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

1. BACKGROUND AND CURRENT REGULATORY FRAMEWORK

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

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

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

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

2. OBJECTS OF BILL

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

3. SUMMARY OF BILL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Clause11: Amendment of section 67 of Act 36 of 2005

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

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

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

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

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

Clause12: Competition Assessments

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

Clause13: Transitional arrangements

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

Clause14: Short title

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

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

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

5. FINANCIAL IMPLICATIONS FOR STATE

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

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

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

6. PARLIAMENTARY PROCEDURE

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

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

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

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

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

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

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

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

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

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

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