
GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF TELECOMMUNICATIONS AND POSTAL SERVICES

NO. 1293

17 NOVEMBER 2017

**INVITATION TO PROVIDE WRITTEN COMMENTS ON
ELECTRONIC COMMUNICATIONS AMENDMENT BILL**

The National Integrated ICT Policy White Paper (White Paper) published on 03 October 2017 outlines the overarching policy framework for the transformation of South Africa into an inclusive and innovative digital and knowledge society. The White Paper outlines government's approach to providing cross-government leadership and facilitating multi-stakeholder participation; interventions to reinforce fair competition and facilitate innovation in the converged environment; policies to protect the open Internet; policies to address the digital divide and new approaches to addressing supply-side issues and infrastructure rollout including managing scarce resources. In addition, the White Paper outlines policies to address demand-side issues in order to facilitate inclusive digital transformation in the country.

In order to enable the full implementation of the White Paper, new legislation and amendments to existing legislation are required. One of the Bills prepared by the Department of Telecommunications and Postal Services for this purpose is the Electronic Communications Amendment Bill that amongst other things seeks to address supply side challenges to transform South

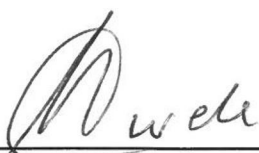
Africa into an inclusive, people-centred and developmental digital society.

Interested persons are invited to provide written comments on the attached Bill within 30 calendar days of the date of publication. Comments are also invited on the cost implications of the amendments.

Written comments should be addressed to –

The Director-General, Department of Telecommunications and Postal Services
For attention: Ms. M Masemola, The Acting Deputy Director-General, ICT Policy and Strategy Development
First Floor, Block A3, iParioli Office Park, 1166 Park Street, Hatfield, Pretoria
Private Bag X860, Pretoria, 0001
ecabill@dtps.gov.za; Tel: (012) 427 8070/8512/8000

Comments received after the closing date may be disregarded.



Dr Siyabonga Cyprian Cwele, MP
Minister of Telecommunications and Postal Services

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. 41261 of 17 November 2017) (The English text
is the official text of the Bill)*

(MINISTER OF TELECOMMUNICATIONS AND POSTAL SERVICES)

[B – 2017]

It231116

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

(The Department to insert the long title)

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

Amendment of section 1 of Act 36 of 2005

1. Section 1 of the Electronic Communications Act, 2005 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the substitution for the definition of "allocation" of the following definition:

 " '**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, that is the responsibility of the Minister of Telecommunications and Postal Services; ";

(b) by the insertion after the definition of "broad-based black economic empowerment" of the following definition:

"B-BBEE ICT Sector Code' means the Broad-Based Black Economic Empowerment Information, Communications and Technology Sector Code, a sector code on broad-based black economic empowerment, issued in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of

(c) by the substitution for the definition of "broadband" of the following definition:

" 'broadband' means an always available, multimedia capable connection with a minimum download speed and quality as annually determined by the Minister responsible for telecommunications and postal services by notice in the *Gazette*, following recommendation by the Authority;";

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

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

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

" 'Consumer Protection Act' means the Consumer Protection Act, 2008 (Act No. 68 of 2008);";

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

" 'essential facility' means—

(a) an electronic communications facility or combination of electronic communications or other facilities that is exclusively or

predominantly provided by a single or limited number of licensees and cannot feasibly (whether economically, environmentally or technically) be substituted or duplicated in order to provide a service in terms of this Act; or

(b) broadband infrastructure in the International Standardisation Organisation Open Systems Interconnect model layer 2 or layer 3 as prescribed by the Authority;";

- (g) by the insertion after the definition of "free-to-air service" of the following definition:

" 'general open access principles' means providing wholesale open access to electronic communications networks on terms that are effective, transparent and non-discriminatory; "

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

" 'high demand spectrum' means spectrum where—

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

(b) radio frequency spectrum is fully assigned, as determined by the Minister responsible for Telecommunications and Postal Services, by notice in the *Gazette*, after consultation with the Authority;"

- (i) by the deletion of the definition of "ICT Charter" ;
- (j) by the insertion after the definition of "multi-channel distribution service" of the following definition:

" 'National Consumer Commission' means the National Consumer Commission established under section 85 of the Consumer Protection Act;"

(k) by the insertion after the definition of "person" of the following definition:

" 'person with disabilities' means persons with long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers hinder their full and effective use of ICT devices, services and technologies on an equal basis with others;"

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

" 'radio frequency spectrum sharing' means a collaborative effort which allows radio frequency spectrum licensees allocated spectrum in the same or adjacent bands to harmonise their spectrum to enhance the utilisation of the radio frequency spectrum;

'radio frequency spectrum trading' means the transfer or transfer of control, re-sale, leasing or sub-letting of spectrum by a licensee to a third party, whether on a stand-alone basis or as part of a the sale or transfer of control of a business or any part thereof;

'radio frequency spectrum refarming' means the re-use of an assigned frequency band for a different technology;"

(m) by the insertion after the definition of "retail" of the following definitions:

" 'SA Connect' means South Africa's National Broadband Policy, 2013 published in Government Gazette 37119, Government Notice No. 953 on 06 December 2013;

'SADC' means Southern African Development Community;

'SADC Model Roaming Regulations' means the model roaming regulations agreed to by SADC Ministers responsible for Telecommunications, Postal Services and ICTs in Walvis Bay, Namibia in June 2015;

'SADC Roaming Policy Guidelines' means the roaming policy guidelines agreed to by SADC Ministers responsible for Telecommunications, Postal Services and ICTs in Walvis Bay, Namibia in June 2015;"

- (n) by the insertion after the definition of " SA Connect' " of the following definition:

" **'sector-specific agencies'** means the South African Marine Safety Authority and the Civil Aviation Authority;"

- (o) by the insertion after the definition of "service licence" of the following definition:

" **'SIP15'** means Strategic Infrastructure Project 15: Expanding access to communication technology of the National Infrastructure Plan, 2012."and

- (p) by the addition of the following definition:

"**'Wireless Open Access Network'** means the entity contemplated in section 19A that must provide wholesale electronic communications network services on open access principles."

Amendment of section 2 of Act 36 of 2005

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

- (a) by the substitution for the words preceding paragraph (a) of the following words:

“The primary object of this Act is to provide for the regulation of electronic communications in the Republic **[in the public interest]** in line with the National Integrated ICT Policy White Paper, 2016 and the public interest objectives in such White Paper, since ICTs play an essential role in socio-economic development and effective participation of all South Africans in the affairs of the Republic and for that purpose to—”;

- (b) by the insertion of the following paragraphs after paragraph (c):

“(cA) redress the skewed access by a few to economic and scarce resources such as radio frequency spectrum, to address the barriers to market entry;

“(cB) promote serviced-based competition and avoid concentration and duplication of electronic communications infrastructure in urban areas;

“(cC) promote an environment of open access to electronic communications networks on terms that are effective, transparent and non-discriminatory;

“(cD) redress market dominance and control.”;

- (b) by the substitution for paragraph (i) of the following paragraph:

“(i) encourage research and development as well as new innovative services within the ICT sector;” and

- (c) by the substitution for paragraph (p) of the following paragraph:

“(p) develop and promote SMMEs and cooperatives and market

entry by SMMEs;".

Amendment of section 3 of Act 36 of 2005

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

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

"(e) **[guidelines for]** the determination by the Authority of licence fees and spectrum fees associated with the award of the licences contemplated in Chapter 3 and Chapter 5, including incentives that may apply to individual licences where the applicant makes binding commitments to construct electronic communications networks and provide electronic communications services in rural and underserved areas of the Republic;"

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

"(bB) universal service or universal access obligations or both, having identified any access gaps;";

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

"(cC) compliance with international obligations;";

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

- "(d) **[guidelines for]** the radio frequency spectrum and the determination by the Authority of spectrum fees including incentives, spectrum fee exemption and spectrum fee reductions that may apply; and"; and
- (e) by the substitution in subsection (2) for paragraph (e) of the following paragraph:
- "(e) any other matter which may be necessary to give effect to ICT related national policy or for the application of this Act or the related legislation."

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 of the]** use of the radio frequency spectrum, radio activities and the use of radio apparatus, in line with the National Radio Frequency Plan. "; and
- (b) by the insertion after subsection (1) of the following subsection:
- "(1A) (a) Any regulations prescribed by the Authority on radio frequency spectrum fees must be in accordance with any policy or policy directions issued by the Minister as contemplated in section 3(1)(e) and 3(2)(d).
- (b) The Authority must amend any existing radio frequency spectrum fees regulations which are in force when the

Minister issues a policy direction as contemplated in section 3(2)(d),
within six months after the Minister issues such policy direction."

Amendment of section 5 of Act 36 of 2005

5. Section 5 of the principal Act is hereby amended by the substitution in subsection (9) for paragraph (b) of the following paragraph:

"(b) promote broad-based black economic empowerment including the empowerment of women and the youth and persons with disabilities, in accordance with the requirements of the **[ICT charter]** B-BBEE ICT Sector Code."

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]** must include, but are not limited to;"

(b) by the deletion in subsection (2)(d) of the word "and" at the end of subparagraph (iii), and the insertion of the following subparagraph after subparagraph (iii):

"(iiiA) informing subscribers and end-users about the quality of service standards contemplated in section 69A; and"

- (c) by the substitution for subsections (3) and (4) of the following subsections, respectively:

"(3) The Authority may prescribe additional terms and conditions that may be applied to any individual licence or class licence **[subject to the provisions of Chapter 10]**.

(4) The Authority **[may]** must by regulation make provision for the designation of licensees to whom universal service and universal access obligations are to be applicable and **[may]** must prescribe additional terms and conditions in respect of the relevant universal service and universal access obligations on such designated licensees.";

- (d) by the insertion of the following subsection after subsection (4):

"(4A) The Authority must review the regulations contemplated in subsection (4) at least every five years and the review must include an assessment of—

(a) the appropriateness of target levels set in universal service and universal access obligations;

(b) the timelines set for achieving such targets;

(c) the level of service to be provided; and

(d) mechanisms to enforce compliance, including reporting frameworks."; and

- (e) by the addition of the following subsection:

"(6) The Authority must by regulation make provision for obligations applicable to electronic communications network service licensees for the rapid deployment of electronic communications

networks or facilities and must prescribe additional terms and conditions for such licences.”.

Amendment of section 9 of Act 36 of 2005

7. Section 9 of the principal Act is hereby amended 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;”.

Amendment of section 10 of Act 36 of 2005

8. Section 10 of the principal Act is hereby amended by the addition in subsection (1) of the following paragraph:

“(i) if the amendment relates to the rapid deployment of electronic communications networks or facilities, as contemplated in chapter 4.”.

Amendment of section 13 of Act 36 of 2005

9. Section 13 of the principal Act is hereby amended by the substitution for subsection (5) of the following subsection:

“(5) Regulations contemplated in subsection (3) must be made with due regard to the objectives of this Act, the related

legislation and where applicable, any other relevant legislation."

Insertion of chapter 3A in Act 36 of 2005

10. The following Chapter is hereby inserted in the principal Act after Chapter 3:

"CHAPTER 3A

WIRELESS OPEN ACCESS NETWORK

19A. (1) The Authority must ensure that an individual electronic communications network service licence and a radio frequency spectrum licence is issued to a Wireless Open Access Network.

(2) The Wireless Open Access Network must -
(a) provide wholesale open access to its electronic communications networks and facilities, upon request, to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of a wholesale open access agreement entered into between the parties, in accordance with the general open access principles;

(b) in addition to the requirement in subparagraph (a), comply with the following open access principles on its electronic communications network:

(i) Active infrastructure sharing that includes but not limited to national roaming, radio access network sharing and enabling mobile virtual

network operators, for voice and data based on the latest generation of technologies;

(ii) cost-based pricing;

(iii) access to its electronic communications network or electronic communications facilities as prescribed by the Authority; and

(iv) specific network and population coverage targets.

(3) The Minister may issue a policy direction to the Authority in terms of section 5(6) to issue an invitation to apply for the Wireless Open Access Network licences after—

(a) the Authority has made recommendations on the terms and conditions including universal service and access obligations which will apply to the Wireless Open Access Network as contemplated in section 31A and 31E; and

(b) the Minister has considered incentives that will apply as contemplated in subsection (4).

(4) The Minister must, for purpose of licensing the Wireless Open Access Network, consider incentives that may be granted to the Wireless Open Access Network including—

(a) reduced or waived spectrum fees as contemplated in section 3(2)(d) of the Act;

(b) access to rights of way, public infrastructure as well as public electronic communications facilities through government facilitation; and

(c) allocation of funds as contemplated in section 88 of the Act to construct or extend an electronic communications network in under-served areas."

11. The following heading is hereby substituted for chapter 4 of the principal Act:

"RAPID DEPLOYMENT OF ELECTRONIC COMMUNICATIONS NETWORKS AND ELECTRONIC COMMUNICATIONS FACILITIES"

Substitution of section 20 of Act 36 of 2005

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

"Definition

20. In this Chapter, unless the context indicates otherwise—

"Minister" means Minister of Telecommunications and Postal Services; and

"land" includes any property or premises, street, road, footpath, railway or waterway in the Republic of South Africa."

Insertion of sections 20A, 20B, 20C, 20D, 20E, 20F, 20G, 20H, 20I, 20J, 20K, 20L, 20M, 20N, 20O AND 20P

13. The following sections are hereby inserted in the principal Act after section 20:

“Role of the Minister

20A. (1) The Minister must provide oversight over the implementation of this Chapter and liaise with other Ministers responsible for aspects of rapid deployment of electronic communications networks and facilities.

(2) The Minister must establish a Rapid Deployment National Coordinating Centre and a Rapid Deployment Steering Committee to oversee the activities of the Centre.

Role of the Rapid Deployment National Co-ordinating Centre

20B. (1) The Rapid Deployment National Co-ordinating Centre must support rapid deployment of electronic communications networks and facilities and must work with the SIP 15 infrastructure team.

(2) The Rapid Deployment National Co-ordinating Centre must interface with local municipalities to fast track rights of way and way-leave approvals.

(3) The Rapid Deployment National Co-ordinating Centre must—

(a) oversee the establishment of common automated wayleave application system or systems based on an understanding of common information requests across various bodies;

(b) oversee the creation of a geographic information system database and mapping of all fibre deployments and other electronic communication

network and facility deployments. The database must include the requirement to prevent damages to networks and facilities as contemplated in section 29(1)(a);

(c) oversee the coordination of infrastructure rollout and participation in other infrastructure coordination fora such as SIP 15;

(d) oversee the engagement with relevant industry bodies dealing with rapid deployment or any aspect thereof; and

(e) provide advice to electronic communications network service licensees on the provision of electronic communications networks and facilities.

Role of Authority

20C. (1) The Authority must prescribe rapid deployment regulations which must include-

(a) the structure of the GIS database contemplated in section 20B(3)(b), its security and the manner in which it can be accessed;

(b) obligations applicable to electronic communications network service licensees for the rapid deployment of electronic communications networks or facilities;

(c) alternatives to new deployment of electronic communications networks and facilities, in order to use suitable existing electronic communications networks and facilities;

(d) processes and procedures to enable a landowner to object to the Authority at least 14 days before the electronic communications network service licensee commence with the activity, if the proposed

- electronic communication network or facility will cause significant interference with the land;
- (e) high sites that are not technically feasible for access and use by an electronic communications network service licensee for the deployment of electronic communications networks and facilities that promote broadband;
- (f) processes and procedures that electronic communications network service licensee must follow to request access to high sites of government for the installation of electronic communications networks and facilities that promote broadband, including the determination of cost-based rentals;
- (g) processes and procedures that enable single trenching for fibre in each geographic location where it is technically feasible to do so;
- (h) guidelines on reasonable access fees that may be charged by landholders to electronic communications network service licensees for deploying electronic communications networks or facilities that are intrusive.

(2) The regulations must provide for procedures and processes for resolving disputes that may arise between an electronic communications network service licensee and any landowner on an expedited basis, in order to satisfy the public interest in the rapid rollout of electronic communications networks and electronic communications facilities.

(3) The Authority must ensure that electronic communications network service licensees—

- (a) provide information on existing and planned electronic communications networks and facilities, including alterations or removal thereof as contemplated in this Chapter, to the Rapid Deployment National Co-ordinating Centre for inclusion into the geographic information system database;
- (b) provide information on existing and planned electronic communications networks and facilities to the Authority and other electronic communications network service licensees;
- (c) seek out alternatives to new deployment of electronic communications networks and facilities, notably through the sharing or leasing of existing facilities;
- (d) contribute to research and development on new deployment methods;
- (e) comply with environmental requirements;
- (f) co-ordinate activities wherever appropriate, avoiding anti-competitive behaviour; and
- (g) advise landholders in writing of their right to recourse through the Authority.

Role of South African Local Government Association and Municipalities

20D. (1) Processing of rapid deployment of electronic communications networks and facilities takes place at municipal level.

(2) The South African Local Government Association must promote uniformity in processes and prices, which prices must be cost-based, charged by municipalities for wayleave applications.

(3) Municipalities must, when planning municipal infrastructure, make provision for the installation of electronic communications networks and facilities including without limitation ducts for fibre optic cabling, conduit pipes and space for radio equipment.

(4) Municipalities must provide information on existing and planned municipal infrastructure including ICT infrastructure to the Rapid Deployment National Co-ordinating Centre in a digitised format for inclusion into the geographic information system database.

(5) The Department of Telecommunications and Postal Services may render the necessary support to ensure that the objectives of subsection (3) are achieved.

Obligations of landowners at municipal, provincial and national government levels

20E. Landowners at municipal, provincial and national government levels must—

- (a) provide information on existing and planned infrastructure including ICT infrastructure to the Rapid Deployment National Co-ordinating Centre in a digitised format for inclusion into the geographic information system database;
- (b) provide clear rules and guidelines relating to access to their facilities, and comply with any national policy and rules published in that regard;

- (c) when developing infrastructure deployment strategies and plans, make provision for the installation of electronic communications networks and facilities including without limitation fibre ducts;
- (d) act on all similar requests to access their land or other property within a reasonable time, subject to the streamlined processes envisaged in section 20F, taking into account the nature and scope of the request and must treat electronic communications network service licensees equally; and
- (e) must treat electronic communications network service licensees equally when imposing technical standards and are not allowed to impose different setback, height, or safety restrictions in residential and commercial zones.

Other Authorities

20F. (1) The Rapid Deployment National Co-ordinating Centre must within 24 months of its establishment, develop coordinated, efficient and streamlined processes for the granting of an approval, authorisation, licence, permission or exemption, in consultation with environment, health, safety, security, heritage, building, aviation or any other authorities, to enable rapid deployment of electronic communications networks and facilities.

(2) The Rapid Deployment National Co-ordinating Centre must consult with relevant authorities to ensure the alignment of the said processes.

(3) The Rapid Deployment National Co-ordinating Centre must promote and encourage consistency in the time taken by authorities to grant approvals for the deployment of electronic communications networks and facilities.

(4) Any request and decision accepting or denying a request must be in writing and substantiated by evidence contained in the written record of the Authority.

ECNS right to enter and use property

20G. (1) Electronic communications network service licensees have the right to enter upon and use public and private land for the deployment of electronic communications networks and facilities, subject to subsection (5).

(2) Electronic communications network service licensees are entitled to select appropriate land and gain access to such land for the purposes of constructing, maintaining, altering or removing their electronic communications networks or facilities.

(3) Electronic communications network service licensees retain ownership of any electronic communications networks and facilities constructed.

(4) Property owners may not cause damage to electronic communications networks or facilities.

(5) An electronic communications network service licensee must, for the purposes of subsection (1)—

- (a) give written notice of its proposed property access activity to an owner and if applicable, occupier of the affected land which must specify the reasons for engaging in the activity and the date of commencement of such activity, outline the objection process to its plans and provide environmental, health and safety information, as may be applicable;
- (b) provide all information required by the automated application process, if any, and obtain a wayleave certificate from the relevant authority which must specify information such as the presence, height and depth of other infrastructure such as water pipes, electricity cables and gas pipes in the area;
- (c) exercise due care and diligence to minimise damage which must include, act according to good engineering practice, and take all reasonable steps to restore the property to its former state including the repair of damages caused;
- (d) ensure the design, planning and installation of the electronic communications network or facility follow best practice and comply with regulatory or industry standards;
- (e) take all reasonable steps to ensure the activity interferes as little as practicable with the operations of a public utility;
- (f) update the geographic information system database about the type and location of electronic communications networks and facilities deployed as contemplated in section 20C(3)(a); and
- (h) uphold the principle of open access and infrastructure sharing and seek out alternatives to new deployment of electronic communications networks and facilities in accordance with the rapid deployment regulations

prescribed by the Authority, in order to use suitable existing electronic communications networks and facilities.

(6) A landowner may object to the Authority in the prescribed manner at least 14 days before the electronic communications network service licensee commence with the activity and only if the proposed electronic communication network or facility will cause significant interference with the land.

Access to high sites for radio-based systems

20H. (1) For the purpose of this section 'high site' means any structure or feature, constructed or natural, including buildings, which is suitable for radio-based systems.

(2) An electronic communications network service licensee may access and use any high site for the deployment of electronic communications networks and facilities that promote broadband, except for high sites that are not technically feasible for this purposes, as may be prescribed by the Authority.

(3) An owner of a high site may not refuse access to an electronic communications network service licensee for the installation of electronic communications networks and facilities that promote broadband.

(4) All spheres of government that own high sites must upon request make such high sites available for the installation of electronic communications networks and facilities that promote broadband, at a cost-based rental in accordance with the rapid deployment regulations prescribed by the Authority.

Access to trenches

20I. (1) The Authority must, in order to ensure a single trench for fibre in each geographic location where it is technically feasible to do so, prescribe the processes and procedures that enable a single trench for fibre under the rapid deployment regulations.

(2) The regulations contemplated in subsection (1) must specify, among other things—

- (a) that electronic communications network service licensees must consult with other parties in the interest of the single trench policy;
- (b) how other electronic communications network service licensees can get access or capacity at a later stage if they are unable to participate at the time of trenching;
- (c) obligations on electronic communications network service licensees to include excess capacity in their deployment and to lease spare capacity to other licensees at reasonable rates or such rates as prescribed under the open access policy regulatory framework contemplated in Chapter 8, whichever is lower;
- (d) procedures and processes for resolving disputes that may arise between the electronic communications network service licensee, any landowner or other stakeholder; and
- (e) the role of Rapid Deployment National Co-ordinating Centre to coordinate with key stakeholders.

Access to infrastructure

20J. (1) Government entities in all spheres of government that have rights of way for the construction of infrastructure such as roads, power lines, water pipes, sewer pipes and railways, must permit electronic communications network service licensees to use such rights of way to deploy electronic communications networks and facilities.

(2) The Rapid Deployment National Co-ordinating Centre must coordinate with key stakeholders and ensure dialogue between electronic communications network service licensees and roads authorities, power suppliers and other entities that deploy infrastructure, to ensure that electronic communications networks and facilities are taken into account when deploying new infrastructure such as roads, power lines, water pipes, sewer pipes and railways.

Access to buildings

20K. Electronic communications network service licensees may access any building with multiple tenants—

- (a) to inspect the building to determine whether it is suitable for deployment of electronic communications networks and facilities;
- (b) to deploy electronic communications networks and facilities for such building or subscribers outside the building;
- (c) to maintain electronic communications networks and facilities located in or on the building; or

(d) to provide electronic communications services.

New property developments and buildings

20L. (1) New property developments and buildings must provide for the installation of electronic communications facilities such as ducts for fibre optic cabling, conduit pipes and space for radio equipment that will enable electronic communication services, including voice services and broadband services, at the quality and speeds provided in SA Connect.

(2) Entities responsible for approval of new property developments and buildings at all three spheres of government must make such approvals conditional on compliance with subsection (1) above.

(3) The relevant organ of state must align the National Building Regulations and Building Standards Act, 1977 (Act No. 103 of 1977), or any other relevant regulations, to give effect to the provisions of this section within 24 months of the date of commencement of this Act.

Adequately served

20M. (1) For the purposes of this section "adequately served" means—

(a) an electronic communications network or facilities that enables electronic communications services including voice services and broadband services at the quality and speeds provided in SA Connect, has already been deployed to and within a set of premises such as a

gated complex, an office park, a shopping mall, a government building
or a block of flats, by an electronic communications network service
licensee ("in this section referred to as the access provider"); and
(b) the access provider has the ability to connect each and every occupant
or user within such premises.

(2) The Authority must ensure that the access provider
complies with the following rules when premises are 'adequately served':

- (a) The electronic communications network or facilities or elements thereof
should be available from the access provider to access seeking
licensees on an open-access basis as contemplated in section 43.
Such electronic communications network or facilities or elements
thereof are deemed essential facilities;
- (b) an occupant within the premises is not obliged to receive an electronic
communications service from the access provider and may select and
receive a service from any electronic communication service provider
of choice; and
- (c) the access provider must establish a "meet-me" facility at a suitable
point within the premises at which all access seeking licensees may
install their own electronic communications facilities or equipment so as
to interconnect with the electronic communications network of the
access provider, or that the access seeking licensee may use those
facilities of the access provider as would enable it to provide services
as requested.

(3) No electronic communications networks or facilities may be deployed in adequately served premises except with the approval of the Authority, if such deployment will not discourage service-based competition.

Emergency

20N. No entity may refuse access to any site or charge a fee for access to any site for the deployment of electronic communications network or facilities during emergency situations.

Application process / procedure

20O. (1) All applications and related processes for approval, authorisation, licence, permission or exemption and processes relating to any consultation and participation required by the relevant laws, required for the deployment of electronic communications networks and facilities including, without limitation, environmental authorisations, civil aviation authority permission for erection of masts, town planning approval and building plan approval must, in order to expedite the matter, run concurrently.

(2) The Rapid Deployment National Co-ordinating Centre must keep updated information on the application processes and minimum information requirements for an approval, authorisation, licence, permission or exemption and processes relating to any consultation and participation required by the relevant laws, required for the deployment of electronic communications networks and facilities.

- (3) Any authority responsible for the approval, authorisation, licence, permission or exemption contemplated herein—
- (a) must ensure that its employees are familiar with the requirements of the rapid deployment provisions in this Act and the rapid deployment regulations;
 - (b) must acknowledge receipt of an application within a week, and immediately indicate any outstanding information;
 - (c) may impose reasonable conditions and standards on the deployment of electronic communications networks and facilities;
 - (d) may not prohibit an electronic communications network service licensee from deploying electronic communications networks or facilities; and
 - (e) must align their processes with the processes contemplated in section 20F(1).

Fees, charges and levies

20P. (1) No access fee may be charged by landholders to electronic communications network service licensees for deploying electronic communications networks or facilities in cases where the electronic communications networks or facilities are not intrusive, such as buried or overhead cabling, that does not constitute a cost to the landholder, or deprive the landholder of its own use of the land.

(2) (a) Reasonable access fees may be charged in cases where more intrusive electronic communications networks or facilities, such as masts, are erected on property.

(b) In such cases any access fee must be reasonable in proportion to the disadvantage suffered and must not enrich the landowner or exploit the electronic communications network service licensee.

(3) In the case of any dispute on access fees, the reasonableness of the access fees must be determined by the Authority on an expedited basis.

(4) If access to land involves an administrative process, a once-off administrative fee may be charged by the landholder that is based on the administrative cost of dealing with the application.

(5) A landholder is entitled to reasonable compensation agreed to between the landholder and the electronic communications network service licensee, for any financial loss or damage, whether permanent or temporary, caused by an electronic communications network service licensee entering and inspecting land, or installing, deploying or maintaining electronic communications networks or facilities.

(6) In the case of any dispute on compensation, the reasonableness of the compensation must be determined by the Authority on an expedited basis.

(7) An electronic communications network service licensee may continue to deploy electronic communications networks and facilities while awaiting the resolution of the dispute by the Authority.

Repeal of sections 21, 22 and 23 of Act 36 of 2005

14. Sections 21, 22 and 23 of the principal Act are hereby repealed.

Amendment of section 24 of Act 36 of 2005

15. Section 24 of the principal Act is hereby amended—

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

“An electronic communications network service licensee may, after
[providing thirty (30) days] prior written notice to the local authority or
person owning or responsible for the care and maintenance of any
street, road or footpath—”; and

(b) by the substitution for subsections (2) and (3) of the following subsections, respectively:

(2) The local authority or person to whom any such water, gas or electricity pipe belongs or by whom it is used is entitled, at all times while any work in connection with the alteration in the position of that pipe is in progress, to supervise that work.

(3) The licensee must pay all reasonable cost-based expenses incurred by any such local authority or person in connection with any alteration **[or removal]** of water, gas or electricity pipes under this section or any supervision of work relating to such alteration.”.

Amendment of section 25 of Act 36 of 2005

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

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

“(1) If an electronic communications network service licensee finds it necessary to move any electronic communications facility, pipe, tunnel or tube constructed upon, in, over, along, across or under any land, railway, street, road, footpath or waterway, owing to any alteration of alignment or level or any other work on the part of any public authority or person, the reasonable cost-based expenses of the alteration or removal must be borne by that local authority or person.”; and

(b) by the substitution for subsections (4), (5), (6), (7) and (8) of the following subsections, respectively:

“(4) If any deviation or alteration of an electronic communications network facility, pipe, tunnel or tube constructed and passing over any private property is desired on any ground other than those contemplated in subsection (1) or (2), the owner of the property must give the electronic communications network service licensee written notice of 28 days, of such deviation or alteration.

(5) The electronic communications network service licensee must decide whether or not the deviation or alteration contemplated in subsection (4) is possible, necessary or expedient.

(6) If the electronic communications network service licensee agrees to make the deviation or alteration as provided for in subsection **[(3)] (4)**, the cost of such deviation or alteration must be borne by the person at whose request the deviation or alteration is affected.

(7) If, in the opinion of the electronic communications network service licensee the deviation or alteration contemplated in subsection (4) is justified, the licensee may bear the whole or any part of the said cost.

(8) Where a dispute arises between any owner of private property and an electronic communications network service licensee in respect of any decision made by an electronic communications network services licensee in terms of subsection (4), such dispute must be **[referred to the Complaints and Compliance Committee in accordance with section 17C of the ICASA Act]** resolved by the Authority on an expedited basis as envisaged in section 20C.".

Amendment of section 27 of Act 36 of 2005

17. Section 27 of the principal Act is hereby amended—

(a) by the substitution in subsection (1)(b) for the words following subparagraph (iii) of the following words:

“must, after reasonable notice to the owner or occupier of the land, be cut down or trimmed by the authority responsible for the care and the management of such State-owned land, road or private land, in accordance with its requirements or by the owner or occupier of such private land, as the case may be, at the expense of the electronic communications network service licensee, that must be cost-based.”; and

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

“(2) In the event of failure to comply with a notice referred to

in subsection (1) [(b)], the electronic communications network service licensee may cause the said tree or vegetation to be cut down or trimmed as the electronic communications network service licensee may consider necessary.”.

Repeal of section 28

18. Section 28 of the principal Act is hereby repealed.

Insertion of section 29A in chapter 5 of Act 36 of 2005

19. The following section is hereby inserted in Chapter 5 of the principal Act before section 30:

“Functions of the Minister of Telecommunications and Postal Services

29A. The Minister of Telecommunications and Postal Services is responsible for—

- (a)** representing the Republic on radio frequency spectrum at international, multi-lateral and bi-lateral level;
- (b)** representing the Republic at the ITU including radio frequency spectrum planning, allocation, and international coordination of radio frequency spectrum use;
- (c)** issuing policies and policy directions in relation to radio frequency spectrum as contemplated in section 3;

- (d) the development and approval of the National Radio Frequency Plan including the allocation of spectrum for the exclusive use by national security services as contemplated in section 34;
- (e) establishment of a National Radio Frequency Spectrum Planning Committee and National Radio Frequency Spectrum Division as contemplated in section 34A;
- (f) coordination across Government including sector-specific agencies; and
- (g) coordination with the Minister of Communications on issues relating to spectrum that has been allocated to the broadcasting services."

Substitution of section 30 of Act 36 of 2002

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

"[Control] Administration of radio frequency spectrum

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

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

The Authority must, in the performance of the functions contemplated in subsection (1)—

- (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 and ministerial policies and policy directions as contemplated in section 3;
- (b) take into account modes of transmission and efficient utilisation of the radio frequency spectrum, including allowing shared use of radio frequency spectrum when interference can be eliminated or reduced to acceptable levels as determined by the Authority, subject to section 31C;
- (c) give high priority to applications for radio frequency spectrum where the applicant proposes to utilise digital electronic communications facilities for the provision of broadcasting services, electronic communications services, electronic communications network services, and other services licensed in terms of this Act or provided in terms of a licence exemption;
- (d) plan for the conversion of analogue uses of the radio frequency spectrum to digital, including the migration to digital broadcasting **[in the Authority's preparation and modification of the radio frequency spectrum plan]; [and]**
- (e) give due regard to the radio frequency spectrum allocated to security services~~[.]~~;

- (f) conduct periodic radio frequency spectrum audits and evaluation, that should also be made available to the Minister and published on the Authority's website;
- (g) maintain a high quality and appropriately accessible real-time database of radio frequency spectrum assignments, excluding assignments to security services, that includes real-time updates from sector-specific agency databases as contemplated in section 34B;
- (h) advise the Minister of Telecommunications and Postal Services on areas for future research, development and planning; and
- (i) ensure that radio frequency spectrum licensees submit an annual report on its spectrum usage to the Authority and Minister that includes at least the following information:

 - (aa) Frequency;
 - (bb) bandwidth;
 - (cc) geographic location;
 - (dd) effective radiated power;
 - (ee) utilisation of the network;
 - (ff) efficiency and technology utilised;
 - (gg) network rollout;
 - (hh) investment in the network;
 - (ii) achievement of spectrum license obligations, as applicable; and
 - (ij) alignment of its network plans with national objectives and targets.

(3) The Authority must, in performing its functions in terms of subsection (1), ensure that in the use of the radio frequency spectrum harmful

interference to authorised or licensed users of the radio frequency spectrum is eliminated or reduced to the extent reasonably possible.

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

(5) For the purposes of Chapter 5, management of spectrum by the Authority is the technical term for the process of regulating the spectrum."

Amendment of section 31 of Act 36 of 2002

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

- (a) by the deletion of subsection (2A);
- (b) 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) radio frequency spectrum licences in instances where there is insufficient spectrum available to accommodate demand;

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

[(c) permission to 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).];

- (c) by the insertion after subsection (3) of the following subsection:

"(3A) (a) Radio frequency spectrum licences are renewable annually, despite the duration of the licence.

(b) The Authority must include compliance with section 30(2)(i) as a condition for renewal of a radio frequency spectrum licence."

- (d) by the addition in subsection (4) of the following paragraph:

"(f) if the Authority has approved an application for spectrum sharing, spectrum trading or spectrum refarming."

- (e) by the substitution for subsection (7) of the following subsection:

"(7) The Authority may, on its own initiative, take appropriate action to ensure compliance with the provisions of this Chapter and must develop and implement an effective monitoring and enforcement system including adjudication of spectrum disputes."

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

"(8) Subject to subsection (9), the Authority may withdraw any radio frequency spectrum licence or assigned radio frequency spectrum when the licensee fails to utilise the assigned radio frequency spectrum in accordance with the licence conditions applicable to such licence or fails to use the assigned radio frequency spectrum for a period of one year, referred to as the 'use it or lose it' principle."

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

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

(b) The Minister may, upon recommendation by the Authority, exempt SMMEs and new entrants from the 'use it or lose it' principle contemplated in subsection (8), upon good cause shown. "

and

(h) by the addition of the following subsection:

"(11) The Authority must develop an automated licensing system for radio frequency spectrum that is not high demand radio frequency spectrum."

Insertion of sections 31A, 31B, 31C, 31D and 31E in Act 36 of 2005

22. The following sections are hereby inserted in the principal Act after section 31:

"Universal access and universal service obligations of radio frequency spectrum licences.

31A. (1) In addition to any universal access and universal service obligations contemplated in section 8, the Authority must impose universal access and universal service obligations on existing and new radio frequency spectrum licencees.

(2) The Authority must obtain the Minister's approval on the nature and form of all universal access and universal service obligations before they are imposed on any radio frequency spectrum licensees to ensure that the obligations are coordinated, relevant and aligned with national policy objectives and priorities.

(3) Radio frequency spectrum licensees assigned radio frequency spectrum in similar radio frequency spectrum bands must have similar universal access and universal service obligations.

(4) Radio frequency spectrum licensees must report annually to the Authority on their compliance with their universal access and universal service obligations that the Authority must make publicly available.

(5) Universal access and universal service obligations should be specific, attainable and measurable and compliance should be evaluated by the Authority on an annual basis, as a condition of renewal of the radio frequency spectrum licence.

Radio Frequency Spectrum Trading

31B. (1) The Authority may consider applications for spectrum trading of non-high demand spectrum in accordance with spectrum trading regulations.

(2) The Authority must prescribe spectrum trading regulations for non-high demand spectrum that include—

(a) the spectrum trading application process; and

(b) the criteria and conditions for spectrum trading.

(3) The criteria and conditions for spectrum trading must include the following:

(a) Competition may not be distorted by any spectrum trade or by the accumulation and hoarding of spectrum rights of use;

(b) licence obligations will be passed on to the new user of the radio frequency spectrum;

(c) the current radio frequency spectrum licensee must have used the radio frequency spectrum in the year prior to the spectrum trade to ensure that the trade is not used to subvert the 'use it or lose it' principle;

(d) the current and new radio frequency spectrum licensee should be in compliance with all relevant legislation; and

(e) submission to the Authority of the particulars of the spectrum trade transaction including the legal, technical and financial terms and conditions to ensure that the spectrum trade does not undermine policy objectives.

(4) No high demand spectrum may be traded.

(5) The Minister may issue policy directions to the Authority on spectrum trading and spectrum use rights in order to fulfil specific national objectives.

Radio Frequency Spectrum Sharing

31C. (1) Radio frequency spectrum licensees may share licenced spectrum subject to approval from the Authority.

(2) The Authority may not approve spectrum sharing if it will—

(a) have a negative impact on competition;

(b) amount to spectrum trading; or

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

(3) The Authority must prescribe spectrum sharing regulations that include—

(a) the spectrum sharing application process; and

(b) the criteria and conditions for spectrum sharing including for sharing of sector-specific spectrum assigned to sector-specific agencies contemplated in section 34B.

Radio Frequency Spectrum Refarming

31D. (1) Radio frequency spectrum licensees may refarm licenced spectrum subject to approval from the Authority.

(2) The Authority may not approve spectrum refarming if it will have a negative impact on competition.

(3) Universal access and universal service obligations must be imposed on radio frequency spectrum licensees if other assigned spectrum in similar bands to the refarmed spectrum, carry universal access and universal service obligations, as contemplated in section 31A.

(4) Spectrum fees must be imposed on radio frequency spectrum licensees for refarmed spectrum commensurate with other assigned spectrum in similar bands.

(5) The Authority should prescribe spectrum refarming regulations that include—

(a) the spectrum refarming application process; and

(b) the criteria and conditions for spectrum refarming.

High demand spectrum

31E. (1) The Minister responsible for telecommunications and postal services must, within 6 months of the commencement of the Electronic Communications Amendment Act, ..., and thereafter as required, determine —

(a) what constitutes high demand spectrum; and

(b) which unassigned high demand spectrum must be assigned to the Wireless Open Access Network,

by notice in the *Gazette*, after consultation with the Authority.

(2) The assignment of high demand spectrum is—

(a) subject to the principles of open access as contemplated in Chapter 8;
and

(b) in line with the principle of non-exclusivity, subject to the provisions of the national radio frequency plan.

(3) The Authority must, within 12 months of the commencement of the Electronic Communications Amendment Act, ... finalise an inquiry as contemplated in section 4B of the ICASA Act and make

recommendations to the Minister on the terms and conditions which will apply to the Wireless Open Access Network.

(4) The unassigned high demand spectrum as determined by the Minister of Telecommunications and Postal Services in terms of subsection (1) must be assigned to the Wireless Open Access Network following a policy direction issued by the Minister in terms of section 5(6) as contemplated in section 19A.

(5) The Authority may issue radio frequency spectrum licences for unassigned high demand spectrum not assigned to the Wireless Open Access Network as contemplated in subsection (4), on condition that—

(a) the Wireless Open Access Network is functional;

(b) the licensee procures a minimum of 30% capacity or such higher capacity as determined by the Authority, in the Wireless Open Access Network for a period determined by the Authority; and

(c) universal access and universal service obligations contemplated in section 31A are imposed on the licensee, and such obligations are complied with in rural and under-serviced areas before the assigned spectrum may be used in other areas by the licensee.

(6) The Authority must, within 24 months of the commencement of the Electronic Communications Amendment Act, ... conduct an inquiry as contemplated in section 4B of the ICASA Act and make recommendations to the Minister on the terms and conditions, as well as the time frame, under which the exclusively/individually assigned high demand spectrum, excluding the high demand spectrum assigned to the Wireless Open Access Network,

must be returned to the Authority, taking into account policy, market developments and extent of availability of open access networks."

Amendment of section 34 of Act 36 of 2005

23. Section 34 of the principal Act is hereby amended—

- (a) by the deletion of subsection (1);
- (b) by the substitution for subsection (2) of the following subsection:

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

- (c) by the deletion of subsection (4);
- (d) by the addition in subsection (6) of the following paragraph:

"(g) determine the service allocation to be made in the national table of frequency allocations in cases where there are competing services in a particular radio frequency spectrum band, and where the decisions of an ITU World Radiocommunication Conference create divergent interests nationally."

- (e) by the substitution for subsection (7) of the following subsection:

"(7) In preparing the national radio frequency plan, the **[Authority]** Minister must—

- (a) take into account the ITU's international spectrum allocations for radio frequency spectrum use, in so far as ITU allocations have been adopted or agreed upon by the Republic, and give due regard to the reports of experts in the field of spectrum or radio frequency planning and to internationally accepted methods for preparing such plans;
- (b) take into account existing uses of the radio frequency spectrum and any radio frequency band plans in existence or in the course of preparation; and
- (c) **[consult with the Minister to]** take into account—
 - (i) **[incorporate]** the radio frequency spectrum allocated **[by the Minister]** for the exclusive use of the security services **[into the national radio frequency plan]**;
 - (ii) **[take account of]** the government's current and planned uses of the radio frequency spectrum, including but not limited to, civil aviation, aeronautical services, public protection and disaster relief services and scientific research; **[and]**
 - (iii) **[co-ordinate a plan for]** migration of existing users, as applicable, to make available radio frequency spectrum to satisfy the requirements of subsection (2) and the objects of this Act and of the related legislation[.]
 - (iv) priority of access, availability and protection from harmful interference of frequencies for safety-of-life services; and

(v) the allocation and preservation of specific bands for
broadcasting and audio visual services.

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

“(7A) If the national radio frequency plan includes
migration of existing users, the time period for migration may not
exceed five years, unless otherwise specified by the Minister and the
plan must indicate whether any licensee or another party is responsible
for the migration costs.”;

(g) by the deletion of subsections (8)-(15)

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

“(8A) The provisions of section 3 (5) apply, with the
necessary changes, to the development or amendment of the national
radio frequency plan.”;

(i) by the substitution for subsection (16) of the following subsection:

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

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

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

Insertion of sections 34A and 34B

24. The following sections are hereby inserted in the principal Act after section 34:

"National Radio Frequency Spectrum Planning Committee and National Radio Frequency Spectrum Division

34A. (1) The Minister responsible for telecommunications and postal services must coordinate radio frequency spectrum across government and sector-specific agencies contemplated in section 34B.

(2) (a) The Minister responsible for telecommunications and postal services must establish a National Radio Frequency Spectrum Planning Committee that includes representation from relevant Government stakeholders.

(b) The purpose of the National Radio Frequency Spectrum Planning Committee is to ensure fairness and equitable distribution of radio frequency spectrum.

(3) The Minister responsible for telecommunications and postal services must establish a National Radio Frequency Spectrum Division within the Department of Telecommunications and Postal Services to, amongst other things, coordinate the work of the National Radio Frequency Spectrum Planning Committee.

Sector-specific agencies

34B. (1) The sector-specific agencies must—

- (a) account to the Authority as determined by the Authority for the use of radio frequency spectrum assigned to such sector-specific agencies;
- (b) assign the radio frequency spectrum contemplated in paragraph (a) and register users of radio frequency spectrum in such sector in accordance with regulations prescribed by the Authority;
- (c) ensure availability and maintenance of quality information related to radio frequency spectrum assignments and usage; and
- (d) maintain a database of radio frequency spectrum users in their respective sectors and ensure that such database enables real-time updating of the corresponding database of the Authority.

(2) The Minister of Telecommunications and Postal Services, the Authority and the sector-specific agencies must enter into a Memorandum of Understanding on matters relevant to the radio frequency spectrum contemplated in this section.

(3) The Authority will be required to develop a database with real-time updates including that such database enables real-time updating by the corresponding databases of sector-specific agencies."

Amendment of section 36 of Act 36 of 2005

25. Section 36 of the principal Act is hereby amended by the deletion in subsection (2) of the word "and" at the end of paragraph (c), insertion of that word at the end of paragraph (d) and addition of the following paragraph:

"(e) ensuring universal design requirements to make provision for persons with disabilities."

Insertion of Chapter 7A in Act 36 of 2005

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

"CHAPTER 7A

SADC Roaming

42A (1) An electronic communications service licensee that provides international roaming to or from any other SADC country shall adhere to the following SADC Roaming Policy Guidelines agreed to by the SADC Ministers responsible for Telecommunications, Postal Services and ICTs—

(a) prices for roaming services must be transparent, fair, and non – discriminatory;

(b) subscribers or end-users must be provided with adequate information with regards to the provision of roaming services in relation to retail prices and billing cycles;

(c) prices for all roaming services should not be less than underlying costs;

(d) prices for roaming services should be cost-based and not be too excessive in comparison with prices charged for the same services at national level;

(e) prices charged and other obligations imposed on electronic communications service licensees should not distort the competitive conditions between electronic communications service providers within the SADC region;

(f) any roaming network connection should be established with the subscriber or end-user's consent; and

(g) the quality of service parameters for roaming services should at least be equivalent to those prescribed by the National Regulatory Authority of each SADC country.

(2) The Authority must prescribe SADC roaming regulations within 6 months of the coming into operation of the Electronic Communications Amendment Act, ...

(3) The regulations may be conditional on reciprocal terms and conditions being imposed on electronic communications service providers of another SADC country by such SADC country or its National Regulatory Authority.

(4) (a) When prescribing the SADC roaming regulations, the Authority must take the SADC Roaming Policy Guidelines in subsection (1) and SADC Model Roaming Regulations into consideration.

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

(5) The Authority may obtain any information required for SADC roaming regulation from electronic communications service licensees and may share such information with Communications Regulators'

Association of Southern Africa and National Regulatory Authorities of other SADC countries.

(6) The Authority may engage National Regulatory Authorities of any other SADC country in order to—
(a) promote SADC roaming between the respective countries;
(b) ensure reciprocity of the roaming terms and conditions applicable to electronic communications service providers of the respective countries; or
(c) enter into a bi-lateral agreements to give effect to the SADC Roaming Policy Guidelines, SADC Model Roaming Regulations and reciprocity as contemplated in this section, despite any other provision in the underlying legislation.

(7) This section applies *mutatis mutandis* to international roaming to any other jurisdiction."

Substitution of heading of chapter 8 of Act 36 of 2005

27. The following heading is hereby substituted for the heading of chapter 8:

"[ELECTRONIC COMMUNICATIONS FACILITIES LEASING] OPEN ACCESS"

Substitution of heading of section 43 of Act 36 of 2005

28. The following heading is hereby substituted for the heading of section 43 of the following heading:

"Obligation to [lease electronic communications facilities] provide open access"

Amendment of section 43 of Act 36 of 2005

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

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

"(1) All electronic communications network service licensees must provide wholesale open access to their electronic communications networks and facilities, upon request, to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of a wholesale open access agreement entered into between the parties, in accordance with the general open access principles."

(b) by the insertion of the following subsections after subsection (1):

"(1A) An electronic communications network service licensee that is determined a vertically integrated operator by the Authority in the wholesale open access regulations must, in addition to the requirement in subsection (1), do accounting separation."

(1B) An electronic communications network service licensee that is determined a deemed entity by the Authority in the wholesale open access regulations must, in addition to the requirement in subsection (1), comply with the following open access principles on its electronic communications network:

- (a) Active infrastructure sharing that includes but not limited to national roaming, radio access network sharing and enabling mobile virtual network operators, for voice and data based on the latest generation of technologies;
- (b) cost-based pricing;
- (c) access to its electronic communications network or electronic communications facilities as prescribed by Authority; and
- (d) specific network and population coverage targets.”;

(c) by the deletion of subsections (2), (3) and (4).

(d) by the substitution for subsections (5), (6) and (7) of the following subsections, respectively:

“(5) In the case of unwillingness or inability of an electronic communications network service licensee to negotiate or agree on the terms and conditions of **[an electronic communications facilities leasing agreement]** a wholesale open access agreement, either party may notify the Authority in writing and the Authority may—

- (a) impose terms and conditions consistent with this Chapter;
- (b) propose terms and conditions consistent with this Chapter which; subject to negotiations among the parties, must be agreed to by the parties within such period as the Authority may specify; or
- (c) refer the dispute to the Complaints and Compliance Committee for resolution on an expedited basis in accordance with the procedures prescribed in terms of section 46.

(6) For the purposes of subsection (5), unless otherwise agreed in writing by the parties, a party is considered unwilling to negotiate or

unable to agree if a **[facilities leasing agreement]** wholesale open access agreement is not concluded within the time frames prescribed.

(7) The **[lease of electronic communications facilities]** open access provided to electronic communications networks or facilities by an electronic communications network service licensee in terms of subsection (1) must, unless otherwise requested by the **[leasing]** requesting party, be non-discriminatory as among comparable types of electronic communications networks or facilities being **[leased]** provided 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.”; and

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

“(7A) 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 Chapter.”; and

(f) by the deletion of subsections (8), (8A) and (9).

Substitution of heading of section 44 of Act 36 of 2005

30. The following heading is hereby substituted for the heading of section 44 of the principal Act:

"[Electronic communications facilities leasing] Wholesale open access regulations"

Amendment of section 44 of Act 36 of 2005

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

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

“(1) The Authority must prescribe wholesale open access regulations to facilitate wholesale open access to electronic communications networks and facilities within 18 months of the coming into operation of the Electronic Communications Amendment Act, ...”;

(b) by the deletion of subsection (2);

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

(3) Matters which the wholesale open access regulations must address include but are not limited to—

(a) wholesale open access agreement principles including—

(i) reference offers containing model terms and conditions for the different open access categories contemplated in section 43;

(ii) the time frame and procedures for—

(aa) the negotiation of wholesale open access agreements;

(bb) the conclusion of wholesale open access agreements;

and

(cc) the technical implementation of the wholesale open access agreements;

(b) implementation and enforcement of open access principles;

(c) a list of vertically integrated entities including the criteria used to determine vertically integrated entities;

- (d) accounting separation procedures for vertically integrated entities;
 - (e) determination of deemed entities;
 - (f) the quality, performance and level of service to be provided, including time to repair or restore, performance, latency and availability;
 - (g) wholesale rates as contemplated in section 47;
 - (h) the sharing of technical information including obligations imposed in respect of the disclosure of current and future electronic communications network planning activities;
 - (i) contractual dispute resolution procedures;
 - (j) billing and settlement procedures;
 - (k) a list of essential facilities
 - (l) services associated with open access such as support systems, collocation, fault reporting, supervision, functionality, unbundling, and co-operation in the event of faults;
 - (m) access and security arrangements;
 - (n) the requirement that an electronic communications network service licensee negotiate and enter into a wholesale open access agreement with an applicant for an individual licence;
 - (o) the manner in which unbundled electronic communications facilities are to be made available; and
 - (p) any other matter necessary for the effective regulation of open access in accordance with this Act.”;
- (d) by the insertion of the following subsection after subsection (3):
- “(3A) For purposes of the determination of deemed entities as contemplated in subsection (3), the Authority must—

- (a) following the definition of markets as contemplated in section 67(3A), determine in respect of infrastructure markets, which electronic communications network service licensee, if any, has significant market power in such market or has an electronic communications network that constitutes more than twenty-five percent of the total electronic communication infrastructure in such market, following which such electronic communications network service licensee is regarded as a deemed entity;
- (b) determine which electronic communications network service licensee, if any, controls an essential facility or a scarce resource such as exclusively assigned radio frequency spectrum, following which such electronic communications network service licensee is regarded as a deemed entity.”;
- (e) by the substitution for subsection (4) of the following subsection:
- “(4) Where the regulations require negotiations with an applicant in terms of subsection (3) (I), a reference in this Chapter to a licensee seeking to **[lease]** access electronic communications networks or facilities must be considered to include such applicant.”; and
- (f) by the deletion of subsections (5), (6) and (7).

Substitution of section 45 of Act 36 of 2005

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

"Filing of [electronic communications facilities leasing] wholesale open access agreements

45. (1) [An electronic communications facilities leasing] A wholesale open access agreement must be in writing and must be submitted to the Authority.

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

(3)...;

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

(5) The Authority must review **[electronic communications facilities leasing] wholesale open access** agreements submitted in terms of subsection (1) to determine whether such agreements are consistent with the regulations prescribed.

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

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

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

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

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

Substitution of section 46 of Act 36 of 2005

33. The following section is hereby substituted for section 46 of the principal Act:

"Notification of **[electronic communications facilities leasing] wholesale open access agreement disputes**

46. (1) A party to a dispute arising out of **[an electronic communications facilities leasing]** a wholesale open access agreement may notify the Authority in writing of the dispute and such dispute must be resolved, on an expedited basis, by the Complaints and Compliance Committee in accordance with the regulations prescribed by the Authority.

(2) A party who notifies the Authority of a dispute in terms of

subsection (1) may, at any time, withdraw the notice in writing.

(3) A decision by the Complaints and Compliance Committee concerning any dispute or a decision concerning a dispute contemplated in section 43 (5) (c) is, in all respects, effective and binding on the parties to the **[electronic communications facilities leasing]** wholesale open access agreement unless an order of a court of competent jurisdiction is granted against the decision."

Substitution of section 47 of Act 36 of 2005

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

"[Facilities leasing] Open access pricing principles

47. (1) The Authority **[may]** must prescribe regulations establishing a framework for the establishment and implementation of wholesale rates applicable to specified types of **[electronic communication facilities and associated services taking into account the provisions of Chapter 10]** open access including cost-based pricing for deemed entities.

(2) The regulations must be updated at least every second year".

Amendment of section 67 of Act 36 of 2005

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

(a) by the insertion of the following subsections after subsection (3):

"(3A) (a) The Authority must, within 12 months of the coming into operation of the Electronic Communications Amendment Act ..., define all the relevant markets and market segments relevant to the broadcasting and electronic communications sectors, including ICT services dependent on the use and provision of the Internet, including internet exchange points, hosting and data centre services, by notice in the Gazette.

(b) The notice must set out a schedule in terms of which the Authority will conduct market reviews of the defined markets and market segments, prioritizing those markets with the most significant impact on consumer pricing, quality of service and access by users to a choice of services and markets relevant to policy directions issued by the Minister.

(3B) The Authority must thereafter at least every three years review and update the market definitions and schedule in terms of which the Authority will conduct market reviews by notice in the Gazette to among other things assess the impact of convergence on existing market definitions.

(3C) The Authority must give notice of its intention to define or review and update all the relevant markets and market segments in the Gazette and in such notice invite interested parties to submit their written representations to the Authority within such period as may be specified in such notice."

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

"(4) The Authority must, when conducting a market review, prescribe regulations that must, among other things—

(a) determine whether there is effective competition in such market or market segment;

(b) determine which, if any, licensees have significant market power in such market or market segment where there is ineffective competition;

(c) impose appropriate pro-competitive license conditions on those licensees having significant market power to remedy the market failure;

(d) set out a schedule in terms of which the Authority will undertake periodic review of the market or market segment, taking into account subsection (8) and the determination in respect of the effectiveness of competition and application of pro-competitive measures in such market or market segment; and

(e) provide for monitoring and investigation of anti-competitive behavior in the market or market segment."

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

"(4B) Subject to section 4D of the ICASA Act, licensees or any other person 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 insertion of the following subsection after subsection (4B):

“(4C) A market review under this Chapter shall not take longer than 12 months.”;

- (e) by the substitution in subsection (7) for paragraph (a) of the following paragraph:

“(a) obligations in respect of interconnection and **[facilities leasing]** open access in addition to those provided for in Chapters 7 and 8 and any regulations made in terms thereof;”;

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

“(8) Review of pro-competitive conditions:

(a) Where the Authority undertakes a review of the pro-competitive conditions imposed upon one or more licensees under this subsection, the Authority must~~]~~—

(i) **review the market determinations made on the basis of earlier analysis; and**

(ii)] decide whether to modify the pro-competitive conditions set by reference to **[a market determination]** the previous market review;

(b) Where, on the basis of a review under this subsection, the Authority determines that a licensee to whom any pro-competitive conditions apply is no longer a licensee possessing significant market power in that market or market segment, the Authority must revoke the applicable pro-competitive conditions applied to that licensee by reference to the previous market **[determination based on earlier analysis]** review;

(c) Where, on the basis of such review, the Authority determines that the licensee to whom pro-competitive conditions apply continues to possess significant market power in that market or market segment, but due to changes in the competitive nature of such market or market segment the pro-competitive conditions are no longer proportional in accordance with subsection (7), the Authority must modify the applicable pro-competitive conditions applied to that licensee to ensure proportionality.

(d) Where, on the basis of such review, the Authority determines that the appropriate market or market segment have changed as contemplated in subsection (3A) or (3B), the Authority must revoke the applicable pro-competitive conditions applied to that licensee and conduct a market review of the changed market or market segment in accordance with the Schedule contemplated in subsection (3A).";

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

"(8A) The Authority must regularly advise the Minister on expected market trends in the industry and on the impact of policy and legislation."; and

(h) by the addition of the following subsection:

"(13) The Authority must perform the market definition and market review proceedings under this Chapter, after consultation with the Competition Commission.".

33. The following sections are hereby inserted in the principal Act after section 67:

"Concurrent jurisdiction agreement between the Authority and the Competition Commission

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

(2) Any existing concurrent jurisdiction agreement between the Authority and the Competition Commission must be amended within three months of the coming into operation of the Electronic Communications Amendment Act, ... to include a mechanism to facilitate consultation between the Authority and the Competition Commission on market definition, market reviews and mergers as contemplated in this Chapter, and any other matter.

Mergers

67B. (1) The Authority and the Competition Commission must coordinate with and consult each other when—

(a) the Competition Commission considers an intermediate or a large merger as contemplated in section 13A of the Competition Act and one or more parties to the merger are licensed to provide electronic communications services, electronic communications network services or broadcasting services; or

(b) the Authority considers a licensing matter as contemplated in sections 13(1) or 31B, relevant to an intermediate or a large merger as contemplated in section 13A of the Competition Act.

(2) The Authority and the Competition Commission should, when coordinating and consulting as contemplated in subsection (1), align their decisions, approvals or recommendations to the extent possible."

Substitution of section 69 of Act 36 of 2005

37. The following section is hereby substituted for section 69 of the principal Act:

"Code of conduct, end-user and subscriber service charter

69. (1) The Authority must **[, as soon as reasonably possible after the coming into force of this Act,]** prescribe regulations, that must be reviewed and updated at least every two years, setting out a code of conduct on consumer protection for licensees subject to this Act and persons exempted from holding a licence in terms of section 6 to the extent such persons provide a service to the public.

(1A) The code of conduct must include without limitation, provision for the protection of different types of end-users and subscribers including persons and institutions as well as users of wholesale services.

(2) The Authority may develop different codes of conduct applicable to different types of services. All electronic communications

network services licence and electronic communications service licensees must comply with the Code of Conduct for such services as prescribed.

(3) The Authority must[, **as soon as reasonably possible after the coming into force of this Act,**] prescribe regulations, that must be reviewed and updated at least every two years, setting out the minimum standards for **[and]** end-user and subscriber service charters.

(4) The Authority may develop different minimum standards for **[and]** end-user and subscriber service charters for different types of services.

(5) The matters which an end-user and subscriber service charter **[may]** must address include, but are not limited to—

- (a) the provision of accurate, understandable and comparable information to end-users and subscribers regarding services, rates, and performance procedures;
- (aA) standards of service that end-users and subscribers can expect;
- (b) provisioning and fault repair services;
- (c) the protection of private end-user and subscriber information;
- (d) end-user and subscriber charging, billing, collection and credit practices;
- (e) complaint procedures and the remedies that are available to address the matters at issue; and
- (f) any other matter of concern to end-users and subscribers.

(6) Where an end-user or subscriber is not satisfied after utilising the complaint procedures set out in the regulations, his or her

complaint may be submitted to the Authority in accordance with the provisions of section 17C of the ICASA Act.

(7) The Authority must enter into a concurrent jurisdiction agreement with the National Consumer Commission in terms of section 4(3A) of the ICASA Act, to ensure coordination of consumer protection within the ICT sector."

Insertion of section 69A to Act 36 of 2005

38. The following section is hereby inserted in the principal Act after section 69:

"Quality of service

69A. (1) The Authority must make regulations prescribing quality of service standards for each category of licence which must be reviewed and updated at least every two years.

(2) The standards contemplated in subsection (1) must include matters relating to—

(a) broadband download and upload speeds and latency, together with waiting time for installation and fault clearance;

(b) the defined level of technical quality such as call quality and success rates;

(c) time frames for service installations;

(d) requirements to ensure reliability and robustness of services;

(e) the required level of customer service including the handling and resolution of complaints and disputes;

(f) minimum requirements to meet the needs of persons with disabilities;
and

(g) standards to ensure quality of emergency services.

(3) Subject to subsection (2), the Authority must, in preparing quality of service standards, take account of guidelines issued by the ITU as well as best practice in other jurisdictions.

(4) The Authority must promote public awareness of the quality of service standards.

(5) Licensees must publish information for end-users and subscribers on the quality of their services which information must also be supplied to the Authority.

(6) The Authority may prescribe the quality of service parameters to be measured, and the content, form and manner of information to be published by licensees.

(7) The Authority must monitor and evaluate the national broadband policy targets in SA Connect and compliance with broadband quality of service standards on an ongoing basis, and annually make recommendations to the Minister of Telecommunications and Postal Services regarding the review of the national broadband policy targets as necessary."

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

"Market performance report

79C. (1) The Authority must annually publish a market performance report in respect of the broadcasting, electronic transactions, postal and electronic communications sectors. The report must, among other things—

- (a) include assessment of affordability of services, accessibility to services, quality of service, impact on users of market trends and compliance by licensees with conditions and obligations set; and
- (b) consider the effects of convergence, including monitoring of the extent and impact of horizontal and vertical integration and bundling of services.

(2) 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.

(3) The Authority must submit the market performance report to the Minister and Parliament within 30 days of publication."

Amendment of section 82 of Act 36 of 2005

40. Section 82 of the principal Act is hereby amended by the substitution in subsection (3)(a) for the words preceding subparagraph (i) of the following words:

"The Agency must from time to time, with due regard to circumstances and attitudes prevailing in the Republic including the needs of persons with disability and broadband, and after obtaining public participation to the greatest degree practicable, make recommendations to enable the Minister to determine what constitutes."

Amendment of section 88 of Act 36 of 2005

41. Section 88 of the principal Act is hereby amended by the addition of the following subsection:

"(4A) In exercising the powers contemplated in subsection (4), the Agency must consider the needs of persons with disabilities in assessing the access gap and setting universal service and access definitions and targets."

Amendment of Schedule to Act 36 of 2005

42. The following amendments are hereby inserted in the Schedule to the principal Act after Act No. 63 of 1996:

SCHEDULE

No. and year of Act	Short Title	Extent of repeal or amendment
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Act No. 13 of 2000	Independent Communications Authority of South Africa Act, 2000	<p>By the insertion after the definition of "Broadcasting Act" of the following definition:</p> <p>"B-BBEE ICT Sector Code" means the Broad-Based Black Economic Empowerment Information, Communications and Technology Sector Code, a sector code on broad-based black economic empowerment, issued in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);</p> <p>By the substitution in section 4(3) for paragraph (k) of the following paragraph:</p> <p>"(k) [may] must make regulations [on empowerment requirements] to apply the B-BBEE ICT Sector Code to existing and new licences, exemptions or other authorizations including spectrum assignment to promote broad-based black economic empowerment within 12 months of the promulgation of the Electronic Communications Amendment Act, 201....".</p>

Short title and commencement

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

(2) Different dates may be fixed for the coming into operation of different sections of this Act.

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MEMORANDUM ON THE OBJECTS OF THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL, 2017

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 The Act is amended to improve implementation and remove 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 Cabinet initiated the review of all ICT related policies in 2012. The then Minister of Communications appointed a Policy Review Panel in January 2013 following public nominations. The Panel included representatives from the South African ICT industry, academia, NGOs, public institutions and state-owned companies.

1.5 Research was commissioned to assist the Panel in assessing and diagnosing challenges and to identify proactive policy approaches for the future. The Panel, together with the Ministry and Department, initiated a series of public consultations – broadly in line with the approach for regulatory impact assessments issued by the Presidency in 2012, prior to the Panel making its final recommendations to the Minister in March 2015.

1.6 The following Papers were released for public comment as part of the consultation process: The Framing Paper issued in April 2013 sought input on the objectives and goals of policy. A Green Paper released in January 2014 reflected on achievements against the original vision, and asked what core issues/problems need to be addressed in future policy. A Discussion Paper was published in November 2014 outlining a range of options and possible policy approaches to realise the objectives set in the Framing Paper. The Policy Review Panel then prepared the National Integrated ICT Policy Review report in March 2015. This White Paper has been developed after considering the Panel recommendations and the inputs received from stakeholders through the policy review process. Cabinet approved the White Paper on 28 September 2016 following which it was published on 03 October 2016.

1.7 The National Integrated ICT Policy White Paper outlines the overarching policy framework for the transformation of South Africa into an inclusive and innovative digital and knowledge society. The White Paper outlines government's approach to providing cross-government leadership and facilitating multi-stakeholder participation; interventions to reinforce fair competition and facilitate innovation in the

converged environment; policies to protect the open Internet; policies to address the digital divide and new approaches to addressing supply-side issues and infrastructure rollout including managing scarce resources.

1.8 In addition, the White Paper outlines policies to address demand-side issues in order to facilitate inclusive digital transformation in the country and provides for a new national postal sector policy framework, in respect of the market structure for the postal sector and the regulation and licensing thereof. The White Paper also addresses issues related to promotion of growth in the ICT and postal industries and provides for institutional frameworks necessary to facilitate the implementation of this policy document.

1.9 This Bill is one of a number of Bills that will be introduced to give effect to the White Paper, including a Bill creating a new ICT Economic Regulator and Tribunal and a Bill creating a new Digital Development Fund.

2. OBJECTS OF BILL

The objects of the Bill are to amend the Act, so as to align it with the National Integrated ICT Policy White Paper approved by Cabinet on 28 September 2016; to provide for transformation of the sector through enforcement of broad-based black economic empowerment; to provide for lowering of cost of communications, reducing infrastructure duplications and encouraging service based competition through a wireless open access network; to provide a new framework for rapid deployment of electronic communications facilities; to provide for new approaches on scarce resources such as spectrum including the allocation of high demand spectrum on

open access principles; to create a new framework for open access; to provide for the regulation of international roaming including SADC roaming to ensure regulated roaming costs, quality of service and transparency; to provide for regular market definition and review to ensure effective competition; to provide for improved quality of services including for persons with disabilities; to provide for consumer protection of different types of end-users and subscribers, including persons and institutions; to provide for enhanced cooperation between the National Consumer Commission and Authority as well as the Competition Commission and the Authority; and to provide for matters connected therewith.

3. SUMMARY OF BILL

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

3.1 The definitions contained in the Act are amended as follows:

The definition of allocation is amended to clarify that it is the function of the Minister, as opposed to assignment that is the function of the Authority.

A definition for "B-BBEE ICT Sector Code" is inserted in view of the deletion of the definition of ICT Charter.

The definition of "broadband" is amended to align it with and enable achievement of SA Connect targets. It is further amended to ensure that the Authority makes recommendations in this regard as required under SA Connect.

A definition for "Competition Commission" is inserted to refer to the Competition Commission established in terms of the Competition Act.

A definition for "Consumer Protection Act", is inserted to refer to the Consumer Protection Act, No. 68 of 2008.

The definition of "essential facility" is amended to align it with the White Paper that provides that Layer 2 and 3 broadband infrastructure (International Standardisation Organisation Open Systems Interconnect model) constitute 'essential facilities'.

A new definition for "General open access principles" is inserted to mean providing wholesale open access to electronic communications networks on terms that are effective, transparent and non-discriminatory.

A definition is inserted for "high demand spectrum" to provide which spectrum can be determined to be high demand spectrum by the Minister, after consultation with the Authority.

The definition of ICT Charter is amended to refer to the B-BBEE ICT Sector Code.

A definition is inserted for "National Consumer Commission" to mean the National Consumer Commission established under section 85 of the Consumer Protection Act.

A definition is inserted for "person with disabilities", to align with the White Paper definition that is based on the UN Convention on the Rights of Persons with Disabilities.

A new definition for "radio frequency spectrum sharing" is inserted to mean a collaborative effort which allows radio frequency spectrum licensees allocated spectrum in the same or adjacent bands to harmonise their spectrum to enhance the utilisation of the radio frequency spectrum. This definition is necessary in view of the new section 31C that provides for the conditions for radio frequency spectrum sharing.

A new definition for "radio frequency spectrum trading" is inserted to mean the transfer or transfer of control, re-sale, leasing or sub-letting of spectrum rights by a licensee to a third party, whether on a stand-alone basis or as part of the sale or transfer of control of a business or any part thereof. This definition is necessary in view of the new section 31B that provides for the conditions for radio frequency spectrum trading.

A new definition for "radio frequency spectrum refarming" is inserted to mean the re-use of an assigned frequency band for a different technology. This definition is necessary in view of the new section 31D that provides for the conditions for radio frequency spectrum refarming.

A definition for "SA Connect" is inserted to refer to South Africa's National Broadband Policy, 2013 published in Government Gazette 37119, Government Notice No. 953 on 06 December 2013.

A new definition is inserted for "SADC" to mean the Southern African Development Community.

New definitions are inserted for "SADC Model Roaming Regulations" and "SADC Roaming Policy Guidelines" to refer to the regulations and guidelines agreed to by SADC Ministers responsible for Telecommunications, Postal Services and ICTs in Walvis Bay, Namibia in June 2015.

A new definition is inserted for "sector-specific agencies" to mean the South African Marine Safety Authority and the Civil Aviation Authority in alignment with the new clause 34B.

A definition is inserted for "SIP 15" to mean the Strategic Infrastructure Project 15: Expanding access to communication technology of the National Infrastructure Plan, 2012

A definition is inserted for "Wireless Open Access Network" to mean the entity contemplated in section 19A that must provide wholesale electronic communications network services on the open access principles. Though it is called a wireless network due to the assignment of high demand spectrum to it, and in accordance with the name given to it in the White Paper, it is an electronic communications

network service licensee as defined, but may only render the electronic communications network services on a wholesale basis as defined.

Amendment of section 2 of Act 36 of 2005

3.2 Section 2 is amended to align the objects of the Act with amendments in the Act emanating from the White Paper. The role that ICTs play in socio-economic development and effective participation of all South Africans in the affairs of the Republic is emphasized. Objects of the Act that were added include redressing the skewed ownership and control of economic and scarce resources such as radio frequency spectrum, to address the barriers to market entry including for SMMEs; to promote serviced-based competition and avoid concentration and duplication of electronic communications infrastructure in urban areas; to promote an environment of open access to electronic communications networks on terms that are effective, transparent and non-discriminatory; and the encouragement of new innovative services.

Amendment of section 3 of Act 36 of 2005

3.3 Section 3(1)(e) is amended to remove the reference to guidelines to clarify that policy is required similar to the other provisions in this subsection.

Section 3(2)(bB) is inserted to provide that the Minister may issue policy directions on universal service or universal access obligations, having identified any access gaps.

Section 3(2)(cC) is inserted to provide that the Minister may issue policy directions on compliance with international obligations.

Section 3(2)(d) is amended to remove the reference to guidelines to clarify that policy direction is required. It further ensures that policy directions can be issued on spectrum. On spectrum fees, it adds that policy directions can be issued on incentives, spectrum fee exemption and spectrum fee reductions that may apply.

Section 3(2)(e) is amended to make it clear that policy directions can be issued by the Minister to give effect to ICT related national policy issued under section 85(2)(b) of the Constitution of the Republic of South Africa, 1996.

Amendment of section 4 of Act 36 of 2005

3.4 This clause seeks to amend section 4(1)(d) by removing the reference to 'control' in line with the new clause 29A and amendments to section 30. The amendment is part of amendments that clarify the role of the Minister, as supported by the National Radio Frequency Spectrum Planning Committee and National Radio Frequency Spectrum Division vis-a-vis the Authority and Sector-Specific Agencies on spectrum.

A new clause (1A) is inserted to ensure that regulations on radio frequency spectrum fees must be in accordance with any policy or policy directions issued by the Minister.

Amendment of section 5 of Act 36 of 2005

3.5 The amendment substitutes subsection 5(9)(b) in order to substitute the term "ICT Charter" with "B-BBEE ICT Sector Code" in accordance with the amendment made to the definition.

Amendment of section 8 of Act 36 of 2005

3.6 Subsection 8(2) is amended to make it obligatory for the Authority to prescribe standard terms and conditions for the matters provided in that subsection and to require that such regulations include regulations that strengthen the protection of subscribers and end-users in relation to quality of service standards.

Subsection 8(3) is amended to delete the reference to Chapter 10 that will make it impractical for the Authority to prescribe additional license terms and conditions.

Subsection 8(4) is amended to oblige the Authority to make regulations on universal service and access obligations (USAO) and to designate licensees that carry such obligations.

A new subsection 8(4A) is inserted to ensure a regular review of such USAO regulations and considerations relevant to such review.

A new subsection 8(6) makes provision for the inclusion of rapid deployment obligations on licensees.

Amendment of section 9 of Act 36 of 2005

3.7 The amendment seeks to make it clear that the broad-based black economic empowerment conditions must be prescribed.

Amendment of section 10 of Act 36 of 2005

3.8 The purpose of the amendment is to ensure that the Authority may amend licenses to include rapid deployment obligations.

Insertion of section 19A of Act 36 of 2005

3.9 The proposed section 19A seeks to enable the licensing of a Wireless Open Access Network to provide wholesale electronic communications network services on open access principles.

The section refers to pre-requisites necessary before licensing such as the terms and conditions including universal service and access obligations which will apply to the Wireless Open Access Network. The Minister must consider incentives that may be granted to the Wireless Open Access Network.

Thereafter, the Minister will issue a policy direction to the Authority in terms of section 5(6) of the Act to issue an invitation to apply for the Wireless Open Access Network licence.

Substitution of Chapter 4 of Act 36 of 2005

3.10 The purpose of this clause is to substitute Chapter 4 of the Act by amending the relevant provisions in accordance with the White Paper, to give effect to the rapid deployment policy.

Section 20 is substituted with a new section that defines the meaning of land.

The clause replaces section 21 to 23 with new sections 20A to 20P.

A new section 20A is inserted to provide for the oversight role of the Minister of Telecommunications and Postal Services including liaison with other relevant Ministries and the establishment of the Rapid Deployment National Coordinating Centre and Rapid Deployment Steering Committee.

A new section 20B is inserted on the role of the National Co-ordinating Centre to ensure central coordination of activities and process for rapid deployment including its relationship with SIP 15 and local municipalities.

Section 20C on the role of the Authority is inserted to establish the regulatory framework for rapid deployment of electronic communication network, for resolving disputes on an expedited basis and matters that must be included in the regulations.

Section 20D is inserted to establish the role of South African Local Government Association (SALGA) and Municipalities in promoting uniformity in process and price for approvals and wayleaves, that must be at cost, and to make provision for ICT

infrastructure when planning infrastructure at municipal level. Municipalities are required to provide information on municipal infrastructure and ICT infrastructure to the National Coordination Centre.

Section 20E on the obligations of landowners at municipal, provincial and national levels is inserted to ensure that landowners provide information on infrastructure for inclusion into the geographic information system database, make provision for the installation of electronic communications networks and facilities including without limitation fibre ducts and treat Electronic Communications Network Service (ECNS) licensees equally.

Section 20F is inserted to provide for the role of the National Co-ordinating Centre to develop coordinated and streamlined processes for the granting of an approval, authorisation, licence, permission or exemption to enable rapid deployment of electronic communications networks and facilities. It provides how the Centre must act in consultation with other relevant authorities. The section further requires the Department of Environmental Affairs to consider amending their legislation to simplify and reduce the periods relevant to environmental approvals to enable rapid deployment of electronic communications networks and facilities, with due regard to the protection and conservation of the environment.

A new section 20G is inserted to provide for the rights and obligations of ECNS licensees. The rights include entering upon public and private land to deploy networks, which networks remain their property. A procedure is provided to give notice and apply to the property owner or occupier including right to objection and

relevant procure, if the network or facility will cause significant interference with the land. Obligations are placed on ECNS licensees to act with due care in accordance with industry standards and restore the property to its former state. ECNS licensees must update the geographic information system database about the type and location of facilities deployed. The section further seeks to uphold open access principles and infrastructure sharing obliging ECNS licensees to seek alternatives to new infrastructure deployments.

Section 20H is inserted to provide for access to high sites for radio-based systems to ensure that ECNS licensees may access and use any high sites including high sites owned by all spheres of government for the deployment of electronic communications networks and facilities that promote broadband. The Authority must prescribe regulations that include the cost-based rental fees that may be charged by owners of high sites.

A new section 20I is inserted to provide for access to trenches. It includes the requirements for single trenching for fibre deployment where possible and requires the Authority to make regulations that include how ECNS licensees must cooperate to ensure single trenching, how to resolve disputes and the role of the National Coordination Centre in coordination with stakeholders.

Section 20J is inserted to enable ECNS licensees to deploy infrastructure using the rights of way of government entities in all spheres of government such as rights of way for construction of roads and railways. The National Coordination Centre must play a coordination role to ensure dialogue and that government entities that deploy

infrastructure such as roads and power lines, take electronic communications networks and facilities into account.

A new section 20K is inserted to provide that ECNS licensees may access any building to deploy electronic communications networks or facilities.

A new section 20L is inserted to provide that new property developments and buildings must provide for the installation of electronic communications networks and facilities such as ducts for fibre cables or space for radio equipment in the interest of broadband roll-out. Government must ensure that approvals for new developments and buildings are subject to this requirement. The Minister of Trade and Industry must consider amending the National Building Regulations accordingly.

Section 20M is inserted to introduce the concept of 'adequately served' and provides that ECNS licensees may not deploy networks or facilities in adequately served premises except if the Authority determines otherwise. Adequately served is described to mean that an electronic communications network or facilities that enables electronic communications services including voice services and broadband services at the quality and speeds provided in SA Connect, has already been deployed to and within a set of premises such as a gated complex, an office park, a shopping mall, a government building or a block of flats by an electronic communications network service licensee. The section provides the requirements that must be met by the access provider in an adequately served area such as providing its network on open access basis and providing a "meet me" facility where access seekers can connect of the network of the access provider. It further

establishes a right for occupants in the adequately served premises to choose who to receive a service from.

Section 20N on emergency is inserted to ensure that no entity may refuse access to any site nor charge any fee for access for the deployment of electronic communications network or facilities during emergency situations.

Section 20O on application process / procedure is inserted in order to expedite all applications and related processes for approval, authorisation, licence, permission or exemption and processes relating to any consultation and participation required by the relevant laws, required for the deployment of electronic communications networks and facilities, and provides that they may run concurrently. The role of the National Co-ordination Centre is described to keep updated information about application processes and requirements. The section further describes the obligations of authorities responsible for approvals and authorizations such as providing a decision within 30 calendar days and ensuring that its employees are familiar with the rapid deployment requirements in the Act.

A new section 20P is inserted to provide for fees, charges and levies. Access fees may not be charged by landowners if networks and facilities are not intrusive or deprive the landholder of its use of the land. It describes when reasonable access fees are payable when the access is more intrusive. The section enables dispute resolution by the Authority. This section also ensures that a landholder is entitled to reasonable compensation agreed to between the landholder and the electronic communications network service licensee, for any financial loss or damage, and that

in any dispute about compensation, the reasonability of the compensation must be determined by the Authority on an expedited basis.

Section 24 is amended to remove the time frame for the electronic communications network licensee to give notice to the local authority to avoid conflicting timeframes elsewhere in this Chapter. The amendment further ensures that the costs payable by an ECNS licensee to a local authority for alteration of water, gas or electricity pipes are cost-based.

Section 25 is amended to ensure that the costs payable by a local authority to an ECNS licensee for moving any electronic communications facility owing to any alteration or other work required by a public authority, is cost based. The section is further amended to replace the reference to section 17C of the ICASA Act with section 20C of the ECA, that provides the new process for expedited dispute resolution.

Section 27 is amended to ensure that costs payable by an ECNS licensee to a landowner for cutting or trimming trees or vegetation that interferes with electronic communications networks, are cost based.

Section 28 is deleted since it is covered by the new section 20G.

Insertion of section 29A of Act 36 of 2005

3.11 The purpose of the amendment is to clarify the functions of the Minister of Telecommunications and Postal Services in relation to spectrum, in accordance with

the White Paper. This clause seeks to clarify that the Minister's role in representing the Republic is wider than just international allocation of spectrum, coordination of spectrum usage and approval of regional radio frequency spectrum plans. The Minister represents the Republic on all radio frequency matters at international, multi-lateral and bi-lateral level.

Some of the new functions include the development and approval of the National Radio Frequency Plan, the establishment of a National Radio Frequency Spectrum Planning Committee and National Radio Frequency Spectrum Division and coordination across Government including sector-specific agencies.

Amendment of section 30 of Act 36 of 2005

3.12 The amendment of Chapter 5 of the Act seeks to align the radio frequency spectrum provisions with the White Paper.

Subsection 30(1) is amended to provide that the Authority is responsible for the administration and management of the assignment of spectrum, the issuing of licenses and monitoring and enforcement of spectrum use. Planning will become the responsibility of the national radio frequency spectrum planning committee appointed by the Minister, as contemplated in section 34A.

The amendment of subsection 30(2) seeks to ensure that the Authority in assigning radio frequency spectrum must comply with radio frequency spectrum policy and policy directions issued by the Minister.

A number of new responsibilities of the Authority are inserted such as a requirement to conduct periodic audits, the establishment of a real-time database of radio frequency spectrum assignments and monitoring and evaluation of harmful interference. The Authority should also ensure that radio frequency spectrum licensees submit an annual report on its spectrum usage to the Authority and Minister.

Amendment of section 31 of Act 36 of 2005

3.13 Subsections 31(2A) and (3)(c) are deleted and subsection 31(3)(b) amended in view of spectrum trading clause contemplated in section 31B.

Subsection 31(3A) is inserted to clarify that radio frequency spectrum licences are renewable annually and conditional.

Subsection 31(7) is amended to ensure that the Authority develops a monitoring and evaluation system.

Amendments to subsection 31(8) are made to insert the 'use it or lose it' principle that provides for the withdrawal of a licence if assigned radio frequency spectrum is not used for one year.

The proposed section 31(8A) creates exceptions to the 'use it or lose it' principle such as for passive science services.

The proposed section 31(11) requires that the Authority develops an automated licensing system for non-high demand radio frequency spectrum.

Insertion of section 31A of Act 36 of 2005

3.14 This clause seeks to introduce a specific requirement for universal service and universal access obligations for specific radio frequency spectrum licensees determined by the Authority. A role is inserted for the Minister to approve obligations to ensure alignment with national policy objectives. The obligations must be similar for similar bands and licensees must report annually on their compliance with such obligations. Compliance with the obligations are made a condition for radio frequency spectrum license renewal.

Insertion of section 31B of Act 36 of 2005

3.15 This clause seeks to provide for spectrum trading of non-high demand spectrum and prohibits spectrum trading of high demand spectrum. It enables the Authority to make spectrum trading regulations in respect of non-high demand spectrum. The clause provides the criteria and conditions for non-high demand spectrum trading including that competition may not be distorted and policy objectives may not be undermined.

Insertion of section 31C of Act 36 of 2005

3.16 The proposed section 31C enables spectrum sharing subject to approval from the Authority. Conditions include that it may not have a negative impact on competition or compromise emergence services.

It makes provision for spectrum sharing regulations that should amongst other things provide criteria for spectrum sharing.

Insertion of section 31D of Act 36 of 2005

3.17 This clause seeks to introduce provisions on spectrum refarming since no policy previously existed for it. Refarming of spectrum relates to the re-use of spectrum for a different application than it was originally assigned.

Radio frequency spectrum licensees may refarm licenced spectrum subject to approval from the Authority as long as it will not have a negative impact on competition.

Spectrum fees and universal access and universal service obligations must be imposed on radio frequency spectrum licensees for refarmed spectrum commensurate with other assigned spectrum in similar bands.

Insertion of section 31E of Act 36 of 2005

3.18 This clause seeks to introduce provisions for high demand spectrum that must be subject to the principles of open access and non-exclusivity as provided in the White Paper.

Two inquiries by the Regulator are envisaged.

In the first immediate inquiry, the Authority must make recommendations to the Minister about the terms and conditions of licensing unassigned high demand spectrum to the Wireless Open Access Network.

The section also makes provision for the assignment of unassigned high demand spectrum not assigned to the WOAN, to other licensees on certain conditions such as the procurement of capacity in the WOAN.

The second inquiry by the Authority is about making recommendations to the Minister on the terms and conditions, as well as the time frame, under which the exclusively/individually assigned high demand spectrum, excluding the high demand spectrum assigned to the Wireless Open Access Network, must be returned to the Authority, taking into account policy, market developments and extent of availability of open access networks.

Amendment of section 34 of Act 36 of 2005

3.19 Subsection (1) is deleted in view of the new section 29A.

The White Paper makes the Minister responsible for the development of the national radio frequency plan and the majority of the amendments in this clause seek to align section 34 accordingly including procedural aspects such as public consultation.

The White Paper provides that the Minister will make a determination in the best interest of the Republic regarding the service allocation to be made in the national table of frequency allocations, in cases where there are competing services in a

particular frequency band, and where the decisions of an ITU World Radio-communication Conference could create divergent interests nationally. Subsection 34(6) is amended to make provision for this requirement.

Subsection (7)(c)(ii) is amended to ensure that public protection and disaster relief services are also taken into account in the development of the national radio frequency plan, in accordance with World Radio-communication Conferences.

Subsection (7)(c)(iv) and (v) are included to ensure that the following matters are taken into account in the development of the national radio frequency plan:

- priority of access, availability and protection from harmful interference of frequencies for safety-of-life services; and
- the allocation and preservation of specific bands for broadcasting and audio visual services.

A new subsection 34(7A) is inserted to place a cap on the time period for migration of radio frequency spectrum users and to require that the national radio frequency plan should, where it includes migration, indicate whether any licensee or another party is responsible for the migration costs.

Insertion of section 34A of Act 36 of 2005

3.20 This clause seeks to give effect to the responsibility placed on the Minister to establish a National Radio Frequency Planning Committee as well as a Spectrum Division.

The White Paper provides as follows in paragraph 9.2.5.1. "The Ministry of Telecommunications and Posts ("the Ministry") is responsible for:

- Coordination across other Departments and sector-specific agencies whose industries are impacted by policy related to the use of the frequency spectrum resource;
- Establishment of a National Radio Frequency Planning Committee with representatives from Government Departments. The Committee would ensure fairness and equitable distribution of Spectrum; and
- Establishment of a Spectrum Directorate to coordinate the work of the Committee."

Insertion of section 34B of Act 36 of 2005

3.21 This clause seeks to specify the responsibilities of sector-specific agencies that manage radio frequency spectrum use, in relation to the Authority, such as the South African Marine Safety Authority. The responsibilities include—

- Ensuring availability and maintenance of quality information related to spectrum assignments, licensing and utilisation; and
- Maintaining a database of frequency spectrum users in their respective industries and ensuring that their database corresponds with that of the Authority.

The insertion further seeks to ensure that the Minister, the Authority and the sector-specific agencies enter into a Memorandum of Understanding on matters relevant to the management of the radio frequency spectrum by sector sector-specific agencies.

The Authority will be required to develop a database with real-time updates including that such database enables real-time updating by the corresponding databases of sector-specific agencies.

Amendment of section 36 of Act 36 of 2005

3.22 This clause seeks to amend section 36 on technical standards that ICASA may prescribe for electronic communications facilities and equipment by requiring that it meets universal design requirements to make provision for persons with disabilities which means that electronic communications facilities and equipment must be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design.

Insertion of Chapter 7A of Act 36 of 2005

3.23 A new Chapter 7A is inserted to make provision for SADC roaming. It requires that Electronic Communications Service (ECS) licensees that provide international roaming must adhere to the SADC Roaming Policy Guidelines. It enables the Authority to prescribe regulations taking into consideration SADC Roaming Policy Guidelines and SADC Model Roaming Regulations including price controls for SADC roaming. The regulations must be made urgently due to the Republic's obligations regarding SADC roaming as agreed in SADC meetings of Ministers responsible for Telecommunications, Postal Services and ICTs. The regulations may be conditional on reciprocal terms and conditions being imposed on electronic communications service providers of another SADC country by such SADC country or its National Regulatory Authority. The section enables the Authority to obtain any information required for SADC roaming regulation from electronic communications service

licensees and that the Authority may engage National Regulatory Authorities of any other SADC country in order to promote SADC roaming. This section applies mutatis mutandis to international roaming to any other jurisdiction to enable the Authority to make international roaming regulations that apply beyond SADC.

Amendment of Chapter 8

3.24 In order to realise South Africa's developmental objectives, transform society and the economy, encourage broadband deployment, and preserve and promote the open and interconnected nature of the Internet, an open access regime will be implemented in South Africa along the entire infrastructure and services value chain.

To support this new approach, an open access framework has to be created and therefore Chapter 8 is amended to convert it from facilities leasing to open access to give effect to Chapter 9.1 of the White Paper. Chapter 8 of the Act is amended to provide how networks should be shared between all licensees for the benefit of society, including through a Wireless Open Access Network.

Amendment of section 43 of Act 36 of 2005

3.25 Section 43 is amended in general to substitute facilities leasing with open access. The amendment seeks to oblige electronic communications network service licensees to provide wholesale open access upon request, to enter into wholesale open access agreements, and to provide wholesale open access on the general open access principles. "General open access principles" have been defined in the definitions section to mean providing wholesale open access to electronic

communications networks on terms that are effective, transparent and non-discriminatory.

If the Authority determines that an electronic communications network service licensee is a vertically integrated operator then that licensee must do accounting separation, in addition to the defined general open access principles.

If the Authority determines that an electronic communications network service licensee is a deemed entity that licensee must in addition to the defined general open access principles, do active infrastructure sharing, cost-based pricing, access to network or electronic communications facilities prescribed by the Authority; and specific network and population coverage targets.

Subsections 43(2) to (4) are deleted since the White Paper does not mention the reasonability test, though it provides in general that open access should be provided on reasonable terms. If reasonability is in dispute that will be defined and decided by the Authority, without diluting the open access principles, to avoid abuse of the reasonability test by incumbents.

Subsections 8, 8A and 9 are deleted in its current form since these provisions are related to the reasonability test. The wholesale open access regulations contemplated in section 44 will include a list of essential facilities since the determination of essential facilities is still necessary for deemed entity classification. The definition of essential facility has also been amended in the definitions section to align it with the White Paper.

Amendment of section 44 of Act 36 of 2005

3.26 Section 44 is amended in general to substitute the requirement for facilities leasing regulations with wholesale open access regulations. The regulations will now also include implementation and enforcement of open access principles, a list of vertically integrated entities including the criteria used to determine vertically integrated entities, accounting separation procedures for vertical integrated entities, the determination of deemed entities and essential facilities.

Subsection 44(3)(j) is deleted since it is not aligned with the open access regime.

Subsection 44(3)(k) is deleted in view of the deletion of the reasonability test in section 43.

A new subsection is inserted to describe the procedure to determine deemed entities.

Subsections 44(5) to (7) are deleted since the White Paper does not mention these exemptions for purposes of open access.

Amendment of section 45 of Act 36 of 2005

3.27 Section 45 is amended in general to substitute the requirement for filing of facilities leasing agreements with wholesale open access agreements.

Amendment of section 46 of Act 36 of 2005

3.28 Section 46 is amended in general to substitute facilities leasing with wholesale open access in the context of notification of agreement disputes.

Amendment of section 47 of Act 36 of 2005

3.29 Section 47 is amended in general to substitute facilities leasing pricing principles with wholesale open access pricing principles. The requirement to prescribe a pricing framework is now made compulsory since pricing is integrally linked to open access. A new provision is inserted to ensure that the framework includes cost-based pricing for deemed entities.

Amendment of section 67 of Act 36 of 2005

3.30 Subsections 67(3A), (3B) and (3C) are inserted requiring the Authority to define all the relevant markets and market segments relevant to the broadcasting and electronic communications within 12 months of the coming into operation of the Electronic Communications Amendment Act. Importantly the section requires that the Authority sets out a schedule in terms of which it will conduct market reviews of the defined markets and which markets should be prioritized. It also requires that such market definitions be reviewed every three years to address technological advancement which require more nuanced, proactive and informed ex ante competition regulation. Market definition of all markets therefore becomes a distinct action that the Authority must continuously perform.

Subsection (4) is amended to remove the requirement for an inquiry that overburdens the market review process and also omits reference to market definition

that is now provided separately in the new subsections 67(3A), (3B) and (3C). The subsection is further simplified and consequential amendments made.

Subsection (4B) is amended to ensure that the Authority can request information from any person, in addition to licensees, during market review processes. This is necessary since industry players such as mobile virtual network operators may have information that is relevant for such market review.

Subsection (8) is amended to delete reference to market determinations as such exercise is catered for in the new subsections 67(3A), (3B) and (3C) and consequential amendments that are necessary. A new paragraph (d) is inserted to ensure that where, on the basis of such review, the Authority determines that the appropriate market or market segment have changed as contemplated in subsection (3A) or (3B)— the Authority must revoke the applicable pro-competitive conditions applied to that licensee and conduct a market review of the changed market or market segment.

Subsection (8A) is inserted to mandate the Authority to regularly advise the Minister on market trends in the industry and on the impact of policy and legislation on competition.

Subsection (13) is inserted on consultation with Competition Commission by the Authority when performing the market definition and market review proceedings to strengthen the Authority in the regulation of competition.

Insertion of section 67A of Act 36 of 2005

3.31 Section 67A is inserted to formalise the requirement for a concurrent jurisdiction agreement between the Authority and the Competition Commission. It also requires that such agreement must include consultative mechanisms between the two Authorities to strengthen the market definition and market review process as well as assist the Authority in the consideration of the effect of mergers on competition.

Insertion of section 67B of Act 36 of 2005

3.32 Section 67B is inserted to strengthen consultation between the Authority and the Competition Commission in case of certain mergers, to the extent that the merger requires consideration by both Authorities under their respective enabling legislation.

Amendment of section 69 of Act 36 of 2005

3.33 Section 69 is amended to ensure that both the Code of Conduct on consumer protection for licensees and the End-User and Subscriber Service Charter, are updated by the Authority every 2 years. The amendment provides that the Code of Conduct must include provision for the protection of different types of end-users and subscribers including persons and institutions as well as users of wholesale services. The amendment also ensures that the End-User and Subscriber Service Charter "must" include the content mentioned in subsection (5). The content is also expanded by for example adding that the Charter must include standards of service that end-users and subscribers can expect.

A new subsection 69(7) is inserted to ensure that the Authority enters into a concurrent jurisdiction agreement with the National Consumer Commission ("the NCC") to ensure that consumer related issues in the ICT sector are dealt with comprehensively and in a coordination way.

Insertion of section 69A of Act 36 of 2005

3.34 A new section 69A is inserted to comprehensively provide for quality of service issues, in line with ITU and international best practice. It empowers the Authority to prescribe regulations that must be reviewed every two years. It provides the type of quality of service standards that must be included in the regulations such as broadband download and upload speeds and latency, call quality, time frames for service installations etc.

The amendments places obligations on the Authority and licensees towards the promotion of awareness of the quality of service standards.

Importantly, as required under SA Connect, an obligation is placed on the Authority to monitor and advise the Minister on the review of national broadband policy targets, and compliance with broadband quality of service standards.

Insertion of new section 79C of Act 36 of 2005

A new section is inserted to give effect to the requirement in the White Paper that in addition to formal market reviews, the regulator will be required to annually conduct and publish overviews of performance across all sectors. This must for example include assessment of affordability of services and accessibility to services. The

market performance report must be submitted to the Minister and Parliament to strengthen the oversight roles.

Amendment of section 82 of Act 36 of 2005

3.35 Section 82 is amended to ensure that when the Universal Service and Access Agency of South Africa makes recommendations to the Minister, to enable the Minister to determine the meaning of universal service and access, the Agency must also consider the needs of persons with disabilities and broadband.

Amendment of section 88 of Act 36 of 2005

3.36 Section 88(4) provides that the Agency must make recommendations to enable the Minister to determine, for the purposes of payments from the Universal Service and Access Fund, types of needy persons to whom assistance may be given. A new subsection (4A) is inserted to ensure that when the Agency makes such recommendations, the Agency must consider the needs of persons with disabilities in assessing the access gap and setting universal service and access definitions and targets.

Clause on repeal and amendment of laws

3.37 This clause provides for the amendment of the ICASA Act in the Schedule. The purpose of the amendment is to oblige the Authority to make regulations to apply the B-BBEE ICT Sector Code to existing and new licences, exemptions or other authorizations including spectrum assignment to promote broad-based black economic empowerment within 12 months of the promulgation of the Electronic Communications Amendment Act.

Short title

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

4. CONSULTATIONS

The Departments of Cooperative Governance and Traditional Affairs; Environmental Affairs; Trade and Industry (DTI); Rural Development and Land Reform; Economic Development; Transport; and Water and Sanitation; as well as the Competition Commission, ICASA, National Consumer Commission, SALGA, and the South African National Roads Agency Limited (SANRAL) were consulted. Written submissions/feedback were received from SALGA, ICASA, Departments of Communications, Trade and Industry and Water and Sanitation that were taken into account.

5. FINANCIAL IMPLICATIONS FOR STATE

5.1 The Department has included the financial implications of the amendments in the SEIAS report that will be supplemented with information received during public consultation.

5.2 The cost of operationalisation of the Rapid Deployment Co-ordinating Centre and Spectrum Unit will be provided for in the normal MTEF budgeting processes, as part of funding the new organisational structure, once approved. Existing resources will be used to perform these functions in the interim.

5.3 The operational and administrative costs for the two steering committees on rapid deployment and spectrum will be funded by existing resources of the Department of Telecommunications and Postal Services, including its secretarial functions and meeting venues.

5.4 ICASA will budget for the regulatory obligations imposed by the Bill.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Telecommunications and Postal Services are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2 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 contains no provision pertaining to customary law or customs of traditional communities.