

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. 36550 of 7 June 2013)
(The English text is the official text of the Bill)*

(MINISTER OF COMMUNICATIONS)

[B 17—2013]

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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 insert, amend or delete certain definitions; to align the Act with broad-based black economic empowerment legislation; to refine provisions relating to licensing; to decrease turn-around times for consultative processes; to make further provision towards ensuring effective competition amongst persons licensed under the Act; to remove regulatory bottlenecks; to require the Minister of Communications to establish a council to advise the Minister on broadband policy and implementation; to make further provision for the discounted rate at which Internet services must be provided to schools and other educational institutions; to authorise the Minister to require that certain information be submitted to the Minister; to make provision for the fiduciary duties of members of the Board of the Universal Service and Access Agency of South Africa; to provide afresh for the appointment and conditions of appointment of the chief executive officer of the Board; to make further provision for the utilisation of money in the Universal Service and Access Fund; 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, as amended by section 1 of Act 37 of 2007

1. Section 1 of the Electronic Communications Act, 2005 (Act No. 36 of 2005) (hereinafter referred to as the principal Act), is hereby amended— 5

(a) by the insertion before the definition of “affiliate” of the following definition:
“**Advertising Standards Authority of South Africa**’ means the entity which regulates the content of advertising, or any entity that replaces it but has the same functions;”;

(b) by the insertion after the definition of “Agency” of the following definitions: 10
“**allocation**’, in relation to 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 radio astronomy service under specified conditions;
“**assignment**’, in relation to a radio frequency or radio frequency channel, means authorisation given by the Authority for a radio station to use a radio frequency or radio frequency channel under specified conditions, and “assign” must be interpreted accordingly;” 15

- (c) by the insertion after the definition of “Authority” of the following definition:
 “**‘broadband’** means an always available, multimedia capable connection with a minimum download speed as determined by the Minister by notice in the *Gazette*.”;
- (d) by the substitution for the definition of “broadcasting service radio frequency bands” of the following definition: 5
 “**‘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.”; 10
- (e) by the insertion after the definition of “carrier pre-selection” of the following definition:
 “**‘CEO’** means the chief executive officer of the Agency appointed in terms of section 82A.”; 15
- (f) by the substitution for the definition of “common carrier” of the following definition:
 “**‘common carrier’** means [a] Sentech Limited, a state owned company established in terms of the Sentech Act, 1996 (Act No. 63 of 1996), and any other 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.”; 20
- (g) by the substitution for the definition of “electronic communications facility” of the following definition: 25
 “**‘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; 30
 (d) mast;
 (e) satellite transponder;
 (f) circuit;
 (g) cable landing station;
 (h) international gateway; 35
 (i) earth station; **‘[and]’**
 (j) radio apparatus;
 (k) exchange buildings;
 (l) data centres; and
 (m) carrier neutral hotels, 40
 or other thing, which can be used for, or in connection with, electronic communications, including, where applicable—
 (i) collocation space;
 (ii) monitoring equipment;
 (iii) space on or within poles, ducts, cable trays, manholes, hand holds and conduits; and 45
 (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.”; 50
- (h) by the substitution for the definition of “electronic communications service licensee” of the following definition:
 “**‘electronic communications service licensee’** means a person whom an electronic communications services licence has been granted in terms of section 5(2) or 5(4).”; 55
- (i) 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.”; 60

- (j) by the substitution for the definition of “ITU” of the following definition:
 “**ITU** means International [**Telecommunications**] Telecommunication Union;”;
- (k) by the substitution for the definition of “licensee” of the following definition: 5
 “**licensee** means a person issued with a licence to provide services in terms of Chapter 3 or Chapter 5 of this Act”;
- (l) by the insertion after the definition of “political advertisement” of the following definition:
 “**political party**, for the purposes of Chapter 9, means— 10
 (a) any registered party defined in section 1 of the Electoral Act, 1998 (Act No. 73 of 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;” 15
- (m) 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— 20
 (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 25
 (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;” 30
- (n) 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;” 35
- (o) 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 of the radio frequency spectrum in terms of Chapter 5 of this Act;” 40
- (p) by the substitution for the definition of “radio station” of the following definition:
 “**radio station** means one or more transmitters or receivers or a combination of transmitters and receivers, including the accessory equipment, necessary at one location for carrying an electronic communications service, broadcasting service or any electronic communications authorised by the Authority;” 45
- (q) by the deletion of the definition of “registered political party”;
- (r) by the substitution in the definition of “reseller” for paragraph (a) of the following paragraph: 50
 “(a) acquires, through lease or other commercial arrangement, [**by**] any electronic communications network service or electronic communications service; and”;
- (s) by the substitution for the definition of “service charter” of the following definition: 55
 “**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;” 60

- (t) by the insertion after the definition of “service charter” of the following definition :
 “ **‘service licence’** means a licence authorising the holder to provide any service contemplated in Chapter 3;”; and
- (u) 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, as amended by section 2 of Act 37 of 2007

2. Section 2 of the principal Act is hereby amended 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, as amended by section 3 of Act 37 of 2007

3. Section 3 of the principal Act is hereby amended—

- (a) by the substitution for subsection (2) of the following subsection: 20
 “(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; 25
- (b) the determination of priorities for the development of electronic communications networks and electronic communications services or any other service contemplated in Chapter 3; 30
- (c) the consideration of any matter within the Authority’s or Agency’s jurisdiction reasonably placed before it by the Minister for urgent consideration; 35
- (d) guidelines for the determination by the Authority of spectrum fees; and
- (e) any other matter which may be necessary for the application of this Act or the related legislation.”; 35
- (b) 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).”; 40
- (c) 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— 45
- (a) must consult the Authority or the Agency, as the case may be; and
- (b) must, in order to obtain the views of interested persons, publish the text of such policy or policy direction by notice in the *Gazette*— 50
- (i) declaring his or her intention to issue the policy or policy direction;
- (ii) inviting interested persons to submit written submissions in relation to the policy or policy direction in the manner specified in such notice in not less than 30 calendar days from the date of the notice; 55
- (c) must publish a final version of the policy or policy direction in the *Gazette.*”; and

(d) 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 the time period specified in subsection (5)(b)(ii).”

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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.”; and

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

“(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 the Minister with a copy of the proposed regulations.”

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

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.”;

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(b) by the deletion in subsection (3) of paragraph (d);

(c) 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.”;

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(d) by the insertion in subsection (5) after paragraph (b) of the following paragraph:

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

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

“(6) **[In consideration of the implementation of the managed liberalisation policies, the]** The Authority may only accept and consider applications for individual electronic communications network services licences in terms of a policy direction issued by the Minister in terms of section 3.”;

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(f) 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.”;

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

“(8A) Subsection (8) applies with the changes required by the context to any electronic communications service or network service that may be provided, electronic communications network that may be operated and any radio frequency spectrum that may be used, as contemplated in section 6.”;

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(h) 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.”

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Amendment of section 8 of Act 36 of 2005

6. Section 8 of the principal Act is hereby amended—

- (a) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:
 “Such standard terms and conditions may [**take into account**] include,
 but are not limited to—”; 5
- (b) by the substitution for subsections (3) and (4) of the following subsections, respectively:
 “(3) The Authority may [**prescribe**] impose additional terms and conditions that may be applied to any individual licence or class licence [**taking into account**] subject to the provisions of Chapter 10. 10
 (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.”; and 15
- (c) 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 powers and perform such functions after consultation with the Agency.”. 20

Amendment of section 9 of Act 36 of 2005

7. 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 other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act;”; and 25
- (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 section 8(3) and make a designation contemplated in section 8(4).”. 30

Amendment of section 10 of Act 36 of 2005

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8. 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 and any regulations that have been made under it.”. 40

Amendment of section 13 of Act 36 of 2005

9. Section 13 of the principal Act is hereby amended—

- (a) by the substitution for subsections (1) and (2) of the following subsections, respectively:
 “(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. 45
 (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.”; and 50
- (b) by the deletion of subsections (3), (4) and (5).

Amendment of section 16 of Act 36 of 2005

10. Section 16 of the principal Act is hereby amended—

- (a) by the substitution for subsections (1) and (2) of the following subsections, respectively:

“(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 one person do not collectively assume the scope or coverage of an individual licence. 5

(2) Registration for a class licence may be submitted **[at any time]** in the manner prescribed by the Authority.”; and 10

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

“(6) No class licence may be ceded, let, sub-let or transferred without the prior written approval of the Authority, provided that if the Authority has not refused or denied the cession, let, sublet or transfer within 30 days after notice has been given to the Authority, approval shall be considered to have been given.” 15

Amendment of section 17 of Act 36 of 2005

11. Section 17 of the principal Act is hereby amended by the substitution for subsections (3), (4) and (5) of the following subsections, respectively: 20

“(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; 25
 (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— 30
 (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] licences;** 35

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

(d) the Authority has not **[declined to accept]** refused or denied 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 **[61st]** 31st day after receipt of the registration notice by the Authority.” 40

Amendment of section 20 of Act 36 of 2005

12. Section 20 of the principal Act is hereby amended by the addition of the following subsection:

“(3) The Authority must, within 18 months of the coming into operation of the Electronic Communications Amendment Act, 2013, prescribe how electronic communications network service licensees must exercise their rights and fulfil their obligations under this Chapter and may, within that period, in the prescribed manner, impose conditions and obligations on licensees in the exercise and fulfilment of such rights and obligations, having considered the policy and policy directions contemplated in section 21.” 45 50

Substitution of section 21 of Act 36 of 2005

13. The following section is hereby substituted for section 21 of the principal Act:

“[Guidelines for rapid] Rapid deployment of electronic communications facilities

21. (1) The Minister must, in consultation with the Minister of Provincial and Local Government Cooperative Governance and Traditional Affairs, the Minister of Land Affairs Rural Development and 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.

(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, 2013.”.

Amendment of section 30 of Act 36 of 2005

14. Section 30 of the principal Act is hereby amended by—

- (a) the substitution in subsection (2) for the words preceding paragraph (a) of the following words:
 “In controlling, planning, administering, managing **[and]**, licensing and assigning the use of the radio frequency spectrum, the Authority must—”; and
- (b) by the substitution in subsection (2) for paragraph (a) of the following paragraph:
 “(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 with the national radio frequency plan contemplated in section 34;”.

Amendment of section 31 of Act 36 of 2005

15. Section 31 of the principal Act is hereby amended—

- (a) by the substitution for subsection (2) of the following subsection:
 “(2) (a) 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.
 (b) A service licence is required in addition to any radio frequency spectrum licence where the provision of such service entails the use of radio frequency spectrum.”;
- (b) by the insertion after subsection (2) of the following subsection:
 “(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 Authority.”;

- (c) by the substitution for subsection (3) of the following subsection:
 “(3) 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; 5
 (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, share 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).”; 10
- (d) by the insertion after subsection (4) of the following subsection:
 “(4A) The Authority must notify the licensee within 60 days of its decision with regard to an application for an amendment of a spectrum licence.”; and 15
- (e) by the substitution for subsections (8), (9) and (10) of the following subsections, respectively:
 “(8) Subject to subsection (9), 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. 20
 (9) Before 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 Authority) demonstrating that it is utilising the radio frequency spectrum in compliance with this Act and the licence conditions. 25
 (10) 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.”. 30

Amendment of section 34 of Act 36 of 2005

- 16.** Section 34 of the principal Act is hereby amended— 35
 (a) by the substitution for subsection (1) of the following subsection:
 “(1) The Minister, in the exercise of his or her functions, represents the Republic in international fora, including the ITU, in respect of—
 (a) the international **[allotment]** allocation of radio frequency spectrum; **[and]** 40
 (b) the international coordination of radio frequency spectrum usage; and
 (c) the co-ordination and approval of any regional radio frequency spectrum plans applicable to the Republic,
 in accordance with international treaties[,] and multinational and bilateral agreements entered into by the Republic.”; and 45
 (b) by the substitution in subsection (7) for paragraph (a) of the following paragraph:
 “(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;”. 50

Amendment of section 35 of Act 36 of 2005

- 17.** Section 35 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 55

“(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.”. 5

Amendment of section 36 of Act 36 of 2005

18. Section 36 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) The Authority may, subject to the provisions of the Standards Act, **[1993 (Act No. 29 of 1993) 2008 (Act No. 8 of the 2008)**, prescribe standards for the performance and operation of any equipment or electronic communication facility, including radio apparatus.”. 10

Amendment of section 37 of Act 36 of 2005

19. Section 37 of the principal Act is hereby amended— 15

(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 licensee to itself or to an affiliate.” 20 25

Amendment of section 38 of Act 36 of 2005

20. Section 38 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection: 30

“(1) (a) The Authority must prescribe regulations to facilitate the conclusion of interconnection agreements by stipulating interconnection agreement principles.

(b) The regulations may include any regulations referred to in **[section 39] sections 39 and 41.**” 35

(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” 40

(c) by the substitution for subsections (5) and (6) of the following subsections, respectively:

“(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].** 45

(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)** do not apply to such an interconnection agreement.”. 50

Amendment of section 39 of Act 36 of 2005

21. Section 39 of the principal Act is hereby amended by the substitution for subsection (4) of the following section:

- “(4) 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 5
 - (b) must review an interconnection agreement submitted in terms of subsection (1), 10
- to determine whether the agreement is consistent with the regulations prescribed.”.

Amendment of section 42 of Act 36 of 2005

22. Section 42 of the principal Act is hereby amended by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

- “The framework contemplated in subsection (1)(b) must **[be in force not later than 1 July 2006 and]** ensure that—”. 15

Amendment of section 43 of Act 36 of 2005

23. Section 43 of the principal Act is hereby amended—

- (a) by the substitution in subsection (4) for paragraph (a) of the following paragraph: 20
 - “(a) is technically and **[financially]** economically feasible; and”;
- (b) by the substitution for subsection (7) of the following subsection: 25
 - “(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.”; 30
- (c) by the insertion after subsection (8) of the following subsection: 35
 - “(8A) (a) Requests for leasing of essential facilities are deemed to promote efficient use of electronic communication networks and services. 35
 - (b) All electronic communications network services licensees receiving requests contemplated in paragraph (a) are required to agree on non-discriminatory terms and conditions of a facilities leasing agreement for those essential facilities within ten 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 ten day period the electronic communications network services licensee may refuse the request. 40
 - (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 5 (five) days of receiving notification of the failure to reach an agreement.”; and 45
- (d) by the substitution for subsection (11) of the following subsection: 50
 - “(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 the Electronic Communications Amendment Act, 2013.”.

Amendment of section 44 of Act 36 of 2005

24. Section 44 of the principal Act is hereby amended by the substitution for subsections (5) and (6) of the following subsections, respectively:

“(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]**. 5

(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] an** 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.”. 10 15

Amendment of section 45 of Act 36 of 2005

25. Section 45 of the principal Act is hereby amended—

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

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

“(5) The Authority— 20

(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 agreements are] the agreement is consistent with the regulations prescribed.”. 25

Substitution of section 55 of Act 36 of 2005

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

“**Control over advertisements** 30

55. (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 to any advertising regulations prescribed by the Authority in respect of scheduling of adverts, infomercials and programme sponsorships. 35

(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. 40

(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 sections 17A to 17H of the ICASA Act.”. 45

Amendment of section 62 of Act 36 of 2005

27. Section 62 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection: 50

“(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) [in determining its tariffs,] 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 duly take into account 5
the following:
- (i) the different categories of broadcasting service [licenses] licences 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 10
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 an electronic communications network service licensee that provides signal distribution for public broad- 15
casting services.”.

Amendment of section 65 of Act 36 of 2005

28. Section 65 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) No person may— 20
- (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 25
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 30
commercial broadcasting service [license] licence in the commercial television broadcasting service.”.

Amendment of section 67 of Act 36 of 2005

29. Section 67 of the principal Act is hereby amended—

- (a) by the deletion of subsections (1), (2) and (3); 35
- (b) by the substitution for subsection (4) of the following subsection:

“(4) The Authority must, following an inquiry, 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]** and impose 40
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— 45

 - (a) **[define and identify the retail or] define** 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)];** 50
 - (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)];** 55

- (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 remedy the market failure; 5
- (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 10
- (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: 15
- “(4A) When determining whether there is effective competition in markets and market segments, the Authority must consider, among other things—
- (a) the non-transitory (structural, legal, and regulatory) entry barriers to the applicable markets or market segments; and
- (b) 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. 20
- (4B) Subject to section 4D of the ICASA Act, 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: 25
- “(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: 30
- “(7) Pro-competitive licence terms and conditions may include but are not limited to— 40
- (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; 45
- (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;
- (e) obligations to maintain structural separation for the provision of any services specified by the Authority; 50
- (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; 55
- (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.” 60

Amendment of section 68 of Act 36 of 2005

30. Section 68 of the principal Act is hereby amended by the substitution in subsection (1)(b) for the words preceding subparagraph (i) of the following words:

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

5

Amendment of section 72 of Act 36 of 2005

31. Section 72 of the principal Act is hereby 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.”; and

(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.”.

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Insertion of section 72A in Act 36 of 2005

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

“National Broadband Council

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72A. (1) The Minister must establish a National Broadband Council to perform the functions referred to in subsection (3) having regard to the provisions of any other national law on the development of infrastructure.

(2) The terms and conditions of appointment of members who may be from the public and private sector, including allowances, composition and meetings applicable to the Council by virtue of its appointment in terms of subsection (1), must be as determined by the Minister.

25

(3) The Council must report to and advise the Minister on broadband policy and implementation and must, where required to do so by the Minister, perform the following functions:

30

(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 which plan must include, without limitation, skills development, research and development of broadband priority areas;

35

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

40

(e) recommend measures to increase uptake and usage of broadband as well as enhance public awareness on the benefits of broadband; and

(f) annually survey and evaluate the status of broadband penetration in the Republic including, without limitation, household broadband penetration and electronic communications network connectivity to municipalities and broadband providers.”.

45

Substitution of section 73 of Act 36 of 2005

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

“E-rate

73. (1) Internet services, provided to all public and independent schools as defined in the South African Schools Act, 1996 (Act No. 84 of 1996), all public and private colleges and all public and private further education and training institutions [as defined in] established, declared or registered in terms of the Further Education and Training Colleges Act, [1998 (Act No. 98 of 1998)] 2006 (Act No. 16 of 2006), and all public and private higher education institutions defined in the Higher Education Act, 1997 (Act No. 101 of 1997), 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. 5

(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: 10

- (a) Any connectivity charges for access to the Internet;
- (b) charges for any [equipment] electronic communications facilities 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. 20

(3) Where the electronic communications service licensee, who provides Internet services to the institutions and schools as contemplated in subsection (1), obtains its electronic communications facilities for the provision of Internet services from [a] an 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, which discount shall be passed on to the schools and other institutions mentioned in subsection (1). 25

(4) The implementation of this section must be in the manner prescribed. 30

[(5) The Minister may, in consultation with the Minister responsible for Education, 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 school or other institution contemplated in subsection (1), in which event the Agency is entitled to the discount mentioned in subsection (1).” 35

Insertion of sections 79A and 79B in Act 36 of 2005

34. The following sections are hereby inserted in the principal Act, after section 79: 40

“Limitation of liability

79A. No person in the employ of a 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. 45

Provision of information

79B. (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. 50

(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) When information is requested by the Minister the relevant person may request the Minister to treat specific information as confidential, and for that purpose section 4D of the ICASA Act applies with the changes required by the context.”.

Amendment of section 80 of Act 36 of 2005 5

35. Section 80 of the principal Act is hereby amended 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 81A in Act 36 of 2005 10

36. The following section is hereby inserted in the principal Act, after section 81:

“Fiduciary duties of Board members, and removal and dissolution

81A. In addition to any other applicable law relating to the fiduciary duties of members of a board, 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. 15
- (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— 20
 - (i) offer goods or services to the Agency or conclude any business with the Agency; or 25
 - (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— 30
 - (i) take reasonable steps to inform himself or herself about the Agency, its business and activities and the circumstances in which it operates; 35
 - (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; 40
 - (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; 45
 - (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; 50
 - (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.”. 55

Amendment of section 82 of Act 36 of 2005

37. 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.”.

Insertion of sections 82A to 82E in Act 36 of 2005

38. (1) The following sections are hereby inserted in the principal Act, after section 82:

“Appointment of chief executive officer

82A. (1) The Board must, with the approval of the Minister, appoint a CEO to ensure that the Agency meets its objectives.

(2) The Board must invite applications for the post of CEO by publishing advertisements in the media.

(3) A person appointed as CEO must—

- (a) have the qualifications or experience relevant to the functions of the Agency; and
- (b) not be disqualified due to any action contemplated in section 81A(1)(b).

Conditions of appointment of CEO

82B. (1) The appointment of the CEO is subject to the conclusion of an annual performance agreement with the Agency.

(2) The CEO 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 CEO holds office on terms and conditions determined by the Board, with the concurrence of the Minister.

(4) The CEO is a member of the Board by virtue of his or her office.

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

(6) The CEO is accountable to the Board.

Termination of employment of CEO

82C. (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 CEO—

- (a) for misconduct; or
- (b) for failing to perform the duties connected with that office diligently.

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

(3) The CEO must vacate the office if he or she becomes disqualified from membership of the Board due to any action contemplated in section 81A(1)(b).

(4) The CEO may resign on written notice of at least 30 days to the chairperson of the Board.

Acting chief executive officer

82D. (1) The Board may in writing appoint any senior employee of the Agency to act as CEO 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 CEO has not yet been appointed.

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

Delegation and assignment by CEO

82E. (1) The CEO may delegate any of his or her powers and assign any of his or her duties to an employee of the Agency.

- (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 CEO; 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 CEO is not divested of any power or duty so delegated or assigned.”.

(2) (a) Any reference in any other law to the CEO referred to in section 83 of the principal Act prior to the insertion of sections 82A by subsection (1) of this section, must be construed as a reference to the CEO referred to in the said section 82A.

(b) Anything done by the CEO prior to the commencement of this section in the administration of any law, must be regarded to have been done by the CEO referred to in section 82A.

(c) The person who held office as CEO immediately prior to the commencement of this section, must be regarded to have been appointed as the CEO under section 82A of the principal Act as inserted by subsection (1) of this section.

Amendment of section 83 of Act 36 of 2005

39. Section 83 of the principal Act is hereby amended—

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

“(1) The Agency is under the direction and control of the CEO **[appointed by the Board]**.”;

- (b) by the deletion of subsections (2) and (4);

- (c) by the substitution for subsections (9) and (10) of the following subsections, respectively:

“(9) The **[CEO and other]** staff of the Agency must be appointed on the grounds of their qualifications, expertise or experience in the fields, when viewed collectively, of development planning, community development, social sciences, economics, electronic communications and publicity.

(10) A person may not be appointed or continue in office as **[CEO or other]** a member of the staff of the Agency if he or she becomes unfit to hold the office or becomes incapacitated.”;

- (d) by the deletion of subsection (11); and

- (e) by the substitution for subsections (12) and (13) of the following subsections, respectively:

“(12) The **[CEO and other employees]** members of the staff of the Agency hold office on such conditions as to remuneration and otherwise[—

(a) **in the case of the CEO, as the Minister may determine with the concurrence of the Minister of Finance;**

(b) **in the case of other employees,**] as the CEO may determine with the concurrence of the Minister and the Minister of Finance.

(13) Different periods and conditions may be determined under **[subsections (11) or] subsection (12)** in respect of different **[employees] members of the staff of the Agency.**”.

Amendment of section 87 of Act 36 of 2005

40. Section 87 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection: 5

“(2) All money received, the amounts of which in terms of subsection (1) must be credited to to 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.”. 10

Amendment of section 88 of Act 36 of 2005

41. Section 88 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraphs (a) and (b) of the following paragraphs, respectively:

“(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; 15

(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 underserviced areas as prescribed;” 20

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

(c) by the substitution in subsection (1)(d) for the words preceding subparagraph (i) of the following words:

“to schools and **[further education and training institutions] colleges** as defined in or established, declared or registered in terms of the South African Schools Act, 1996 (Act No. 84 of 1996), and the Further Education and Training Colleges Act, [1998 (Act No. 98 of 1998)] 2006 (Act No. 16 of 2006), respectively, for the procurement of broadcasting and electronic communications services and access to electronic communications networks: Provided that—” 25 30

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

(e) by the substitution in subsection (1)(d)(ii) for the words preceding item (aa) of the following words:

“in the case of independent schools and **[independent further education and training institutions] private colleges—**” 35

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

“(e) for the establishment and operation of **[broadcasting services and for the establishment and operation] community 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.**” 40

(g) by the addition to subsection (1) of the following paragraph: 45

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

(h) 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.”; and 50

(i) by the substitution for subsections (3) and (4) of the following subsections, respectively: 55

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

- (4) [**The Minister may**] The Agency must at least every two years, after obtaining public participation, make recommendations to enable the Minister to determine by notice in the *Gazette*, for the purposes of payments referred to in subsection (1)(a)[, **by notice in the *Gazette* determine]**— 5
- (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.”. 10

Amendment of section 89 of Act 36 of 2005

42. 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 from the Authority.” 15

Amendment of section 95 of Act 36 of 2005

43. 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, the** The Authority may, if the Authority considers it necessary, repeal or amend the regulations made under— 20

- (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; 25
- (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**] the Electronic Communications Amendment Act, 2013.”.

Amendment of Arrangement of Sections 30

44. The Arrangement of Sections which occur before section 1 of the principal Act is hereby amended—

- (a) by the substitution for item 21 of the following item:
 - “**21. [Guidelines for rapid] Rapid** deployment of electronic communications facilities”; 35
- (b) by the insertion after item 72 of the following item:
 - “**72A. National Broadband Council**”;
- (c) by the insertion after item 79 of the following items:
 - “**79A. Limitation of liability**”;
 - 79B. Provision of information**”; 40
- (d) by the insertion after item 81 of the following item:
 - “**81A. Fiduciary duties of Board members, and removal and dissolution**”; and
- (e) by the insertion after item 82 of the following items: 45
 - “**82A. Appointment of chief executive officer**”
 - 82B. Conditions of appointment of CEO**
 - 82C. Termination of employment of CEO**
 - 82D. Acting chief executive officer**
 - 82E. Delegation and assignment by CEO**”.

Short title and commencement 50

45. (1) This Act is called the Electronic Communications Amendment Act, 2013, and comes into operation on a date determined by the Minister by notice in the *Gazette*.

(2) Different dates may be so determined in respect of different sections of this Act.

MEMORANDUM ON THE OBJECTS OF THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL, 2013

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. It established the framework in line with developments internationally, renaming telecommunications “electronic communications” for consistency and introducing various changes to the way in which networks and services were regulated.
- 1.2 Because it was the first such law, over time it has become obvious that certain provisions are not capable of implementation in the way that was intended or do not have the intended effect when applied. There are also areas of ambiguity and vagueness which hamper efficient and effective regulation.
- 1.3 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.
- 1.4 At the same time as amending the Electronic Communications Act, 2005 (Act No. 36 of 2005), it is proposed that the ICASA Act also be amended for similar reasons, and to ensure consistency across the sector legislation.
- 1.5 An ICT Policy Review process (“Review”) is now underway to review the information, communications and technology (“ICT”) sectors. Several areas in which other changes may be appropriate have been earmarked for the Review Panel which has now been constituted. The areas of change within the Bill that have been deferred for the Review are:
 - 1.5.1 the creation, functions and duties of the Spectrum Management Agency;
 - 1.5.2 some of the amendments to the functions and powers of the Universal Service and Access Agency of South Africa and its governance; and
 - 1.5.3 ownership and control of licensees.
- 1.6 However, the Review may take between two and three years to conclude and it is not appropriate to await the outcome of that process before proceeding with necessary and timely changes to existing statutes.

2. OBJECTS OF THE BILL

The objects of the Bill are to amend the Electronic Communications Act, 2005, so as to align the Act with broad-based black economic empowerment initiatives; to incorporate the Authority’s recommendation on ownership and control of commercial broadcasting services; to refine licensing issues; to improve the competition provisions; to improve turn-around times for consultative processes; to provide for the terms of appointment and the duties of the Chief Executive Officer; 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.

3. SUMMARY OF THE BILL

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

The definitions contained in the Act are amended as follows:

- (a) A new definition of “Advertising Standards Authority of South Africa” is inserted, as Chapter 9 (broadcasting) addresses the roles of the

- Independent Communications Authority of South Africa (“ICASA”) and this entity respectively in relation to advertising.
- (b) Definitions for “allocation” and “assignment” are inserted, based on the Radio Regulations definitions of the International Telecommunication Union (“ITU”). “Allocation” is intended to mean the classification of use of a particular band of spectrum, whilst “assign” has a similar meaning to “license” (as a verb). A consequential amendment has been made to the definition of “broadcasting service radio frequency bands” to confirm that “allotment” should be read to mean “allocation”.
 - (c) The new definition of “broadband” is intended to permit a flexible approach to the fast-moving technological advances in this area and avoid amendment of the Bill whenever the parameters need to be adjusted. This definition was proposed in a detailed study which will inform the broadband policy in due course.
 - (d) The definition of “common carrier” is amended to refer specifically to Sentech Limited because a Cabinet minute provides that Sentech’s strategic role should be defined. This amendment does not exclude other persons from being designated as common carriers, which is made clear in section 62(3) of the Act.
 - (e) The definition of “electronic communications facility” is amended to include access to wiring in multi-tenant buildings. Also included in the *indicative* list of these sorts of facilities are exchange buildings, carrier-neutral hotels and data centres.
 - (f) The definition of “end user” is amended to confirm that this person could use services of a licensed entity or a licence-exempt entity.
 - (g) The definition of “ITU” is amended to refer to the International Telecommunication Union (an “s” has been removed).
 - (h) The definition of “licensee” is amended to simply refer to Chapters 3 and 5 of the Act for clarity.
 - (i) A new definition of “political party” is inserted to clarify when such a party should be considered to be constituted for purposes of the Act. The associated definition of “registered political party” is deleted.
 - (j) The definition of “radio frequency plan” now seeks to refer to section 34.
 - (k) The definition of “radio frequency spectrum” is substituted to include broadcasting in addition to electronic communications for clarity, and “broadcasting” has also been added to the definition of “radio station”. Other clarifications have been added to the definition of “radio frequency spectrum licence”.
 - (l) A new definition of “service licence” is inserted so as to confirm that this is a licence authorising the holder to provide any service contemplated under Chapter 3.
 - (m) The definition of “universal service” is amended to include electronic communications network services.

3.2 Clause 2: Amendment of section 2(h) of Act 36 of 2005

The amendment seeks to replace the phrase “historically disadvantaged individuals” with the term “broad-based black economic empowerment”.

3.3 Clause 3: Amendment of section 3 of Act 36 of 2005

- (a) Section 3(2) is amended 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. The amendment seeks to afford the Minister an opportunity to properly fulfil his or her own policy mandate. There are many matters on which policy should be made. The new wording simply clarifies that this is possible.
- (b) The addition of subsection (d) restates the existing Ministerial powers in relation to licence fees as set out in section 5(7)(iii) for clarity.
- (c) An amendment of subsection (5)(b)(ii) seeks to make it clear that the period allowed for inputs regarding proposed policy by the Minister, must at least be 30 calendar days. A new subsection is added to section 3

to enable a deviation from the time period if it is reasonable and justifiable as contemplated in the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

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

The amendments propose that the Minister be given a copy of regulations prior to their publication by ICASA.

3.5 Amendment of section 5 of Act 36 of 2005

- (a) This clause seeks to amend section 5(3)(b) by replacing ‘regional’ with ‘provincial’ to provide more certainty.
- (b) The deletion of subsection (3)(d) is to address the existing situation which requires municipalities, smaller networks like Dube TradePort, and other government-owned networks or services to apply for an individual licence when they may be providing services within a relatively small area or to a closed user group.
- (c) Other changes to the definitions of characteristics of individual licences have been omitted, save that commercial broadcasting licences should be provincial or national to require individual licences.
- (d) The reference to the historical “managed liberalisation policies” in subsection (6) is deleted as it is now irrelevant.
- (e) A new subsection is inserted to confirm that subsection (8) applies to any electronic communications service or network service, electronic communications network and radio frequency spectrum.

3.6 Clause 6: Amendment of section 8 of Act 36 of 2005

- (a) The amendment seeks to authorise the imposition of additional licence terms and conditions on designated licensees relating specifically to universal access and universal service, and competition.
- (b) The amendment furthermore seeks to require ICASA to impose conditions in licences “subject to” the provisions of Chapter 10 in order to ensure that the proper checks and balances are in place.

3.7 Clause 7: Amendment of section 9 of Act 36 of 2005

The focus of the Act has been changed from the empowerment of ‘historically disadvantaged individuals’ to broad-based black economic empowerment. Therefore the required equity ownership by historically disadvantaged groups in section 9(2)(b) has been retained for the time being provided that broad-based black economic empowerment requirements prescribed by ICASA under section 4(3)(k) of the ICASA Act may replace it in due course.

3.8 Clause 8: Amendment of section 10 of Act 36 of 2005

The amendment seeks to enable ICASA to amend a licence in accordance with Chapter 10 and any regulation that may have been made under that Chapter.

3.9 Clause 9: Amendment of section 13 of Act 36 of 2005

This clause seeks to ensure that the transfer of individual licences including the transfer of control, letting and sub-letting of such licences, requires the prior approval of ICASA.

3.10 Clause 10: Amendment of section 16 of Act 36 of 2005

The changes provide that class licences obtained by any person may not collectively assume the scope or coverage of an individual licence. It also enables ICASA to prescribe the intervals at which registrations may be submitted and allows the transfer of a class licence upon notification to ICASA. ICASA’s approval is required for class licence transfers, but the

clause also deems approval to have been given if ICASA does not respond within a specified period of time.

3.11 Clause 11: 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.

3.12 Clauses 12 and 13: Amendment of sections 20 and 21 of Act 36 of 2005

Due to the critical importance of the provision in section 21 in relation to the guidelines for the rapid deployment of electronic communications facilities, especially for broadband roll-out, the changes to sections 20 and 21 seek to replace guidelines with policy and policy directions made by the Minister to remove the uncertainty on the status of guidelines. Section 20(3) is new and seeks to require ICASA to prescribe how licensees must exercise their rights and fulfil their obligations. It also seeks to authorise ICASA to impose conditions and obligations on licensees, having regard to any policy directions issued by the Minister in section 21.

3.13 Clauses 14, 15 and 16: Amendment of sections 30, 31 and 34 of Act 36 of 2005

- (a) The amendment to section 30 seeks to align the radio frequency spectrum issues in Chapter 5 of the Act with the Cabinet-approved National Radio Frequency Spectrum Policy. In terms of changes to section 30(2), the use of allocation of spectrum must comply with the national radio frequency plan under section 34 as well as with the ITU standards. The concept of “assignment” is introduced in subsection (2)(a), to confirm ICASA’s licensing role in relation to the radio frequency spectrum.
- (b) The wording of section 31, permitting the letting or sub-letting or transfer of radio frequency spectrum licences, is amended in the interests of freeing up the use of this scarce resource, subject to any conditions that ICASA may determine to be appropriate in the course of approving assignment, cession or transfer of spectrum. The amendment to section 31(2), by adding paragraph (b), confirms that a service licence is required in addition to any radio frequency spectrum licence if the service requires radio frequency spectrum.
- (c) ICASA should respond to applications for amendments to frequency spectrum licences within a stipulated period of time and subsection (11) is added to section 31 to this effect. This is in line with amendments to the Act in general to require more accountability and efficiency within the regulatory process.
- (d) Amendments to section 34(1) are made to ensure the Minister also addresses the co-ordination and approval of any regional radio frequency spectrum plans that apply in the Republic.

3.14 Clause 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 any type of approval from ICASA.

3.15 Clause 18: Amendment of section 36 of Act 36 of 2005

The Standards Act, 1993 (Act No. 29 of 1993), has been repealed. The current Act is the Standards Act, 2008 (Act No. 8 of 2008).

3.16 Clauses 19 to 21: Amendment of sections 37 to 39 of Act 36 of 2005

The amendments seek to redefine the reasonableness of interconnection requests by changing the requirement for financial feasibility to economic feasibility. This is more apt because of the criteria that can be taken into account in considering the feasibility of the request. The changes further seek

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. Finally, they also enable class licensees to enter into interconnection agreements.

3.17 Clauses 22 to 25: Amendment of sections 42 to 45 of Act 36 of 2005

The amendments seek to delete the timeframe that is now irrelevant; to redefine the reasonableness of facilities-leasing requests by changing the requirement for financial feasibility to economic feasibility to have wider application; 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; 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; and further seek to nullify exclusivity provisions contained in any agreement or other arrangement that is prohibited under subsection (10) three years after the commencement of the Act.

3.18 Clause 26: Substitution of section 55 of Act 36 of 2005

- (a) This clause seeks to ensure that ICASA may regulate scheduling of adverts, infomercials and programme sponsorships as proposed by ICASA. The scheduling of adverts, infomercials and programme sponsorships was previously regulated via regulations issued in 1999 (Advertising, Infomercials and Programme Sponsorship Regulations).
- (b) These provisions relating to regulations on advertising and sponsorship are important in the interests of monitoring the allocation and use of advertising by subscription broadcasters.

3.19. Clause 27: Amendment of section 62 of Act 36 of 2005

This proposed amendment addresses the obligations of a common carrier and requires such carrier to submit its tariffs for approval by ICASA. The changes are intended to strengthen the regulatory oversight of the common carrier.

3.20 Clause 28: Amendment of section 65 of Act 36 of 2005

The proposed changes seek to clarify that the restrictions on ownership and control of broadcasting licensees apply in relation to commercial broadcasting licensees only.

3.21 Clause 29: Amendment of section 67 of Act 36 of 2005

- (a) 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.
- (b) Amendments to subsections (4) to (7) are intended to assist ICASA in implementing the regulatory regime set out in Chapter 10.
- (c) The proposed deletion of subsection (6) is as a result of the amendments proposed in relation to subsection (7). Subsection (7) seeks to list pro-competitive licence terms and conditions. The list is indicative only and not limited.

3.22 Clause 30: Amendment of section 68 of Act 36 of 2005

This clause seeks to remove a redundant timeframe.

3.23 Clause 31: 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, information and related services free of charge. This

service is currently provided by SITA on behalf of the Department of Public Service and Administration (“DPSA”). The four digit number allocated for this service in terms of section 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 the DPSA. That was not the initial intention. The wording is changed to make it clear that licensees may not levy any charge on calls to the centre.

3.24 Clause 32: Insertion of section 72A in Act 36 of 2005

This clause seeks to empower the Minister to establish the National Broadband Council to advise the Minister on broadband policy and implementation. It further specifies the functions of the Council.

3.25 Clause 33: Amendment of section 73 of Act 36 of 2005

- (a) It is proposed that section 73 be amended to assist with the enforcement of the e-rate provisions. It is necessary to make it clear when an electronic communications service licensee should give the discount and when the licensee is entitled to a discount from the electronic communications network service licensee. A problem is also experienced due to information service providers that do not want to give the 50% discount to the USAASA when the USAASA pays the charge on behalf of a school. A new subsection is proposed to make it clear that the USAASA can pay a charge on behalf of a school and will in such instance be entitled to the 50% discount.
- (b) Subsection (5) is deleted as no differentiation is now made in proposed subsection (1) between different schools or higher education institutions when applying the e-rate.

3.26 Clause 34: Insertion of sections 79A and 79B in Act 36 of 2005

Proposed section 79A 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 Act.

3.27 Insertion of section 79B in Act 36 of 2005

Proposed section 79B seeks to enable access to information held by ICASA, USAASA or any other person 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, market reviews and the imposition of remedies, compilation of relevant statistics, and provision of updated information to the ITU, for example. If the Minister requires information, the person submitting it may request that the information be treated as confidential, in which instance section 4D of the ICASA Act applies with the necessary changes. (Section 4D sets out how confidential information must be dealt with.)

3.28 Clauses 35 and 36: Amendment of section 80 and insertion of section 81A of Act 36 of 2005

- (a) The changes make it clear that USAASA is subject to the Public Finance Management Act, 1999.
- (b) The other changes seek to improve the governance and structure of the USAASA Board including the fiduciary duties of the Board to move towards “best practise”. It further makes it clear that the Minister has the power to remove a member of the Board and dissolve the Board on good cause shown.

3.29 Clause 37: Amendment of section 82 of Act 36 of 2005

- (a) The amendment of section 82 seeks to remove contradictions between that section and the definitions of universal access and universal service contained in section 1.
- (b) ‘Universal access’ is defined in the 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 electronic communications services and electronic communications network services. No mention is made of broadcasting services as is in the definition of universal access. The amendments to this section seek to correct inconsistencies.
- (c) The same applies for ‘universal service’.

3.30 Clause 38: Insertion of sections 82A to 82E in Act 36 of 2005

This clause seeks to provide new provisions on the appointment of the chief executive officer of USAASA, conditions of appointment, termination of employment, and delegation of authority. These provisions are aimed at improving governance provisions in relation to the chief executive officer. Provision is also made for the appointment of an acting chief executive officer.

3.31 Clause 39: Amendment of section 83 of Act 36 of 2005

This clause seeks to amend section 83 due to the new provisions in sections 82A to 82E regarding the chief executive officer.

3.32 Clause 40: Amendment of section 87 of Act 36 of 2005

This clause seeks to amend section 87 to reflect the appropriate section in the Constitution of the Republic of South Africa, 1996.

3.33 Clause 41: Amendment of section 88 of Act 36 of 2005

- (a) This clause seeks to correct the 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 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. The clause furthermore seeks to require USAASA to create, at least every two years, application procedures for persons to apply for subsidies from the Universal Service and Access Fund for all of the purposes for which funds may be distributed under section 88(1), and for distribution procedures. It also seeks to change ICASA’s obligation to review the definition of under-served area every two years instead 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.
- (b) The changes amount to technical amendments to clarify and simplify the provisions.

3.34 Clause 42: Amendment to section 89 of Act 36 of 2005

The section has been amended to clarify that USAASA must collect monies due to the Universal Service and Access Fund from the Authority.

3.35 Clause 43: Amendment of section 95 of Act 36 of 2005

This clause seeks to amend section 95 by removing the 24 month time-frame, which has passed. This amendment is necessary as the current provision in effect prevents ICASA from repealing or amending regulations issued under now repealed Acts.

3.36 Clause 44: Amendment of arrangement of sections

This section seeks to amend the Arrangement of Sections which occur before section 1 of the Act.

3.37 Clause 45: 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*.

4. PARTIES CONSULTED

- Advtech;
- Altech;
- Bowman Gilfillan Attorneys;
- Broadband Infraco;
- Cape Town TV;
- Cell C;
- Charlene Deacon;
- Competition Commission;
- Department of Agriculture, Forestry and Fisheries;
- Department of Basic Education;
- Department of Economic Development;
- Department of Energy;
- Department of Water and Environmental Affairs;
- Department of Finance;
- Department of Mineral Resources;
- Department of Performance Monitoring and Evaluation;
- Department of Public Enterprises;
- Department of Public Works;
- Department of Rural Development and Land Reform;
- Department of Transport;
- Ericsson;
- Etv;

- Film and Publications Board;
- FTTH Council;
- Google;
- ICASA, National Treasury;
- Internet Solutions;
- ISPA;
- Kagiso Media;
- LINK Centre;
- MDDA;
- MTN;
- Multichoice and MNET;
- MWEb;
- NAB;
- National Planning Commission;
- Neotel;
- ODM;
- Paul Huji ICT Policy Analyst;
- Primedia;
- Qualcomm;
- SACF;
- SALGA;
- Sentech;
- Smile Communications;
- SOS;
- Telkom;
- TENET;
- Transnet;
- Vodacom;
- WAPA.

5. FINANCIAL IMPLICATIONS FOR THE STATE

The operational cost of establishing and institutionalising the National Broadband Council is estimated to be R2 million a year, over the MTEF period.

6. IMPLICATIONS FOR PROVINCES

None.

7. PARLIAMENTARY PROCEDURE

- 7.1 The State Law Advisers and the Department of Communications are of the opinion that the Bill must be dealt with in accordance with the procedure established in section 75 of the Constitution, since it contains no provision to which the procedure set out in section in 74 or 76 of the Constitution applies.
- 7.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders 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.