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## GENERAL NOTICE ALGEMENE KENNISGEWING

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NOTICE 572 OF 2012

DEPARTMENT OF COMMUNICATIONS

### ELECTRONIC COMMUNICATIONS AMENDMENT BILL, 2012

I, Dina Pule, Minister of Communications, hereby publish the proposed Electronic Communications Amendment Bill, 2012.

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:  
Ms M Mphahlele  
The Chief Director: Economic Policy Development  
ICT Policy Development  
Department of Communications;  
Private Bag x860  
Pretoria  
0001;

or deliver to: First Floor, Block A3  
iParioli Office Park  
1166 Park Street  
Hatfield, Pretoria;

or email to: lerato@doc.gov.za

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

Please contact Ms. Lerato Monareng at (012) 427 8217 or Mr. Khayaletu Rutsha on (012) 427 8019 for any enquiries.



MS DINA PULE, MP  
MINISTER OF COMMUNICATIONS

DATE: 03 . 07 . 2012

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 2012)  
(The English text is the official text of the Bill)*

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(Minister of Communications)

**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 align the Act with broad-based black economic empowerment; to incorporate the Authority's recommendation on ownership and control of commercial broadcasting services; to introduce a Spectrum Management Agency and clarify the responsibilities of the Agency and the Authority in respect of frequency spectrum management; to refine licensing issues; to improve the competition provisions; to improve turn-around times for consultative processes; to improve the governance provisions of the Universal Service and Access Agency of South Africa; 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**

1. Section 1 of the principal Act is hereby amended-

(a) by the insertion of the following definitions after the definition of "Agency":

"allocation' (of a frequency band) means the entry in the Table of Frequency Allocations of a given frequency band for the purpose of its use by one or more terrestrial or space radio-communication services or the radio astronomy service under specified conditions. This term shall also be applied to the frequency band concerned;";

"assignment' (of a radio frequency or radio frequency channel) means authorization given by the Spectrum Management Agency or the Authority for a radio station to use a radio frequency or radio frequency channel under specified conditions;";

(b) 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;”;

(c) 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;”;

(d) 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;”;

(e) 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;”;

(f) 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;”;

(g) by the insertion of the following definition after the definition of "Complaints and Compliance Committee":

“control’ in sections 64 to 66 means the holding in a company, directly or indirectly, of issued share capital equal to or exceeding twenty-five percent of

the issued share capital in the company, irrespective of whether or not such issued share capital confers *de facto* control;”;

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

(i) by the substitution for the definition of “electronic communications facility” of the following definition:

“‘electronic communications facility’ includes but is not limited to any—

- (a) wire including wiring in multi-tenant buildings;
- (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, whether an active or passive

infrastructure component, 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;”;

(j) 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;”;

(k) 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);”

(l) by the deletion of the definitions for “existing licences” and “transition period”;

(m) by the substitution for the definition of “ITU” of the following definition:

“ITU’ means International Telecommunication[s] Union;”;

(n) 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 of this Act] service licence or radio frequency spectrum licence**;”;

(o) by the substitution for the definition of “radio frequency plan” of the following definition:

“radio frequency plan’ means **[a national plan] the national radio frequency plan contemplated in section 34** 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;”;

(p) 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;”;

(q) by the substitution for the definition of “radio frequency spectrum licence” of the following definition:

“radio frequency spectrum licence’ means a licence authorising the holder to provide services that require the use the radio frequency spectrum in terms of Chapter 5 of the Act;”;

(r) 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;”;

(s) 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;”;

(t) 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;”;

(u) 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;”;

(v) by the insertion of the following definition after the definition of “service charter”:

“‘service licence’ means a licence authorising the holder to provide services in terms of Chapter 3 of the Act;”

(w) by the insertion of the following definition after the definition of “sound broadcasting service”:

“‘Spectrum Management Agency’ means an Agency established in terms of legislation prepared for this purpose;”

(x) 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**

2. Section 2 of the principal Act is hereby amended –

(a) 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,";

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

"(h) promote **[the] broad-based black economic empowerment [of historically disadvantaged persons, including Black people]**, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities;".

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

3. 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 including foreign ownership and control of individual licences;"

(b) 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 or Agency's jurisdiction reasonably placed before it by the Minister for urgent consideration[.];

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

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

(c) 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 policies made by the Minister in terms of subsection (1) and policy directions issued by the Minister in terms of subsection (2).”;

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

“(5) When issuing a policy under subsection (1) or a policy direction under subsection (2) the Minister—

(a) must consult the Authority and the Agency; 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.”;

(e) 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**

4. 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**

5. 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 substitution in subsection 8 for paragraph (b) of the following paragraph:

“(b) a juristic person, is[, or will be,] registered under the laws of the Republic and has [or will have] its principal place of business located within the Republic.”;

(h) 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.”;

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

“(b) promote **[the empowerment of historically disadvantaged persons]** broad-based black economic empowerment including the empowerment of 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**

6. 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**

7. 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.”.

(d) by the addition of the following subsection:

“(5) The Authority, in exercising its powers and performing its functions in terms of this section, as it relates to universal service and universal access, must exercise such power or perform such function after consultation with the Agency.”.

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

8. Section 9 of the principal Act is hereby amended –

(a) 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, which must not be less than 30%, or such higher percentage as may be prescribed]** broad-based black economic empowerment requirements prescribed under section 4(3)(k) of the ICASA Act;”;

(b) 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**

9. 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**

10. 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 let, sub-let, 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 let, sub-let, assign, cede or in any way transfer an individual licence, or assign, cede 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**

11. 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 and control of existing and new individual licences for electronic communications network services and electronic communications services in order to promote competition in the ICT sector.**

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

**(a) promote competition in the ICT sector; and**

**(b) 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 regulations on broad-based black economic empowerment requirements prescribed under section 4(3)(k) of the ICASA 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**

12. 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 the class licences obtained by any person do not collectively assume the scope or coverage of an individual licence.**”;

(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**

13. 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)] thirty (30)** 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)] thirty (30)** 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)] thirty (30)** 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>]** 31<sup>st</sup> day after receipt of the registration notice by the Authority.”.

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

14. 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, 2012.”.

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

15. 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, 2012.”.

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

16. The following section is hereby substituted for section 30 of the principal Act:

**“(1) [In carrying out its functions under this Act and the related legislation, the Authority controls, plans, administers and manages the use and licensing of the radio frequency spectrum except as provided for in section 34.]**

(a) The Spectrum Management Agency is responsible, on behalf of the State for-

(i) long term spectrum planning including the development of the national radio frequency plan;

(ii) the allocation of radio frequency spectrum for both government and non-government use; and

(iii) the assignment of the radio frequency spectrum for government use.

(b) The Authority is responsible for the assignment of the radio frequency spectrum for non-government use.

**(2) In [controlling, planning, administering, managing and licensing] assigning the use of the radio frequency spectrum for government and non-government use, the Spectrum Management Agency and Authority respectively must—**

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

**(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 Spectrum Management Agency or the Authority; and**

**(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;**

**[(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].**

**[(3) The Authority must, in performing its functions in terms of subsection (1) ensure that in the use of the radio frequency spectrum harmful interference to authorised or licensed users of the radio frequency spectrum is eliminated or reduced to the extent reasonably possible.**

**(4) The Authority must investigate and resolve all instances of harmful interference to licensed services that are reported to it.]**

(3) The Spectrum Management Agency is responsible on behalf of the State for all international radio frequency spectrum matters pertaining to South Africa, including Regional and sub-Regional spectrum planning.

(4) The Spectrum Management Agency is responsible on behalf of the State for the co-ordination and approval of any Regional radio frequency spectrum plans applicable to South Africa.

(5) The Authority may ask for and receive from the Spectrum Management Agency, assistance or advice on relevant proceedings of the Authority, including proceedings under this Chapter.

(6) The Spectrum Management Agency may ask for and receive from the Authority, assistance or advice on relevant proceedings of the Spectrum Management Agency.

(7) The Spectrum Management Agency and the Authority must enter into an Agreement governing the mutual cooperation contemplated in subsections (5) and (6), within 3 months of the coming into operation of the Electronic Communications Amendment Act, 2012.”.

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

17. The following section is hereby substituted for section 31 of the principal Act:

“31. Radio frequency spectrum licence.—(1) Subject to subsections (5) and (6), no person may transmit any signal by radio or use radio apparatus to receive any signal by radio except under and in accordance with a radio frequency spectrum licence granted by the Spectrum Management Agency or the Authority to such person in terms of this Act.

(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.

(2A) A radio frequency spectrum licence may not be let, sub-let, assigned, ceded or in any way transferred, and the control of a radio frequency spectrum licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Spectrum Management Agency or the Authority.

(3) The Spectrum Management Agency and the Authority may, taking into account the objects of the 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;

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

(c) permission to let, sub-let, assign, cede or in any way transfer a radio frequency spectrum licence, or assign, cede or transfer control of a radio frequency spectrum licence as contemplated in subsection 2A.

(4) The Spectrum Management Agency or the Authority may amend a radio frequency spectrum licence—

- (a) to implement a change in the radio frequency plan;
- (b) in the interest of orderly radio frequency spectrum management;
- (c) to effect the migration of licensees in accordance with a revised radio frequency plan or the transition from analogue to digital broadcasting;
- (d) if requested by the licensee concerned to the extent that the request is fair and does not prejudice other licensees; or
- (e) with the agreement of the licensee.

(5) Subsection (1) does not apply to a person who utilises radio frequency spectrum—

(a) in the course of making due and proper use, as a subscriber, of an electronic communications service or electronic communications network service, the provision of which is licensed in terms of Chapter 3 or as a recipient of a service subject to a licence exemption;

(b) in the course of making due and proper use of an electronic communications service, the provision of which is licensed in terms of Chapter 3 as part of his or her duties in the service of the State or a local authority, including any military force, police service or traffic authority, in instances of force majeure; or

(c) in accordance with the regulations contemplated in subsection (6).

(6) The Spectrum Management Agency and the Authority may prescribe—

(a) types of radio apparatus the use or possession of which; or

(b) the circumstances in which the use or possession of radio apparatus, does not require a radio frequency spectrum licence, including, but not limited to radio frequency spectrum allocated for use in respect of radio astronomy and other scientific uses of radio frequency spectrum that have been coordinated and agreed to by the Spectrum Management Agency or the Authority.

(7) The Spectrum Management Agency and the Authority may, on its own initiative, take appropriate action to ensure compliance with the provisions of this Chapter.

(8) Subject to subsection (9), the Spectrum Management Agency and the Authority may withdraw any radio frequency spectrum licence or allocated radio frequency spectrum when the licensee fails to utilise the allocated radio frequency spectrum in accordance with the licence conditions applicable to such licence.

(9) Before the Spectrum Management Agency or the Authority withdraws a radio frequency spectrum licence or allocated radio frequency spectrum in terms of subsection (8), it must give the licensee prior written notice of at least 30 days and the licensee must have 7 (seven) business days in which to respond in writing to the notice (unless otherwise extended by the Spectrum Management Agency or the Authority) demonstrating that it is utilising the radio frequency spectrum in compliance with this Act and the licence conditions.

(10) The Spectrum Management Agency or the Authority, based on the written response of the licensee, must notify the licensee of its decision to withdraw or not to withdraw the licence or allocated radio frequency spectrum."

#### **Amendment of section 32 of Act 36 of 2005**

18. Section 32 of the principal Act is hereby amended by the insertion after subsection (4) of the following subsection:

“(5) The Spectrum Management Agency may request the Authority to perform any power or function mentioned in this section in respect of any radio apparatus identified by the Spectrum Management Agency.”.

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

19. The following section is hereby substituted for section 33 of the principal Act:

“33. Frequency co-ordination.—(1) Holders of a radio frequency spectrum licence must, in good faith, co-ordinate their respective frequency usage with other such licensees to—

(a) avoid harmful interference among radio frequency spectrum licensees;

(b) ensure efficient use of any applicable frequency band; and

(c) allow for the provision of cost-efficient services.

(2) Where radio frequency spectrum licensees are unable or unwilling to co-ordinate in good faith in terms of subsection (1), the Spectrum Management Agency or Authority must intervene and resolve the dispute.

(3) The Spectrum Management Agency and Authority must prescribe regulations governing the co-ordination contemplated in subsection (1), which may include a process for the resolution of disputes among radio frequency spectrum licensees on an expedited basis.

(4) The Spectrum Management Agency and Authority must, in performing its functions in terms of this Chapter, ensure that in the use of the radio frequency spectrum harmful interference to authorised or licensed users of the radio frequency spectrum is eliminated or reduced to the extent reasonably possible.

(5) The Spectrum Management Agency and Authority must investigate and resolve all instances of harmful interference to licensed services that are reported to it.

(6) The Spectrum Management Agency is responsible on behalf of the State for all matters concerning international harmful interference and international frequency co-ordination.”.

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

20. The following section is hereby substituted for section 34 of the principal Act:

“34. Radio frequency plan.—(1) The **[Minister]**Spectrum Management Agency, in the exercise of **[his or her]** its functions, represents the Republic in international fora, including the ITU, in respect of—

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

(b) the international coordination of radio frequency spectrum usage,

in accordance with international treaties, multinational and bilateral agreements entered into by the Republic.

(2) The Minister must approve the national radio frequency plan developed by the Spectrum Management Agency [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.

(3) The Spectrum Management Agency and Authority must assign radio frequencies consistent with the national radio frequency plan for the use of radio frequency spectrum by licence holders and other services that may be provided pursuant to a licence exemption.

**[(4) The Authority must, within 12 months of the coming into force of this Act, prepare the national radio frequency plan or make appropriate modification to any existing radio frequency plan to bring it into conformity with this Act.]**

(5) The national radio frequency plan must be updated and amended when necessary in order to keep the plan current. When updating and amending this plan due regard must be given to the current and future usage of the radio frequency spectrum.

(6) The national radio frequency plan must—

(a) designate the radio frequency bands to be used for particular types of services;

(b) ensure that the radio frequency spectrum is utilised and managed in an orderly, efficient and effective manner;

(c) aim at reducing congestion in the use of the radio frequency spectrum;

(d) aim at protecting radio frequency spectrum licensees from harmful interference;

(e) provide for flexibility and the rapid and efficient introduction of new technologies;

(f) aim at providing opportunities for the introduction of the widest range of services and the maximum number of users thereof as is practically feasible.

(7) In preparing the national radio frequency plan as contemplated in subsection [(4)] (2), the [Authority] Spectrum Management Agency 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—

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

(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. ] Authority on radio frequency spectrum for non-government use.**

**(7A) The Spectrum Management Agency or 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.**

**(8) The [Authority] Spectrum Management Agency must give notice of its 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.**

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

**(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] Spectrum Management Agency must forward the national radio frequency plan to the Minister for approval.**

**(11) The Minister must, within 30 days of receipt of the national radio frequency plan, either approve the plan, at which time the plan must become effective, or notify the [Authority] Spectrum Management Agency that further consultation is required.**

**(12) Upon approval of the national radio frequency plan by the Minister, the [Authority] Spectrum Management Agency must publish the plan in the Gazette.**

**(13) Any radio frequency plan approved in terms of this section and all the comments, representations and other documents received in response to the notice contemplated in subsection (8) or tendered at the hearing must be—**

**(a) kept at the offices of the [Authority] Spectrum Management Agency; and**

**(b) open for public inspection by interested persons during the normal office hours of the Authority.**

**(14) The [Authority] Spectrum Management Agency must, at the request of any person and on payment of such fee as may be prescribed, furnish him or her with a copy of the radio frequency plan.**

**(15) The provisions of subsections (6) to (14) apply, with the necessary changes, in relation to any amendment made by the [Authority] Spectrum Management Agency to the radio frequency plan.**

**(16) The Spectrum Management Agency and the Authority may, where the national radio frequency plan identifies radio frequency spectrum that is occupied and requires the migration of the users of such radio frequency spectrum to other radio frequency bands, migrate the users to such other radio frequency bands in accordance with the national radio frequency plan, **except where such migration involves governmental entities or organisations, in which case the Authority—****

**(a) must refer the matter to the Minister; and**

**(b) may migrate the users after consultation with the Minister].”**

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

21. 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**

22. 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**

23. 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**

24. 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**

25. 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**

26. 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**

27. 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**

28. 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**

29. 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**

30. 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**

31. 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**

32. 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.”.

#### **Substitution of section 65 of Act 36 of 2005**

33. The following section is hereby substituted for section 65 of the principal Act:

“65. Limitations on control of commercial broadcasting services.—(1) No person may—

(a) directly or indirectly exercise control over more than one commercial broadcasting service licence in the commercial television broadcasting service; or

(b) be a director of a company which is, or of two or more companies which between them are, in a position to exercise control over more than one commercial broadcasting service licence in the commercial television broadcasting service; or

(c) be in a position to exercise control over a commercial broadcasting service licence in the commercial television broadcasting service and be a director of any company which is in a position to exercise control over any other commercial broadcasting service licence in the commercial television broadcasting service.

**[(2) No person may—**

(a) be in a position to exercise control over more than two commercial broadcasting service licences in the FM sound broadcasting service;

(b) be a director of a company which is, or of two or more companies which between them are, in a position to exercise control over more than two commercial broadcasting service licences in the FM sound broadcasting service;

(c) be in a position to exercise control over two commercial broadcasting service licences in the FM sound broadcasting service and be a director of any company which is in a position to exercise control over any other commercial broadcasting licence in the FM sound broadcasting service.]

(2) No person shall directly or indirectly exercise control over more than a total number of three commercial sound broadcasting service licensees.

**[(3) A person referred to in subsection (2) must not be in a position to control two commercial broadcasting service licences in the FM sound broadcasting service, which either have the same licence areas or substantially overlapping licence areas.]**

(3) Notwithstanding the provisions of subsection (2), no person shall, directly or indirectly, exercise control over more than three commercial sound broadcasting service licensees which have the same licence areas or coverage areas that overlap by a margin of 50% or more.

**(4) No person may—**

(a) be in a position to exercise control over more than two commercial broadcasting service licences in the **[AM]** commercial sound broadcasting service;

(b) be a director of a company which is, or of two or more companies which between them are, in a position to exercise control over more than two commercial broadcasting service licences in the **[AM]** commercial sound broadcasting services; or

(c) be in a position to exercise control over two commercial broadcasting service licences in the **[AM]** commercial sound broadcasting service and be a director of any company which is in a position to exercise control over any other commercial broadcasting service licence in the **[AM]** commercial sound broadcasting service.

**(5) No person referred to in subsection (4) may be in a position to control two commercial broadcasting service licences in the **[AM]** commercial sound**

broadcasting service, which either have the same licence areas or substantially overlapping licence areas.

(6) The Authority may, on application by any person, on good cause shown and without departing from the objects and principles enunciated in section 2, exempt such person from **[the provisions of subsections (1) to (5)]** adhering to any one of the limitations contemplated in subsections (1) to (5), which reasons may include the following:

(a) the promotion and facilitation of broad-based black economic empowerment;

(b) ensuring the survival of a commercial sound broadcasting service licensee;

(c) the growth of local content output; and

(d) the promotion of job creation within the ICT sector.

(7) The Authority may, whenever the Authority considers it necessary in view of the developments in broadcasting technology or for the purposes of advancing the objects and principles enunciated in section 2, institute and conduct a public inquiry and make recommendations to the Minister regarding the amendment of any of the provisions of subsections (1) to (6).

(8) The recommendations contemplated in subsection (7) must be tabled in the National Assembly by the Minister within 14 days of receipt thereof, if the National Assembly is then in session, or if the National Assembly is not in session, within 14 days after the commencement of its next ensuing session.”.

#### **Substitution of section 66 of Act 36 of 2005**

34. The following section is hereby substituted for section 66 of the principal Act:

“66. Limitations on cross-media control of commercial broadcasting services.—(1) Cross-media control of broadcasting services must be subject to such limitations as may from time to time be determined by the National Assembly acting on the recommendation of the Authority, after consultation with the Minister, in accordance with the provisions of the Constitution.

(2) No person who controls a newspaper or newspapers, **[may acquire or retain financial]** shall exercise, directly or indirectly, control of **[a commercial broadcasting service licence in both the]** both a commercial television broadcasting service licensee and a commercial sound broadcasting service licensee.

(3) No person who **[is in a position to control a newspaper may be in a position to control a]** controls a newspaper shall exercise, directly or indirectly, control over any commercial broadcasting service **[licence, either in the television broadcasting service or sound broadcasting service, in an area where the]** licensee where such newspaper has an average ABC circulation of **[twenty (20%)]** twenty-five (25%) percent of the total **[newspaper readership in the area, if the licence area of the commercial]** weekly ABC circulation in the licence area of that commercial broadcasting service **[licence overlaps substantially with the said circulation area of the newspaper]** licensee.

**[(4) In this section “Substantial overlap” means an overlap by fifty (50%) percent or more.**

**(5) A twenty (20%) percent shareholding in a commercial broadcasting service licence, in either the television broadcasting service or sound broadcasting service, is considered as constituting control.]**

(6) The Authority may, on good cause shown and without departing from the objects and principles enunciated in section 2, exempt affected persons from any of the limitations provided for in this section subject to any terms and conditions imposed by the Authority.

(7) The Authority may, whenever the Authority considers it necessary in view of the developments in broadcasting technology or for the purposes of advancing the objects and principles enunciated in section 2, institute and conduct a public inquiry and make recommendations to the Minister regarding amendment of any of the provisions of subsections (1) to (6).

(8) The recommendations contemplated in subsection (7) must be tabled in the National Assembly by the Minister within 14 days of receipt thereof if the National Assembly is then in session, or if the National Assembly is not in session, within 14 days after the commencement of its next ensuing session.

(9) A determination made in terms of subsection (1), whether or not pursuant to an inquiry by the Authority, is not applicable to, and is not enforceable against, any broadcasting service licensee to which such determination relates for the duration of the term of the licence valid at the time such determination is made, but becomes applicable to, and enforceable against, such a broadcasting service licensee only upon the renewal of its licence upon the expiration of such term.”.

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

35. 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**

36. 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**

37. 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**

38. 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 reports to the Minister, 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**

39. 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).”.

#### **Amendment of section 74 of Act 36 of 2005**

40. Section 74 of the principal Act is hereby amended by the insertion of the following subsections after subsection (5):

“(6) Any member of the Board of the Agency who fails to comply with section 81A(3)(b)(i) or (ii) or 81A(4)(b)(i), or who contravenes section 81D(1)(c)(vii) or (viii), or any former member who failed to comply with or contravened any of those sections while being a member, commits an offence and is liable on conviction to a fine or to imprisonment not exceeding five years or to both a fine and such imprisonment.

“(7) Any person referred to in section 81D(1)(b) who contravenes that section, or any former member of the Board who contravened that section while being a member, or any person, other than a member of the Board, referred to in section 81D(1)(b) who contravened that section during the tenure of a former member, commits an offence and is liable on conviction to a fine or to imprisonment not exceeding five years or to both a fine and such imprisonment.”.

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

41. 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**

42. 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 80 of Act 36 of 2005**

43. Section 80 of the principal Act is hereby amended –

(a) by the deletion of subsection (2) and (3);

(b) by the addition of the following subsection:

**“(4) The Agency is subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999).”**

**Insertion of section 80A in Act 36 of 2005**

44. The following section is hereby inserted in the principal Act after section 80:

**“80A. Board of Agency.—(1) The Board of the Agency is responsible for managing the affairs of the Agency.**

**(2) The Board consists of—**

**(a) not more than seven non-executive members appointed in terms of section 81B.**

**(b) one executive member appointed in terms of section 83; and**

**(3) The Chairperson and Deputy Chairperson must be appointed by the Minister from the non-executive members of the Board.**

**(4) The Board may designate any other non-executive member to act as chairperson if both the Chairperson and Deputy Chairperson are absent or unable to perform any function.”**

**Amendment of section 81 of Act 36 of 2005**

45. The following section is hereby substituted for section 81 of the principal Act:

**“81. Functions of Board.—[(1) The Agency’s board must exercise the powers conferred, and perform the duties imposed, upon it in accordance with any policy direction issued by the Minister.**

**(2) The board must—**

**(a) represent the Agency before the Minister and the Authority;**

**(b) oversee the functions of the Agency;**

(c) prepare and update a strategic plan for the Agency at least once every three years to be used by the Agency in exercising its powers and carrying out its functions;

(d) approve the annual report referred to in section 86 prior to submission to the Minister;

(e) approve the statement of estimated income and expenditures and any adjusted statements referred to in section 84 prior to submission to the Minister;

(f) approve the Chief Executive Officer's (CEO's) recommendations referred to in section 83 (3) (b);

(g) oversee the accounts of the Agency referred to in sections 84, 85 and 91; and

(h) take such other decisions as may be requested by the CEO of the Agency in terms of this Chapter.]

The Board—

(a) must give effect to the corporate plan of the Agency contemplated in section 52 of the Public Finance Management Act in order to achieve the objectives of the Agency;

(b) is the accounting authority of the Agency;

(c) takes decisions on behalf of the Agency and gives effect to those decisions;

(d) provides guidance and gives instructions to the chief executive officer concerning the exercise of the functions of the Agency;

(e) must notify the Minister immediately of any matter that may prevent or materially affect the achievement of the objects or financial targets of the Agency; and

(f) generally, must refer to the Minister any matter that may adversely affect the functioning of the Agency.”.

#### **Insertion of sections 81A to 81F in Act 36 of 2005**

46. The following sections are hereby inserted in the principal Act after section 81:

#### **“81A. Disqualification from membership of Board and disclosure .— (1)**

\_\_\_\_\_ A person may not be appointed as a Board member or remain a member of the Board if he or she—

(a) is a member of Parliament, any provincial legislature or any municipal council;

(b) is an unrehabilitated insolvent;

(c) has been declared by a court to be mentally ill or disordered;

(d) has at any time been convicted, whether in the Republic or elsewhere, of—

(i) theft, fraud, forgery or uttering a forged document, perjury, an offence in terms of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), or any other offence involving dishonesty; or

(ii) an offence under this Act;

(e) has been sentenced, after the commencement of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), to a period of imprisonment of not less than one year without the option of a fine;

(f) has at any time been removed from an office of trust on account of misconduct;

(g) has any direct or indirect interest in conflict with the business of the Agency; or

(h) is not a South African citizen.

(2) A person who is subject to a disqualification contemplated in subsection (1)(a), (1)(b) or (1)(g) may be nominated for appointment as a Board member, but may only be appointed if at the time of such appointment he or she is no longer subject to that disqualification.

(3) (a) A person nominated for appointment as a member of the Board must, before appointment and upon a request from the Minister, submit to the Minister a written statement containing—

(i) a full disclosure of all his or her financial interests; and

(ii) a declaration that he or she has no direct or indirect interests that are in conflict with the business of the Agency as contemplated in subsection (1)(g) or section 81D(1).

(b) If, after appointment, a member of the Board acquires any—

(i) further financial interest contemplated in paragraph (a)(i), the member must immediately in writing declare that fact to the Minister and the Board; or

(ii) direct or indirect interest contemplated in subsection (1)(g) or section 81D(1), the member must immediately declare that fact to the Minister and the Board.

(4) (a) Any member of the Board of the Agency referred to in section 81B(9)(a) must as soon as possible after the commencement of this Act, but not later than three months thereafter, submit to the Minister and the Board a written statement containing the disclosure and declaration referred to in subsection (3)(a).

(b) Notwithstanding subsection (1)(g), if a member of the Board of the Agency referred to in paragraph (a) has any direct or indirect interest in conflict with the business of the Agency as contemplated in subsection (1)(g) or section 81D(1), when this Act commences, the member must—

(i) immediately declare that fact to the Minister and the Board; and

(ii) within three months after the commencement of this Act divest himself or herself of that interest.

(c) Subsection (3)(b) also applies to a Board member referred to in section 81B(9)(a).

**81B. Appointment of non-executive members of Board.—**(1) For the purposes of appointing the non-executive members of the Board, the Minister must by notice in two newspapers and in the *Gazette* invite interested persons to submit, within the period and in the manner mentioned in the notice, the names of persons fit to be appointed as members of the Board.

(2) The Minister must appoint a nomination committee to make recommendations to the Minister for the appointment of the non-executive members of the Board contemplated in subsection (1).

(3) In establishing a nomination committee, the Minister must—

(a) ensure that the committee broadly reflects the race and gender composition of the Republic; and

(b) that the committee members have the necessary skills, knowledge, qualifications and experience to serve on the committee.

- (4) The nomination committee, in making a recommendation to the Minister, must consider—
- (a) the proven skills, knowledge, qualifications and experience of a candidate in areas of—
- (i) financial management;
  - (ii) economics;
  - (iii) governance compliance and risk management;
  - (iv) ICT law, regulation and policy;
  - (v) community, under-served area and rural development;
  - (vi) ICT and ICT management;
  - (vii) universal service and universal access; or
  - (viii) any other field of expertise relevant to the Agency;
- (b) the need for representation of historically disadvantaged persons;
- (c) whether a candidate has any direct or indirect interest in conflict with the business of the Agency as contemplated in section 11(1)(g).
- (5) The Committee must ensure that the persons nominated represent a sufficient spread of skills, knowledge, qualifications and experience to enable the Agency to function efficiently and effectively.
- (6) (a) Nominations of suitable persons as contemplated in subsection (4) must include at least one and a half times the number of Board members to be appointed.
- (b) If a suitable person or the required number of suitable persons are not nominated as contemplated in subsections (4), the Minister may identify and appoint the required number of further members.
- (7) (a) The Minister must appoint the non-executive members of the board from suitable persons nominated as contemplated in subsection (4).
- (b) The Minister must, within 30 days after appointing the members, by notice in the Gazette publish the names of the members so appointed and the date of commencement of their terms of office.
- (8) (a) Any vacancy occurring in the Board in terms of section 81C, must be filled in the manner provided for in this section.
- (b) Any member appointed under this subsection holds office for the rest of the period of the predecessor's term of office, unless the Minister directs that such member holds office for a longer period, which may not exceed one subsequent term of up to three years.
- (9) A non-executive member of the Board—
- (a) holds office for a period not exceeding three years provided that the Electronic Communications Amendment Act, 2011 does not affect the continued existence of the Board of the Agency that managed the affairs of the Agency immediately prior to the commencement of the Electronic Communications Amendment Act, 2011;
  - (b) may be reappointed, but may not serve for more than two terms consecutively, unless otherwise determined by the Minister;
  - (c) is appointed according to the terms and conditions determined by the Minister;
  - (d) must be paid from the revenue of the Agency such remuneration and allowances as may be determined by the Minister, taking into consideration prescriptions and guidelines issued by the Minister for the Public Service and Administration and the National Treasury;
  - (e) is appointed on a part-time basis.



**81C. Resignation, removal from office and vacancies.**— (1) A non-executive member of the Board may resign by giving to the Minister—

(a) one month's written notice; or

(b) less than one month's written notice, with the approval of the Minister.

(2) The Minister may, after having afforded the member of the Board concerned a reasonable opportunity to be heard, remove the member from office if that member—

(a) acted in conflict with this Act;

(b) refuses or fails to make a declaration contemplated in section 81A(3)(b)(ii) or refuses or fails to make disclosure as contemplated in section 81A(3)(b)(i);

(c) after having been appointed, acquires any direct or indirect interest contemplated in section 81A(3)(b)(ii), read with section 81A(1)(g);

(d) is a member of the Board of the Agency referred to in section 81B(9)(a) and—

(i) refuses or fails to submit to the Minister and the Board the written statement contemplated in section 81A(4)(a); or

(ii) refuses or fails to submit to the Minister and the Board a declaration as contemplated in section 81A(4)(b)(i); or

(iii) refuses to divest himself or herself of the interest contemplated in section 81A(4)(b)(ii);

(e) neglected to properly perform the functions of his or her office;

(f) is absent from three consecutive Board meetings without prior leave of the Chairperson.

(3) Any member of the Board must vacate the office if he or she becomes disqualified from membership of the Board in terms of section 81A.

**81D. Fiduciary duties of Board members.**— (1) In addition to any other applicable legislation, the following shall apply to members of the Board:

(a) A member of the Board may not be present, or take part in, the discussion of or the taking of a decision on any matter before the Board in which that member or his or her family member, business partner or associate has a direct or indirect interest.

(b) A member of the Board or his or her family member, business partner or associate, or an organisation or enterprise in which a member of the Board or his or her family member, business partner or associate has a direct or indirect interest, may not—

(i) offer goods or services to the Agency or conclude any business with the Agency; or

(ii) make improper use, in any manner whatsoever, of the position of a Board member or of any information acquired by a Board member by virtue of his or her position as a Board member.

(c) A member of the Board must perform his or her functions at all times with the utmost good faith, honesty and integrity, care and diligence and, in furtherance of his or her functions, without limiting their scope, must—

(i) take reasonable steps to inform himself or herself about the Agency, its business and activities and the circumstances in which it operates;

- (ii) take reasonable steps, through the processes of the Board, to obtain sufficient information and advice about all matters to be decided by the Board to enable him or her to make conscientious and informed decisions;
- (iii) regularly attend Board meetings;
- (iv) exercise an active and independent discretion with respect to all matters to be decided by the Board;
- (v) exercise due diligence in the performance of his or her functions as a member;
- (vi) comply with any internal code of conduct that the Agency may establish for Board members;
- (vii) not engage in any activity that may undermine the integrity of the Agency;
- (viii) not make improper use of his or her position as a member or of information acquired by virtue of his or her position as a member;
- (ix) treat any confidential matters relating to the Agency, obtained in his or her capacity as a Board member, as strictly confidential and not divulge them to anyone without the authority of the Agency or as required as part of that person's official functions as a member of the Board.

**81E. Procedures at meetings, and committees of Board.—** (1) (a) The Board determines its procedures at meetings.

(b) Seventy percent of serving members constitutes a quorum at any meeting of the Board.

(c) A decision taken by the Board or an act performed under that decision is not invalid merely by reason of—

(i) any irregularity in the appointment of a member;

(ii) a vacancy in the Board; or

(iii) the fact that any person not entitled to sit as a member sat as such at the time when the decision was taken,

provided such decision was taken by a majority of the members present at the time and entitled so to sit, and those members at the time constituted a quorum.

(2) The Board may appoint one or more committees with the concurrence of the Minister.

(3) The Board must—

(a) assign members of the Board to serve on a committee, based on their knowledge and skills;

(b) determine the—

(i) terms of reference of a committee;

(ii) composition of a committee;

(iii) tenure of members of a committee;

(iv) reporting mechanisms of a committee; and

(v) method and reasons for removal of a member from a committee.

(4) Non-executive members of the Board must make up the majority of the members of a Committee.

(5) The Board may appoint any person with particular knowledge, expertise or qualifications to assist a committee in the performance of its functions.

(6) Unless specially delegated by the Board, a committee has no decision-making powers and can only make recommendations to the Board.

(7) A committee must meet as often as is necessary in order to carry out its functions and may determine its own procedures.

(8) Each committee must be chaired by a non-executive member of the Board.

**81F. Delegation and assignment of functions by Board.—** (1) The Board may, by a resolution passed by 75 per cent of its members—

(a) delegate any of its powers and assign any of its duties to any member of the Board or any committee established in terms of section 81E, the chief executive officer, the chief financial officer, the chief operating officer or any employee of the Agency; and

(b) amend or revoke such delegation or assignment.

(2) Notwithstanding a delegation or assignment contemplated in subsection (1), the Board is not divested of any power or duty so delegated or assigned.

(3) (a) Any delegation or assignment contemplated in subsection (1)—

(i) may be made subject to such conditions as the Board may determine; and

(ii) must be communicated to the delegatee or assignee in writing.

(b) The written communication contemplated in paragraph (a) (ii) must contain full particulars of the matters being delegated or assigned and of the conditions subject to which the power may be exercised or the duty must be performed.

(4) The Board may not delegate—

(a) the power to appoint the chief executive officer; and

(b) its role in deciding on—

(i) the appointment of the chief executive officer;

(ii) the mandate and strategic plan of the Agency.”.

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

47. 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 83 of Act 36 of 2005**

48. Section 83 of the principal Act is hereby deleted.

**Insertion of sections 83A to 83F in Act 36 of 2005**

49. The following sections are hereby inserted in the principal Act after section 83:

**83A. Appointment of chief executive officer**

**officer.—(1) The Board must, with the approval of the Minister, appoint a chief executive officer to ensure that the Agency meets its objects.**

**(2) The Board must invite applications for the post of chief executive officer by publishing advertisements in the media.**

**(3) A person appointed as chief executive officer must—**

**(a) have the qualifications or experience relevant to the functions of the Post Office; and**

**(b) not be disqualified as contemplated in section 81A.**

**83B. Conditions of appointment of chief executive officer.—(1) The appointment of the chief executive officer is subject to the conclusion of an annual performance agreement with the Agency.**

**(2) The chief executive officer is appointed for a term not exceeding five years and may, subject to the approval of the Minister, be reappointed for one additional term not exceeding five years.**

**(3) The chief executive officer holds office on terms and conditions determined by the Board, with the concurrence of the Minister.**

**(4) The chief executive officer is a member of the Board by virtue of his or her office.**

**(5) The chief executive officer is entitled to a remuneration package determined by the Board with the concurrence of the Minister and the Minister of Finance.**

**(6) The chief executive officer is accountable to the Board.**

**83C. Termination of employment of chief executive officer.—(1) The Board must, with the concurrence of the Minister and subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), and applicable labour legislation, terminate the employment of the chief executive officer—**

**(a) for misconduct, which includes any act or failure to act contemplated in section 81C(2); or**

**(b) for failing to perform the duties connected with that office diligently.**

**(2) The Board may suspend the services of the chief executive officer pending the finding of any misconduct proceedings against him or her, during which period the chief executive officer is also suspended as executive member of the Board.**

**(3) The chief executive officer must vacate the office if he or she becomes disqualified from membership of the Board in terms of section 81A.**

**(4) The chief executive officer may resign on written notice of at least 30 days to the chairperson of the Board.**

**83D. Acting chief executive officer.— (1) The Board may in writing appoint any senior employee of the Agency to act as chief executive officer when the holder of that office—**

**(a) is temporarily unable to perform the duties connected with that office;**

**(b) has been suspended from office; or**

(c) has vacated or been removed from that office and a new chief executive officer has not yet been appointed.

(2) An acting chief executive officer may exercise all the powers and must perform all the duties of the chief executive officer as the case may be.

**83E. Delegation by chief executive officer.—** (1) The chief executive officer may delegate to an employee of the Agency any of his or her powers and assign any of his or her duties.

(2) Any delegation or assignment contemplated in subsection (1)—

(a) may be made subject to such conditions as the Board may determine;

(b) must be communicated to the delegatee or assignee in writing;

(c) may be amended or withdrawn in writing by the chief executive officer; and

(d) does not prohibit the holder of the office that made the delegation or assignment from exercising that power or performing that duty.

(3) Notwithstanding a delegation or assignment contemplated in subsection (1), the chief executive officer is not divested of any power or duty so delegated or assigned.

**83F. Personnel of Agency.—**(1) The Board must determine the structure or organogram of the Agency and the conditions of service, remuneration and service benefits of the personnel of the Agency after consultation with the chief executive officer and with the concurrence of the Minister and the Minister of Finance.

(2) The work relating to the functions of the Agency is performed by such persons as the chief executive officer may appoint.

(3) The chief executive officer must determine and supply each employee with a copy

of the code of conduct, applicable to all members of staff of the Agency and justiciable for purposes of disciplinary proceedings, to ensure—

(a) compliance with applicable laws;

(b) the effective, efficient and economical use of the Agency's resources; and

(c) the promotion and maintenance of a high standard of professional ethics.

(4) Staff may be transferred or seconded to the Agency from the public service

subject to the provisions of the Public Service Act, 1994 (Proclamation No. 103 of

1994), and the human resource policy contemplated in subsection (2).”.

#### **Insertion of sections 86A to 86B in Act 36 of 2005**

50. The following sections are hereby inserted in the principal Act after section 86:

**“86A. Investigation of Agency.—** (1) The Minister may appoint a person to investigate the affairs or financial position of the Agency and compliance by the Agency with this Act and may recover from the Agency the fees and disbursements incurred by that person during the investigation.

(2) The Agency or an employee of the Agency must, for the purposes of subsection (1), provide the Minister or a person authorised by the Minister

with such data, information, books, accounts, documents and assets of the Agency as the Minister or the authorised person may require.

**86B. Intervention by Minister.**— (1) The Minister may direct the Agency to take any action specified by the Minister if the Agency—

- (a) is in financial difficulty or is being mismanaged;
- (b) fails to perform its functions effectively or efficiently;
- (c) has acted unfairly or in a discriminatory or inequitable way towards a person to whom it owes a duty under this Act; or
- (d) has failed to comply with any law or any policy envisaged in this Act.

(2) A directive contemplated in subsection (1) must state—

- (a) the reason for issuing the directive;
- (b) the steps which must be taken to remedy the situation; and
- (c) a reasonable period within which the steps contemplated in paragraph (b) must be taken.

(3) If the Agency fails to comply with the directive contemplated in subsection (1) within the stated period, the Minister may—

- (a) after having given the Agency a reasonable opportunity to be heard; and
- (b) after having afforded the Agency a hearing on any submissions received, replace the members of the Board in the same manner as the departing members have been appointed or, where circumstances so require, appoint a person as an administrator to take over the relevant function of the Agency.

(4) If the Minister appoints an administrator in terms of subsection (3)—

- (a) the administrator may do anything which the Agency might otherwise be empowered or required to do by or under this Act, to the exclusion of the Agency;
- (b) the Board may not, while the administrator is responsible for the relevant function, exercise any of its powers or perform any of its duties relating to that function;
- (c) an employee or a contractor of the Agency must comply with a directive given by the administrator.

(5) The Minister must—

- (a) review the performance of the Agency regularly whilst it is under administration; and
- (b) within six months of appointing the administrator, table a report on his or her findings in the National Assembly.

(5) Once the Minister is satisfied that the Agency is able to perform its functions effectively, the Minister must terminate the appointment of the administrator.

(6) (a) Notwithstanding subsection (3), the Minister may dissolve the Board if the Minister, on good cause shown, loses confidence in the ability of the Board to perform its functions effectively and efficiently.

(b) The Minister may dissolve the Board only—

- (i) after having given the Board a reasonable opportunity to be heard; and
- (ii) after having afforded the Board a hearing on any submissions received.

(c) If the Minister dissolves the Board, the Minister—

- (i) may appoint an administrator to take over the functions of the Board and to do anything which the Board might otherwise be empowered or required to do by or under this Act, subject to such conditions as the Minister may determine; and

(ii) must, as soon as it is feasible but not later than three months after the dissolution of the Board, replace the members of the Board in the same way as the way in which they were appointed.

(7) (a) The costs associated with the appointment of an administrator shall be for the account of the Agency.

(b) The appointment of the administrator terminates when the Board members have been replaced in terms of subsection (6)(c)(ii).

(8) Notwithstanding this section, the Minister retains the right at any time to approach a competent court for relief in any matter he or she considers appropriate in furtherance of this Act."

#### **Amendment of section 87 of Act 36 of 2005**

51. Section 87 of the principal Act is hereby amended –

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

**"(1) [Despite the repeal of the Telecommunications Act by this Act, the] The Universal Service Fund [established in terms of section 65 (1) of the Telecommunications Act] as it existed at the date of commencement of this Act continues to exist in terms of this Act and will henceforth be called the Universal Service and Access Fund, and the Agency must collect contributions referred to in section 89 and keep account of the Fund in its books and credit the Fund with—**

- (a) universal service contributions referred to in section 89; and
- (b) money accruing to the Universal Service and Access Fund from any other source.";

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

**"(2) All money received, the amounts of which in terms of subsection (1) must be [credited to] paid into the Universal Service and Access Fund [in the books of the Agency], must be paid into the National Revenue Fund established by section [185] 213 of the Constitution."**

#### **Amendment of section 88 of Act 36 of 2005**

52. Section 88 of the principal Act is hereby amended –

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

**"(a) for the assistance of needy persons towards the cost of the provision to, or the use by, them of broadcasting, electronic communications network services and electronic communications services;"**

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

**"(b) subject to subsection (2), to any [broadcasting service licensee and] electronic communications network service licensee for the purpose of**

financing the construction or extension of electronic communications networks in underserved areas as prescribed;”;

(c) by the deletion of paragraph (c) of subsection (1);

(d) by the deletion of subparagraph (i) of paragraph (d) of subsection (1);

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

“(e) for the establishment and operation of **[broadcasting services and for the establishment and operation]** community access centres, including training of and the payment of allowances to personnel of centres where access can be obtained to electronic communications **[networks]** network services, electronic communications services and broadcasting services.”;

(f) by the addition of the following paragraph in subsection 1:

“(f) as prescribed by the Minister, with the concurrence of the Minister of Finance.”;

(g) by the insertion after subsection 1 of the following subsection:

“(1A) The Agency must at least every two years, after obtaining public participation, determine by notice in the Gazette for the purposes of payments referred to in subsection (1), the manner in which applications must be made and the manner in which subsidies will be paid”;

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

“(3) The Authority must at least **[bi-annually]** every two years review and update, the prescribed definition of under-served area and the list of designated under-served areas eligible for construction payments from the Universal Service and Access Fund.”.

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

“(4) The Agency must at least every two years, after obtaining public participation, make recommendations to enable the [The] Minister [may] to determine by notice in the Gazette, for the purposes of payments referred to in subsection (1) (a)[, **by notice in the Gazette determine]**—

(a) types of needy persons to whom assistance may be given;

(b) the persons who must apply for assistance **[and the manner in which such applications must be made]**;

(c) **[the manner in which and]** persons to whom subsidies may be paid.”.

#### **Amendment of section 89 of Act 36 of 2005**

53. Section 89 of the principal Act is hereby amended by the addition of the following subsection:



“(4) The Agency must collect all money that is due and payable to the Universal Service and Access Fund.”.

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

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

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

55. 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]**The 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**

56. (a) This Act is called the Electronic Communications Amendment Act, 2012 and comes into operation on a date determined by the Minister by Notice in the *Gazette*.

(b) Different dates may be fixed for the coming into operation of different sections of this Act by Notice in the *Gazette*.

## MEMORANDUM ON THE OBJECTS OF THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL, 2012

### 1. BACKGROUND AND OBJECTS

The object of the Bill is to amend the Electronic Communications Act, 2005, so as to align the Act with broad-based black economic empowerment; to incorporate the Authority's recommendation on ownership and control of commercial broadcasting services; to introduce a Spectrum Management Agency and clarify the responsibilities of the Agency and the Authority in respect of frequency spectrum management; to refine licensing issues; to improve the competition provisions; to improve turn-around times for consultative processes; to improve the governance provisions of the Universal Service and Access Agency of South Africa; to remove regulatory bottlenecks; and to provide for matters connected therewith.

### 2. PROVISIONS OF BILL

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

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

- a) Definitions are inserted for "allocation", "assignment" and "broadband". The definitions are linked to the Chapter 5 amendments on Frequency and are based on the ITU Radio Regulations. A new definition of broadband is proposed. Even though the definition in paragraph 1.3.3 of Broadband Policy for SA, GG33377, 13 July 2010 indicates a broadband speed of 256kbps, it is understood that EXCO decided that it must be left open to determine from time to time;
- b) the definition of "broadcasting service radio frequency bands" is amended to refer to the ITU table of allocation as opposed to allotment;
- c) common carrier is redefined to mean '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'. See discussion under 'Sentech as Common Carrier' below;
- d) the definitions for "community" and "community broadcasting service" are redefined to limit the service to a geographically defined community. ICASA requested that community broadcasting service should be restricted to a geographic area since frequencies are finite. 'Community' and 'community broadcasting service' were subsequently redefined to limit the service to a geographically defined community;
- e) a definition is inserted for "control". ICASA proposed amendments to sections 64, 65 and 66 of the Act. The recommendations must be tabled in the National Assembly as required by the Act. Instead of describing what constitutes control in a new clause 65(1A) as

recommended by ICASA, the insertion of a definition for control in section 1 should be considered. The current section 66(5) should subsequently be deleted. This approach is suggested since ICASA's recommendation will still leave uncertainty regarding the meaning of control in section 64. See discussion under 'Limitations on Control and Cross-Media Control of Commercial Broadcasting Services' below;

- f) the definition of "electronic communications facility" is amended to include access to wiring in multi-tenant buildings as well as both active and passive components. The amendments were requested by ICASA since operators argue that they are only obliged to lease the passive components on their network;
- g) the definition of "end-user" is amended so that it is defined in relation to not only licensees, but also those exempt from licensing. "End-user" is currently defined in relation only to licensees, but there are end-users in respect of those using licence exempt services as well, so the definition should be amended;
- h) the definition of "electronic communications service licensee" is amended to include a reference to section 5(4) (class licences) since it currently only refers to section 5(2) (individual licences);
- i) the definitions for "existing licences" and "transition period" are deleted since they have become redundant. ICASA commented that the definitions for "existing licences" and "transition period" are redundant as license conversion is completed;
- j) the definition of "ITU" is corrected to reflect the correct name i.e. "ITU" means International Telecommunication[s] Union";
- k) the definition of "licensee" is substituted to include radio frequency spectrum licensees. According to ICASA the definition has always fell short, failing to include radio frequency spectrum licensee(s) in terms of Chapter 5 of the Electronic Communications Act, 2005. The existing definition has as a result excluded a radio frequency spectrum licensee or holder to be characterised as a licensee as defined in the Act. The anomaly in the definition creates technical challenges in the monitoring and enforcement functions of the Authority;
- l) the definition of "radio frequency plan" is amended to refer to the national radio frequency plan contemplated in section 34 and to provide the correct terminology since it should refer to ITU table of allocations and not allotments;
- m) the definition of "radio frequency spectrum" is substituted to include broadcasting in addition to electronic communications. "Radio frequency spectrum" and "radio station" are defined in relation only to ECS and not also BS, which is not consistent with the reality that BS licensees use spectrum. The terms, "radio frequency spectrum" and

“radio station” should be amended to be defined in relation to BS, as well as ECS;

- n) a definition is inserted for “radio frequency spectrum licence”. ICASA indicated that the definition of ‘licensee’ (discussed above) has always fell short, failing to include radio frequency spectrum licensee(s) in terms of Chapter 5 of the Electronic Communications Act, 2005. The Authority proposed that definitions be inserted for “service licensee” and “radio frequency spectrum licensee”;
- o) the definition of “radio station” is substituted to include broadcasting in addition to electronic communications;
- p) the definition of “registered political party” is substituted with “political party” since only the latter term is used in the Act;
- q) the definition of “reseller” is substituted to correct the language;
- r) the definition of “service charter” is substituted to add ‘end-users’ to ‘subscribers’ for consistency with the text in the Act. This is required since all references in the Act to ‘service charter’ is preceded by the words ‘end-user and subscriber’. End-user is the person who uses a product. The end-user or consumer may differ from the person who purchases the product or subscribes to the service;
- s) a definition is inserted for “service licensee”. ICASA indicated that the definition of ‘licensee’ (discussed above) has always fell short since it fails to include radio frequency spectrum licensee(s) in terms of Chapter 5 of the Electronic Communications Act, 2005. The Authority proposed that definitions be inserted for “service licensee” and “radio frequency spectrum licensee”;
- t) a definition is inserted for “Spectrum Management Agency” to mean an Agency established in terms of legislation prepared for this purpose. See discussion under Radio Frequency Spectrum below;
- u) the definition of “universal service” is substituted to clarify that it applies to electronic communications network services in addition to electronic communications services and broadcasting services.

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

- a) The purpose of the amendments is to amend some of the Objects of the Act. This clause seeks to amend section 2(b) to narrow the meaning of the obligation to create a technologically neutral licensing framework. ICASA believes this narrowed meaning should be inserted as the term technology neutrality has compounded the administration of licensing. ICASA is of the view that the distinction between ECS and BS contradicts a technology neutral licensing framework. A narrowed meaning is required to allow technology specificity where applicable such as the frequency plan.

- b) The amendment of section 2(h) is discussed under BEE below.

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

- a) 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; 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 (USAASA). It further seeks to broaden the scope of policy directions that may be issued.
- b) The amendment of clause 3(4) seeks to include USAASA.
- c) It further amends section 3(5) to include USAASA 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.

### **2.4 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.

### **2.5 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 to close the loophole used by foreign entities; and it seeks to amend section 5(9)(b) by replacing the empowerment of historically disadvantaged persons with broad-based black economic empowerment.

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

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

**2.7 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 be about and not just take into account certain listed matters. It further seeks to clarify that ICASA may impose additional licence terms and conditions. It seeks to make it clear that ICASA may impose licence terms and conditions on designated licensees relating to universal access and universal service. It further seeks to ensure that ICASA consults with USAASA on universal service and access.

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

- a) It is proposed that the focus of the Act be changed from the empowerment of historically disadvantaged persons to broad-based black economic empowerment. ICASA has requested an alignment of the ECA's use of the terms historically disadvantaged persons and groups with section 4(3)(k) of the ICASA Act that refers to regulations in accordance with the BBBEE Act. ICASA should therefore be enabled to prescribe regulations in accordance with the BBBEE Act, Code of Good Practice, and Balanced Scorecard.
- b) This clause seeks to replace the required equity ownership by historically disadvantaged groups in section 9(2)(b) with broad-based black economic empowerment requirements prescribed under section 4(3)(k) of the ICASA Act. It also contains consequential amendments following the amendment of sections 8(3) and (4). Consequential amendments are also required in the definitions, sections 2(h), 5(9)(b), 13A(3)(a) and 65(6)(a).

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

This clause seeks to amend section 10(1)(h) to remove ambiguity. The amendment enables ICASA to amend a license whether regulations have been issued under Chapter 10 or not.

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

- a) This clause seeks to ensure that the transfer of individual licences including the transfer of control, letting and sub-letting of such licences, require the prior approval of ICASA.
- b) The ownership and control provisions are removed from section 13 that deals with transfers and included in a separate new clause 13A.

**2.11 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. The limitations should be applicable to existing and new licences, with due regard to section 4(3)(k) of the ICASA Act.

**2.12 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 provides that class licences obtained by any person may not collectively assume the scope or coverage of an individual licence; 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.

### **2.13 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.

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

Following the Altech judgement, a significant number of former Value Added Network Service licenses were converted to ECNS licenses with accompanying right of way rights under Chapter 4. The section 20 amendment seeks to limit the application of Chapter 4 to specific ECNS licensees as prescribed by the Authority since it is currently impractical; it also seeks to make better provision for the regulation of ECNS licensees that exercise any rights and obligations under this Chapter.

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

Due to the critical importance of the provision in section 21 on the Guidelines for the rapid deployment of electronic communications facilities especially for broadband roll-out, it should be considered how to best give full effect to it. This clause seeks to replace guidelines with policy and policy directions made by the Minister to remove the uncertainty on the status of guidelines. It further enables ICASA to prescribe regulations to give effect to the policy and policy directions..

### **2.16 Amendment of sections 30 to 34 of Act 36 of 2005**

- a) This clause seeks to align the radio frequency spectrum issues in Chapter 5 of the Act with the Cabinet approved National Radio Frequency Spectrum Policy. It further seeks to introduce a Spectrum Management Agency within the portfolio of the Minister of Communications with overall responsibility for the country's spectrum as contemplated in the White Paper on Broadcasting Policy, 1998.
- b) The National Radio Frequency Spectrum Policy clarifies the Minister and ICASA's role in respect of allocation and assignment as follows:

*"2.1.3 The Minister of Communications ("The Minister") acts as the custodian of the spectrum on behalf of the people of South Africa."*

#### *"2.5 Roles and Responsibilities*

##### *2.5.1 The Minister*

*The Minister represents South Africa in the ITU. This includes, inter alia the allocation of the radio frequency spectrum to various radio-communication services.*

*The Minister is responsible for all international spectrum matters*

*pertaining to South Africa, including Regional and sub-Regional spectrum planning, all cases concerning international harmful interference and international frequency co-ordination. The Department will liaise with ICASA in such matters.*

*2.5.1.1 The Minister is responsible for issuing policies and policy directions in relation to the radio frequency spectrum.*

*2.5.1.2 The Minister is responsible for the development of the South African national allocation plan, and for the allocation of spectrum to the different radio-communication services.*

*2.5.1.3 The Minister is required to allocate spectrum for the exclusive use of the security services, and that such spectrum be included in the national frequency plan.*

*2.5.1.4 The Minister is responsible for the co-ordination and approval of any Regional radio frequency spectrum plans applicable to South Africa.*

## **2.5.2 ICASA**

*2.5.2.1 ICASA is responsible for, administering and managing the usage of the radio frequency spectrum, and for the licensing thereof.*

*2.5.2.2 In order to fulfil its functions ICASA issues National Radio Regulations that must be adhered to by all the users of national spectrum.*

*2.5.2.3 ICASA is responsible for the implementation of this Policy.*

*2.5.2.4 ICASA is responsible for the assignment of radio frequency spectrum to licensees and for the development of national assignment plans.”*

- c) The role and functions allocated to the Minister in the National Radio Frequency Spectrum Policy should be assigned to the Spectrum Management Agency with the exception that the Minister must approve the national radio frequency policy ‘*as the custodian of the spectrum on behalf of the people of South Africa*’.
- d) Accordingly, the Department will prepare a separate Bill to establish the Spectrum Management Agency.

### **2.17 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.



**2.18 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.

**2.19 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.

**2.20 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.

**2.21 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.

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

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

**2.23 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.

**2.24 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.

**2.25 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.

**2.26 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.

**2.27 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 as proposed by ICASA. This is due to the fact that the ASA's code of advertising practice does not regulate it. The scheduling of adverts, infomercials and programme sponsorships was previously regulated via regulations issued in 1999 (Advertising, Infomercials and Programme Sponsorship regulations).

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

- a) Common carrier has been redefined in the definitions section as follows:

“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;”;

- b) 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.

**2.29 Substitution of sections 65 and 66 of Act 36 of 2005**

These clauses contain amendments requested by ICASA in line with recommendations made by the Authority under sections 65(7), 66(1) and 66(7) of the Act. The recommendations follow the publication by ICASA of a Discussion Document on Ownership and Control on 17 November 2009. Public hearings were held from 05 to 07 May 2010 and a Findings Document published on 15 September 2011. The Minister must table the recommendation in the National Assembly. The National Assembly also determines the limitations on cross-media control, and has to consult with the Minister. The amendments as proposed by ICASA have been included in the Bill to facilitate the consideration thereof by the National Assembly.

**2.30 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.

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

This clause seeks to remove a redundant timeframe.

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

It is proposed that section 72 be amended to ensure that the public can access government directory and information services free of charge. The amendment is required to reflect government directory and information services. This is a service that is currently provided by SITA on behalf of DPSA. The four digit number allocated for this as per s. 72(6) is 1020. The call centre handles calls for government information, queries and directory and related services. Currently because section 72(7) refers to government directory information services, the cost is carried by DPSA that was not the initial intention. The wording should be changed to "government directory, information and related services" to close the loophole and oblige operators to carry these communications to the centre free of charge.

### **2.33 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.

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

It is proposed that section 73 be amended further to assist with the enforcement of the e-rate provisions. It is necessary to make it clear when an ECS licensee should give the discount and when the ECS licensee is entitled to a discount from the ECNS licensee. A problem is also experienced due to ISPs that do not want to give the 50% discount to USAASA when USAASA pays the charge on behalf of a school. A new subsection is proposed to make it clear that USAASA can pay a charge on behalf of a school and will in such instance be entitled to the 50% discount.

### **2.35 Amendment of section 74 of Act 36 of 2005**

This clause creates certain offences related to the Universal Service and Access Agency of South Africa and sets out the penalties that may be imposed.

### **2.36 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.

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

A new clause 79B seeks to enable access to information held by ICASA or USAASA for the purposes of the performance of the functions of the Minister.

Lack of information hampers a number of functions including impact assessment and monitoring, compilation of relevant statistics, provision of updated information to the ITU etc.

#### **2.38 Amendment of section 80 of Act 36 of 2005**

This clause seeks to make it clear that USAASA is subject to the Public Finance Management Act, 1999.

#### **2.39 Insertion of section 80A in Act 36 of 2005**

This clause seeks to expand the current provisions in the Act on the composition of the USAASA Board and makes it clear that the Board is responsible for the affairs of the Agency.

#### **2.40 Amendment of section 81 of Act 36 of 2005**

This clause seeks to improve the functions of the USAASA Board especially from a governance perspective.

#### **2.41 Insertion of sections 81A to 81F in Act 36 of 2005**

This clause seeks to make provision for the disqualification from membership of the USAASA Board, appointment of non-executive members of the Board, resignation, removal from office and vacancies, fiduciary duty and disclosure, committees of the Board, delegation and assignment of functions by the Board.

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

- a) The amendment of section 82 and definitions seek to remove contradictions between section 82 and the definitions of universal access and service to ensure that broadcasting is also included.
- b) 'Universal access' is defined in the EC Act as "universal access to electronic communications network services, electronic communications services and broadcasting services, as determined from time to time in terms of Chapter 14". Section 82(3)(a)(i) provides that the Minister must determine what constitutes universal access by all areas and communities to ECS and ECNS. There is no mention of BS like there is in the definition of universal access itself. The amendments to this section seek to correct this inconsistency.
- c) The same applies for 'universal service'.

#### **2.43 Deletion of sections 83 of Act 36 of 2005**

This clause seeks to delete section 83 due to new provisions in sections 83A to 83F on the appointment of the CEO and staff of USAASA.

#### **2.44 Insertion of sections 83A to 83F in Act 36 of 2005**

This clause seeks to provide provisions on the appointment of the Chief Executive Officer of USAASA, conditions of appointment, termination of employment, acting chief executive officer, delegation of authority, and staff of the Agency. It further seeks to remove provisions that conflict with the responsibility of the Board to manage the affairs of the Agency.

**2.45 Insertion of sections 86A to 86B in Act 36 of 2005**

- a) These clauses empower the Minister to appoint a person to investigate the affairs or financial position of the Agency and compliance by the Agency with the Act. It further obliges the Agency or an employee of the Agency to provide the Minister or a person authorised by the Minister with such information, books, accounts, documents and assets of the Agency as the Minister or the authorised person may require.
- b) It further authorises the Minister under certain circumstances to issue directives requiring the Agency to take action specified by the Minister. A directive may for example be issued if the Agency is in financial difficulty, if it is mismanaged, or if it fails to perform its functions effectively and efficiently. The clause also seeks to empower the Minister to replace the members of the Board or to appoint an administrator to take over certain functions of the Board if the Board fails to comply with the directive. The Minister is also empowered to dissolve the Board if, on good cause shown, the Minister loses confidence in the ability of the Board to perform its functions effectively and efficiently.

**2.46 Amendment of section 87 of Act 36 of 2005**

This clause seeks to correct the reference to section 185 in stead of section 213 of the Constitution regarding the National Revenue Fund; it further makes it clear that USAASA can collect the Universal Service Fund contributions.

**2.47 Amendment of section 88 of Act 36 of 2005**

This clause seeks to correct reference to 'electronic communications network services', 'electronic communications services' and 'broadcasting services' in the context of subsidies that may be paid out of the Universal Service and Access Fund; it ensures that the contradiction between subsection (1)(c) and (d) are removed by making subsidies payable to all public schools; it further seeks to empower the Minister, acting with the concurrence of the Minister of Finance, to prescribe additional uses of money in the Universal Service and Access Fund from time to time; it seeks to enable USAASA to create application procedures for persons to apply for subsidies from the USAF for all of the purposes for which funds may be distributed under section 88(1), and distribution procedures, at least every two years; it seeks to change ICASA's obligation to review the definition of under-serviced area every two years in stead of bi-annually; it further seeks to enable USAASA to make recommendations to the Minister every two years to determine the meaning of needy persons.

**2.48 Amendment of section 89 of Act 36 of 2005**

This clause seeks to empower USAASA to collect all money that is due and payable to the Universal Service and Access Fund.

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

ICASA proposed the deletion of these two sections since license conversion is complete, and these sections bear no significance.

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

This clause seeks to amend section 95 to enable ICASA to repeal or amend existing regulations under related legislation by removing the prohibitive 24-month time-frame. This amendment is necessary as the current provision prohibits ICASA from repealing or amending regulations issued under now repealed Acts, as the 24-month period from the commencement date of the Act, has passed.

**2.51 Short title**

This clause provides the name of the Act and seeks to provide that different dates may be fixed for the coming into operation of different sections of this Act by Notice in the Gazette. This provision is necessary to ensure that the amendments relevant to Chapter 5 of the Act only come into operation once a Spectrum Management Agency has been established under legislation prepared for this purpose.

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