of Act 36 of 2005**

The following section is hereby substituted for section 55 of the principal Act:

“55. Control over advertisements.—(1) All broadcasting service licensees must adhere to the Code of Advertising Practice (in this section referred to as the Code) as from time to time determined and administered by the Advertising Standards Authority of South Africa and any advertising regulations prescribed by the Authority in respect of scheduling of adverts, infomercials and programme sponsorships.

(2) The Complaints and Compliance Committee must adjudicate complaints concerning alleged breaches of the Code by broadcasting service licensees who are not members of the Advertising Standards Authority of South Africa,

in accordance with section 17C of the ICASA Act as well as complaints concerning alleged breaches of the advertising regulations.

(2A) Where the Advertising Standards Authority of South Africa has adjudicated any complaint against a broadcasting service licensee who is a member thereof, that body shall forward a certified copy of the record of such adjudication and of its finding to the Complaints and Compliance Committee.

(2B) A finding forwarded to the Complaints and Compliance Committee as envisaged by subsection (2A) shall be dealt with by that body mutatis mutandis in accordance with the provisions of section 17D of the ICASA Act as if such finding was a finding made by itself in terms of section 17D(1) of the ICASA Act.

(3) Where a broadcasting licensee, irrespective of whether or not he or she is a member of the said Advertising Standards Authority of South Africa, is found to have breached the Code or advertising regulations, such broadcasting licensee must be dealt with in accordance with applicable provisions of the ICASA Act.”.

#### **Amendment of section 62 of Act 36 of 2005**

Section 62 of the principal Act is hereby amended

(a) by the insertion of the following subsection after subsection (2):

“(2A) The radio frequency spectrum in respect of a digital multi-channel distribution service should be assigned to an electronic communications network service licensee that provides broadcasting signal distribution in respect of such digital multi-channel distribution service, as contemplated under section 31(2).”;

(b) by the substitution for subsection 3 of the following subsection:

“(3) A common carrier must—

(a) **[subject to its technological capacity to do so and to the provisions of paragraph (b),]** provide broadcasting signal distribution to broadcasting licensees upon their request and in accordance with the national radio frequency plan contemplated in section 34, on an equitable, reasonable, non-preferential and non-discriminatory basis;

(b) submit its tariffs annually on a date determined by the Authority, for approval by the Authority, which tariffs must comply with any tariffs or other conditions prescribed and must [in determining its tariffs,] duly take into account the following:

(i) the different categories of broadcasting service licenses referred to in sections 49, 50 and 51; and

(ii) the nature and technical parameters of the service provided to each broadcasting licensee with a view to ensuring that the different tariffs are appropriate to and commensurate with the various broadcasting services to which they relate;

(c) carry public broadcasting services, including educational, commercial and community services and shall be deemed the electronic communications network service licensee that provides signal distribution for public broadcasting services.”.



**Amendment of section 67 of Act 36 of 2005**

Section 67 of the principal Act is amended –

(a) by the deletion of subsections (1) to (3);

(b) by the substitution for subsection (4) of the following subsection:

“(4) The Authority must prescribe regulations **[defining the] determining** relevant markets and market segments**[, as applicable, that pro-competitive conditions may be imposed upon licensees having significant market power where the Authority determines such markets or market segments have]** where there is ineffective competition, and whether any licensee has significant market power in such markets or market segments, and if so, imposing appropriate and sufficient pro-competitive licence conditions on such licensees. The regulations must, among other things—

(a) **[define and identify the retail or] determine relevant** wholesale and retail markets or market segments **[in which it intends to impose pro-competitive measures in cases where such markets are found to have ineffective competition];**

(b) **[set out the methodology to be used to determine the effectiveness of] determine whether there is effective** competition in **[such] those relevant markets [or] and** market segments**[, taking into account subsection (8)];**

(c) **[set out the pro-competitive measures the Authority may impose in order to remedy the perceived market failure in the] determine** which, if any, licensees have significant market power in those markets **[or] and** market segments **[found to have] where there is** ineffective competition **[taking into account subsection (7)];**

(d) **[declare licensees in the relevant market or market segments, as applicable, that have significant market power, as determined in accordance with subsection (6), and the] impose** appropriate pro-competitive licence conditions **[applicable to each such licensee] on those licensees having significant market power to sufficiently remedy the market failure.];**

(e) set out a schedule in terms of which the Authority will undertake periodic review of the markets and market segments, taking into account subsection (9) and the determination in respect of the effectiveness of competition and application of pro-competitive measures in those markets; and

(f) provide for monitoring and investigation of anti-competitive behaviour in the relevant market and market segments.];”;

(c) by the insertion after subsection 4 of the following subsections:

“(4A) When determining whether there is effective competition in markets and market segments, the Authority must consider, among other things, the non-transitory (structural, legal, and regulatory) entry barriers to the applicable markets or market segments and the dynamic character and functioning of the

markets or market segments, including an assessment of relative market share of the various licensees or providers of exempt services, in the markets or market segments, and a forward looking assessment of the relative market power of the licensees in the markets or market segments.

(4B) Licensees must provide to the Authority any information specified by the Authority in order that the Authority may carry out its duties in terms of this section.”;

(d) by the substitution for subsection (5) of the following subsection:

“(5) A licensee has significant market power **[with regard to the relevant] in a market or market segment [where the Authority finds that the particular individual licensee or class] if that licensee—**

- (a) is dominant;
- (b) has control of an essential **[facilities] facility**; or
- (c) has a vertical relationship that the Authority determines could harm competition **[in the market or market segments applicable to the particular category of licence].”;**

(e) by the deletion of subsection (6);

(f) by the substitution for subsection (7) of the following subsection:

“(7) Pro-competitive licence terms and conditions may include but are not limited to—

**[(a) an obligation to act fairly and reasonably in the way in which the licensee responds to requests for access, provisioning of services, interconnection and facilities leasing;**

**(b) a requirement that the obligations contained in the licence terms and pro-competitive conditions must be complied with within the periods and at the times required by or under such terms and conditions, failing which a penalty may be imposed;**

**(c) a prohibition against discriminating in relation to matters connected with access, provisioning of services, interconnection and facilities leasing;**

**(d) an obligation requiring the licensee to publish, in such manner as the Authority may direct, all such information for the purpose of ensuring transparency in relation to—**

- (i) access, interconnection and facilities leasing; or**
- (ii) the provision of electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue;**

**(e) an obligation to publish, in such manner as the Authority may direct, the terms and conditions for—**

- (i) access, interconnection and facilities leasing; or**
- (ii) the provision of electronic communications network services, electronic communications services or any other service**

offered by the licensee applicable to the relevant market or market segments at issue which may take the form of a reference offer;

(f) an obligation to maintain a separation for accounting purposes between different matters relating to—

(i) access, interconnection and facilities leasing;

(ii) the provision of electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue; and

(iii) retail and wholesale prices;

(g) a requirement relating to the accounting methods to be used in maintaining the separation of accounts referred to in paragraph (f);

(h) such price controls, including requirements relating to the provision of wholesale and retail prices in relation to matters connected with the provision of—

(i) access, interconnection and facilities leasing; or

(ii) electronic communications network services, electronic communications services or any other service offered by the licensee applicable to the relevant market or market segments at issue;

(i) matters relating to the recovery of costs and cost orientation and with regard to broadcasting services, the appropriate amount of South African programming, including—

(i) music content;

(ii) news and information programmes; and

(iii) where appropriate, programming of local or regional significance;

(j) matters relating to the accounts, records and other documents to be kept and made available for inspection by the Authority.]

(a) obligations in respect of interconnection and facilities leasing in addition to those imposed by chapters 7 and 8 and any regulations made in terms thereof;

(b) penalties for failure to abide by the pro-competitive licence conditions;

(c) obligations to publish any information specified by the Authority;

(d) obligations to maintain separate accounting for any services specified by the Authority;

(e) obligations to maintain structural separation for the provision of any services specified by the Authority;

(f) rate regulation, including without limitation price controls on wholesale and retail rates, as determined by the Authority, in addition to that imposed by Chapters 7 and 8 and any regulations made in terms thereof, including matters relating to the recovery of costs; and

(g) obligations relating to accounts, records and other documents to be kept, provided to the Authority, and published.”

**Amendment of section 68 of Act 36 of 2005**

Section 68 of the principal Act is hereby amended by the substitution for the first sentence in paragraph (b) of subsection 1 of the following sentence:

“(b) measures to ensure that number portability is introduced [in 2005 or soon thereafter, as far as is practicably possible,] including—”.

**Amendment of section 72 of Act 36 of 2005**

Section 72 of the principal Act is amended -

(a) by the substitution for subsection (6) of the following subsection:

“(6) The Authority must allocate a four-digit number through which the public can access government directory, information and related services at the centre free of charge.”;

(b) by the substitution for subsection (7) of the following subsection:

“(7) [The cost of providing the government directory information service] Electronic communications service and electronic communications network service licensees that carry communications to the centre may not levy any charge on the caller for placing calls to the centre since such costs must be borne by the licensee.”.

**Insertion of section 72A in Act 36 of 2005**

The following section is hereby inserted in the principal Act after section 72:

**“72A. Broadband Inter-Governmental Implementation Committee.—**

(1) The Minister must establish a Broadband Inter-Governmental Implementation Committee, incorporating all spheres of Government, to perform the functions in subsection (3).

(2) The terms and conditions of appointment including allowances, composition and meetings applicable to the Committee by virtue of its appointment in terms of subsection (1) must be as determined by the Minister.

(3) The Committee must advise the Minister on broadband policy and implementation and must perform the following functions:

(a) Coordinate overall broadband implementation by government at national, provincial and local government levels;

(b) facilitate the monitoring and measurement of broadband penetration in South Africa;

(c) develop a broadband implementation plan that supports the Broadband Policy for South Africa (Government Notice No. 617 of 2010, published in Gazette No. 33377 of 13 July 2010), which plan must include, without limitation, skills development, research and development and broadband priority areas;

(d) identify mechanisms to realise the potential benefits of broadband;

(e) advise the Minister and the Minister of Finance on government investment in electronic communications facilities and networks that contribute to broadband on national, provincial and local government levels to avoid unnecessary duplication;

- (f) recommend measures to increase uptake and usage of broadband as well as enhance public awareness on the benefits of broadband; and  
(g) annually survey and evaluate the status of broadband penetration in the Republic including, without limitation, household broadband penetration, electronic communications network connectivity to municipalities and broadband providers."

#### **Amendment of section 73 of Act 36 of 2005**

The following section is hereby substituted for section 73 of the principal Act:

**"73. E-rate.**—(1) Internet services, provided to all public schools as defined in the South African Schools Act, 1996 (Act No. 84 of 1996), and all public further education and training institutions as defined in the Further Education and Training Act, 1998 (Act No. 98 of 1998), must be provided at a minimum discounted rate of 50% off the total charge levied by the electronic communications service licensee providing Internet services to such institutions.

(2) The discount is applicable ~~[of]~~ to the total charge levied by the electronic communications service licensee which includes but is not limited to the following:

- (a) Any connectivity charges for access to the Internet;
- (b) charges for any equipment used for or in association with connectivity to the Internet; and
- (c) ~~[all calls made to an Internet Service Provider]~~ all call charges for access to the Internet.

(3) Where the electronic communications service licensee, who provides Internet services to the institutions as contemplated in subsection (1), obtains its electronic communications facilities for the provision of Internet services from a electronic communications network service licensee, the licensee is entitled to a minimum of 50% off the retail rate charged to it by the electronic communications network service licensee for the facilities in question.

(4) The implementation of this section must be in the manner prescribed.

(5) The Minister may, in consultation with the ~~[Minister]~~ Ministers responsible for ~~[Education]~~ Basic Education and Higher Education & Training respectively, declare categories of independent schools or private further education and training institutions to be entitled to the discount mentioned in subsection (1).

(6) The Agency may pay the charge contemplated in subsection (1) on behalf of any public school or public further education and training institution contemplated in subsection (1), or any independent school or private further education and training institution contemplated in subsection (5), in which event the Agency will be entitled to the discount mentioned in subsection (1)."

#### **Insertion of section 79A in Act 36 of 2005**

The following section is hereby inserted in the principal Act after section 79:

**"79A. Limitation of liability.**—No person in the employ of the 112 Emergency Centre, including the State, shall be liable for any damage or loss suffered by any person in consequence of any act which in good faith was performed or omitted in the performance of any function in terms of this Act."

**Insertion of section 79B in Act 36 of 2005**

The following section is hereby inserted in the principal Act after section 79A:

**“79B. Provision of information.—(1) The Minister may, in writing, require the Authority or the Agency, or any other person to provide, within a reasonable time or on a regular basis, any data, information or documents to the Minister that are required for the purposes of the performance of the functions of the Minister.**

**(2) A notice under subsection (1) may also indicate the manner in which the information must be furnished and, if required, how the information must be verified.**

**(3) Any information requested by the Minister, determined to be confidential by the Authority under section 4D of the ICASA Act, 2000, must be treated confidentially by the Minister.”.**

**Amendment of section 82 of Act 36 of 2005**

Section 82 of the principal Act is hereby amended by the substitution in subsection 3 for paragraph (a) of the following paragraph:

“(a) The Agency must from time to time, with due regard to circumstances and attitudes prevailing in the Republic and after obtaining public participation to the greatest degree practicable, make recommendations to enable the Minister to determine what constitutes—

(i) universal access **[by all areas and communities in the Republic to electronic communications services and electronic communications network services];** and

(ii) **[the universal provision for all persons in the Republic of electronic communications services and access to electronic communications networks, including any elements or attributes thereof] universal service.”.**

**Deletion of sections 92 to 93 of Act 36 of 2005**

Sections 92 to 93 of the principal Act are hereby deleted.

**Amendment of section 95 of Act 36 of 2005**

Section 95 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

**“(1) [Within twenty-four months of the coming into force of this Act,] [t]he Authority may, if the Authority considers it necessary, repeal or amend [the] existing regulations [made under—**

- (a) section 119A of the Post Office Act, 1958 (Act No. 44 of 1958);**
- (b) the Telecommunications Act;**
- (c) the Broadcasting Act;**
- (d) the IBA Act;**
- (e) the Radio Act, 1952 (Act No. 3 of 1952); and**

(f) **the Sentech Act,]**  
which were in force immediately prior to the commencement of this Act.”.

**Short title**

This Act is called the Electronic Communications Amendment Act, 2011.

## **MEMORANDUM ON THE OBJECTS OF THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL, 2011**

### **1. BACKGROUND AND OBJECTS**

The object of the Bill is to amend the Electronic Communications Act, 2005, in order to clarify and strengthen the role, powers and functions of the Minister and the Authority; to improve turn-around times for consultative processes; to make provision for policy on ownership and control; to revise the role of the Minister and the Authority in respect of frequency spectrum management; to refine licensing issues; to improve the competition provisions; to remove regulatory bottlenecks; and to provide for matters connected therewith.

### **2. PROVISIONS OF BILL**

#### **Amendment of section 1 of Act 36 of 2005**

This clause seeks to amend the definitions of the Act as follows:

A definition is inserted for "broadband"; the definition of "broadcasting service radio frequency bands" is amended to refer to the ITU table of allocation as opposed to allotment; common carrier is redefined to refer to Sentech Limited, a public company established in terms of the Sentech Act, 1996 (Act No. 63 of 1996); the definitions for "community" and "community broadcasting service" are redefined to limit the service to a geographically defined community; the definition of "end-user" is amended so that it is defined in relation to not only licensees, but also those exempt from licensing; the definition of "electronic communications service licensee" is amended to include reference to section 5(4); "Historically disadvantaged person" is defined and references to historically disadvantages groups in sections 9(2)(b) and 13(3)(a) changed accordingly to ensure consistency; the definitions for "ICT Charter", "existing licences" and "transition period" are deleted since they have become redundant; the definition of "ITU" is corrected to reflect the correct name; the definition of "licensee" is substituted to include radio frequency spectrum licensees; the definition of "public entity" is deleted since it is not required anymore following the proposed deletion of section 3(1A); the definition of "radio frequency plan" is amended to provide the correct terminology since it should refer to ITU table of allocations and not allotments; the definition of "radio frequency spectrum" is substituted to include broadcasting in addition to electronic communications; the definition of "radio station" is substituted to include broadcasting in addition to electronic communications; the definition of "registered political party" is substituted with "political party" since only the latter term is used in the Act; the definition of "reseller" is substituted to correct the language; the definition of "service charter" is substituted to add 'end-users' to 'subscribers' for consistency with the text in the Act; the definition of "universal service" is substituted to clarify that it applies to electronic communications network services.

#### **Amendment of section 2 of Act 36 of 2005**

This clause seeks to amend section 2(b) to narrow the meaning of the obligation to create a technologically neutral licensing framework.



**Amendment of section 3 of Act 36 of 2005**

This clause seeks to amend section 3(1) by adding a new paragraph on ownership and control of individual licences to the policy making categories; it further seeks to delete section 3(1A) since it is redundant; this clause further amends section 3(2) to enable the Minister to issue policy directions to the Universal Service and Access Agency of South Africa; it further seeks to broaden the scope of policy directions that may be issued; it seeks to amend section 3(4) to include the Universal Service and Access Agency of South Africa and to make it clear that ICASA must regulate the industry in accordance with policy and policy directions made by the Minister; it further amends section 3(5) to include the Universal Service and Access Agency of South Africa and to amend the consultative period to 30 calendar days; it further seeks to add a new subsection to enable deviation from the Promotion of Administrative Justice Act, 2000 by the Minister when reasonable and justifiable.

**Amendment of section 4 of Act 36 of 2005**

This clause seeks to amend section 4(1)(d) to amend ICASA's power to make regulations from 'control' of the radio frequency spectrum, to 'use' of the radio frequency spectrum; it further seeks to amend section 4(3) to create more latitude for ICASA regarding the imposition of fines; this clause amends sections 4(4) and (5) to amend the consultative period to 30 calendar days and to require that a copy of the proposed regulations be made available to the Minister 30 calendar days before such regulations are made; it further seeks to add a new subsection to enable deviation from the Promotion of Administrative Justice Act, 2000 by ICASA when reasonable and justifiable.

**Amendment of section 5 of Act 36 of 2005**

This clause seeks to amend section 5(3)(b) by replacing 'regional' with 'provincial' to provide more certainty; it seeks to amend section 5(3)(c) to better describe the types of electronic communications services that require an individual licence; it further seeks to delete section 5(3)(d) since it is not required; this clause amends section 5(5)(b) to distinguish between 'community broadcasting' and 'low power services' that are two distinct categories; it seeks to insert a new section 5(5)(c) to ensure that the same distinction that applies between individual and class electronic communications network services should also apply to electronic communications services using scope and coverage; it further adds a new paragraph 5(8A) to ensure that applicants for licence exemption must be South African similar to other licence applicants; and it seeks to amend section 5(9)(b) by removing the reference to ICT Charter.

**Amendment of section 6 of Act 36 of 2005**

This clause seeks to delete all references to spectrum licence exemptions.

**Amendment of section 8 of Act 36 of 2005**

This clause seeks to amend section 8(2) to clarify that the standard terms in licences may concern and not just take into account certain listed matters. It further seeks to clarify that ICASA may impose additional licence terms and conditions. It also seeks to make it clear that ICASA may impose licence

terms and conditions on designated licensees relating to universal access and universal service.

**Amendment of section 9 of Act 36 of 2005**

This clause seeks to amend section 9(1) by removing the requirement for an ITA before application can be made for individual ECS and ECNS licenses. It further seeks to replace the reference to historically disadvantaged groups with persons in section 9(2)(b). It also contains consequential amendments following the amendment of sections 8(3) and (4).

**Amendment of section 10 of Act 36 of 2005**

This clause seeks to amend section 10(1)(h) to remove ambiguity and to clarify that licence amendment is not only possible after the Chapter 10 regulations have been made.

**Amendment of section 13 of Act 36 of 2005**

This clause seeks to ensure that the transfers of control of individual licences require the prior approval of ICASA.

**Insertion of section 13A in Act 36 of 2005**

This clause seeks to empower ICASA to impose limitations on ownership and control even outside the context of a transfer application.

**Amendment of section 16 of Act 36 of 2005**

This clause seeks to change the requirement that ICASA grants class licences as the intention is mere registration; it limits the number of class licences to two; it enables ICASA to prescribe the intervals at which registrations may be submitted and allows the transfer of a class licence upon notification to ICASA.

**Amendment of section 17 of Act 36 of 2005**

This clause seeks to simplify the class licence registration process and turn-around time and includes consequential amendments following the amendment of section 16.

**Amendment of section 20 of Act 36 of 2005**

This clause seeks to limit the application of Chapter 4 to specific electronic communications network service licensees as prescribed by the Authority since it is currently impractical; it also seeks to make better provision for the regulation of electronic communications network service licensees that exercise any rights and obligations under this Chapter.

**Amendment of section 21 of Act 36 of 2005**

This clause seeks to remove the uncertainty on the status of guidelines by replacing it with policy and policy directions, followed by regulations prescribed by ICASA and corrects the names of relevant Ministries.

**Amendment of section 30, 31, 33, 34 of Act 36 of 2005**

This clause seeks to bring the radio frequency spectrum issues in Chapter 5 of the Act in line with the National Radio Frequency Spectrum Policy

approved by Cabinet on 10 March 2010, corrects certain terminology and clarifies the responsibilities of the Minister and ICASA respectively.

**Amendment of section 31 of Act 36 of 2005**

This clause seeks to ensure that a service licence is required in addition to any radio frequency spectrum licence where the provision of such service entails the use of radio frequency spectrum; it further seeks to enable ICASA to determine the procedure and criteria for all radio frequency spectrum applications and not only competing applications.

**Insertion of section 34A in Act 36 of 2005**

This clause seeks to introduce a National Radio Frequency Management Committee.

**Amendment of section 35 of Act 36 of 2005**

This clause seeks to close a loophole by requiring that persons possessing equipment and facilities must also obtain type approval from ICASA.

**Amendment of section 37 of Act 36 of 2005**

This clause seeks to redefine the reasonability of interconnection requests by changing the requirement for financial feasibility to economic feasibility that have wider application; it further seeks to ensure that interconnection agreements are not in any way discriminatory compared to the comparable network services provided by a licensee to itself or an affiliate.

**Amendment of section 38 of Act 36 of 2005**

This clause seeks to add a reference to section 41 that is about the wholesale interconnection rate regulations, that could now form part of the main interconnection regulations under section 38; it also enables class licensees to enter into interconnection agreements; it further seeks to ensure that ICASA can regulate interconnection and facilities leasing regardless of what it does or does not do in terms of Chapter 10 of the ECA; it further seeks to make consequential amendments by changing cross-references to section 39 following changes to the sequence of subsections.

**Amendment of section 39 of Act 36 of 2005**

This clause seeks to amend the sequence of the subsections to ensure that the processes are in correct order; it further seeks to permit the review of interconnection agreements even before formally concluded and filed.

**Amendment of section 41 of Act 36 of 2005**

This clause seeks to ensure that ICASA may prescribe a framework of wholesale interconnection rates regardless of what it does or does not do in terms of Chapter 10 of the ECA.

**Amendment of section 42 of Act 36 of 2005**

This clause seeks to delete the timeframe that is now irrelevant.

**Amendment of section 43 of Act 36 of 2005**

This clause seeks to redefine the reasonability of facilities leasing requests by changing the requirement for financial feasibility to economic feasibility that have wider application; it further seeks to ensure that facilities leasing agreements are not in any way discriminatory compared to the comparable network services provided by a licensee to itself or an affiliate; it further seeks to provide clarity on how essential facilities are to be treated and provided without delay and to enable ICASA to act swiftly in terms of this provision, which is essential to the implementation of a non-discriminatory access regime; it further seeks to nullify exclusivity provisions contained in any agreement or other arrangement that is prohibited under subsection (10) three years after the commencement of this Act.

**Amendment of section 44 of Act 36 of 2005**

This clause seeks to ensure that ICASA can regulate facilities leasing regardless of what it does or does not do in terms of Chapter 10 of the ECA; it further seeks to make consequential amendments by changing cross-references to section 45 following changes to the sequence of subsections.

**Amendment of section 45 of Act 36 of 2005**

This clause seeks to amend the sequence of the subsections to ensure that the processes are in correct order; it further seeks to permit the review of facilities leasing agreements even before formally concluded and filed.

**Amendment of section 47 of Act 36 of 2005**

This clause seeks to enable ICASA to regulate wholesale rates applicable to specified types of electronic communication facilities regardless of what it does or does not do in terms of Chapter 10 of the ECA.

**Substitution of section 55 of Act 36 of 2005**

This clause seeks to ensure that ICASA may regulate scheduling of adverts, infomercials and programme sponsorships.

**Amendment of section 62 of Act 36 of 2005**

This clause seeks to provide that Sentech is the common carrier; it further seeks to clarify that radio frequency should be assigned to the ECNS licensee that performs the signal distribution; it seeks to ensure that the common carrier provides signal distribution in accordance with the national radio frequency plan and submits tariffs for approval.

**Amendment of section 67 of Act 36 of 2005**

This clause seeks to delete subsections (1) to (3) to ensure a clear demarcation between ex-ante regulation, being the preserve of ICASA and ex-post regulation, being within the Competition Commission's domain; it further seeks to rewrite subsections (4) to (7) to make it clear that will assist ICASA in implementing the competition matters regulatory regime set out in Chapter 10.

**Amendment of section 68 of Act 36 of 2005**

This clause seeks to remove a redundant timeframe.

**Amendment of section 72 of Act 36 of 2005**

This clause seeks to ensure that the public can access government directory and information services free of charge to close a loophole in respect of the 1020 government call centre operated by the DPSSA.

**Insertion of section 72A in Act 36 of 2005**

This clause seeks to empower the Minister to establish a Broadband Inter-Governmental Implementation Committee as contemplated in the Broadband Policy for South Africa, *Government Gazette* 33377, 13 July 2010 to advise the Minister on broadband policy and implementation; it further describes the functions of the Committee.

**Amendment of section 73 of Act 36 of 2005**

This clause seeks to improve the wording of the e-rate provisions and ensure that Internet Service Providers are obliged to provide the required 50% discount to schools irrespective of whether the school or USAASA pays the charge.

**Insertion of section 79A in Act 36 of 2005**

This clause seeks to ensure that the State and persons employed at 112 Emergency Centres, do not attract liability when performing an act in good faith and in accordance with the law.

**Insertion of section 79B in Act 36 of 2005**

This clause seeks to enable access to information held by ICASA or USAASA for the purposes of the performance of the functions of the Minister.

**Amendment of section 82 of Act 36 of 2005**

This clause seeks to remove contradictions between section 82 and the definitions of universal access and service to ensure that broadcasting is also included.

**Deletion of sections 92 to 93 of Act 36 of 2005**

This clause seeks to delete sections 92 to 93 of the Act since license conversion is complete.

**Amendment of section 95 of Act 36 of 2005**

This clause seeks to enable ICASA to repeal or amend existing regulations under related legislation by removing the prohibitive time-frame.

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