DEPARTMENT OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES

NO. 3567 **23 June 2023**

INVITATION TO PROVIDE WRITTEN COMMENTS ON PROPOSED ELECTRONIC COMMUNICATIONS AMENDMENT BILL, 2022

1.1 A number of government policies, plans and reports have, over many years, called for the reduction of the cost to communicate and, most recently, the cost of data due to its importance in bringing more people and business into the digital economy.

1.2 As such, the Competition Commission issued a Data Services Market Inquiry (DSMI) report on 2 December 2019. The Commission found that affordable data is becoming essential for every citizen and, the move towards a digital world is hampered by high data prices. This has the potential for the developmental agenda of South Africa to lag and/or stall. The ripple effect is that the poorest of the poor will also be adversely affected. Universal access to affordable data is vital for both communication and the ability to access information. The cost of data will, more broadly, become increasingly important within the context of the Fourth Industrial Revolution and the projected upsurge of the digital economy. A lack of access to affordable data is a socio-economic problem. It will have significant and negative consequences for the economy and the economic and social exclusion of South Africa's citizens.

1.3 The DSMI report makes recommendations that include legislative changes aimed at ultimately increasing the level of competition in the market and driving down prices. An amendment of the Electronic Communications Act, 2005 (Act No. 36 of 2005) is necessary to give effect to the recommendations.

1.4 Interested persons are invited to provide written comments on the proposed Electronic Communications Amendment Bill, 2022 in the Schedule, within 30 working days of the date of publication, addressed to –

The Acting Director-General, Department of Communications and Digital Technologies
For attention: Mr. A Wiltz, Chief Director, Telecommunications and IT Policy
First Floor, Block A3, iParioli Office Park, 1166 Park Street, Hatfield, Pretoria
Private Bag X860, Pretoria, 0001
ecabill@dcdt.gov.za; Cell: 0837140126 (Mr. L Motlatla)

2. Comments received after the closing date may be disregarded.

MR. MONDLI GUNGUBELE, MP
MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES
DATE:

SCHEDULE

REPUBLIC OF SOUTH AFRICA

ELECTRONIC COMMUNICATIONS AMENDMENT BILL

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

(MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES)

[B –2023]

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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.

BILL

To amend the Electronic Communications Act, 2005, so as to provide for a new licence category for electronic communications facilities services, to enable the Minister responsible for local government to make a national standard by-law on rapid deployment, to enable spectrum sharing, to regulate roaming and mobile virtual network services, to improve the facilities leasing framework and its pricing principles; to provide for improved competition regulation; 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 the Act 36 of 2005, as amended by section 1 of Act 37 of 2007 and section 1 of Act 1 of 2014

1. Section 1 of the Electronic Communications Act, 2005 (Act No. 36 of 2005) (hereinafter referred to as the "principal Act"), is hereby amended—

(a) by the insertion after the definition of "community broadcasting service" of the following definition:

"'**community networks**' means an electronic communications network service and electronic communications service that are licence exempted by the Authority, provided in an under-serviced area, by an entity which may include, but not limited to:

(a) a non-profit organisation registered in terms of the Non-Profit Organisations Act, 1997 (Act No. 71 of 1997);

(b) a non-profit company registered in terms of the Companies Act, 2008 (Act 71 of 2008); or

(c) a non-profit organisation established in terms of any other Act of Parliament;";

(b) by the insertion after the definition of "Competition Act" of the following definitions:

"'**competition assessment** ' means an assessment of the general state of competition, or the impact that one or more transactions may have on

competition for purposes or performing any of the powers or functions of the Authority as contemplated in section 67A;

'Competition Commission' means the Competition Commission established by section 19 of the Competition Act;";

(c) by the insertion after the definition of "electronic communications facility" of the following definitions:

"'**electronic communication facility service**' means a service whereby a person makes available an electronic communications facility, whether by sale, lease or otherwise for use in electronic communications networks;";

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

(d) by the substitution for the definition of "essential facility" of the following definition:

"'**essential facility**' means an electronic communications facility **[or combination of electronic communications or other facilities that is exclusively or predominantly provided by a single or limited number of licensees and]** that cannot **[feasibly (whether economically, environmentally or technically)]** practically be substituted or duplicated **[in order to provide a service in terms of this Act]**, and without access to which competitors cannot efficiently provide goods and services to their customers such as to exercise a competitive constraint on the essential facility owner;";

(e) by the insertion after the definition of "harmful interference" of the following definition:

"'**high demand spectrum**' means a spectrum where—

(*a*) the demand for access to the radio frequency spectrum resource exceeds supply; or

(*b*) radio frequency spectrum is fully assigned, as determined by the Authority;"; and

(f) the insertion after the definition of "radio frequency spectrum licence" of the following definitions:

"'radio frequency spectrum sharing' means the simultaneous usage of a specific radio frequency or radio frequency spectrum band in a specific geographical area by different radio frequency spectrum licensees in order to enhance the efficient use of spectrum, and 'spectrum sharing' has a similar meaning;

'radio frequency spectrum trading' means the transfer, by a licensee, of ownership or control of the rights, in full or in part, held under a radio frequency spectrum licence by way of a sale, lease or sub-letting to a third party, and "spectrum trading" has a similar meaning;".

Amendment of section 5 of Act 36 of 2005, as amended by section 4 of Act 37 of 2007 and section 5 of Act 1 of 2014

2. Section 5 of the principal Act is hereby amended by the substitution for subsections (2) to (5) of the following subsections:

"(2) The Authority may, upon application and due consideration in the prescribed manner, grant individual licences for the following—

(*a*) subject to subsection (6), electronic communications network services;

(*b*) broadcasting services; **[and]**

(*c*) electronic communications services[.]; and

(d) electronic communications facility services.

(3) Electronic communications network services, broadcasting services **[and]**, electronic communications services and electronic communications facilities services that require an individual licence, include, but are not limited to—

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

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

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

(*d*) . . . . . .

(dA) electronic communications facility services of a provincial and national scope operated for commercial purposes, that must be prescribed within 18 months of the coming into operation of the Electronic Communications

Amendment Act, 2022, or such other electronic communications facility services as may be prescribed; and

(*e*) such other services as may be prescribed that the Authority finds have significant impact on socio-economic development.

(4) The Authority may, upon registration in the prescribed manner, grant class licences for the following:

(*a*) electronic communications network services;

(*b*) broadcasting services; **[and]**

(*c*) electronic communications services**[.]**; and

(d) electronic communications facility services.

(5) Electronic communications network services, broadcasting services **[and]**, electronic communications services and electronic communications facilities services that require a class licence, include, but are not limited to—

(*a*) electronic communications networks of district municipality or local municipal scope operated for commercial purposes;

(*b*) community broadcasting or low power services whether provided free-to-air or by subscription;

(*b*A) electronic communications services of district municipality or local municipal scope operated for commercial purposes;

(bB) electronic communications facility services of a district municipality or local municipal scope operated for commercial purposes, that must be prescribed within 18 months of the coming into operation of the Electronic

Communications Amendment Act, 2022, or such other electronic communications facility services as may be prescribed; and

(*c*) such other services as may be prescribed, that the Authority finds do not have significant impact on socio-economic development.".

Insertion of section 21A in Act 36 of 2005

3. The following section is hereby inserted after section 21 of the principal Act:

"**Role of Minister responsible for Local Government**

21A. (1) The Minister responsible for local government must make a standard draft by-law as contemplated in section 14 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000) that provides —

(a) a uniform wayleave process for electronic communications networks and facilities;

(b) cost-based wayleave application fees;

(c) a framework for sharing of municipal property and infrastructure including without limitation high sites, poles and ducts with electronic communications network service licensees upon request and sharing municipal property and infrastructure amongst electronic communications network service licensees;

(d) that municipalities must take the deployment of electronic communications networks and facilities into consideration when developing Integrated Development Plans (IDPs);

(e) such other incidental matters necessary to encourage uniformity of wayleave applications and reasonability of fees applicable to electronic communications networks and facilities across municipalities; and

(f) any other measure that enables the rapid deployment of electronic communications networks and facilities across municipalities.

(2) A standard draft by-law contemplated in subsection (1) must be made within 12 months of the coming into operation of the Electronic Communications Amendment Act, 2022.".

Amendment of section 30 of Act 36 of 2005, as amended by section 14 of Act 1 of 2014

4. Section 30 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (*b*) of the following paragraph:

"(*b*) take into account modes of transmission and efficient utilisation of the radio frequency spectrum, including allowing shared use of radio frequency spectrum when interference can be eliminated or reduced to acceptable levels as determined by the Authority, subject to section 31A;".

Amendment of section 31 of Act 36 of 2005, as amended by section 15 of Act 1 of 2014

5. Section 31 of the principal Act is hereby amended by—

(a) the deletion in subsection (4) of the word "or" at the end of paragraph *(d)*, insertion of that word at the end of paragraph *(e)* and addition of the following paragraph:

"*(f)* if the Authority has approved an application for spectrum sharing or applied the 'use it or share it' principle.";

(b) the insertion after subsection (8) of the following subsections:

"(8A) (a) Subject to subsection (9), the Authority may amend any radio frequency spectrum licence when the licensee fails to use the assigned radio frequency spectrum adequately for a period of two years in any under-serviced area, despite significant demand for services in the under-serviced area, and allow spectrum sharing of such spectrum in the relevant under-serviced area until such time and on such conditions as may be determined by the Authority, referred to as the 'use it or share it' principle.

(b) The two-year period of failure to use radio frequency spectrum as contemplated in paragraph (a), may be calculated from a date that precedes the commencement of the Electronic Communications Amendment Act, 2022, provided the calculation of such period, may not be more than one year before the commencement of the Electronic Communications Amendment Act.

(8B) The Authority must prioritise the assignment of spectrum contemplated in subsection (8A) to community networks.

(8C) *(a)* The 'use it or share it' principle contemplated in subsection (8) does not apply to passive science services due to the nature of their operations which do not transmit signals frequently.

(b) The Authority may, upon good cause shown, exempt SMMEs and new entrants from the 'use it or share it' principle contemplated in subsection (8A) for a period defined by notice in the *Gazette*."; and

(c) the substitution for subsections (9) and (10) of the following subsections:

"(9) Before the Authority amends or withdraws a radio frequency spectrum licence or assigned radio frequency spectrum in terms of subsections (8) or (8A), 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 Authority) demonstrating that it is utilising the radio frequency spectrum in compliance with this Act and the licence conditions or fully utilising the radio frequency spectrum in the relevant under-serviced area.

(10) The Authority, based on the written response of the licensee, must notify the licensee of its decision to amend, withdraw or not to withdraw the licence or assigned radio

frequency spectrum.".

Insertion of section 31A in Act 36 of 2005

6. The following section is hereby inserted after section 31 of the principal Act:

"Radio frequency spectrum sharing

31A. (1) Radio frequency spectrum licensees may share licensed spectrum, subject to—

(a) approval from the Authority, in the case of high demand spectrum; and

(b) notification to the Authority, in the case of non-high demand spectrum.

(2) The Authority may refuse spectrum sharing of high demand spectrum if it is likely to—

(*a*) have a negative impact on competition that is not offset by efficiencies or public interest benefits;

(b) amount to spectrum trading; or

(c) compromise emergency services and other services that meet public interest goals.

(3) The Authority, in determining the likely competition impact and offsetting public interest as contemplated in subsection (2)(a), may consult with the Competition Commission.

(4) The Authority must prescribe spectrum sharing regulations within 12 months of the commencement of this section that include—

(a) the spectrum sharing application and notification processes;

(b) the criteria and conditions for spectrum sharing; and

(*c*) processes and procedures applicable to the 'use it or share it' principle as contemplated in section 31(8A) and (8B).".

Insertion of Chapter 7A in Act 36 of 2005

7. The following Chapter is hereby inserted after Chapter 7 of the principal Act:

"CHAPTER 7A

ROAMING AND MOBILE VIRTUAL NETWORK OPERATOR SERVICES

Obligation to provide national roaming and mobile virtual network operator services

42A. (1) An electronic communications network service licensee with access to International Mobile Telecommunications radio frequency spectrum, that has national network coverage of 90% of the population, must provide national

roaming and mobile virtual network operator services, and is hereinafter referred to as an access provider.

(2) An access provider must provide national roaming and mobile virtual network operator services, upon request, to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of a national roaming or mobile virtual network operator services agreement entered into between the parties.

(3) Upon receipt of a request, an access provider must conclude an agreement within 30 days, failing which the dispute must be resolved using the prescribed dispute resolution process.

(4) If the dispute contemplated in subsection (3) cannot be resolved within 30 days, the Authority must make a determination within 30 days on whether the requested access must be provided including the terms and conditions thereof, which period the Authority may extend by 30 days if reasonably necessary in the circumstances.

(5) An access provider must retain separate accounts for its radio access network, core network and retail operations.

National roaming and mobile virtual network operator services regulations

42B. (1) The Authority must prescribe national roaming and mobile virtual network operator services regulations within 18 months of the coming into operation of the Electronic Communications Amendment Act, 2022.

(2) The national roaming and mobile virtual network operator services regulations must address the requirements of national roaming and mobile virtual network operator service agreements, including, but not limited to—

(*a*) a reference offer containing model terms and conditions;

(*b*) the minimum quality, performance and level of service to be provided;

(*c*) the mobile technology generations to which access is mandated;

(*d*) maximum average wholesale rates, as contemplated in section 47;

(*e*) contractual dispute-resolution procedures;

(*f*) the framework for determining the feasibility of providing national roaming and mobile virtual network operator services access and principles of access; and

(*g*) the determination of access providers as contemplated in section 42A(1).

International roaming regulations

42C. (1) The Authority must prescribe international roaming regulations, including SADC roaming regulations.

(2) *(a)* The regulations contemplated in subsection (1) must be conditional on reciprocal terms and conditions being imposed on electronic

communications service providers of another country by such country or its national regulatory authority.

(b) The reciprocal terms and conditions contemplated in paragraph *(a)* mean that the electronic communications service provider of another country must offer similar tariffs as those offered by the South African electronic communications service provider.

(3) *(a)* (i) When prescribing international roaming regulations, the Authority must take into consideration any policy direction that may be issued by the Minister;

(ii) When prescribing SADC roaming regulations, the Authority must take note of SADC roaming decisions and must take into consideration any policy direction that may be issued by the Minister.

(b) The regulations may include rate regulation for the provision of roaming services, including without limitation price controls on wholesale and retail rates, as determined by the Authority.

(4) The Authority may—

(a) obtain any information required for international roaming regulation from electronic communications service licensees;

(b) share the information obtained in terms of paragraph *(a)* with relevant national regulatory authorities of other countries; and

(c) for purposes of SADC roaming regulations, share the information obtained in terms of paragraph *(a)* with the Communications Regulators' Association of Southern Africa.

(5) The Authority may engage national regulatory authorities of any other country in order to—

(a) promote international roaming between the respective countries;

(b) ensure reciprocity of the roaming terms and conditions applicable to electronic communications service providers of the respective countries, as contemplated in subsection (2); or

(c) enter into a bi-lateral agreement to give effect to international roaming and reciprocity, as contemplated in this section, despite any other provision in the underlying legislation.".

Amendment of section 43 of Act 36 of 2005, as amended by section 22 of Act 1 of 2014

8. Section 43 of the principal Act is hereby amended -

(a) by the substitution for subsections (1) to (3) of the following subsections:

"(1) Subject to section 44 (5) and (6), an electronic communications network service licensee and electronic communications facility service licensee must, on request, lease electronic communications facilities to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of an electronic communications facilities leasing agreement entered into between the parties, **[unless such request is**

unreasonable] in accordance with principles of access prescribed by the Authority.

(2) Where the **[reasonableness of any]** request to lease electronic communications facilities is disputed, the party requesting to lease such electronic communications facilities may notify the Authority in accordance with the regulations prescribed in terms of section 44.

(3) The Authority must, within 14 days of receiving the request, or such longer period as is reasonably necessary in the circumstances, **[determine the reasonableness of the request]** make a determination on the request.";

(b) by the deletion of subsection (4);

(c) the substitution for subsection (7) of the following subsection:

"(7) The lease of electronic communications facilities by an electronic communications network service licensee or electronic communications facility 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 or electronic communications facility 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.";

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

"(8) The Authority must prescribe a list of essential facilities within 12 months of the coming into operation of the Electronic Communications Amendment Act, 2022, [**including but not limited to-**

(a) electronic communications facilities, including without limitation local loops, sub-loops and associated electronic communications facilities for accessing subscribers and provisioning services;

(b) electronic communications facilities connected to international electronic communications facilities such as submarine cables and satellite earth stations; and

(c) any other such facilities,]

required to be leased by an electronic communications network service licensee or electronic communications facility service licensee in terms of subsection **[(1)]** (8A) (b).";

(e) by the substitution for subsection (8A) of the following subsection:

"(8A) **[(a) Requests for leasing of essential facilities are deemed to promote efficient use of electronic communication networks and services.]**

(*b*) All electronic communications network services licensees or electronic communications facility service licensees receiving requests **[contemplated in paragraph (a)]** for leasing of essential facilities are required to agree on non-discriminatory terms and conditions of a

facilities leasing agreement for those essential facilities within 20 days of receiving the request.

[(c) If the electronic communications network licensee can prove that the request is not technically or economically feasible within the 20 day period the electronic communications network services licensee may refuse the request.]

(*d*) If no agreement regarding the non-discriminatory terms and conditions contemplated in paragraph (b) can be reached, the Authority must impose terms and conditions consistent with this Chapter within 20 days of receiving notification of the failure to reach an agreement.";

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

"(9) The Authority must review the list of **[electronic communication]** essential facilities at least once every 36 (thirty-six) months and, where the Authority finds market conditions warrant it, make modifications to such list **[after undertaking an inquiry in accordance with section 4B of the ICASA Act]**."; and

(g) by the substitution in subsection (10) for the words preceding paragraph (a) of the following words:

"(10) An electronic communications network service licensee and electronic communications facility service licensee may not enter into any agreement or other arrangement with any person for access

to, or use of, any international electronic communications facilities, including submarine cables and satellites, that-".

Amendment of section 44 of Act 36 of 2005, as amended by section 23 of Act 1 of 2014

9. Section 44 of the principal Act is hereby amended—

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

"(k) **[the framework for determining technical and economic feasibility and promotion of efficient use of electronic communications networks and provision of services contemplated in section 43 (4)]** principles of access contemplated in section 43(1);";

(b) by the substitution in subsection (7) for the words preceding paragraph (a) of the following words:

"(7) **[Despite a finding of significant market power, for]** For purposes of promoting investment in new fibre electronic communications networks, the Authority may exempt an electronic communications network service licensee from the obligation to lease fibre loops and sub-loops serving residential premises if the electronic communications network service licensee meets the following requirements:".

Substitution of section 47 of Act 36 of 2005

10. The following section is hereby substituted for section 47 of the principal Act:

"Facilities leasing pricing principles

47. (1) The Authority **[may]** must 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]** wholesale pricing rules or standards applicable to different types of electronic communications facilities including for essential facilities, roaming and mobile virtual network operator services, within 18 months of the coming into operation of the Electronic Communications Amendment Act, 2022.

(2) The Authority must ensure that wholesale pricing rules or standards are—

(a) fair and reasonable;

(b) non-discriminatory, unless there are pro-competitive or efficiency justifications that exist and it does not prevent or distort competition;

(c) reflect the benefits of sharing costs amongst users sharing the facilities;

(d) cost-oriented; and

(e) at levels reflective of competitive commercial arrangements for other facilities and services.

(3) Providers of essential facilities must retain separate accounts for the electronic communications facilities.".

Amendment of section 67 of Act 36 of 2005

11. Section 67 of the Principal Act is hereby amended—

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

"Market inquiries"

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

"(4) (a) The Authority **[must, following an inquiry, prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition, and if any licensee has significant market power in such markets or market segments. The regulations must, among other things—**

(a) define relevant wholesale and retail markets or market segments;

(b) determine whether there is effective competition in those relevant markets and market segments;

(c) determine which, if any, licensees have significant market power in those markets and market segments where there is ineffective competition;

(d) impose appropriate pro-competitive licence conditions on those licensees having significant market power to 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.] may conduct an inquiry in terms of section 4B of the ICASA Act at any time,

(i) If it has reason to believe that any feature or combination of features of any markets or market segments impedes, distorts or restricts competition within such markets or market segments; or

(ii) to achieve the objects of this Act and of the related legislation.

(*b*) Where the Authority determines that there is a feature or combination of features that impede, distort or restrict competition within that market, the Authority must determine actions to remedy, mitigate or prevent the adverse effect on competition or the objects of this Act and of the related legislation.

(*c*) The actions contemplated in paragraph (b):

(i) must be reasonable, practical and proportionate to the adverse effect that such actions are designed to remedy;

(ii) may include imposing pro-competitive licence conditions on any licensee in terms of subsection (7); and

(iii) may include prescribing regulations.

(*d*) The Authority may, when doing an inquiry or assessment, consider findings by the Competition Commission, other relevant regulators and the Courts.

(*e*) An inquiry contemplated in this subsection must be concluded within 180 days.

(*f*) The Authority may by notice published in the gazette extend the period indicated in paragraph (e) above, by a reasonable period in order to complete the market inquiry process.";

(c) by the deletion of subsection (4A);

(d) by the deletion of subsection (5);

(e) 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) obligations in respect of interconnection and facilities leasing in addition to those provided for in 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 in the manner specified by it;

(d) obligations to maintain separate accounting for any services specified by the Authority including, but not limited to—

(i) the wholesale access and wholesale network infrastructure; and

(ii) the radio access network (RAN) and core network;

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

(f) rate regulation for the provision of specified services, including without limitation price controls on wholesale and retail rates as determined by the Authority, and matters relating to the recovery of costs;

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

(h) obligations concerning the amount and type of premium, sports and South African programming for broadcasting; and

(i) distribution, access and reselling obligations for broadcasters.";

(f) by the deletion of subsection (8); and

(g) by the insertion after subsection (12) of the following subsection:

"(13) The Authority and the Competition Commission may enforce each other's findings, in order to promote and enhance competition.".

Insertion of sections 67A and 67B in Act 36 of 2005

12. The following sections are hereby inserted after section 67 of the principal Act:

"**Competition Assessments**

67A. (1) The Authority may undertake competition assessments in any component of the electronic communications and broadcasting sectors.

(2) Competition assessments may be used to inform the Authority in exercising its licensing functions, including, but not limited to -

(a) service licensing; and

(b) radio frequency spectrum licensing.

(3) The Authority must prescribe regulations setting out the process and procedures for conducting competition assessments.

Concurrent jurisdiction agreement between the Authority and the Competition Commission

67B (1) The Authority may enter into a concurrent jurisdiction agreement with the Competition Commission in terms of section 4(3A) of the ICASA Act and such agreement must be published in the *Gazette.*

(2) The concurrent jurisdiction agreement contemplated in subsection (1) must address all issues pursuant to the co-operation between the Authority and the Competition Commission, including but not limited to—

(*a*) mechanisms to facilitate consultation between the Authority and the Competition Commission;

(*b*) the sharing of information, including confidential information of licensees or firms, between the Authority and the Competition Commission to facilitate the proper administration or enforcement of this Act and the Competition Act; and

(*c*) the management of competition-related assessments, market inquiries, complaints, mergers, cooperation arrangements and other relevant matters conducted by the Authority or the Competition Commission.".

Transitional arrangements

13. The provisions of sections 43 and 44, including regulations issued in terms of these sections, remain in force until the Authority has prescribed the principles of access contemplated in section 43(1) as amended by this Act.

Short title and commencement

14. (1) This Act is called the Electronic Communications Amendment Act, 2023, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

(2) The President may fix different dates for the coming into operation of different sections of this Act.

MEMORANDUM ON THE OBJECTS OF THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL, 2023

1. BACKGROUND AND CURRENT REGULATORY FRAMEWORK

1.1 The Electronic Communications Act, 2005 (Act No. 36 of 2005) (the "Act"), created the first converged regulatory framework for telecommunications and broadcasting in South Africa.

1.2 The sector is currently governed primarily by the Act and the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) ("ICASA Act"), which establishes the sector regulatory authority.

1.3 The National Integrated ICT Policy White Paper, 2016 outlines the overarching policy framework for the transformation of South Africa into an inclusive and innovative digital and knowledge society. The White Paper outlines various policy provisions including interventions to reinforce fair competition, and new approaches to addressing supply-side issues and infrastructure rollout including managing scarce resources.

1.4 The Competition Commission issued a Data Services Market Inquiry report on 2 December 2019. The report makes recommendations to the Department including the amendment of the Electronic Communications Act, 2005 to address the challenges relating to the costs of data. The Electronic Communications Amendment Bill seeks to address a number of the recommendations made.

2. OBJECTS OF BILL

The objects of the Bill are to amend the Act, so as to provide for a new licence category for electronic communications facilities services; to enable the Minister responsible for local government to make a national standard by-law on rapid deployment; to enable spectrum sharing; to regulate roaming and mobile virtual network services; to improve the facilities leasing framework and its pricing principles; to provide for improved competition regulation; and to provide for matters connected therewith.

3. SUMMARY OF BILL

Clause 1: Amendment of section 1 of Act 36 of 2005

Section 1 is amended to include new definitions for terms introduced by amendments proposed in the Bill as outlined below. These include:

- Definitions for new license categories, namely ‘community networks’ and ‘electronic communications facility service licensee’ (with an accompanying definition of an ‘electronic communications facility service’).
- A definition for ‘competition assessment’ to clarify the meaning and to define ‘Competition Commission’.
- An amendment to the definition of ‘essential facility’, to simplify the definition and bring it in line with current thinking on essential facilities which focuses on the effectiveness of competitors and not just their existence.

- Definitions for ‘high demand spectrum’, ‘radio frequency spectrum sharing’ and ‘radio frequency spectrum trading’, all new terms used in the proposed Bill.

Clause 2: Amendment of section 5 of Act 36 of 2005

The purpose of the amendments to section 5 is to insert a new license category for electronic communications facility services. The purpose is to bring electronic communications facility service providers, such as tower companies, within the licensing framework of the Act. This will provide for the wholesale regulation of such facilities and the imposition of licensing conditions.

Clause 3: Insertion of section 21A in Act 36 of 2005

A new section 21A is inserted to require that the Minister responsible for local government must make a national standard draft by-law as contemplated in section 14 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000) that among others provides for a uniform wayleave process for electronic communications networks and facilities.

This amendment provides the basis for the rapid deployment of electronic communications networks and facilities nationally in the context where wayleaves are a municipal level competency. Rapid deployment forms part of the White Paper and the recommendations of the Data Services Market Inquiry. The introduction of a draft by-law provides the basis for a uniform approach across municipalities which would support rapid deployment. Barriers to rapid deployment identified include differing approaches,

unreasonable costs for wayleaves and a lack of access to municipal property and infrastructure including electricity poles, high sites and ducts. The amendment seeks to ensure a uniform approach across municipalities and create the basis for reasonable fees for wayleaves that do not hinder infrastructure deployment. It also seeks to ensure that access is granted to all municipal infrastructure and property through the draft by-law.

Clause 4: Amendment of section 30 of Act 36 of 2005

The purpose of clause 4 is to amend section 30(2)(b) to ensure that any shared use of spectrum is subject to the spectrum sharing requirements contemplated in section 31A.

Clause 5: Amendment of section 31 of Act 36 of 2005

Section 31 of the principal Act is amended to enable the Authority to amend any radio frequency spectrum licence when the licensee fails to use the assigned radio frequency spectrum adequately for a period of two years in any under-serviced area, and allow spectrum sharing of such spectrum in the relevant under-serviced area until such time and on such conditions as may be determined by the Authority, referred to as the 'use it or share it' principle.

The Authority must prioritise the assignment of unused spectrum to community networks.

The amendment seeks to ensure that nationally assigned scarce spectrum is effectively utilized in all geographic areas, either by a licensee or a community network where the licensee is not making full use of the spectrum. Spectrum may not be utilized by a licensee

in an underserviced area due to a number of reasons, including a failure to prioritise the rollout of service in an underserviced area (e.g. providers focused on urban areas primarily), roaming arrangements in those areas which remove the need to utilize the licensees own spectrum (e.g. often also in rural areas), or where sufficient capacity is provided through a portion of spectrum assigned to the network operator (e.g. where coverage spectrum such as sub 1GHz is sufficient to meet demand without capacity spectrum such as the 1.8GHz or 2.3GHz spectrum).

The prioritized assignment of any unused spectrum to community networks ensures that the assignment promotes access in underserviced areas and avoids the difficulties of assignment to competing commercial providers. This is in line with the recommendation of the Data Services Market Inquiry which found that community networks could reduce their costs and improve coverage if they were permitted access to radio frequency spectrum, where such spectrum was not being utilized by some national operators. The alternative, namely WiFi networks, were less efficient and more costly to deploy.

Clause 6: Insertion of section 31A in Act 36 of 2005

Section 31A is inserted to make provisions for rules governing spectrum sharing and the role of the Authority to approve it first. Spectrum sharing has historically been prohibited but such arrangements may further the purposes of the Act under certain circumstances. Furthermore, recent roaming arrangements between network operators have raised the question as to whether these arrangements amount to sharing or trading of spectrum. It

is therefore appropriate to bring spectrum sharing into the Act and regulate such arrangements.

The section indicates that the Authority must approve any sharing of high demand spectrum given its importance in mobile competition but may be notified in respect of spectrum that is not high demand. The section requires that the Authority prescribe regulations in respect of spectrum sharing within 12 months in order to provide licensees with certainty on the processes for notification and authorization, the criteria and conditions for such sharing, including the processes for implementing the 'use it or share it' principle for unused spectrum. However, the amendments do include a restriction on such regulations from the Authority in clause 31A(2), namely that there cannot be approval where sharing amounts to trading, interferes with emergency services or where it has a negative impact on competition.

Clause 7: Insertion of Chapter 7A in Act 36 of 2005

A new chapter is inserted to provide for the regulation of roaming and mobile virtual network operator services ("MVNOs").

An electronic communications network service licensee with access to International Mobile Telecommunications radio frequency spectrum, that has national network coverage of 90% of the population, must provide roaming and MVNOs.

The amendment stems from the Data Services Market Inquiry finding that wholesale roaming arrangements are not competitively priced and contribute to raising rivals costs of challenger networks, thereby reducing the competitive constraint that such operators are able to exert in the market. Roaming agreements must be sought from operators with national network coverage which confers market power on those networks. The amendment also addresses the finding that MVNOs are not well developed in South Africa due largely to a lack of incentives by larger networks to provide access. MVNOs can bring material competitive benefits where barriers to their operation are removed.

Section 42A aims to mandate operators with national coverage to provide roaming and MVNO services upon request, and provides for a dispute resolution mechanism if terms are not agreed with the access provider. It also provides that operators with national coverage engage in accounting separation of their radio access network, core network and retail business. Section 42B requires that the Authority prescribe regulations which set the minimum requirements of such agreements, including the maximum price levels, the minimum quality requirements and the types of technologies to which access is provided.

Section 43C is inserted to make provision for international roaming, including SADC roaming regulations. It places an obligation on the Authority to prescribe regulations taking into consideration policy directions issued by the Minister and SADC Roaming decisions. The regulations must be conditional on reciprocal terms and conditions being imposed on electronic communications service providers of another country by such

country or its National Regulatory Authority. The section enables the Authority to obtain any information required for international roaming regulation from electronic communications service licensees and that the Authority may engage National Regulatory Authorities of any other country in order to promote international roaming.

Clause 8: Amendment of section 43 of Act 36 of 2005

Section 43 of the Act is amended to improve the facilities leasing framework.

The first amendment brings electronic communications facility services within the facilities leasing framework as licensees will now be regulated and must lease facilities. This impacts on various subsections of section 43 where such licensees are included in the coverage.

The second amendment replaces the reasonability test for access with principles of access prescribed by the Authority. When access is denied, the role of the Authority will not be to determine the reasonability of the request, but to decide the matter, considering the principles of access. These principles of access must be prescribed by the Authority in terms of section 44. This impacts on subsections (1) to (3). In addition, for essential facilities there is no longer the ability to refuse the request based on technically and economically feasibility as access is compulsory once a facility is listed as essential.

A third amendment is that the Authority must prescribe a list of essential facilities within 12 months that electronic communications network service licensee and electronic

communications facility service licensees will be required to lease upon request. This list must be reviewed every three years.

Clause 9: Amendment of section 44 of Act 36 of 2005

Section 44 of the Act is amended to enable the Authority to make regulations on the principles of access, which replaces the existing framework which is more narrowly focuses on the framework for the technical and economic feasibility.

Clause 10: Substitution of section 47 of Act 36 of 2005

Section 47 that deals with facilities leasing pricing principles is amended to ensure that the Authority prescribes wholesale pricing rules or standards applicable to different types of electronic communications facilities including for essential facilities, roaming and MVNOs.

General principles that must be adhered to are included such as fairness and reasonability and that costs must be cost-oriented.

The objective of the amendments is to provide that pricing principles for facilities leasing and wholesale rates for roaming and MVNOs are developed by the Authority. This is in contrast to the current position where such regulations may be developed rather than must be developed. This is in line with the findings and recommendations of the Data Services Market Inquiry that such regulation takes place, but that it does recognise that different pricing principles may apply to different facilities and wholesale arrangements.

Whilst the amendment provides the legislative basis for wholesale price regulation, it does not prescribe the form that it takes, rather leaving that to the Authority and only identifying principles that such regulation must adhere to. These include that such pricing regulations are fair and reasonable, non-discriminatory (standard FRAND principles), cost reflective and reflective of competitive commercial arrangements. These principles ensure fair and competitive pricing of facilities, roaming and MVNOs arrangements.

Clause11: Amendment of section 67 of Act 36 of 2005

Section 67 of the Act is amended in order to substitute the heading to be aligned with its contents and to improve the market review processes. The Authority can do a market inquiry if it has reason to believe that any feature or combination of features of any markets or market segments impedes, distorts or restricts competition within such markets or market segments.

Where the Authority determines that there is a feature or combination of features that impede, distort or restrict competition within that market, the Authority must determine actions to remedy, mitigate or prevent the adverse effect on competition or the objects of this Act and of the related legislation.

The amendment aims at improving the market review process of the Authority in line with the recommendations of the Data Services Market Inquiry and in line with the market inquiry process of the Competition Act. The amendment enables the Authority to address any feature which may hinder competition in order to actively promote competition in

communications markets, or to actively achieve purposes such as universal service. This is in contrast to the current narrow scope of market reviews, which limit interventions where competition as a whole in a market is deemed ineffective, and which does not permit the promotion of other objectives of the Act.

A provision is inserted to enable the Authority and the Competition Commission to enforce each other's findings, to promote and enhance competition. This ensures that once a finding is made in respect of competition by the Commission that an inquiry need not be repeated by the Authority in order to implement remedies which may be best overseen by the Authority. This is in the context where the Commission processes will include affected parties and are itself subject to normal review processes.

Clause12: Competition Assessments

A new section 67A is inserted that empowers the Authority to perform competition assessments as part of exercising its licensing functions. The Authority may also prescribe regulations that determine the relevant process and procedures. Section 67B is inserted to formalise the requirement for a concurrent jurisdiction agreement between the Authority and the Competition Commission. It also requires that such agreement must include consultative mechanisms between the two authorities, including the sharing of information and how to manage competition-related assessments, market inquiries, complaints, mergers, cooperation arrangements and other relevant matters conducted by the Authority or the Competition Commission.

Clause13: Transitional arrangements

Clause 13 provides transitional arrangements that are necessary to ensure that facilities leasing can continue under the existing sections 43 and 44 of the Act and Facilities Leasing Regulations until the Authority has prescribed the principles of access contemplated in section 43(1) of the Electronic Communications Amendment Act, 2022, that replaces the existing framework.

Clause14: Short title

This clause provides the name of the Act and seeks to provide that different dates may be fixed by the President for the coming into operation of different sections of this Act by Proclamation in the *Gazette*.

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

- Competition Commission;
- Department of Cooperative Governance;
- Independent Commissions Authority of South Africa (“ICASA”);
- South African Local Government Association ; and
- Department of Trade, Industry and Competition.

5. FINANCIAL IMPLICATIONS FOR STATE

5.1 The resources required to implement the interventions in the Bill mostly affect ICASA and DCoG. A costing exercise was done with both ICASA and COGTA and the financial implications included in the SEIAS.

5.2 The additional costs will need to be applied for during the MTEF process.

5.3 The commencement of relevant sections of the Act can be managed in accordance with budgetary allocations to ICASA.

6. PARLIAMENTARY PROCEDURE

6.1 The Constitution of the Republic of South Africa, 1996 ("the Constitution"), regulates the manner in which legislation may be enacted by Parliament. It prescribes different procedures for different kinds of Bills.

6.2 Section 75 of the Constitution sets out a procedure to be followed when National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 or 76 of the Constitution applies.

6.3 Section 76 of the Constitution on the other hand provides for a procedure that must be followed for all the Bills referred to in this section under subsections (3), (4) and (5).

6.4 In **Tongoane v Minister of Agriculture and others CCT 100/09 [2010] ZACC 10**, the Constitutional Court confirmed and upheld the test for tagging that was formulated in **Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC),** where the Constitutional Court held that ─

"the heading of section 76, namely, 'Ordinary Bills affecting provinces' provides a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4, be dealt with under section 76."

6.5 At paragraph 58 the Constitutional Court held that "What matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill "in substantial measure fall within a functional area listed in Schedule 4".

6.6 The Constitutional Court stated at paragraph 72 that any Bill whose provisions substantially affect the interest of the provinces must be enacted in accordance with the procedure stipulated in section 76. This also includes Bills providing for legislation envisaged in the further provisions set out in section 76(3)(a) to (f), as well as Bills the main substance of which falls within the exclusive national competence, but the provisions of which nevertheless substantially affect the provinces. What must be stressed, however, is that the procedure envisaged in section 75 of the Constitution remains relevant to all Bills that do not in substantial measure affect the provinces.

6.7 We have carefully considered the Bill and we are of the view that the Bill can be distinguished from the Tongoane judgment, as the Bill that does not deal with any of the matters listed in Schedule 4 or Schedule 5 to the Constitution.

6.8 Since the Bil does not fall within a functional areas listed in Schedule 4 or Schedule 5 to the Constitution, we are of the view that the procedure of section 76 of the Constitution does not apply and the Bill cannot be tagged as a section 76 Bill.

6.9 In light of the above, we are of the opinion that the Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

6.10 We are also of the view that it may not be necessary to refer this Bill to the National House of Traditional and Khoi-San Leadership in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.