SUMMARY OF SUBMISSIONS ON THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL, 2013 (AS INTRODUCED) AND THE DEPARTMENT'S RESPONSE THERETO

Categorisation of the inputs

- The inputs have been classified in the following manner:
  - Proposals which are outside of the amendments in the current Bills
  - Proposals that should be deferred to the ICT Policy Review
    - Independence of ICASA – Functional or structural issues and funding issues
    - Competition: market structural – Broadcasting
    - Ownership and control issues
  - Policy issues relating to Broadband Policy and Radio Frequency Spectrum policy
  - Technical drafting

Objectives for amending the Bills

- The Minister wants to finalise these amendments to ensure:
  - Efficient and effective regulation can take place in the interim pending the completion of the policy review
  - There is more transparency in decision-making at ICASA
  - There is a foundation for better working between Minister and ICASA (without impinging on ICASA's "independence")
  - The roles of each of the Minister and ICASA are clarified
- Alignment the ECA with BBBEEE Act of 2003
- Refine provisions on licensing
- Improve turn-around times for consultations
- Ensure improvement in sections on competitions matters.
- Clear regulatory bottlenecks
- Improvements on e-rate for the promotion of ICTs in schools to improve quality of education

- Give effect for the Minister to obtain information as deemed necessary for supporting policy making.
- Improve governance at USAASA
- Powers for the Minister to provide policy directives to USAASA

Issues raised

- *Amendment of section 1 of Act 36 of 2005*
- *Section 1(b): allocation*
- Telkom: remove reference to the ITU
    - Department's Response to the issue
    - The Department does not agree with this – SA must be in line with international requirements particularly in relation to spectrum
- *Amendment of section 1 of Act 36 of 2005*
- *Section 1(c): assignment*
- Telkom: remove reference to the ITU
    - Department's Response to the issue
    - The Department does not agree with this for the same reasons
- *Amendment of section 1 of Act 36 of 2005*
- *Section 1(c): broadband*
- LINK, ICASA, Fibreco, Vodacom, WAPA, SACF, Smile, BBI: include upload and/or download speeds (SACF suggests including minimum 2mbps to start, ICASA suggests that there should be an entirely new definition)
    - Department's Response to the issue
    - These will change over time and we don't want to have to amend the Act each time – rather provide for Ministerial direction in this regard, as is the case.
    - The definition was proposed in a detailed study which will inform the new broadband policy in due course. The Broadband Policy has taken into account the inputs on the speed. DOC is willing to improve the definition of broadband under guidance of the PCC.
- *Amendment of section 1 of Act 36 of 2005*

- *Section 1(f): common carrier*
- Telkom, Neotel, Vodacom and MTN: remove reference to Sentech (Telkom: there is a conflict with the Broadcasting Act definition)
    - Department's Response to the issue
    - The Department does not agree with this – this is Sentech's national mandate.
    - The Department agrees with Telkom and proposes that the definition of common carrier in the Broadcasting Act be aligned with the definition in the Bill. For purposes of development, Sentech must carry transmission for any operator who request them on non-discriminatory basis.
- *Amendment of section 1 of Act 36 of 2005*
- *Section 1(g): electronic communications facility*
- Telkom, Neotel: Telkom wishes to remove all new additions, Neotel suggests they be limited to "passive" infrastructure, and Neotel wants to add Digital Primary Switching Units and Digital Secondary Switching Units
    - Department's Response to the issue
    - The amendment of the definition has been proposed by licensees and is aligned with international practice. Where non-licensees control these facilities clearly they won't be bound by the ECA.
- *Amendment of section 1 of Act 36 of 2005*
- *Section 1(k): licensee*
- Telkom, MNet, Multichoice, NAB: remove reference to services
    - Department's Response to the issue
- In order to avoid confusion with the use of the word 'services' the Department proposes that the definition of 'Licensee' be amended to mean a person issued with a licence to provide services in terms of Chapter 3 or use radio frequency spectrum in terms of Chapter 5.
- *Amendment of section 1 of Act 36 of 2005*
- *Section 1(o): radio frequency spectrum licence*
- NAB, etv, Vodacom, MNet and Multichoice: remove reference to services, this is a licence to use spectrum, not provide services (which are authorised under an ECS/BCS licence)

- Department's Response to the issue
- The objective is to bring Chapter 5 licensees into the ambit of the definition of licensee. The following can be considered to avoid confusion:
- Define Licensee to mean a person issued with a licence to provide services in terms of Chapter 3 or use radio frequency spectrum in terms of Chapter 5.
- Radio frequency spectrum licence can be amended to mean a licence authorising the holder to use the radio frequency spectrum in terms of Chapter 5 of this Act.

- *Amendment of section 1 of Act 36 of 2005 (1)*
- *Section 1: NEW Amendment*
- etv: BBBEE The ECA doesn't refer to the BBBEE Act – it needs to be defined as well as the meaning of BBBEE'
  - Department's Response to the issue
  - As a result of the amendments introduced in the Bill, reference is now made to the BBBEE Act but without defining it. The Department agrees with the proposal to include a new definition for BBBEE.
- Neotel: resale, consumer Short explanation of comment here
- Vodacom: ICT Charter
  - Department's Response to the issue
  - The proposal would make the reference more correct but is not material given that it has the same effect. The Department can consider wording such as the following with the State Law Adviser: "ICT Charter means the ICT Sector Charter, a sector code on black economic empowerment, issued in terms of the BBBEE Act"
- *Amendment of section 1 of Act 36 of 2005 (2)*
- *Section 1: NEW Amendment*
- Telkom: define "allotment"
  - Department's Response to the issue
  - The definition of radio frequency plan replaces the use of the word allotment with allocation, that Telkom broadly supports. A similar amendment is made in section 34(7) doing away with the requirement to define allotment, since it is not used in Act anymore.

- *Amendment of section 1 of Act 36 of 2005*
- *Section 1: other issues*
    - Neotel: amend resale, amend ECS, amend reseller
    - WAPA: amend reseller, class ECS
    - ICASA: funding is required by it to fulfill its mandate
    - Telkom: many substantive issue raised from an academic point of view
    - Vodacom, Neotel: deal with matters in toto, not piecemeal
        - <u>Department's Response to the issue</u>
        - New issues will be difficult to deal with at this late stage, particularly where they will require policy intervention
        - The Department takes note of these views but as stated before, interim amendments are required to improve the current legislative position pending the outcome of the green/white paper process which should necessarily take time. USAASA and Chapter 10 can be improved and focus on these areas will be useful and important in the interim.
- *Amendment of section 3 of Act 36 of 2005 (1)*
- *Section 3(1) and (2): Minister's right to make policy and issue policy directions*
- etv, MTN, ICASA, Telkom, Vodacom, SACF, Smile, Neotel, LINK, BBI: by and large the respondents all felt that 3(2)(d) was limiting of ICASA's rights to determine spectrum fees, and 3(2)(e) is not necessary given 3(1)(i) Telkom suggested that national policies should not be referenced. Vodacom wanted policy to bind municipalities
    - <u>Department's Response to the issues:</u>
    - Amendment relating to municipalities may be unconstitutional in view of section 156 of the Constitution that gives executive authority to municipalities in respect of certain listed matters.
- *Amendment of section 3 of Act 36 of 2005 (2)*
    - <u>Department's Response to the issue</u>
    - Spectrum is a national asset and should be allocated having regard to the public interest. This is the Minister's function. ICASA's role in assigning spectrum is not affected at all, save that it must have regard to guidelines issued by the Minister on fees for spectrum, which is very reasonable

- The amendment simply echoes the powers of the Minister in relation to policy. Policy directions should be permitted on the same matters as policy and the Minister already has the power to make policy on any other matter in section 3(1)(i),so the Minister should also have the power to make policy directions on any other matter. Consideration can be given to including wording similar to 3(2)(d) in 3(1)(e) as well. Indeed sec 3(2)(e) could be deleted under the guidance of PCC.

- In terms of section 85 of the Constitution of the Republic of South Africa, 1996 the executive authority, of which the Minister is a member, is responsible for the development of national policy. The Minister must perform his functions in accordance with such policy.

- National policies apply from national government and sector-specific policies must obviously be in line with national policies (as Telkom itself proposes when it references the NDP in its earlier sections).

- *Amendment of section 3 of Act 36 of 2005 (2)*

  - <u>Department's Response to the issue</u>

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  - National policies apply from national government and sector-specific policies must obviously be in line with national policies (as Telkom itself proposes when it references the NDP in its earlier sections).

- *Amendment of section 3 of Act 36 of 2005 (3)*

- Department's Response to the issue of "independence" raised by ICASA
- The amendments do not interfere at all with the independence of ICASA as spectrum is a national public asset and the Minister is the custodian of this on behalf of the State. The Minister's right to give policy directions is limited to guidelines not instructions. As ICASA has also pointed out before, section 3(4) provides that ICASA should merely consider policy directions made by the Minister. The Act already provides the required backstop in section 3(4) to protect ICASA's independence. The Minister has the right to set spectrum policy in terms of section 3(1)(a).
- As for (e), this subsection is limited to matters relating to the application of the ECA or related legislation.
- To suggest that this could be applied by the Minister contrary to PAJA is with respect not correct either. The Act requires in section 3(5) that the Minister consult with ICASA on proposed policy directions as well as with the public. Again, as indicated, ICASA must consider but is not obliged to implement policy directions.
- As indicated before, just as the Minister may make policy on any matter necessary for the application of the Act under the existing section 3(1)(i), it follows logically that the Minister should be able to issue policy directions accordingly.

- *Amendment of section 3(5) of the Act 36 of 2005*
- *Section 3(5): Minister should consult for not less than 30 calendar days*
- ICASA, MTN, Telkom, Vodacom, MNet, Multichoice, NAB, SACF, Smile, Neotel: at least 30 working days
  - Department's Response to the issue
  - This is agreed. Reference to "calendar" will be removed as "days" is defined in the ECA as working days.
  - Consequential amendments to all references to days will have to be made to ensure consistency ie all are working days
- *Amendment of section 4(1)(d) of the Act 36 of 2005*
- *Section 4(1)(d): amendment of "control" in relation to spectrum, to "use"*
- etv, Vodacom, Neotel: there is no reason to change this to "use"
  - Department's Response to the issue

- The matter of control of the radio frequency spectrum is a significant policy matter that will be considered further in the Policy Review. It is proposed that this amendment be omitted at this stage. DOC take note of the support that this proposed changes has received.

- *Amendment of section 4(5) of the Act 36 of 2005*

- *Section 4(5): ICASA to provide a copy of a proposed regulation to the Minister*

- etv, Vodacom, LINK, SACF, MTN, Neotel: why is this necessary, it suggests the Minister has a right to require change

  - Department's Response to the issue

  - The Minister always had to be advised previously regarding a regulation, this is simply making sure the Minister has a copy of what is proposed. The proposed amendment does not empower the Minister to approve or reject, merely to receive a copy – this is an attempt to improve transparency between Minister and ICASA. The Minister must consult ICASA when a policy or policy direction is made for reasons that include good coordination between the two, avoiding contradictions between policy and regulation etc. The Minister should similarly be enabled to view proposed ICASA regulations.

- *Amendment of section* 5(3)(b), *5(5)(bA) and 5(6) of Act 36 of 2005 (1)*

- *Section 5(5)(bA): class licences should not be limited in scope to district municipal or local municipal scope for commercial purposes*

- LINK, SOS, SABC: this excludes a potential community of national interest

- SABC: Section 5(3)(b): why are provincial licences now granted instead of regional?

- *Section 5(6): deletes reference to managed liberalisation policies.Delete bullet*

- LINK, SOS: section 5(6) unconstitutional. Why should number of licences be limited

- *Amendment of section* 5(3)(b), *5(5)(bA) and 5(6) of Act 36 of 2005*

  - Department's Response to the issue

  - ICASA previously proposed that the same distinction that applies between individual and class ECNS should also apply to ECS using scope and coverage variables.

  - Class licences are not meant to have significant socio-economic impact, therefore their scope should be limited (this does not prevent them from

interconnecting with other networks, it merely prevents the actual licensee's network from extending beyond this area.

- A Policy direction is still required for further individual licences due to inter alia frequency scarcity, numbers, viability etc that should be considered.
- Section 5(6) deletion is not unconstitutional and has certainly never been challenged as such. The SoS and NAB commented on this section. This provision allows the Minister to determine if a new application for individual licences should be sought – it does not in any way infringe on ICASA's powers to grant licences or otherwise deal with licensing.
- ICASA requested the change as regional is not defined and the provincial phrasing provides more certainty.

- *Amendment of section 5(8A) of the Act 36 of 2005*
- *Section 5(8A): requiring a juristic person to be registered and situated within the RSA even if licence-exempt*
- MNet and Multichoice, Neotel – unclear on this and reasons for it, delete it
  - Department's Response to the issue
  - The purpose of this amendment is to prevent foreign entities from circumventing the requirement in section 5(8) through the licence exempt services

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- *Amendment of section 8(2), (3) and (4) of the Act 36 of 2005 (1)*
- *Section 8(3): replacing "prescribe" with "impose" in relation to terms and conditions of licences*

- etv, MNet, Multichoice, NAB, Neotel: why was this done, as "impose" suggests this will take place outside a regulatory procedure since "prescribe" has a definite meaning
- *Section 8(4): Deaf Federation wants additional wording for people with disabilities to be included in licence conditions of broadcasters*
- *Amendment of section 8(2), (3) and (4) of the Act 36 of 2005 (2)*
  - Department's Response to the issues
  - 8(2): The argument is not understood – to "include" is a stronger requirement than merely to take into account. This sets out parameters by requiring the inclusion of the provisions, among others.
  - 8(3): As written, the provision confuses the imposition of individual licence terms and conditions and the prescribing of regulations which can take time. This proposed amendment simply brings clarity and does not mean ICASA should act outside of PAJA's requirements. The wording could be restored however and can be deleted.
  - 8(4): The Department acknowledges the points made by the Deaf Federation of South Africa. The Objects of the Act confirm in section 2(h) the importance of addressing challenges for people with disabilities. The challenge is that the Act cannot impose a specific licence condition in section 8 since that must be done in (implementing) regulations. The insertion of a new section 8(2)(o) can be considered to provide "(o) access for persons with disabilities" in general terms
- *Amendment of section 8(2), (3) and (4) of the Act 36 of 2005 (3)*
  - Department's Response to the issues (cont)
  - The Telkom proposal is valid and can be considered, namely:
  - "(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 **taking into account determinations made by the Minister in terms of section 82 and** after consultation with the Agency."
- *Amendment of section 8(2), (3) and (4) of the Act 36 of 2005 (3)*
  - Department's Response to the issues (cont)
  - The Telkom proposal is valid and can be considered, namely:

- "(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 **taking into account determinations made by the Minister in terms of section 82 and** after consultation with the Agency."

- *Amendment of section 8(5) of the Act 36 of 2005*

- *Section 8(5): consultation by ICASA with the Agency on matters relating to universal service and access*

- Telkom: why should ICASA consult here

  - Department's Response to the issue

  - No other submission on this, retain as is. Consultation clarifies intentions and drives common purposes between the entities.

- *Amendment of section 9 of Act 36 of 2005 (1)*

- *Section 9: licensing issues, terms and conditions*

- Smile, MNet, Multichoice, Vodacom, NAB, SACF, MTN, Neotel: varied comments but several concerns raised about "such other conditions" being imposed, and the perceived inconsistency between a reference to HDI and BBBEE in this section (9(2)(b)).

- Multichoice companies concerned about general use of "impose" in the Bill (ss9(6)(b), 20(3), 43(8A) and 67(4)(d))

- *Amendment of section 9 of Act 36 of 2005 (2)*

- *Section 9: licensing issues, terms and conditions*

  - Department's Response to the issue

  - The 'other conditions' can only be in terms of ICASA's regulations to promote BBBEE in section 4(3)(k) of ICASA Act and will support the empowerment goals

  - Alignment done with BBBEE Act. ICASA Act as amended will allow ICASA under section 4(3)(k) to make BBBEE regulations in accordance with BBBEE Act. This approach aligns with ICT Charter issued under BBBEE Act in June 2012. Section 5(9)(b) also ensures that ICASA promotes BBBEE in accordance with the ICT Charter.

  - Sections 2(h), 5(9)(b) and 9(2)(b) of ECA are relevant and requires ICASA to advance BBBEE in general and in licensing.

- In addition to the alignment with BBBEE, section 9(2)(b) retains the reference to a minimum of 30% equity ownership that remains a minimum pre-requisite for new individual licences to drive transformation in the sector.

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

- *Section 10: amendment of a licence*

- ICASA: unsure why 10(h) was changed, it now refers to regulations under Chapter 10

  - Department's Response to the issue

  - This is to clarify that not only is the law applicable but secondary instruments as well

  - The existing wording in the Act enables an amendment that is in accordance with the regulations only.

  - The amendment will ensure that an amendment can be made to a licence if the amendment is in accordance with Chapter 10 and regulations issued under Chapter 10.

- *Amendment of section 13 of Act 36 of 2005 (1)*

- *Section 13: transfers, ownership and control of a licence*

- LINK, SOS, MNet and Multichoice: general lack of clarity on reason for omitting wording on ownership and control, and why the words "let and sublet" are introduced

- NAB: letting and subletting is appropriate for spectrum licences so should be limited to Chapter 5 and not at all appropriate for BCS licences. Use the 2004 wording for ownership and control

  - Department's Response to the issue

  - As set out, ownership and control will be dealt with as part of the Polcy Review

  - The rationale for new words "let and sublet" is to catch all types and kinds of licence transfer, direct and indirect. There is no intention to allow trading with this as suggested.

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    - Department's Response to the issue
    - As set out, ownership and control will be dealt with as part of the Polcy Review
    - The rationale for new words "let and sublet" is to catch all types and kinds of licence transfer, direct and indirect. There is no intention to allow trading with this as suggested.
- *Amendment of section 13 of Act 36 of 2005 (2)*
- *Section 13: transfers, ownership and control of a licence*
    - Department's Response to the issue
    - When the Bill was published for public comment, subsections 13(3) to (5) were transferred to a new proposed section13A. Section 13A was thereafter omitted from current Bill, but these subsections were not reinserted. These issues form part of ownership and control issues deferred to ICT Policy Review process.
    - The Department agrees that subsections 13(3) to (5) should be reinserted but would propose that subsection (3)(a) be aligned with BBBEE.
    - The LINK Centre raises a valid point. Consideration can be given to including a new subsection 13(6) similar to section 10(2) and 11(3), enabling public consultation in respect of section 13 as well.
- *Amendment of section 16 of Act 36 of 2005 (1)*
- *Section 16: grant/issue of class licence, transfer of licence*
- etv: requires formal approval by ICASA for class licences as to transfer and grant
- *Amendment of section 16 of Act 36 of 2005 (2)*
- *Section 16: grant/issue of class licence, transfer of licence*
    - Department's Response to the issues
    - Grant suggest a process of consideration while issue is a simple administrative step in line with registration as contemplated in section 17
    - The transfer of a RFS or individual licence requires ICASA's specific consideration and approval, it should not be deemed approval. However class licences do not have the same socio-economic impact so it is appropriate that there is a lesser

regulatory burden in this regard. ICASA still has 30 working days to process the request and the deeming provision only applies thereafter.

- The Bill that was published for comment proposed amendments in the definitions to clarify community of interest and geographic coverage. These amendments were omitted from the Bill as they are significant policy issues deferred to the Review.

- *Amendment of section 20, 21 and 22 of Act 36 of 2005 (1)*

- *Section 20, 21 and 22: rapid deployment guidelines by the Minister, regulations on land access by ICASA, access to public and private land*

- ICASA: why are regulations needed if there are guidelines

- Fibreco: include access specifically to water courses, administrative issues pertaining to wayleaves, timelines for negotiations

- Neotel: 18 months for the guidelines is too long – reduce to 6 months, and then give ICASA 3 months to formulate regulations. Ensure municipalities, provincial authorities and agencies produce rules in 12 months. Prohibit private land owners from doing exclusive deals on land access. Delete sentence

- Vodacom, Telkom, WAPA, Smile, SACF: try to include SALGA/municipalities in the wording, so as to bind them, there should be no delay in issuing guidelines, Vodacom: make specific to certain licensees

- BBI: supports

- *Amendment of section 20, 21 and 22 of Act 36 of 2005 (2)*

- *Section 20, 21 and 22: rapid deployment guidelines by the Minister, regulations on land access by ICASA, access to public and private land*

    - <u>Department's Response to the issue</u>

    - The Minister must make policy and policy directions <u>in consultation with</u> various Ministries (which means their approval is required, so we cannot accommodate Telkom's suggestion). Although such policy will be agreed between the various Ministries and will create the enabling environment, in order to have a binding effect, regulations must be published by ICASA to give effect to the policy so licensees can rely on them. The regulations will also go into greater detail.

    - These matters cannot be accommodated further in the law – that is why policy and policy directions at Inter-Ministerial level and regulations by ICASA are

required by this section. The amendments proposed in sections 20 and 21 seek to enable how these rights must be exercised. In a recent Supreme Court of Appeal judgement in the matter of MTN v SMI Trading, the Court remarked that a fair process is required taking into account the rights of the owner of the land

- *Amendment of section 20, 21 and 22 of Act 36 of 2005 (3)*
- *Section 20, 21 and 22: rapid deployment guidelines by the Minister, regulations on land access by ICASA, access to public and private land*
    - <u>Department's Response to the issue (cont)</u>
    - The Bill aims to improve timelines and set the framework in the interim. Vodacom's submission should be referred to the Review Panel as it is very useful research and important information sources for the guidelines, regulations and general approach that government can take, having regard to its obligation in relation to co-operative governance (s41 of the Constitution).
    - The Department's view as contained in one of the previous Bills, was similar to that of Vodacom. Due to the public outcry those amendments were taken out and all ECNS licensees will continue to have the rights in Chapter 4. Section 21(1) already makes provision for the consultation of other relevant institutions that include SALGA.
    - The legal effect of guidelines since term is also not defined, hence proposal for Policy as opposed to guidelines, then regulations.
- *Amendment of section 30-32 of Act 36 of 2005 (1)*
- *Section 30-32: spectrum management and licensing*
- ICASA: reverse the wording
- etv: there is duplication of sections 30 and 31
- Telkom, Neotel, Vodacom: change the use of "allocate" and "assign", under section 31(4A) deem applications to be granted, take care in use of "control"
- MNet, Multichoice: do not allow letting or subletting of BCS licences
- IS, MTN, WAPA, SACF: allow spectrum trading and IS would also like to see wholesale open access mandated in the ECA
- Neotel: include the word "allotment" here and amend various related definitions
- *Amendment of section 30-32 of Act 36 of 2005 (2)*

- *Section 30-32: spectrum licensing*
    - Department's Response to the issue
    - The two words referred to have different meanings as defined and therefore must be used in the right context. 'Allocated' should be amended to 'assigned' in subsections 31(8), (9) and (10). Par 2.5.1.2 of the Radio Frequency Policy provides that the **Minister** is responsible for the **allocation** of spectrum to the different radio-communication services and paragraph 2.5.2.4 provides that **ICASA** is responsible for the **assignment** of radio frequency spectrum to licensees.
    - The transfer of a RFS or individual licence requires ICASA's specific consideration and approval, it should not be deemed approval. However class licences do not have the same socio-economic impact so it is appropriate that there is a lesser regulatory burden in this regard.
- *Amendment of section 30-32 of Act 36 of 2005 (2)*
- *Section 30-32: spectrum licensing*
    - Department's Response to the issue
    - There are some service providers providing services without a service licence, as they historically (pre the Telecommunications Act) were only licensed in respect of spectrum use. This amendment is necessary to unequivocally bring all service providers historically licensed only with spectrum use licences into the regulatory framework of the EC Act, which requires a service licence to provide a service and a spectrum licence to use spectrum
    - The matter of control of the radio frequency spectrum is a significant policy matter that will be considered further in the Policy Review.
    - If ICASA fails to prescribe regulations on spectrum trading, the Minister can issue a policy direction requiring ICASA to urgently consider it.
- *Amendment of section 30-32 of Act 36 of 2005 (2)*
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- *Amendment of section 37 of Act 36 of 2005 (1)*
- *Section 37-42: interconnection*
- Telkom: "economic feasibility" should enable them to recover all their costs
- SACF, Neotel: varied but similar: what is economic? Smile supports economic
- SACF: Interconnection for class licensees creates too heavy burden on other operators?
- Vodacom, BBI: queried why this has to be similar to other network services, and did not approve of the review of proposed agreements since there is already a similar provision in place
- MTN: wants to keep reference to Chapter 10 elements.
- IS: wants to introduce the concept of asymmetry for small operators

- *Amendment of section 37 to 42 of Act 36 of 2005 (2)*
- *Section 37 to 42: interconnection*
  - <u>Department's Response to the issue</u>
  - Reference to Chapter 10 can be retained in the interests of clarity to contextualise exemptions
  - Interconnection must be provided in a non-discriminatory way hence "comparable" across networks. The Department is satisfied that class licensees should also have this right
  - Asymmetry is a remedy to be determined if appropriate on a case by case basis, subject to a market review and review of remedies, not for the law
  - As Telkom is the major provider of fixed links and interconnection, this change must be carefully considered. Delete Telkom is concerned about an "access deficit" and this seems to be an extension of that concern. Telkom must, as any other licensee, provide interconnection unless the request is unreasonable.

ICASA can publish guidelines and resolve disputes on what this is in any given set of circumstances. To set the principle of what is economically feasible by definition in the Bill (Act) would not be appropriate.

- In view of the submissions made and the fact that premature submission of agreements that are not final yet may also prejudice commercial negotiations, the Department agrees that the amendments to sections 39(4) and 45(5) should be omitted.

- *Amendment of section 37 of Act 36 of 2005 (3)*

- *Section 37-42: interconnection*

- ICASA: changes here will mean they have to change all their regulations

  - Department's response to the issue

  - ICASA's point is noted, any changes to law will necessarily result in changes to secondary legislation such as regulations. In ICASA's previous submission clarifications such as this were welcomed. The purpose of this change is to accommodate concerns previously raised by ICASA.

  - Current wording on "reasonable" impedes effective implementation since licensees are likely to follow different accounting and financial models whereas the principles of economics enjoy wider application. The term was changed from "financial" to "economic" at the behest of various respondents to other consultations, and ICASA. ICASA should issue a set of guidelines along with changes to regulations. Economic is a more appropriate standard

  - Economic feasibility is considered to be more suitable because of the criteria that can be taken into account in considering the feasibility of the request.

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- *Amendment of sections 43 to 47 of Act 36 of 2005 (1)*

- *Section 43 to 47: facilities-leasing*

- LINK, Vodacom, SACF, Neotel: all queried the length of the exclusivity period in 43(11), suggest it come down from 3 years to 12 months

  - Department's Response to the issue

  - The Department agrees with the view expressed by the LINK Centre that the period can be reduced to 1 year since this provision, although in a different form, has been in existence since 2006 and any affected party already had sufficient notice in this regard.

  - Section 93(7) and (8) declares that ICASA cannot grant exclusionary rights in licences. It also provides that exclusive rights by virtue of the related legislation are null and void. Those circumstances are different from section 43(10) that prohibits exclusive rights in agreements between an ECNS licensee and another person, regarding international facilities like submarine cables. The existing section 43(11) was inserted because of vested rights that may exist and to allow consultation.

- *Amendment of sections 43 to 47 of Act 36 of 2005 (2)*

- *Section 43 to 47: facilities-leasing*

- Vodacom: concerned about dispute resolution and definition of essential facilities, as were Neotel and Telkom – Neotel being for it and Vodacom and Telkom concerned about it and against it

  - Department's Response to the issue

  - Designation of essential facilities is a critical element of competition, and should be carried out as soon as possible. The legislation provides for exactly this since it should be done through regulations in terms of section 43(8), that ICASA must prescribe in a fair and transparent manner.

- The deeming provision is not uncommon where essential facilities are concerned and necessary given the bottlenecks and barriers to entry for new players without access to necessary infrastructure. ICASA is obliged to define a list and obviously when that list is published the obligation kicks in.
- The Department agrees that the time periods of 10 days in 43(8A)(b) and (c) and 5 days in (d) can perhaps be changed to 20 days in each case, bearing in mind that it is working days that would amount to approximately 30 calendar days in each case.

- *Amendment of sections 43 to 47 of Act 36 of 2005 (3)*
- *Section 43 to 47: facilities-leasing*
- MTN: retain reference to Chapter 10 and retain "financial" rather than "economic" in relation to feasibility
  - Department's Response to the issue
  - To follow approach on interconnection in both retaining the reference to Chapter 10 for context, and in retaining the change to "economic" as being more appropriate a standard
- IS: mandate wholesale access
  - Department's Response to the issue
  - This is not an issue for the law but is likely to form part of the broadband policy and subsequent policy directions
- Several comments: period of time in section 43(8A) should be longer
  - Department's Response to the issue
  - Accepted – see above

- *Amendment of section 55 of Act 36 of 2005 (1)*
- *Section 55: control over advertisements*
- ICASA, MNet, Multichoice, NAB, Neotel: noone felt it was appropriate for ICASA to have these powers over advertisements and scheduling, it would be duplicative, confusing and result in delays. The Multichoice companies felt that this should never apply to pay tv
  - Department's Response to the issue

- The amendment was first requested by ICASA in a written submission of 2009. It was supported by ICASA in a 2011 submission. ICASA recommended that scheduling of adverts, infomercials and programme sponsorships should be regulated as the ASA's code of advertising practice does not regulate it while it is regulated by previous regulations issued in 1999 (Advertising, Infomercials and Programme Sponsorship regulations).

- Some of the issues raised are matters of policy and/or regulation and will be deferred (application to pay tv)

- *Amendment of section 55 of Act 36 of 2005 (2)*

- *Section 55: control over advertisements*

    - <u>Department's Response to the issue (cont)</u>

    - Section 55(2) and (3) already provide for the involvement of the CCC. A role is now included for ICASA to regulate the scheduling of adverts, infomercials and programme sponsorships specifically and the role of the CCC is subsequently extended accordingly.

- *Amendment of section 60 of Act 36 of 2005*

- *Section 60: restriction on subscription tv broadcasters*

- This was not a section that was amended by the DOC but etv has submitted that it should be to limit the amount of revenue that pay tv broadcasters can make from advertising and sponsorship relative to subscriptions (section 60(4)) and that must carry obligations should be revisited in favour of FTA broadcasters (Section 60(5))

    - <u>Department's Response to the issue</u>

    - 60(4) This matter is not currently one of the amendments proposed in the Bill. It is an important matter and will be referred to the Policy Review

    - 60(5) The suggestions cannot be accommodated at this stage of the amendment process as they are new issues and proper administrative procedure requires that an investigation take place in the ordinary course, not as part of an amendment to the law. Furthermore, it is within ICASA's powers to conduct inquiries of this nature with or without a related policy direction.

- *Amendment of section 62 of Act 36 of 2005 (1)*

- *Section 62: broadcasting signal distribution*

- Telkom: the test of reasonableness should not apply to signal distribution, in other words there should not be an obligation in this regard

- etv: comments on “must carry” – FTA channels must not be marginalised by pay tv broadcasters – interventions are necessary
- Vodacom: this entrenches monopoly/exclusive rights for Sentech

- *Amendment of section 62 of Act 36 of 2005 (2)*
- *Section 62: broadcasting signal distribution*
    - Department’s Response to the issue
    - The Department agrees with Telkom and wishes to abandon these amendments in 62(3)(a) and (b). The amendment in (a) places an unreasonable obligation on a common carrier to provide signal distribution irrespective of whether or not it is technologically capable of doing do. The amendment in (b) introduced rate regulation for the common carrier while rates can only be regulated for other operators following a section 67 process. The amendment creates inequality.
    - Sentech is currently the only common carrier but the definition allows the licensing of other common carriers as well. Any such entity will have the same obligations. Sentech is the government mandated, legislated entity responsible for this function. This position is also entrenched in other legislation such as the Broadcasting Act where it is stated in section 8(g) that One of ‘The objectives of the Corporation are—to provide television and radio programmes and any other material to be transmitted or distributed by the common carrier for free to air reception by the public’.
    - Must carry is an urgent. Law can be improved on “must pay” issue. Reulations can take then change in line with the changes on this legislation.
- *Amendment of sections 64 to 66 of Act 36 of 2005*
- *Section 64 to 66: foreign ownership and control, concentrations and cross media ownership of BCS licensees*
- NAB, MDDA: why not include those issues set out in the 2004 ICASA recommendations?
    - Department’s Response to the issue
    - Ownership and Control issues are significant policy issues that have been referred for consideration under the ICT Policy Review process
- *Amendment of section 67 of Act 36 of 2005 (1)*
- *Section 67: competition*

- etv: include provisions to deal with concurrent jurisdiction, tighten market study requirements, add further issues to be taken into account in this regard
- etv, MNet, Multichoice, SACF, MTN, Telkom, Vodacom: do not replace "define" with "determine" because this is standard terminology, issues with confidentiality of information (to be same as Competition Act), issues with content as a pro-competitive obligation
- Telkom: academic suggestions on the type of test that is appropriate
- *Amendment of section 67 of Act 36 of 2005 (2)*
- *Section 67: competition*
    - Department's Response to the issue
    - The Department is of the view that our competition law is development oriented as opposed to other jurisdictions. These can be accommodated within regulations as the Act currently suggests. In part these suggestions are matters of policy.
    - Sections 4(3A) and 4(7) to (9) of the amendments to the ICASA Act already provide explicitly for concurrent jurisdiction agreements to be concluded and revised.
    - The Department agrees with the proposal to change "determine" back to "define".
    - The other proposed changes seem to dilute or say the same thing as the present drafting and would do away with the objective to simplify this section.
- *Amendment of section 67 of Act 36 of 2005 (3)*
- *Section 67: competition*
    - Department's Response to the issue (cont)
    - The wording of section 67(4A) is "take into account among other things" so no need for an extended list. This amendment is in line with the intention to simplify section 67. The other matters can if necessary be addressed in regulations by ICASA, but as suggested they are very limiting.
    - As for confidentiality, there is no need to specify this as section 4D of the ICASA Act always applies
    - The pro-competitive licence term relating to premium content is necessary since the regulation of access to premium content is a specific and important matter

in many jurisdictions. It is only one possible measure that ICASA can consider imposing, if appropriate. Nothing is pre-determined.

- *Amendment of section 72 and 72A of Act 36 of 2005 (1)*
- *Section 72 and 72A: directory services, and National Broadband Council*
- Telkom: they should be able to charge for directory services under s72
    - Department's Response to the issue
    - In the Department's view, no licensee involved should charge any fee to either the caller or another licensee for termination of a call to government directory, information and related services
- LINK, SOS: no such council is required, this should be dealt with in the Policy Review, Telkom: we already have the PICC
    - Department's Response to this issue
    - The establishment of this council is not a new policy matter – it is provided for in the existing Broadband Policy of 2010 and should have been implemented previously. This will simply allow for co-ordination between existing broadband entities and projects pending the new broadband policy currently under consideration.
- *Amendment of section 72 and 72A of Act 36 of 2005 (2)*
- *Section 72 and 72A: directory services, and National Broadband Council*
- Fibreco: the Council should be required to adhere to international standards
- Vodacom: form this within 6 months (include this in the Bill)
- Telkom, BBI: why is this required when there is a PICC, dotted line reporting to PICC
    - Department's Response to the issue
    - In the Department's view, any Council duly exercising its responsibilities will consider international best practice and standards in its work and this very specific requirement does not have to be inserted.
    - The DOC has the primary responsibility for this sector and will co-ordinate with all relevant parties including the PIIC. Due to broadband being a national priority, it is unnecessary to set deadlines for the Minister since broadband must be treated with urgency by everyone involved.
- *Amendment of section 73 of Act 36 of 2005 (1)*

- *Section 73: e-rate*
- Neotel: limit benefit to public schools
- DG Murray Trust: the discount is difficult to recover from upstream providers
- Telkom: refer to "broadband" rather than "internet"
- WAPA: ISPs should be able to claim against the Fund
- MTN: limit provision to educational content
- Vodacom: apply the discount only to wholesale services
- *Amendment of section 73 of Act 36 of 2005 (2)*
- *Section 73: e-rate*
    - <u>Department's Response to the issue</u>
    - Section 73(4) already provides that ICASA must prescribe regulations on how the e-rate should be implemented. Furthermore, USAASA must determine an appropriate procedure
    - The new Broadband policy will translate into legislation that will detail broadband implementation. A more comprehensive approach is required on broadband.
    - The Department agrees with Vodacom that the 50% discount the ECS licensee gets from the ECNS licensee should be in respect of the wholesale rate, not the retail rate subject to ICASA's views.
    - The proposal to replace e-rate with another mechanism using subsidies from the USAF, will be considered by the Policy Review. As an interim arrangement, the current amendment seeks to improve the e-rate provisions to enable easier implementation.
- *Amendment of section 79B of Act 36 of 2005*
- *Section 79B: requests for information*
- etv, MNet and Multichoice, NAB, Vodacom, Neotel: requests for operator information should be either subject to PAIA, or subject to confidentiality, or the licensee's permission should be given first
    - <u>Department's Response to the issue</u>

- Confidentiality would have applied under section 4D in relation to ICASA and will therefore continue to apply in relation to the Minister.
- Subsection (1) can be amended to say "Subject to the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), the Minister may…" as access to information provisions can exist in laws other than PAIA as long as they are not materially inconsistent with an object of PAIA (s.5).

- *Amendment of section 80 to 91 of Act 36 of 2005 (1)*
- *Sections 80 to 91: USAASA, universal service and access*
- DG Murray Trust: include NGOs, PBOs who can apply for a subsidy
  - Department's Response to the issue
  - "needy persons" or their representatives can in any event apply
  - The initiatives can only be considered further as part of a proper regulatory framework for universal service (to be addressed in the Policy Review). The current amendments seek to improve governance USAASA and improve access to USAF subsidies in the interim such as the new subsection 88(1A) that enables how applications for subsidies can be made.
  - Procedures for applications for subsidies from USAF which the Bill proposes in a new section 88(1A) and the amended (4), should be finalised.
- LINK, SOS: wait for outcome of Policy Review, Ministerial interference in USAF 88(1)(f)
  - Department's Response to the issue
  - The Minister needs to have more legal oversight of USAASA and this subsection specifically also requires the agreement of the Minister of Finance as well, as a legal backstop.
- *Amendment of section 80 to 91 of Act 36 of 2005 (2)*
- *Sections 80 to 91: USAASA, universal service and access*
- etv: references to the Minister in sections 82A(1), 82B(2) and 82(C)(1) give the Minister too much power. Retain reference to broadcasting in 88(1)
- *Amendment of section 80 to 91 of Act 36 of 2005 (3)*
- *Sections 80 to 91: USAASA, universal service and access*
  - Department's Response to the issue

- This is necessary for transparency and effectiveness. The role of the Minister is a matter of protocol on corporate governance in relation to SoCs.
- Broadcasting is already covered in subsections (1)(a), (d) and the new (e). The provision in the current section 88(1)(e) is unfair since there is no similar provision to for example establish electronic communications services. If the provision is retained, it should be similar to the wording in subsection (1)(b) and apply to the establishment of broadcasting services in underserviced areas.
- The submission by Vodacom on section 87(1) relates to the version of the Bill published for comment on 18 July 2012. The Bill as introduced already incorporates the concern raised. ICASA will still collect the USAF contributions.
- The amendment to section 89(4) provides that USAASA must collect the money due to the USAF from ICASA. This amendment will enable USAASA to comply with their obligations to keep account of the Fund in its books and to credit the Fund with the contributions as required in section 87(1).

- *Amendment of section 80 to 91 of Act 36 of 2005 (4)*
- *Sections 80 to 91: USAASA, universal service and access*
- Telkom, MTN: a founding statute should be drawn up for USAASA
  - Department's Response to the issue
  - This will be part of the Policy Review
- SACF: the discretion to use USAF should be limited
  - Department's Response to the issue
  - The power of the Minister is not unfettered since Minister of Finance must agree, and regulations that are subject to public consultation must be prescribed. An amendment is however required due to the definition of prescribed that is done by ICASA. 88(1)(f) should be amended to provide 'prescribed by regulation'.
- MDDA, NAB: community broadcasters should be exempt from having to make contributions to the USAF
- Multichoice: Minister should not make universal service policy for broadcasters
- SABC: it should not have to contribute

- *Amendment of section 80 to 91 of Act 36 of 2005 (5)*
- *Sections 80 to 91: USAASA, universal service and access*
    - Department's Response to the issue
    - This is a policy consideration for SABC which can make a profit whereas community broadcasters should not make a profit. Delete
    - The proposal by the MDDA and SABC is not part of the current amendments.
    - Section 3(1)(b) specifically empowers the Minister to make policy on universal service and access.
    - The existing section 3(1)(b) specifically empowers the Minister to make policy on universal service and access that includes broadcasting.
- MTN: merge MDDA and USAASA
    - Department's Response to the issue
    - This is a new matter and will be deferred to the Policy Review
- *Amendment of section 80 to 91 of Act 36 of 2005 (6)*
- *Sections 80 to 91: USAASA, universal service and access*
- MTN, ICASA, BBI: why is it suggested that USAASA should collect funds from ICASA – why add new (4)?
    - Department's Response to the issue
    - This amendment will enable USAASA to comply with their obligations to keep account of the Fund in its books and to credit the Fund with the contributions. The Minister must consult Minister of Finance who must agree, and regulations that are subject to public consultation must be prescribed. An amendment may be required due to the definition of prescribed that is done by ICASA. 88(1)(f) should be amended to provide 'prescribed by regulation'.
- *General*
- ICASA: the ECA amendments should address ICASA's funding challenges, the more changes there are the more ICASA has to deal with, the more funds it needs
    - Department's Response to the issue
    - The funding of ICASA is being addressed in the Policy Review

- Telkom, Vodacom, SACF, Neotel: the amendment of the Bill is being done piecemeal when there is a Policy Review underway. The changes proposed for example to Chapter 10 (Competition) and Chapter 14 (USAASA) are not likely to remedy the issues with these aspects of the Bill in the interim pending the outcome of the green/white paper process

    - Department's Response to the issue

    - See original statement of intent in relation to this process (technical amendments)

Agreement

- The Department has responded to the various submissions made regarding the two Bills. The Department's response mainly focused on submissions requesting changes and deletion of amendments in the Bill as well as requests to defer matters to the ICT Policy Review process.

- It is however important to note that many of the submissions were very positive and supportive of changes proposed.