REPUBLIC OF SOUTH AFRICA

ELECTRONIC COMMUNICATIONS AMENDMENT BILL

(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill and prior notice of its introduction published in Government Gazette No. 54548 of 20 April 2026)
(The English text is the official text of the Bill)

(MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES)

[B 12—2026]

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GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Electronic Communications Act, 2005, so as to enable the Minister responsible for local government to make a national standard by-law on rapid deployment of electronic communications networks and facilities; to enable the "use it or share it" principle for spectrum; to regulate roaming and mobile virtual network operator services; to improve the facilities leasing framework and provide for wholesale pricing rules and standards; to provide for improved competition regulation; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 36 of 2005, as amended by section 1 of Act 37 of 2007 and section 1 of Act 1 of 2014

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

(a) by the insertion before the definition of "Advertising Standards Authority of South Africa" of the following definition:

"**'access provider'** means an electronic communications network service licensee assigned International Mobile Telecommunications radio frequency spectrum that has mobile network coverage of at least 90% of the population;"; 10

(b) by the insertion after the definition of "community broadcasting service" of the following definition:

"**'community network'** means an electronic communications network service provided by an entity which may include, but is not limited to— 15

(a) a non-profit organisation registered in terms of the Nonprofit Organisations Act, 1997 (Act No. 71 of 1997);

(b) a non-profit company registered in terms of the Companies Act, 2008 (Act No. 71 of 2008); or 20

(c) a non-profit organisation established in terms of any other Act of Parliament;"; and

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

"**'Competition Commission'** means the Competition Commission established by section 19 of the Competition Act;". 25

Amendment of section 6 of Act 36 of 2005

2. Section 6 of the principal Act is hereby amended by the substitution for paragraph *(a)* in subsection (2) of the following paragraph:

"*(a)* electronic communications services and electronic communications network services provided on a not-for-profit basis;". 5

Insertion of section 21A in Act 36 of 2005

3. The following section is hereby inserted after section 21 of the principal Act:

"**Role of Minister responsible for Local Government**

21A. (1) The Minister responsible for local government must make a standard draft by-law as contemplated in section 14 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000) that provides for— 10

(a) a uniform wayleave process for electronic communications networks and facilities;

(b) terms and conditions for sharing of municipal property and municipal infrastructure, including without limitation high sites, poles and ducts with electronic communications network service licensees upon request; 15

(c) municipalities to take the deployment of electronic communications networks and facilities into consideration when developing Integrated Development Plans (IDPs); 20

(d) cost-based fees; and

(e) such other incidental matters as are necessary to—

(i) encourage uniformity of wayleave applications; and

(ii) enable the rapid deployment of electronic communications networks and facilities across municipalities. 25

(2) Any standard draft by-law contemplated in subsection (1) that was made before the coming into operation of the Electronic Communications Amendment Act, 2026 and any other by-law intended to have the same effect that is made after the coming into effect of this Act, must be reviewed at least once every five years.". 30

Amendment of section 31 of Act 36 of 2005, as amended by section 15 of Act 1 of 2014

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

(a) by the deletion in subsection (4) of the word "or" at the end of paragraph *(d)*, insertion of that word at the end of paragraph *(e)* and the addition of the following paragraph: 35

"*(f)* if the Authority applies the 'use it or share it' principle.";

(b) by the insertion after subsection (8) of the following subsections:

"(8A)*(a)* Where radio frequency spectrum has been assigned in terms of a radio frequency spectrum licence from 10 December 2021 up to the date of commencement of the Electronic Communications Amendment Act, 2026 and where any part of that assigned radio frequency spectrum remains unused in any area, two years after the date of commencement of the Electronic Communications Amendment Act, 2026, the Authority shall apply the 'use it or share it' principle in accordance with subsection (4)*(f)*. 40 45

(b) Where radio frequency spectrum has been assigned in terms of a radio frequency spectrum licence at any time after the commencement of the Electronic Communications Amendment Act, 2026 and any part of that assigned radio frequency spectrum remains unused in any area two years after assignment, the Authority shall apply the 'use it or share it' principle in accordance with subsection (4)*(f)*. 50

(c) For purposes of this section, the 'primary licensee' shall be the entity to whom the radio frequency spectrum is first assigned, the 'secondary licensee' shall be the entity to whom the unused radio 55

frequency spectrum is assigned on a shared basis in terms of paragraph *(a)* or paragraph *(b)*, and 'unused spectrum' shall mean the spectrum identified in paragraph *(a)* or paragraph *(b)* as the case may be.

(d) The Authority must—

(i) prescribe regulations to provide processes, procedures and criteria regarding 'use it or share it' which shall include how the frequency will be coordinated, the process for concluding a spectrum-sharing agreement with the secondary licensee, and how interference with any other licensee will be managed, with due regard to electronic communications network deployment plans, obligations and commitments of the primary licensee; and

(ii) as soon as possible after the commencement date of this Act, develop a monitoring framework to determine where spectrum is unused.

(e) Any interested person may inform the Authority of areas where it is suspected that the radio frequency spectrum is unused, for investigation by the Authority.

(f) Where the Authority, following investigation in response to the notice under paragraph *(e)* or pursuant to its own inquiries, identifies unused spectrum, the Authority may permit another service licensee or person exempted from holding a licence as contemplated in subsection (8B), to share the unused spectrum in terms of paragraph *(g)* but subject to conditions imposed under paragraph *(d)*.

(g) The Authority, having complied with the provisions of subsection (9), must invite interested persons to apply for a radio frequency spectrum licence as a secondary licensee for the use of unused spectrum—

(i) using any licensing mechanism that it chooses;

(ii) on such terms and conditions as may be determined relating to duration, withdrawal, interference, inspection, reporting, sharing, coordination, technical parameters, and notifications to be given to customers; and

(iii) in a specific location.

(h) If the unused spectrum is not assigned under subsection *(g)*, the Authority may withdraw such unused spectrum assigned to the primary licensee under subsection (8).

(i) In accordance with subsection (4)*(a)* and *(b)*, the Authority may amend the primary licensee's radio frequency spectrum licence on such conditions as may be determined by the Authority relating to duration, interference, sharing, coordination, and withdrawal of the licence.

(j) The Authority may withdraw a licence granted to a secondary licensee on application by the primary licensee in the prescribed form, which demonstrates to the reasonable satisfaction of the Authority that the primary licensee requires the unused spectrum to deploy its electronic communications network in the relevant area within the next 12 months.

(k) The Authority must, in writing, provide the secondary licensee with at least 12 months' notice of its intention to withdraw its licence.

(l) No radio frequency spectrum fees are payable by the holder of a secondary licence for the first 12 months from the date on which the spectrum is assigned to the secondary licensee.

(8B) When undertaking an assignment of radio frequency spectrum contemplated in subsection (8A), the Authority should prefer community networks and SMMEs holding a service licence issued under Chapter 3 or exempted from holding a licence in terms of section 6.

(8C) The 'use it or share it' principle contemplated in subsection (8A) does not apply to science services as this term is defined by the ITU from time to time."; and

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

"(9) Before the Authority amends or withdraws a radio frequency spectrum licence or **[assigned]** radio frequency spectrum assigned to a licensee in terms of subsection (8) or (8A), it must give the affected licensee prior written notice of at least 30 days **[and the licensee must**

have 7 (seven) business days in which] to respond, in writing, **[to the notice (unless otherwise extended by the Authority)]** demonstrating that it is utilising the radio frequency spectrum in compliance with this Act and the licence conditions or already has network plans in place for the use of that radio frequency spectrum within 12 months, calculated from the date of the written notice.

(10) The Authority **[, based on the written response of the licensee,]** must notify the affected licensee of its decision to amend or withdraw **[or not to withdraw]** the licence or assigned radio frequency spectrum, having taken into account the licensee's written response.''.

Insertion of Chapter 7A in Act 36 of 2005

5. The following Chapter is hereby inserted after Chapter 7 of the principal Act:

"CHAPTER 7A

ROAMING AND MOBILE VIRTUAL NETWORK OPERATOR SERVICES

Obligation to provide national roaming services

42A. (1) An access provider must provide national roaming services, upon request, to any 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 national roaming agreement entered into between the parties.

(2) Upon receipt of a request, an access provider must conclude an agreement within 60 days, or such longer period not exceeding a further 60 days, as may be agreed to by the access seeker.

(3) Where a dispute arises in respect of the terms and conditions of an agreement, such dispute must be resolved within 30 days, using the dispute resolution process prescribed in terms of subsection (7).

(4) If the dispute contemplated in subsection (3) cannot be resolved within 30 days, the Authority must make a determination on the terms and conditions of the agreement, within a period of no longer than 60 days.

(5) The Authority may request any information from an access provider in relation to the underlying cost structure of the price for the services for purposes of making a determination as contemplated in subsection (4).

(6) The Authority must prescribe regulations to address the provision of access in the form of national roaming services within 18 months of the coming into operation of the Electronic Communications Amendment Act, 2026, which period may be extended by a further six months due to circumstances beyond the Authority's control and provided that the Authority shall publish an Explanatory Notice in the Gazette setting out its reasons for this decision.

(7) The national roaming regulations must address the requirements of national roaming services agreements contemplated in subsection (1), including, but not limited to—

(a) definition of the term 'national roaming services';
(b) a reference offer or offers containing model terms and conditions for national roaming services;
(c) the minimum quality, performance and level of service to be provided by the access provider;
(d) the mobile technology generations to which access shall be granted;
(e) wholesale rate rules and standards as contemplated in section 47;
(f) contractual dispute-resolution and termination procedures;
(g) determination of the identity of access providers; and
(h) any other matter necessary or expedient for the regulation of national roaming services.

Mobile virtual network operator services

42B. (1) An access provider must provide mobile virtual network operator services, 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 mobile virtual network operator services agreement entered into between the parties. 5

(2) Upon receipt of a request, an access provider must conclude an agreement within 60 days, or such longer period not exceeding a further 60 days, as may be agreed to by the access seeker.

(3) Where a dispute arises in respect of the terms and conditions of the agreement, such dispute must be resolved within 30 days in terms of subsection (7). 10

(4) If the dispute contemplated in subsection (3) cannot be resolved within 30 days, the Authority must make a determination on the terms and conditions of the agreement, within a period of no longer than 60 days. 15

(5) The Authority may request any information from an access provider in relation to the underlying cost structure of the price for the services for purposes of making a determination as contemplated in subsection (4).

(6) The Authority must prescribe regulations to address the provision of access in the form of mobile virtual network operator services within 18 months of the coming into operation of the Electronic Communications Amendment Act, 2026, which period may be extended by a further six months due to circumstances beyond the Authority's control and provided that the Authority shall publish an Explanatory Notice in the Gazette setting out its reasons for this decision. 20 25

(7) The mobile virtual network operator services regulations must address the requirements of mobile virtual network operator services agreements contemplated in subsection (1), including, but not limited to—

(a) definitions of the term 'mobile virtual network operator' taking into account other mobile virtual network business models; 30

(b) a reference offer or offers containing model terms and conditions for mobile virtual network operator and other mobile virtual network business models;

(c) the minimum quality, performance and level of service to be provided by the access provider; 35

(d) the mobile technology generations to which access shall be granted;

(e) wholesale rate rules and standards as contemplated in section 47;

(f) contractual dispute-resolution and termination procedures;

(g) determination of the identity of access providers; and

(h) any other matter necessary or expedient for the regulation of mobile virtual network operator and other mobile virtual network services. 40

International roaming regulations

42C. (1) The Authority may prescribe international roaming regulations relevant to the Southern African Development Community (SADC) region and may prescribe any other international roaming regulations as necessary for one or more specific countries or regions. 45

(2)*(a)* The application of the regulations contemplated in subsection (1) are conditional on reciprocal terms and conditions being imposed on electronic communications service providers of another country, countries or region by such country, countries or region or its national regulatory authority and is subject to the requirement in subsection (2)*(b)* and subsection (5) in respect of such country, countries or region. 50

(b) The reciprocal terms and conditions contemplated in paragraph *(a)* mean that the electronic communications service provider of another country must offer similar tariffs as those offered by the South African electronic communications service provider. 55

(3)*(a)* When prescribing international roaming regulations relevant to the SADC region, the Authority must consider the terms of SADC roaming decisions endorsed by the South African government.

(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.

(4) The Authority may—

(a) obtain any information required for international roaming regulation from electronic communications service licensees; 5

(b) share the information obtained in terms of paragraph *(a)* on an aggregated and de-identified basis with national regulatory authorities of relevant countries; and

(c) for purposes of international roaming regulations applicable to the SADC region, share the information obtained in terms of paragraph *(a)* with the Communications Regulators' Association of Southern Africa on an aggregated and de-identified basis. 10

(5) The Authority may engage national regulatory authorities of any other country in order to— 15

(a) promote international roaming between the respective countries; and

(b) ensure reciprocity of the roaming terms and conditions applicable to electronic communications service providers of the respective countries, as contemplated in subsection (2).''.

Substitution of heading of Chapter 8 of Act 36 of 2005 20

6. Chapter 8 of the principal Act is hereby amended by the substitution for the heading of the following heading:

''**ELECTRONIC COMMUNICATIONS FACILITIES LEASING AND WHOLESALE PRICING RULES OR STANDARDS**''.

Amendment of section 43 of Act 36 of 2005, as amended by section 22 of Act 1 of 2014 25

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

(a) by the substitution for subsection (8) of the following subsection:

''(8) The Authority must prescribe a list of essential facilities within 12 months of the coming into operation of the Electronic Communications Amendment Act, 2026, **[including but not limited to—** 30

(a) **electronic communications facilities, including without limitation local loops, sub-loops and associated electronic communications facilities for accessing subscribers and provisioning services;** 35

(b) **electronic communications facilities connected to international electronic communications facilities such as submarine cables and satellite earth stations; and**

(c) **any other such facilities,]**

required to be leased by an electronic communications network service licensee in terms of subsection **[(1)]** (8A)*(b)*.''; 40

(b) by the substitution for subsection (8A) of the following subsection:

''(8A) **[*(a)* Requests for leasing of essential facilities are deemed to promote efficient use of electronic communications networks and services.]** 45

[*(b)*]*(a)* All electronic communications network services licensees receiving requests **[contemplated in paragraph *(a)*]** for leasing of essential facilities are required to agree on non-discriminatory terms and conditions of a facilities leasing agreement for those essential facilities within **[20]** 60 days of receiving the request. 50

[*(c)* If the electronic communications network licensee can prove that the request is not technically or economically feasible within the 20 day period the electronic communications network services licensee may refuse the request.]

[*(d)*]*(b)* If no agreement regarding the non-discriminatory terms and conditions contemplated in paragraph **[*(b)*]***(a)* can be reached, the Authority must impose terms and conditions consistent with this Chapter within **[20]** 60 days of receiving notification of the failure to reach an agreement.''; and 55

(c) by the substitution for subsection (9) of the following subsection:

"(9) The Authority must review the list of **[electronic communications]** essential facilities at least once every 36 (thirty-six) months and, where the Authority finds market conditions warrant it, make modifications to such list **[after undertaking an inquiry in accordance with section 4B of the ICASA Act]**.".

Amendment of section 44 of Act 36 of 2005, as amended by section 23 of Act 1 of 2014

8. Section 44 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The Authority must prescribe regulations to facilitate the conclusion of electronic communications facilities leasing agreements by stipulating electronic communications facilities leasing agreement principles which regulations must be reviewed at least once every 24 months with due regard to market and legal developments and such regulations may include the regulations referred to in section 47.".

Substitution of section 47 of Act 36 of 2005

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

"**[Facilities leasing pricing principles] Wholesale pricing rules or standards**

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.]** wholesale pricing rules or standards applicable to different types of electronic communications facilities, including for essential facilities, and to each of roaming and mobile virtual network operator services, within 18 months of the coming into operation of the Electronic Communications Amendment Act, 2026, which period may be extended by a further six months due to circumstances beyond the Authority's control and subject to the publication of an Explanatory Notice in the *Gazette*.

(2) The Authority must ensure that wholesale pricing rules or standards are—

(a) fair and reasonable;
(b) non-discriminatory, unless there are pro-competitive or efficiency justifications that outweigh the negative impact of the discriminatory practice on competition;
(c) cost-oriented or reflect the benefits of sharing costs amongst users sharing the facilities; and
(d) for essential facilities, reflective of cost plus a reasonable return.".

Amendment of section 67 of Act 36 of 2005, as amended by section 28 of Act 1 of 2014

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

(a) by the substitution for the heading of the following heading:

"**[Competition matters] Market inquiries**";

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

"(4)*(a)* The Authority must, **[following an inquiry, prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition, and if any licensee has significant market power in such markets or market segments. The regulations must, among other things—**

***(a)* define relevant wholesale and retail markets or market segments;**

(b) **determine whether there is effective competition in those relevant markets and market segments;**

(c) **determine which, if any, licensees have significant market power in those markets and market segments where there is ineffective competition;** 5

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

(e) **set out a schedule in terms of which the Authority will undertake periodic review of the markets and market segments,** 10 **taking into account subsection (9) and the determination in respect of the effectiveness of competition and application of pro-competitive measures in those markets; and**

(f) **provide for monitoring and investigation of anti-competitive behaviour in the relevant market and market segments.]** 15 conduct an inquiry in terms of section 4B of the ICASA Act on its own initiative or upon receiving a complaint—

(i) if it has reason to believe that any feature or combination of features of any market or market segment impedes, distorts or restricts competition or is or are likely to lead to the 20 impediment, distortion or restriction of competition within such market or market segment; or

(ii) to achieve the objects of this Act and of the related legislation in relation to competition in a market or market segment.

(b) Where the Authority determines that there is a feature or 25 combination of features that impede, distort or restrict competition within that market or market segment, or a feature or combination of features that is or are likely to lead to the impediment, distortion or restriction of competition in such market or market segment, the Authority must— 30

(i) determine which if any licensee or licensees are contributing to, or benefitting from, any such feature or features, or are likely to do so, having regard to, among other things, their market power in that market or market segment;

(ii) determine which actions it will take to remedy, mitigate or 35 prevent any adverse effect on competition having regard to the objects of this Act and of the related legislation, which may include an amendment to the licences of that or those licensees identified in (i), the making of a regulation or regulations which relate to all licensees within a particular category, or any 40 other appropriate action within the powers and mandate of the Authority; and

(iii) where the Authority is unable to remedy, mitigate or prevent an adverse effect on competition, make recommendations to the relevant institution or department with the powers to do so, and 45 such recommendations may include the investigation by the Competition Commission of a suspected abuse of dominant position by any licensee identified in the market inquiry above.

(c) The actions contemplated in paragraph *(b)*—

(i) must be reasonable, practical and proportionate to the adverse 50 effect that such actions are designed to remedy;

(ii) may include imposing any of the pro-competitive licence conditions in subsection (7); and

(iii) must be reviewed within a period to be determined by the Authority; 55

(d) The Authority may, when conducting an inquiry, consider findings by the Competition Commission, other relevant regulators and the Courts; and

(e) An inquiry contemplated in this subsection, including the publication of a finding in terms of section 4C(6) of the ICASA Act must be 60 concluded within 18 months, which period may be extended by a further six months due to circumstances beyond the Authority's control

and provided that the Authority shall publish an Explanatory Notice in the *Gazette* setting out its reasons for this decision.'';

(c) by the deletion of subsection (4A);

(d) by the deletion of subsection (5);

(e) by the substitution for subsection (7) of the following subsection: 5

''(7) Pro-competitive licence **[terms and]** conditions may include but are not limited to—

(a) obligations in respect of interconnection and facilities leasing in addition to those provided for in Chapters 7 and 8 and any regulations made in terms thereof; 10

(b) penalties for failure to abide by the pro-competitive licence conditions;

(c) obligations to publish any information specified by the Authority in the manner specified by it;

(d) obligations to maintain separate accounting for any services specified by the Authority; 15

(e) obligations to maintain structural separation for the provision of any services specified by the Authority;

(f) rate regulation for the provision of specified services, including without limitation price controls on wholesale and retail rates as determined by the Authority, and matters relating to the recovery of costs; 20

(g) obligations relating to accounts, records and other documents to be kept, provided to the Authority, and published;

(h) obligations concerning the amount and type of premium, sports and South African programming for broadcasting; and 25

(i) distribution, access and reselling obligations for broadcasters.'';

(f) by the deletion of subsections (8) and (9); and

(g) by the insertion after subsection (12) of the following subsection:

''(13) Despite any provision in the Competition Act or the ICASA Act, the Authority and the Competition Commission may implement, give effect to or enforce each other's findings, following due consideration thereof and provided it is within the Authority's or the Competition Commission's mandated scope.''. 30

Insertion of section 67A in Act 36 of 2005 35

11. The following section is hereby inserted after section 67 of the principal Act:

''**Concurrent jurisdiction agreement between Authority and 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 in the *Gazette.* 40

(2) The concurrent jurisdiction agreement contemplated in subsection (1) must address all issues pursuant to the co-operation between the Authority and the Competition Commission, including but not limited to—

(a) mechanisms to facilitate consultation between the Authority and the Competition Commission; 45

(b) the sharing of information, including confidential information of licensees or firms, between the Authority and the Competition Commission to facilitate the proper administration or enforcement of this Act and the Competition Act; and 50

(c) the management of competition-related assessments, market inquiries, complaints, mergers, co-operation arrangements, overlapping jurisdiction and other relevant matters conducted by the Authority or the Competition Commission or both.''.

Amendment of Arrangement of Sections in Act 36 of 2005 55

12. The Arrangement of Sections after the long title of the principal Act is hereby amended—

(a) by the insertion after item ''21. Rapid deployment of electronic communications facilities'' of the following item:

''21A. Role of Minister responsible for Local Government'';

(b) by the insertion after item ''42. Carrier pre-selection'' of the following Chapter: 5

''CHAPTER 7A

ROAMING AND MOBILE VIRTUAL NETWORK OPERATOR SERVICES

42A. Obligation to provide national roaming services

42B. Mobile virtual network operator services 10

42C. International roaming regulations'';

(c) by the substitution in Chapter 8 for the heading of the following heading:

''ELECTRONIC COMMUNICATIONS FACILITIES LEASING AND WHOLESALE PRICING RULES OR STANDARDS'';

(d) by the substitution in section 47 for the heading of the following heading: 15

''**[Facilities leasing pricing principles]** Wholesale pricing rules or standards'';

(e) by the substitution in section 67 for the heading of the following heading:

''**[Competition matters]** Market inquiries''; and

(f) by the insertion after item ''67. Market inquiries'' of the following item: 20

''67A. Concurrent jurisdiction agreement between Authority and Competition Commission''.

Short title and commencement

13. (1) This Act is called the Electronic Communications Amendment Act, 2026, and comes into operation on a date determined by the President by proclamation in the 25 *Gazette*.

(2) The President may fix different dates for the coming into operation of different sections of this Act.

MEMORANDUM ON THE OBJECTS OF THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL, 2026

1. BACKGROUND AND CURRENT REGULATORY FRAMEWORK

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

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

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

1.4 The Competition Commission issued a Data Services Market Inquiry report on 2 December 2019. The report made recommendations to the Department, including the amendment of the Electronic Communications Act, 2005 to address various issues in the market for data services which result from — among other things — a failure to promote competition in the market which manifests in various ways, including high data prices. The Electronic Communications Amendment Bill (the ''Bill'') seeks to address a number of the recommendations made. The recommendations of the Data Services Market Inquiry remain relevant and necessary. This is echoed by the Authority in its 2024/2025 Annual Report in which its Impact Statement reflected ''Access for all South Africans to a variety of affordable & reliable communication services for inclusive economic growth'', also noting that in the year under review, the Authority ''. . . continued to pursue its mandate to promote competition and reduce cost to communicate.''.

2. OBJECTS OF BILL

The objects of the Bill are to amend the principal Act, so as to require the Minister responsible for local government to make a national standard by-law on rapid deployment of electronic communications networks and facilities; to enable the ''use it or share it'' principle for spectrum; to regulate roaming and mobile virtual network operator services; to improve the facilities leasing framework and provide for wholesale pricing rules and standards; to provide for improved competition regulation; and to provide for matters connected therewith.

3. SUMMARY OF BILL

3.1 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 the following definitions:

(a) **'access provider'** means an electronic communications network service licensee assigned International Mobile Telecommunications radio frequency spectrum that has mobile network coverage of at least 90% of the population,

(b) **'community network'** means an electronic communications network service provided by an entity which may include, but is not limited to:

(a) a non-profit organisation registered in terms of the Nonprofit Organisations Act, 1997 (Act No. 71 of 1997);

(b) a non-profit company registered in terms of the Companies Act, 2008 (Act No. 71 of 2008); or
(c) a non-profit organisation established in terms of any other Act of Parliament; and

(c) **'Competition Commission'** means the Competition Commission established by section 19 of the Competition Act.

3.2 **Clause 2: Amendment of section 6 of Act 36 of 2005**

The purpose of the amendment of section 6 is to include electronic communications network services provided on a not-for-profit basis, as licence exempt.

3.3 **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 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 other things, provides for a uniform wayleave application and approval process for electronic communications networks and facilities.

This amendment is intended to enable 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, but more than that, it forms the bedrock of every nation's policy for connectivity and has been part of the Act since inception. The introduction of a requirement for a draft by-law is intended to mitigate and remove barriers to rapid deployment which include differing approaches in granting access to land, unreasonable costs for wayleaves, and limited access to municipal property and infrastructure, including electricity poles, high sites and ducts which could facilitate more efficient and cost-effective service delivery.

The amendment seeks to ensure a uniform approach across municipalities at a reasonable fee through the draft by-law. At the time that this amendment is gazetted if such a bylaw is in place, then the amendment will continue to support the need for the intervention of national, provincial and local government as well as government agencies, in a whole-of-government approach, and require regular review of the by-law. The amendment will also require review of this by-law at least every five years.

3.4 **Clause 4: Amendment of section 31 of Act 36 of 2005**

Section 2*(e)* of the principal Act promotes the object of efficient use of radio frequency spectrum.

Section 31 of the principal Act is amended to enable the Authority to amend any radio frequency spectrum licence when the assigned radio frequency spectrum remains unused for a period of two years, by requiring or enabling spectrum-sharing in the relevant 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 Next Generation Radio Frequency Spectrum for Economic Development Policy, 2024 (Spectrum Policy), supports an effective and efficient utilisation of spectrum resources and given the scarcity and value of spectrum to national development, hoarding or inefficient use of spectrum is not permissible, especially when other applications and users might benefit from accessing that spectrum even if for limited purposes, as anticipated in sections 19, 22 and 23.3 of the Spectrum Policy.

The Spectrum Policy provides that licensed spectrum that is unused for more than 24 months will be subjected to the ''use it or lose it'' principle. Radio

frequency spectrum licences issued in January 2024 (IMT700, 2600 and 3500) provide that in cases where the spectrum is not fully utilised by the licensee within five years, the Authority may initiate the sharing of unused spectrum or the surrender thereof. However, the rationale for the five-year period was that spectrum in the 700MHz and 800MHz bands was not available because broadcasters with that spectrum had not yet completed the analogue switch-off process. In negotiations with winning bidders, the Authority agreed to a five-year period to accommodate the situation where winning bidders could not access low-band spectrum within the Lot. However, this is no longer the case, and digital migration is expected to be completed within a far shorter period. It is therefore appropriate to align the legislation with the period in the Spectrum Policy. Consequential amendments will be required to licences issued pursuant to the high demand spectrum auction.

The reference to 2021 is based on the date the Authority issued an Invitation to Apply on the Licensing process for IMT in respect of the provision of Mobile Broadband Wireless Access Services. The ITA clarified that in cases where the spectrum is not fully utilised by the licensee within a certain period, the Authority will initiate the sharing or surrender of unused spectrum. The ITA culminated in the Radio Frequency Spectrum Licenses for the use of Radio Frequency Spectrum in the IMT700, IMT2600 and IMT3500 Bands granted by ICASA on 15 January 2024. Licensees bidding for the spectrum in response to the ITA, were aware of the requirement regarding spectrum use, from 10 December 2021. This was also the first time this requirement was imposed and therefore the 'use it or share it' principle is only applied to spectrum assigned after that date.

A failure to use spectrum may be due to a number of reasons, including a failure to prioritise the rollout of service in an area (e.g. providers focused on urban areas primarily), roaming arrangements in those areas which remove the need to utilize the licensee's 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 so-called "coverage" spectrum such as sub-1GHz spectrum is sufficient to meet demand but the licensee holds both coverage and other spectrum. In the United Kingdom, so-called local access licences[1] are granted in the same circumstances, on the basis that other users should be able to access spectrum which has already been licensed to the UK's Mobile Network Operators (MNOs), in locations where an MNO is not using their spectrum. As in the UK, the secondary licensee may use any technology, which aligns with the technology-neutral approach already in place in the principal Act.

The Authority must prefer community networks and SMMEs when assigning unused spectrum, which gives effect to section 2*(p)* of the principal Act, provided that the Authority must also monitor the use of spectrum by these users to ensure that it is operated without causing interference. The prioritised assignment of any unused spectrum to community networks and SMMEs ensures that the assignment promotes access and avoids the difficulties of assignment to competing commercial providers. Recognising that SMMEs and community networks will require regulatory support, the secondary licensees will not be required to pay spectrum licence fees for a period of 12 months from the date on which the spectrum is assigned.

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 utilised by some national operators, and the ITU has noted that regulation-induced spectrum scarcity should be avoided.

1. Local Access Licence: Guidance Document. Paragraph 1.5. See www.ofcom.org.uk/siteassets/resources/documents/consultations/category-1–10-weeks/129951–enabling-opportunities-for-innovation/associated-documents/local-access-licence-guidance.pdf?v=324100

Germany, Albania, Canada, China, Singapore and Hong Kong are all reimagining the use rights and conditions applicable to high demand spectrum.[2]

Recognising that licensees may consider themselves to be deprived of spectrum if spectrum is proposed to be shared in this way, and that, having invested in equipment for network rollout, the investment may not be realised, the amendment is intended to encourage proper spectrum-planning and efficient network rollout, and a notice and comment process will always be followed prior to any spectrum rearrangement in the manner proposed.

In addition, the Authority, as the entity with responsibility for assignment, is required to prepare a regulation to set out the process it will follow for the implementation of sharing and co-ordination agreements.

The amendment also provides for spectrum to be returned to the Authority which aligns with the approach taken to date of ''use it or lose it'' where spectrum is not used by a licensee, if no service licensee is successfully licensed for the unused spectrum.

3.5 **Clause 5: 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 access provider, as newly defined, must provide access for national roaming and MVNOs. As there are now several types of mobile virtual operators, this is taken into account in the wording.

Wholesale roaming arrangements that are not competitively priced can contribute to raising rivals' costs, particularly for challenger networks, thereby reducing the competitive constraint that such operators are able to exert in the market. Therefore, after considering submissions received, roaming agreements must be concluded by licensees with national network coverage. The amendment also addresses the finding that MVNOs are not well-developed in South Africa due largely to a lack of incentives by large networks to provide access. MVNOs can bring material benefits for consumers at the retail level, including choice, quality, and lower or more innovative pricing. The amendment requires the Authority to define the terms ''national roaming'' and ''MVNO'' in a manner that gives effect to the objects of the principal Act, and specifically section 2*(c)*, *(d)*, *(f)*, and *(g)*.

Although Chapter 6 has been in force for 20 years and the Facilities Leasing Regulations for almost as long, the state of facilities leasing in the market is poor, as evidenced by the numerous comments in this regard. Sections 42A and 42B mandate licensees 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 (as newly defined). It requires the Authority to prescribe regulations which set the minimum requirements for such agreements, including price levels, the minimum quality requirements and the types of technologies to which access should be provided and additional input may therefore be given during the regulatory process. However, these two sections also seeks to underscore the importance of the role of the Authority in facilitating access.

Section 42C is inserted to make provision for international roaming regulations relevant to the SADC region and other international roaming regulations. It enables the Authority to prescribe regulations taking into consideration policy directions issued by the Minister and any SADC Roaming decisions adopted by the Government of South Africa. The regulations must be conditional on reciprocal terms and conditions being imposed on electronic communications service providers of another country

2. https://digitalregulation.org/overview-of-national-spectrum-licensing-2/

by such country or its National Regulatory Authority. The section also enables the Authority to obtain any information specifically required in relation to international roaming from electronic communications service licensees within the Republic, and provides for the Authority to engage National Regulatory Authorities of any other country in order to promote cross-border roaming with South Africa.

3.6 **Clause 6: Substitution of heading of Chapter 8 of Act 36 of 2005**

The purpose of clause 6 is to amend the heading of Chapter 8, to ensure that wholesale pricing rules and standards will apply.

3.7 **Clause 7: Amendment of section 43 of Act 36 of 2005**

Section 43 of the principal Act is amended to improve the facilities leasing framework in relation to essential facilities.

While section 43(8) has been in place for some time, the Authority has not yet prescribed a list of essential facilities and the principal Act requires the Authority to do so within 12 months. These essential facilities must be leased upon request. This list must be reviewed every three years.

Once a facility is determined to be an essential facility access is compulsory in order to speed up access to essential facilities which by their very nature are difficult to duplicate or gain access to without regulatory intervention and this has a direct effect on the cost to competitors which do not have but which would benefit from or need access to those facilities. These facilities include, but are not limited to, high sites, cable landing stations, backhaul, earth stations, ducts within road and rail reserves, access to municipal infrastructure, and internet peering points.

3.8 **Clause 8: Amendment of section 44 of Act 36 of 2005**

Section 44 of the principal Act is amended to require the Authority to review all facilities leasing regulations at least every 24 months with due regard to the market and regulatory developments. High Court orders in the past have required an update to the regulations which has not taken place, with negative consequences for small licensees and new entrants which lack countervailing buying power.

3.9 **Clause 9: Substitution of section 47 of Act 36 of 2005**

The heading of section 47 is substituted to cover wholesale pricing rules and standards. Section 47 is substituted to ensure that the Authority prescribes wholesale pricing rules or standards applicable to different types of electronic communications facilities, including essential facilities and roaming and MVNOs.

General principles that must be adhered to are included such as fairness and reasonableness, and that costs must be cost-oriented or reflect the benefits of sharing costs amongst users sharing the facilities.

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 and best practice 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, leaving that to the Authority. These principles are intended to ensure fair and competitive pricing of facilities, roaming and MVNOs arrangements — in other words, different types of access which will enable different types of services to be provided by different entities, and not only licensees.

3.10 **Clause 10: Amendment of section 67 of Act 36 of 2005**

Section 67 of the principal Act is amended in order to substitute the heading to be aligned with its contents and to improve the market review processes. The Authority and stakeholders have raised several issues over the years regarding the process of carrying out a market inquiry. These amendments are intended to enable the Authority to carry out a review on its own initiative or upon receiving a complaint, 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 or is likely to lead to such an outcome, absent pro-competitive regulation.

Where the Authority determines that there is a feature or combination of features that impede, distort or restrict competition within that market or are likely to have that outcome, the Authority must determine what action may be proportionate and appropriate to remedy, mitigate or prevent the adverse effect on competition or the objects of this Act and of the related legislation. Regulation is appropriate where markets fail or are likely to struggle to become competitive absent intervention, having inquired into the reason or likely reason for failure, taking into account relevant factors.

The amendment aligns with the recommendations of the Data Services Market Inquiry which recommendations remain relevant given that markets and particularly electronic communications markets and sub-markets require frequent review and also taking into account the Authority's own observations about its mandate and the sector, in its Annual Reports and State of the ICT Sector Reports. The findings of the Commission are relevant here because the Commission is a national competition regulatory authority which should work in tandem with a sector regulatory authority where one exists, as here.

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, for example, 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 after due consideration.

3.11 **Clause 11: Insertion of section 67A in Act 36 of 2005**

A new 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, including the sharing of information and how to manage competition-related assessments, market inquiries, complaints, mergers, cooperation arrangements, overlapping mandate and other relevant matters conducted by the Authority or the Competition Commission.

3.12 **Clause 12: Amendment of Arrangement of Sections**

Consequential amendments have been effected to the Arrangement of Sections of the principal Act.

3.13 **Clause 13: Short title and commencement**

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/PUBLICATION

- Competition Commission;
- Department of Cooperative Governance (DCoG);

- Independent Communications Authority of South Africa (ICASA);
- South African Local Government Association; and
- Department of Trade, Industry and Competition.

The Bill was published in the *Gazette* for comment on 23 June 2023 (Government *Gazette* No. 48841, Notice 3567).

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 DCoG and the financial implications are included in the SEIAS report.

5.2 The additional costs will need to be applied for during the Medium-Term Expenditure Framework (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 types of Bills.

6.2 Section 75 of the Constitution sets out a procedure to be followed when the 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 Bill does not fall within a functional area 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 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)*(a)* of the Traditional and Khoi San Leadership Act, 2019 (Act No. 3 of 2019), since it does not directly affect traditional or Khoi-San communities or pertain to customary law or customs of traditional or Khoi-San communities.

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