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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.