SNO MEMBERS'

SUBMISSION

to the

PORTFOLIO COMMITTEE ON COMMUNICATIONS

on the

CONVERGENCE BILL, 2005
Government Gazette No. 27294

15 APRIL 2005

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INTRODUCTION

1. THE PARTIES TO THIS SUBMISSION

1.1. The intended shareholders in the Second National Operator ("SNO") set out herein their joint submission in relation to Government Gazette No. 27294 of 16 February 2005 issued by the Minister of Communications, regarding the draft Convergence Bill (the "Convergence Bill"). We welcome the opportunity to comment on the Convergence Bill and thus to participate in the legislative process of finalising the Convergence Bill.

1.2. The intended shareholders in the SNO consist of the following parties: CommuniTel, Eskom Telecommunications, Nexus Connexion, Tata Africa (VSNL), Transtel and Two Consortium (collectively "the SNO stakeholders").

1.3. The SNO stakeholders would also be grateful to participate in any public hearings that the Portfolio Committee on Communications ("the portfolio committee") may hold, and respectfully request that the portfolio committee allocate a slot to make oral representations before Parliament.

2. STRUCTURE OF THE SUBMISSION

2.1. In view of the very tight time constraints (submissions to the portfolio committee were due by 8 April 2005), the SNO stakeholders handed in a preliminary submission on the Convergence Bill to Parliament on 11 April 2005, which we indicated that we would supplement.

2.2. This submission of 15 April 2005 supplements and consolidates our earlier submission of 11 April 2005. have not had the opportunity to make detailed comments on all the provisions of the Convergence Bill. For the time being, we have therefore confined our comments to a discussion of the key issues at a very high-level, which we believe is appropriate given that many of the policy drivers underlying the Convergence Bill have still not been finalized. Where possible and appropriate, the SNO stakeholders will supplement these submissions with suggestions regarding the redrafting of sections in the Convergence Bill when the hearings take place before Parliament.

2.3. In these submissions, we will first make general comments on the Convergence Bill process before dealing with our specific comments on the various chapters of the Convergence Bill. We have attempted to follow the format of the Convergence Bill as closely as possible, except that we have chosen to deal with the introductory provisions (definitions and objects) in Chapter 1 of the Convergence Bill at the end of this submission. This is because issues such as the definitions and objects of the legislation have to be contextualised in relation to our comments on the substance of the Convergence Bill as a whole.

GENERAL COMMENTS ON THE CONVERGENCE BILL

3. DEFINING CONVERGENCE

3.1. One of the stated objects of the Convergence Bill is to promote convergence in the telecommunication and broadcasting signal distribution sectors.[1] The Convergence Bill does not define what convergence is, but generally speaking the term is understood to refer to the horizontal integration of the computing / information technology ("IT"), telecommunications, broadcasting and other electronic media sectors.

3.2. From a policy perspective, convergence is blurring the boundaries between each of these traditionally distinct sectors. This is resulting in discrepancies in the way in which similar functions and services are regulated in different sectors.

4. PURPOSE OF CONVERGENCE REGULATION

4.1. The main purpose of regulating for convergence is to harmonise the rules that apply to the various sectors, in order to prevent these kinds of regulatory asymmetries from arising. In South Africa, the main focus of policy thus far thus has been on the integration of regulation for telecommunications and broadcasting, and the Convergence Bill broadly follows in this trend.[2]

4.2. Convergence regulation that is aimed at harmonising telecommunications and broadcasting regulation typically tends to have three aspects to it, namely:

4.2.1. the harmonisation of the regulatory framework for infrastructure regulation across telecommunication and broadcasting networks; and/or

4.2.2. the harmonisation of the regulatory framework for content regulation across different platforms; and/or

4.2.3. the harmonisation of the powers and functions of the regulator with respect to infrastructure regulation and content regulation.

4.3. As will be become clear below, the Convergence Bill is primarily aimed at harmonising infrastructure regulation, and at harmonising the powers and functions of the regulator. The Convergence Bill does not propose to harmonise content regulation at this stage, but rather to consolidate the regulation of broadcasting services only within the framework of the Convergence Bill.

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[1] See section 2(a) of the Convergence Bill.

[2] This is evident with the merger of the broadcasting regulator (the IBA) and the telecommunications regulator (SATRA) to form ICASA.

5. NATURE OF THE CONVERGENCE BILL

5.1. There are currently four major pieces of legislation that deal with the regulation of the electronic communications sector in South Africa ("the existing legislation"). These are:

5.1.1. the Independent Broadcasting Authority Act 153 of 1993 ("the IBA Act");

5.1.2. the Broadcasting Act 4 of 1999 ("the Broadcasting Act");

5.1.3. the Independent Communications Authority of South Africa Act 13 of 2000 ("the ICASA Act"); and

5.1.4. the Telecommunications Act 103 of 1996 ("the Telecommunications Act").

5.2. In relation to telecommunications and broadcasting, the Convergence Bill is intended to replace the IBA Act and the Telecommunications Act. The Broadcasting Act will continue in force, primarily with the purpose of regulating the SABC (South African Broadcasting Corporation). The SNO stakeholders believe that the consolidation of legislation into an omnibus statute is the preferable approach to adopt. However, in consolidating the statutory framework, we believe that care should be taken to ensure that all the important aspects of the existing legislation that warrant retention are in fact carried over into the Convergence Bill.

5.3. In relation to ICASA, there are many references in the Convergence Bill to sections of the ICASA Act that do not currently exist, but that indicate an intention is to amend the ICASA Act in conjunction with the Convergence Bill.[3] However, the draft ICASA Amendment Act has not yet been published for public comment. In the absence of this, it is therefore not possible to comment at this stage on many of the provisions of the Convergence Bill that pertain to ICASA.

6. POLICY IMPERATIVES UNDERLYING CONTENT AND INFRASTRUCTURE REGULATION

6.1. The policy imperatives that underlie infrastructure and content regulation differ quite dramatically. Whereas content regulation is primarily directed at preserving a plurality of opinions and voices in the marketplace of ideas, infrastructure regulation is primarily concerned with questions of access to bottleneck services and facilities, preventing abuses of dominance in the market, promoting competition and universal access and universal service.

6.2. Given the divergence in policy drivers that underlie content and infrastructure regulation, it may not always be appropriate to treat content and infrastructure regulation in the same way (this is particularly the case in relation to licensing – currently infrastructure and broadcast

[3] For example, the Convergence Bill refers to the following sections in the ICASA Ac that do not currently exist in that statute:

- Section 1 refers to the "Complaints and Compliance Committee" established in terms of section 17H of the ICASA Act.
- Section 1 refers to an "investigation unit" established by ICASA in terms of section 17G of the ICASA Act.

licensing are dealt with together, which is not wholly appropriate). Nevertheless, there are other aspects of the Convergence Bill that have been conceived of purely in infrastructure related terms that may be appropriate to extend to content regulation (for example, the access regime contemplated in the Convergence Bill only deals with interconnection and facilities leasing, but conceivably could be extended into the content arena, where appropriate).

7. THE ABSENCE OF A PRIOR POLICY PROCESS

7.1. The first draft of the Convergence Bill that was released for public comment in 2003 ("the 2003 Convergence Bill")[4] was drawn up extremely quickly, and was not preceded by a comprehensive Green Paper / White Paper process. Consequently, no clear policy framework was established before the 2003 Convergence Bill was drafted. (With a statute of this magnitude, it is common to conduct a Green Paper / White Paper process before drafting the legislation. The purpose of a Green Paper is to raise all the pertinent policy issues for comment, whereas the White Paper sets out the broad policy principles on which the proposed legislation is based).

7.2. More than a year has passed since the current draft of the Convergence Bill was published for comment in 2005. It is respectfully submitted that it is unfortunate that the intervening period was not used to embark on a comprehensive policy framework formulation process. In our view, this was an opportunity missed. The result is that the many complex policy issues underlying convergence remain unventilated. For example, it is unclear what will be the intended impact of the Convergence Bill on the government's policy of managed liberalisation for the sector. These and other important policy drivers are not clear at this stage.

7.3. Conceptually, the 2005 Convergence Bill mirrors the 2003 draft and many of the policy foundations on which the 2005 Convergence Bill are based remain unclear. It is for this reason that we have confined our comments to discussing the general policy imperatives that should inform a convergence statute of this nature. Moreover, in the absence of a Green Paper / White Paper process, we anticipate that many of the policy debates that would have ordinarily taken place leading up to the drafting of the legislation will probably be ventilated in Parliament. In this regard, it is the SNO stakeholders' respectful request that Parliament hold extensive consultations with the industry and in Parliament beforehand, to compensate for the lack of a prior policy framework. We foresee that it may be necessary for Parliament to publish more than one draft of the Convergence Bill for public comment, and to hold multiple hearings before the portfolio committee. Moreover, it may be necessary to indicate the policy building blocks in much more detail in the explanatory memorandum to the draft legislation.

- Section 3(2)(a) refers to the conduct of inquiries in terms of section 17F of the ICASA Act.

[4] Convergence Bill, Notice 3382, Gazette 25806, 3 December 2003.

7.4. Ideally, such consultation process should seek to achieve the following:

7.4.1. identifying and inviting public comment on all the important policy issues from a South African perspective, with reference to international benchmarks where appropriate;

7.4.2. formulating the underlying policy principles that will form the foundation of the Convergence Bill; and

7.4.3. drafting a Convergence Bill that takes account of public comments and which has clear statements on the underlying policy principles as adopted by Government.

8. TIMING OF THE LEGISLATION

8.1. As we indicated when the 2003 Convergence Bill was first published for public comment, the SNO stakeholders wish to reiterate that we unequivocally support the need for convergence regulation. Nevertheless, we have a number of concerns regarding the timing of the Convergence Bill.

8.2. Our first concern is that the legislation has been proposed prior to the completion of the managed liberalization timetable for the telecommunications context. If the Convergence Bill succeeds in harmonising the regime for the infrastructure regulation, then one of the effects of this will be to increase the number of infrastructure providers in the market. This is because the Convergence Bill will allow infrastructure providers who were previously restricted to providing services within a particular service category or a particular sector to enter into each other's territory. To give an example, the telecommunications network operators will theoretically be able to provide broadcasting signal distribution services, and vice versa for signal distributors.

8.3. In the fixed-line segment, which is of immediate concern to the SNO stakeholders, it was intended that the SNO would initially be licensed to compete with the fixed line incumbent Telkom SA Limited ("Telkom") for a fixed term duopoly period before the market was opened up to competition. In fact, the original SNO business plan and licensing process were premised on the assumption of a duopoly in the fixed line segment for between two and three years prior to the introduction of infrastructure-based competition. The SNO stakeholders are concerned that the Convergence Bill will leapfrog this process by introducing facilities-based competition prior to the establishment of an alternative network to rival that of Telkom. We are concerned that this will only serve to entrench the dominance of the incumbent to the detriment not only of the SNO, but also to the detriment of the South African economy as a whole.

8.4. Another concern is that, in the absence of a Green Paper / White Paper process, there is no clarity from a policy point of view regarding the issue of new facilities-based licences. The

lack of a policy framework regarding the government's intentions for market liberalisation means that it is impossible for existing market players and potential investors to predict the South African market landscape in the future. Unfortunately this not only undermines the SNO's business plan, but it also undermines stability and predictability in the communications sector. It is our respectful submission that the Minister should give an indication of the framework and timetable for market liberalisation as soon as possible before the Convergence Bill is passed into law, alternatively, the Minister should publish policy directions on this issue as soon as possible after the Convergence Bill has been enacted.

SPECIFIC COMMENTS ON THE CONVERGENCE BILL

9. **INTRODUCTORY PROVISIONS (CHAPTER 1)**

We have a number of comments on the definitions (section 1) and proposed objects of the Convergence Bill (section 2). Due to time constraints, we will confine our comments to the substantive issues in the legislation, and supplement this submission with more detailed comments on section 1 and section 2 at a later stage.

10. **POLICY AND REGULATIONS (CHAPTER 2)**

10.1. The original Chapter 2 of the 2003 Convergence Bill proposed to harmonise the powers of ICASA to regulate telecommunications and broadcasting with reference to things such as the holding of public inquiries, Ministerial policy directions and regulation-making. This objective has been followed through into the 2005 Convergence Bill, with the exception that the 2005 draft deals solely with the issuing of Ministerial policy directives and the promulgation of regulations by ICASA. It would appear as if other procedural issues such as the holding of public inquiries and dispute resolution are intended to be dealt with by way of an amendment to the ICASA Act. As indicated above, it is unfortunate that the ICASA Amendment Act was not published for comment simultaneously with the Convergence Bill, as it is not possible to provide a full commentary on ICASA's proposed powers under the new convergence framework without it.

10.2. Nevertheless, the notion of harmonising ICASA's powers and functions across telecommunications and broadcasting is a welcome move. Up until now, there has been a discrepancy in ICASA's statutory powers in relation to telecommunications and broadcasting, particularly *vis-à-vis* the Minister. With respect to its telecommunications functions, ICASA has operated under a severely constrained form of independence, unlike in relation to its broadcasting functions where it enjoys a higher level of independence. In particular, ICASA's powers to issue limited competition telecommunication service licences and to issue regulations under the Telecommunications Act have been significantly encroached upon. Moreover, under the Telecommunications Act ICASA is obliged to adhere to policy directives

issued by the Minister, whereas under the IBA Act, ICASA is merely required to consider such policy directives.

10.3. The SNO stakeholders support the notion of doing away with the bifurcated levels of independence of ICASA *vis-à-vis* telecommunications and broadcasting respectively. As a general point of principle, the SNO stakeholders respectfully submit that ICASA should be given the same levels of independence that it currently enjoys under the IBA Act, as is mandated by the Constitution of the Republic of South Africa 108 of 1996 ("the Constitution"). In this regard, section 192 of the Constitution, requires legislation to establish an independent regulator to regulate broadcasting in the public interest.

10.4. Certain aspects of the Convergence Bill accord ICASA the constitutionally required level of independence for the broadcasting regulator, which the SNO stakeholders support. In particular, the Convergence Bill:

10.4.1. requires ICASA solely to consider (rather than to adhere to) policy directives issued by the Minister (see section 3(3));

10.4.2. empowers ICASA to pass regulations without the need for prior ministerial approval (see section 4); and

10.4.3. gives ICASA the final say over the award of individual service licences (see section 9).

10.5. Nevertheless, certain provisions of the Convergence Bill still allow the Minister to play a role in regulatory processes, which the SNO stakeholders believe is inappropriate. In particular, the Convergence Bill (amongst other things):

10.5.1. empowers the Minister to determine the market entry date for the issue of new network facilities provider licences ("network communication service licences") (see section 5(4));

10.5.2. gives the Minister the final say over the licence conditions for individual licences (including broadcasting service licences, which is unconstitutional in the broadcasting arena) (see section 9(2)(e)); and

10.5.3. gives the Minister the authority to finally approve the radio frequency plan (see section 34(9)), and to allot and assign radiocommunications frequency spectrum for the security services (see section 34(14)).

(Our concerns in relation to each of these issues are canvassed in greater detail in our comments pertaining to Chapter 3 (*Licensing*) and Chapter 5 (*Radio Frequency Spectrum*)).

10.6. In this regard, we are concerned that these and other areas of co-regulation between the Minister and ICASA mitigate against the principle of creating "a clear allocation of roles and assignment of tasks between policy formulation and regulation within the communications sector", which is listed as a key object of the Convergence Bill in section 2(j).

10.7. The SNO stakeholders also have a number of concerns regarding the determination of Ministerial policy as follows:

10.7.1. it is unclear whether there is any difference (and if so, what the difference is) between section 3(1) (which deals with the powers of the Minister to make policies on matters of national policy) and section 3(2) (which deals with the power of the Minister to issue policy directions to ICASA) – it is suggested that section 3(1) should be subsumed under section 3(2);

10.7.2. it is not clear whether the Ministerial policies in referred to in section 3(1) are subject to the same procedural requirements as the Ministerial policy directions referred to in section 3(2) – it is respectfully submitted that they should be;

10.7.3. some of the matters listed in sections 3(1) and 3(2) are not appropriate subject matter for policy directions – such as for example, the application of new technologies,[5] or the determination of priorities for the development of networks and services;[6]

10.7.4. there is no obligation on the Minister to consult with ICASA before issuing a policy direction to ICASA (this is currently mandatory under the existing broadcasting and telecommunications legislation)[7] – it is suggested that this should also be obligatory under the Convergence Bill;

10.7.5. there is also no obligation on the Minister to invite comment from the portfolio committee before issuing a policy direction (as is currently the case under the Telecommunications Act and the IBA Act)[8] – it is respectfully submitted that this should be mandatory under the Convergence Bill; and

10.7.6. it is unclear why the 30 day minimum time period for the inviting of public comments on draft policy directions has been removed from section 3(4)(ii) – this should be retained in order to ensure that the public is given an adequate response time.

[5] See: section 3(1)(d) of the Convergence Bill.
[6] See: section 3(2)(b) of the Convergence Bill.
[7] See: section 5(4)(a)(i) of the Telecommunications Act and section 13A(6)(a) of the IBA Act.
[8] See: section 5(4)(a)(iii) of the Telecommunications Act and section 13A(6)(c) of the IBA Act.

11. LICENSING FRAMEWORK (CHAPTER 3)

11.1. Introductory comments

11.1.1. The greatest impact of the Convergence Bill is likely to be its effect on the licensing of infrastructure-related services and on broadcasting services.

11.1.2. It is respectfully submitted that there are a number of problems with the way in which the licensing framework has been conceived of at the substantive level. In our submission on Chapter 3, we will therefore first discuss our substantive concerns with the new licensing framework before we deal with our specific comments on each of the sections falling under Chapter 3.

11.2. Overview of the new horizontal licence categories

11.2.1. One of the key features of the Convergence Bill is that it proposes to adopt a horizontal licensing regime, and to move away from the current vertical system of licensing. Under the current vertical system, similar services are treated differently according to the sector in which they fall (for example, broadcasting signal distributors are licensed differently from telecommunication network operators even though both are infrastructure providers). The new horizontal regime will treat all service of a similar type in the same way.

11.2.2. To this effect, the Convergence Bill proposes the adoption of a horizontal licensing system with four main licence categories. These categories are:

11.2.2.1. “communications network service” (which essentially refer to network facilities providers);

11.2.2.2. “communications services” (which essentially refer to the connectivity layer);

11.2.2.3. “application services” (which essentially refer to enhanced services); and

11.2.2.4. “broadcasting services” (which we assume to refer to terrestrial, satellite and cable broadcasting services to the exclusion of online and internet content).

11.2.3. In addition, Chapter 3 of the Convergence Bill also makes mention of the following additional licence categories:

11.2.3.1. “radio frequency spectrum licences” (this is out of place in Chapter 3, which is not concerned with spectrum licences, but

with service licences. This should rather have been dealt with under Chapter 5); and

11.2.3.2. "other services as may be prescribed" (the need for this is unclear, unless it is proposed to introduce "special" sector and/or service specific licence categories, which is precisely what the Convergence Bill is trying to steer clear of);

11.2.4. Lastly, section 1 of the Convergence Bill contains a definition for "content services", which has not been included as a licence category in section 5.

11.2.5. The Convergence Bill sets out three methods for authorising communications providers in the South African market, namely individual licensing (section 5(2)), class licensing (section 5(3)) and licence exemptions (section 6).

11.2.6. It is the respectful view of the SNO that there are a number of problems with Chapter 3 of the Convergence Bill, each of which we shall deal with in detail. Briefly and for the sake of clarity we summarise the major problem areas before proceeding to discuss each one. These problem areas are:

11.2.6.1. The licence categories in the Convergence Bill have been based on the service licence categories contained in the Malaysian Communications and Multimedia Act 588 of 1998 ("the Malaysian Act"). However, the licence categories in the Convergence Bill are not the same as the licence categories in the Malaysian Act, and are unclear and confusing. Moreover, radio frequency spectrum licences should not be dealt with under Chapter 3 but rather belong in Chapter 5, as the licensing of the spectrum is a totally separate issue from service licensing.

11.2.6.2. The Convergence Bill misconstrues the essential differences between the various licensing methodologies, and in particular confuses the distinction between individual licences (for which the pre-approval of the regulator is required) and class licences (for which the pre-approval of the regulator is <u>not</u> required).

11.2.6.3. The licence categories in the Convergence Bill have been fixed to certain licensing methodologies which will only lead to inflexibility in the long term.

11.2.6.4. The Convergence Bill provides for the Minister of Communications ("the Minister") to finally approve the licence conditions for individual licences, which may be inappropriate.

11.3. **General comments on the new licensing categories**

11.3.1. Introduction

11.3.1.1. In making its submissions on this aspect of the Convergence Bill, the SNO stakeholders will make numerous references to the Malaysian Act, on which the proposed new licensing regime in the Convergence Bill is largely based. We will discuss the key features of the Malaysian licensing regime in conjunction with the licensing regime set out in the Convergence Bill that will hopefully place the submissions that we make into context.

11.3.1.2. For ease of reference we will deal with the content and infrastructure-related licence categories separately. For the purposes of this submission, we will group infrastructure provision, connectivity and application services under the broad generic category of "infrastructure" regulation, and we will deal with broadcasting services under the category of content regulation.

11.3.2. Infrastructure-related licences

There are three infrastructure-related licence categories in the Convergence Bill for: network facilities (referred to as "communications network services" in the Convergence Bill), connectivity or network services (referred to as "communications services" in the Convergence Bill) and application services (referred to as "application services" in the Convergence Bill). We shall deal with each in turn. Unfortunately, the labels given these licence categories are unhelpful in that they do not reflect the subject matter of each category.

- *Network facilities providers ("communications network services")*

  The label "communications network service" is meant to refer to the network facility provision layer. Unfortunately, the label is not very helpful because it does not reflect the meaning of the concept that it is meant to describe. At their most basic level, the network facilities providers are the owners of infrastructure such as satellite earth stations, broadband fibre optic cables, telecommunications lines and exchanges, radiocommunications transmission equipment, mobile cellular telecommunication base stations and broadcasting transmission towers and equipment. (Kindly refer to paragraph 23.2.8.1 of this submission for our detailed comments on the definition of a "communications network service in section 1).

- *Network services ("communications services")*

  The label "communications service" is meant to refer to the connectivity layer, that is the switching and routing of traffic over networks. In this regard, the use of the label "communications service" to refer to the connectivity is rather unfortunate, as this label is more appropriate as a generic term, and also does not reflect the meaning of the concept that it is meant to describe. (Kindly refer to paragraph 23.2.9 of this submission for our detailed comments on the definition of a "communications service in section 1).

- *Application services*

  The label "application services" is presumably meant to refer to enhanced infrastructure-related services provided by means of connectivity services. In their most simple conception, an application service provider is an entity that offers its clients (be they enterprises or individuals) access over the internet to applications, information services and related services that would otherwise have to be located in their own computer systems. The definition of an applications service borrows heavily from the definition of a value added network service ("VANS") in the Telecommunications Act. In this context it is unfortunate then that insufficient clarity has been provided in the Convergence Bill regarding how VANS are to be licensed. In particular, it is unclear what licence categories VANS will be eligible to apply for. At the very minimum we assume VANS licensees will be required to be authorised as application service providers under the Convergence Bill. What is unclear is whether VANS will be eligible to self-provide their own facilities (via a "communications network service" licence) or provide connectivity services (via a "communications service" licence). (Kindly refer to paragraph 23.2.2 of this submission for our detailed comments on the definition of an "application" in section 1. See also our comments in relation to Chapter 13 (*Transitional Provisions*) in paragraph 20 of this submission).

11.3.3. <u>Content-related licences</u>

11.3.3.1. There is only one content licence category, and that his for broadcasting services in section 5 of the Convergence Bill. The Convergence Bill also refers to "content services" in section 1, but not as a licence category in section 5. Technically, broadcasting services are a sub-category of content services. It would appear to be the intention of the drafters that only broadcasting services should be licensed, to the exclusion of other forms of content

such as internet content and interactive voice services, which the SNO stakeholders believe is correct.[9]

11.3.3.2. An omission from the Convergence Bill is the relationship between the licensing of broadcasting services to section 5 of the Broadcasting Act. In this regard, the SNO stakeholders are of the view that section 5 of the Broadcasting Act should be consolidated into the Convergence Bill.

11.3.3.3. In this regard, section 5(1) of the Broadcasting Act delineates three categories of broadcasting services, namely public, commercial and community broadcasting services. Section 5(2) of the demarcates five further sub-categories within each of these, namely free-to-air broadcasting services, terrestrial subscription broadcasting services, satellite subscription broadcasting services, cable subscription broadcasting and low power sound broadcasting services.

11.3.3.4. If a consolidation of section 5 of the Broadcasting Act into the Convergence Bill is accepted, then the SNO stakeholders submit that the current section 5(2) is too rigid because it attempts to tie the various subcategories together in a restrictive way. For example, there is no provision in this section for free-to-air satellite broadcasting services, which is an omission from section 5(2). In this regard, it is respectfully submitted that it would be preferable to leave this as open ended as possible, to allow for different combinations of the various subcategories,

[9] It is our respectful view that it is not practicable to harmonise content regulation, because different content platforms lend themselves to different degrees of regulation. Traditionally, only certain types of content have been subject to regulation, namely broadcasting content transmitted over terrestrial, satellite and cable platforms. Other forms of content such as Internet content and interactive voice services, are usually left unregulated, are subject to self- or co-regulation, alternatively to very light touch statutory regulation.

The various factors that should inform whether or not to licence content include the following:

- whether or not the transmission platform requires spectrum use;
- whether or not the content is private (one-to-one) or public (one-to-many) in nature. Private content is traditionally excluded from the sphere of content regulation;
- whether or not the content platform is capable of being policed. As a point of departure, rules that are incapable of being enforced should not be implemented. Internationally, regulators do not require Internet content providers to be licensed, because of complex international jurisdiction issues;
- the penetration levels of content delivered over non-traditional platforms. Generally speaking, the higher the penetration level, the more likely it is to attract regulation;
- the ease with which the content can be accessed, particularly by children; and
- whether or not other mechanisms exist for regulating objectionable content other than through licensing. In South Africa, provision has already been made in the existing legislation for the regulation of online content. For example, the Electronic Communications and Transactions Act 25 of 2002 contains various provisions dealing with the limitation of liability of infrastructure-related providers for content transmitted over their networks or stored in their systems. The Film and Publications Act 65 of 1996 ("the Film and Publications Act") deals with child pornography over the Internet. The existing legislation in South Africa has taken a minimalist approach to the regulation of Internet content that the SNO stakeholders believe is appropriate for the time being.

The SNO stakeholders respectfully submit that the restriction of content regulation to existing broadcasting services to the exclusion of newer forms of electronic content such as Internet content, is appropriate. This does not mean to say that non-traditional forms of content should be left completely unregulated. It merely means that there may be other forms of regulation that are more appropriate, such as self-regulation, co-regulation or light touch regulation.

where appropriate. Thus the various subcategories should be standalone categories in their own right, and separate provision should be made for:

- the platform over which the service is transmitted (in this case, terrestrial, satellite or cable),
- free-to-air versus subscription services;
- television versus sound broadcasting services;
- low power and other broadcasting services not already covered above.

11.4. **Problems with the authorisation methodologies**

11.4.1. The licensing regime in the Convergence Bill tracks that provided for in the Malaysian Act, which recognises three authorisation methodologies, namely: individual licences, class licences and licence exemptions. Briefly, the difference between the three authorisation methods is as follows:

11.4.1.1. *Individual licences* – one of the defining features of individual licences is that they require pre-approval to be given on individual application to the regulator. From a policy point of view, individual licensing systems are appropriate in respect of major licence categories where the government has a significant interest in regulating the behaviour of certain market players, and in respect of licence categories that are limited to competition.

11.4.1.2. *Class licences* – a key feature of class licences is that the pre-approval of the regulator is not required. At most, class licensees may be required to register with the regulator or to give the regulator advance notification. Under a class-licensing regime, any service provider may provide the services listed in the licence, for so long as it adheres to the terms and conditions of the class licence, and for so long is it has notified or registered with the regulator. From a policy point of view, class licences are a useful tool for simplifying the licensing regime in liberalised sections of the market. Class licences are employed where the government retains an interest in regulating liberalised services – for example imposing empowerment requirements in licences.

11.4.1.3. *Licence exemptions* refer to activities that are permitted to be provided on an unlicensed basis. As in the case of class

licences, licence exemptions are also a useful tool simplifying the authorisation mechanism in respect of liberalised service categories. From a policy point of view licence exemptions are most appropriate in respect of activities that are technically caught within the definition of activities subject to regulation but where no rationale exists for regulation.

11.4.2. A key feature of the Malaysian Act is that the three authorisation methods apply across all four licence categories. Therefore, whether or not an activity is required to be individually licensed, class licensed or licence exempt in Malaysia depends on the nature of the activity in question within its particular licence category. To encourage competition in the market, only activities with a significant economic or social impact are required to be individually licensed. Other activities are either class licensed or are exempt from licensing altogether as illustrated by the table below:

Malaysia – licensable activities at a glance[10]				
Licensing category	**Individual licence**	**Class licence**	**Exempt / unlicensed**	**Comments**
Network facility providers (infrastructure layer)	E.g.: fixed links and cables, satellite and submarine cable facilities, broadcasting signal distribution networks, etc	E.g.: niche or limited purpose network facilities, etc	E.g.: broadcasting and production studios, incidental network facilities, private network facilities, etc	Only major infrastructure providers are required to be individually licensed in Malaysia, because of their strategic importance to the economy. More minor facilities providers are either required to be class-licensed or are licence exempt.
Network service providers (connectivity layer)	E.g.: bandwidth services, broadcasting distribution services, cellular mobile services, access service, etc	E.g.: niche customer access and niche connection service providers, etc	E.g.: incidental network services, LAN services, private network services, etc	Only major connectivity providers who carry traffic over major networks are required to be individually licensed in Malaysia, once again because of their socio-economic importance.
Applications service providers (enhanced services)	E.g.: IP telephony providers and public switched data service providers, etc	E.g.: directory services, Internet access services, messaging services, etc	E.g.: electronic transaction services, interactive transaction services, web hosting, etc	Once again, a distinction has been made between major and minor applications service providers for licensing purposes, depending on their importance to the economy.
Content applications service providers	E.g.: satellite broadcasting subscription services, terrestrial free to air TV and radio, etc	No class content licences have yet been issued in Malaysia	E.g.: Internet content providers	All traditional broadcasting service providers are required to be individually licensed. Perhaps in recognition of the difficulties of regulating online content providers, internet content providers are exempt from the requirement to hold a licence in Malaysia.

11.4.3. The SNO stakeholders respectfully submit that the flexibility inherent in the Malaysian Act (and in particular the non-fixing of authorisation methodologies to fixed particular licence categories) is an approach that should be followed in South Africa. As has already been mentioned above, unlike in the Malaysian

Act, the Convergence Bill does not allow all three authorisation methods to be used in relation to all four of the licence categories. The authorisation methods in the Convergence Bill are strictly differentiated according to the particular applicable licence category as follows:

The authorisation regime in the Convergence Bill		
Category	**Authorisation method**	**Sections in the Convergence Bill**
Network facility providers ("communications network services")	Individual licence	Section 5(2)(a)
Connectivity layer	Class licence	Section 5(3)(a)
Application services	Class licence	Section 5(3)(b)
Broadcasting services	Class licence	Section 5(3)(c)
Radio frequency spectrum licences	Individual licence	Section 5(2)(b)

11.4.4. The SNO stakeholders respectfully submit that there are a number of problems with the authorisation regime provided for in the Convergence Bill, namely:

11.4.4.1. The authorisation regime is too rigid. There is no reason why each of the three authorisation methods should not apply to each of the four licence categories. For example, as currently drafted, the Convergence Bill requires all network facility providers ("communications network service licensees") to be individually licensed. This is unnecessary, as only those network facility providers whose activities are of major social and economic importance should have to be individually licensed. If the intention is to phase in market liberalisation in the long term, provision should be made for smaller network facility providers to be class licensed or license exempt, such as private telecommunication network ("PTN") operators, for example, where there is no need for an individual licensing regime. In this regard, it is our recommendation that the Convergence Bill should delink the licence categories from the licensing methodologies. Rather than fixing particular methodologies to specific licence categories, it is respectfully suggested that the Convergence Bill should incorporate criteria that will be relevant in determining whether an activity needs to be individually licensed, class licensed or licence exempt – with reference to factors such as the scale of the service / network being provided and their importance to the country, economic empowerment goals and the degree of competition within the various segments of the communications industry.

[10] Source: Malaysian Communications and Multimedia Commission website (http://www.mcmc.gov.my/mcmc/what_we_do/licensing/cma/table1.asp)

11.4.4.2. There is considerable confusion in the Convergence Bill between individual and class licences. In particular, section 16 of the Bill makes reference to "applications" to ICASA for class licences, and to the "granting" of class licences by ICASA. The use of this terminology is unfortunate, as it misunderstands the difference between individual licences (where the pre-approval of the regulator is required) and class licences (where it is not). Moreover, it would be unduly burdensome for ICASA to pre-approve class licences where this is not strictly necessary. Many countries that have adopted class-licensing systems merely require a licensee to pre-notify the regulator before commencing to provide class licensed services (as opposed to requiring the pre-approval of the regulator). It is submitted that this would be a more appropriate approach to adopt in South Africa.

11.4.4.3. In relation to licence exemptions, no statutory guidance is given to ICASA as to how to exercise its discretion when exempting a particular activity from the requirement to be licensed. It is also not clear from section 6 of the Convergence Bill whether ICASA can exempt all service providers in all the licence categories from the requirement to hold a licence.

11.4.4.4. Lastly, it is respectfully submitted that it is inappropriate to authorise players in the connectivity layer ("communications service licensees") by way of a class licence. This is because the connectivity layer has historically not been open to competition, moreover, the connectivity layer tends to lend itself to more heavy touch regulation.

11.5. **The Minister's role in relation to licensing**

11.5.1. Chapter 3 of the Convergence Bill retains a role for the Minister in relation to licensing. In particular, the Convergence Bill confers the following powers on the Minister:

11.5.1.1. the Minister must determine the market entry date for applications for new network facilities provider licences ("communication network service licences") (section 5(4)); and

11.5.1.2. the Minister is required to approve the licence conditions for individual licences (including in respect of broadcasting service licences, which may fall foul of section 192 of the Constitution.

11.5.2. While the SNO stakeholders acknowledge that the Minister will undoubtedly be playing a critical role in determining policy for the communications sector, including when additional network facility provider licences ("communication network service licences") ought to be introduced, the SNO stakeholders respectfully question whether the actual approval of licence conditions ought to be done by the Minister, given that the objects of the Convergence Bill require a separation between policy formulation and policy implementation, and given international regulatory best practice on the issue. The SNO stakeholders understand the approval of licence conditions to be a good example of policy implementation.

11.6. **Impact on managed liberalization framework**

11.6.1. We have already highlighted the problems associated with the absence of policy framework to inform the Convergence Bill. One of the issues in respect of which there has been little or no indication as to the intent of the policy makers with respect to the correlation of the Convergence Bill to market liberalisation initiatives in the telecommunications and broadcasting environments.

11.6.2. The Telecommunications Act places restrictions on facilities-based competition and on service-based competition. The Telecommunications Act is founded on the concept of "managed liberalisation", which dictates that competition in the market be introduced on a phased-in basis. It is unclear how the Convergence Bill will tie into this.

11.6.3. In the broadcasting environment, there has been no policy guidance on the issue of the switchover from analogue to digital broadcasting. Neither has there been any guidance on the impact of digitisation on the freeing up of the spectrum and consequently on the liberalisation of the broadcasting sector.

11.7. **Licensing (section 5)**

11.7.1. It is respectfully submitted that there should be four recognised service provider categories and that the labels used to describe these categories should reflect the meaning of the service that they describe. These categories should be in respect of:

11.7.1.1. network facility providers;

11.7.1.2. connectivity providers (or whatever label this is given);

11.7.1.3. application service providers; and

11.7.1.4. broadcasting service providers.

11.7.2. The licensing of the spectrum should be dealt with under Chapter 5 (*Radio Frequency Spectrum*), and not under Chapter 3 (*Licensing Framework*) which should deal with service licensing only. The reference to "radio frequency spectrum licences" in section 5(2)(b) therefore needs to be deleted.

11.7.3. It is not necessary to give ICASA the power in section 5(2)(d) to prescribe other service licence categories. The aim behind having broad, horizontal, technology and service neutral licences is to avoid the need to create vertical service specific licence categories. The only exception to this would be in relation broadcasting services, which are reflected in service specific terms so as to exclude other forms of content services such as online and internet content.

11.7.4. Section 5 should indicate at the outset that three authorisation methodologies will be applicable, namely:

11.7.4.1. individual licences;

11.7.4.2. class licences; and

11.7.4.3. licence exemptions.

11.7.5. If this suggestion is accepted, then section 6 (*Licence exemption*) can be deleted.

11.7.6. The authorisation methodologies should also be delinked from the four service provider categories, and this should be left within the discretion of ICASA to prescribe in order to create flexibility in the regulatory regime. In exercising its discretion, ICASA will need to take into account service-based distinctions within each category along the lines of what has been done in Malaysia. Section 5 should incorporate criteria that must be taken into account by ICASA when exercising its discretion whether or not to individually licence, class licence or exempt an activity from the requirement to hold a licence. In this regard, it is respectfully submitted that relevant factors should include considerations such as:

11.7.6.1. reference to market sub-segments within a horizontal layer (such as MCTS (mobile cellular telecommunications services) versus PTNs (private telecommunication networks), for example);

11.7.6.2. the socio-economic importance of the activity to the economy and the country as a whole;

11.7.6.3. the prevalence of absence of competition within the relevant segment of the market;

11.7.6.4. empowerment goals; and

11.7.6.5. the need to promote universal access / universal service;

11.7.6.6. the need to promote a diversity of content and opinions in the content layer.

11.7.7. As regards sections 5(4)-(5), it is respectfully submitted that it is unworkable to empower the Minister to fix the market entry date for all network facility providers ("communication network service licensees"), as this is inappropriate for smaller facilities providers who are intended to be class licensed or licence exempt. The Minister should only be so empowered in relation to major facility provider licences ("communications network service licences") that are required to be individually licensed.

11.7.8. Sections 6(6)-(8) refer to licence application procedures that are applicable to individual licences only, as no application for a class licence should be necessary. The reach of these sections needs to be limited to individual licences only.

11.7.9. Section 5(8)(b) mandates ICASA when considering an application for a licence to take into account "the empowerment of historically disadvantaged groups, including women and the youth". The concept of a historically disadvantaged group ("HDG") has not been defined in section 1, and the reach of the concept is therefore unclear. At the very least, it is submitted that HDG's should include black people (including people historically designated as Africans, Indians and Coloureds) and women. If this suggestion is accepted, then it is unnecessary to list women as a separate category to HDGs. As regards the youth, it is respectfully submitted that, although the empowerment of the youth is a necessary goal, it is unlikely that the youth are going to participate in licence application process and it is therefore submitted that the reference in section 5(8)(b) to the youth should be deleted.

11.7.10. It is respectfully submitted that the time periods for licences should not be fixed in the Convergence Bill but should rather be prescribed in licence conditions by way of regulation. Nevertheless, it is respectfully submitted that the Convergence Bill should require ICASA to treat licensees within the same category or sub-category (as the case may be) in a non-discriminatory fashion. This would prevent licences of differing durations from being issued to licensees in the same category or sub-category. For example, if the duration of Telkom's PSTS licence is 25 years, then the duration of other PSTS licences should be the same.

11.8. **Licence exemptions (section 6)**

If our proposal in 11.7.4 and 11.7.6 is accepted to deal with licence exemptions under section 5, then section 6 should be deleted.

11.9. **Prohibition of provision of service without licence (section 7)**

Section 7 states the general rule that no person may provide a service in terms of the Convergence Bill or under the related legislation without a service licence. It is respectfully submitted that the reference to related legislation in section 7 should be deleted if it is intended to consolidate the licensing of infrastructure and broadcasting services under the rubric of the Convergence Bill.

11.10. **Terms and conditions for licences (section 8)**

11.10.1. It is clear from section 8 that the intention is for ICASA to prescribe standard licence conditions for licensees within categories and sub-categories as far as is possible in order to facilitate standardisation in licensing, and that ICASA should only impose specific terms and conditions germane to a particular licensee in the circumstances described in section 8(3).

11.10.2. The SNO stakeholders are broadly supportive of this approach, which we hope will go some way towards facilitating ICASA's administrative duties. However, we have a number of concerns with some of the specific provisions of section 8 which we have discussed in greater detail below.

11.10.3. By way of general comment, the considerations that apply to the licence conditions of infrastructure-related service providers and broadcasting service licensees are different. It is respectfully submitted that these should be dealt with separately. Unfortunately, this creates confusion, as some considerations are mutually exclusive of each other.

11.10.4. For example the following considerations are only applicable to broadcasting services and make no sense in an infrastructure-regulation environment:

11.10.4.1. the provision of broadcasting services to the public generally or a limited group (section 2(a) – the reference to content services here is not appropriate as only broadcasting services are regulated under the Convergence Bill);

11.10.5. The following considerations are only applicable in an infrastructure-regulation context:

11.10.5.1. the promotion of interoperability in order to facilitate interconnection and facilities leasing (section 2(f));

11.10.5.2. the promotion of universal access / universal service ((section 2(h));

11.10.5.3. the prevention of harmful interference (section 2(g));

11.10.5.4. ensuring that disaster management process are in place (section 2(i));

11.10.5.5. the avoidance of exposure to electro-magnetic fields (section 2(j));

11.10.5.6. broadcasting signal distribution (section 2(l))

11.10.5.7. the efficient use of the spectrum;

11.10.6. Moreover, the provisions of clauses 8(3)-(6) are germane to infrastructure-related licences and have little or not application in the broadcasting context.

11.10.7. As regards sections 8(3)-(5), the SNO stakeholders support the notion of imposing asymmetrical licence obligations on licensees who wield significant market power ("SMP"). However, the powers of ICASA to impose specific licence obligations on particular licensees should only apply to individual licences and not to class licences, which by their nature are blanket licences.

11.10.8. We also support the incorporation of a methodology in section 8(5) for determining when a licensee has SMP, although we are of the view that the provisions of subsection (5) should be made clearer. The current interconnection and facilities leasing guidelines allow for the determination of SMP with reference to one of three factors:

11.10.8.1. percentage thresholds (currently SMP is defined with reference to a threshold of 35%);

11.10.8.2. the *de facto* exercise of market power (in circumstances where a licensee holds less than 35% of the share in a relevant market, but is able to exercise market power by other means – for example by having control of essential facilities, for example); or

11.10.8.3. other circumstances where ICASA determines that a licensee wields SMP if the circumstances in 11.10.8.1 and 11.10.8.2 are not present.

11.10.9. It is recommended that a similar approach is followed in the Convergence Bill.

11.11. **Applications for and granting of individual licences (section 9)**

11.11.1. Section 9(2)(e) gives the Minister the final say over the approval of individual licence conditions. It is respectfully submitted that this is inappropriate because it reinforces co-regulation between the Minister and ICASA, but this is also unconstitutional in the broadcasting arena. Section 9(2)(e) should therefore be deleted.

11.11.2. Section 9(2)(c) requires ICASA to publish the licence conditions that will apply to a licensee whenever it invites applications for individual licensees. This should refer only to non-standard licence conditions that are intended to apply to a particular licensee where standard licence conditions are already in place. Moreover, such licence terms and conditions should be subject to public comment.

11.12. **Amendments of individual licences (section 10)**

Section 10 permits individual licences to be amended only in consultation with (that is, with the agreement of) the relevant licensee. It is respectfully submitted that this is inappropriate, as this will only serve to entrench the dominance of players who have SMP in the long term. In this regard it is respectfully submitted that ICASA should have the final say over the amendment of individual licences, after a public notice and comment process has been followed as mandated by the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

11.13. **Renewals of individual licences (section 11)**

Section 11 empowers ICASA to renew individual licences. Section 11(8) permits ICASA to refuse to renew a licence. In this regard, it is submitted that ICASA should be required to permit the licensee to make oral representations (and not only written representations) before declining to renew a licence, given that the effects of cancelling a licence are so drastic.

11.14. **Surrender of individual licences (section 12)**

Section 12 empowers licensees to surrender their licences. This section should only be of application to individual licensees, as class licensees would deregister with ICASA rather than surrendering their licences.

11.15. **Transfers of individual licences or changes of ownership (section 13)**

11.15.1. Section 13 has two parts to it:

11.15.1.1. sections 13(1)-(2) prohibit licensees from assigning their licences without ICASA's prior approval; and

11.15.1.2. sections 13(3)-(4) empower ICASA to prescribe limitations on the ownership and control of licensees by way of regulation.

11.15.2. As regards the prohibition on cession and assignment of licences in sections 13(1)-(2), it is submitted that the reach of these sections should be limited to individual licences, as it is unlikely that ICASA would have an interest in maintaining this level of control over class licensees. For record keeping purposes, it would not be unreasonable to impose an obligation on class licensees in section 13 to pre-notify ICASA in the event of a change of ownership and control.

11.15.3. As regards the restrictions on ownership and control in sections 13(3)-(4), the SNO stakeholders are broadly supportive of allowing ICASA to impose such restrictions by way of regulation rather than incorporating these restrictions into the text of the legislation. However, the reference to connectivity providers ("communications service licensees") in section 13(3) is too restrictive, as the reach of this section should extend to all categories of licensee.

11.16. **Suspension or cancellation of individual licences (section 14)**

Section 14 empowers ICASA to suspend or cancel individual licences. We suggest that clause 14(2) provide for a stay of the cancellation or suspension if ICASA's decision to revoke the licence is taken on review to the High Court.

11.17. **Effect of suspension, cancellation, surrender or expiry of individual licences (section 15)**

In section 15(2) permits ICASA to authorise a licensee whose licence is to be terminated to continue providing services for a duration specified by ICASA for the purpose of winding up its affairs. However, the reach of section 15(2) has been inexplicably restricted to network facility providers ("communication network service licensees") and connectivity providers ("communication service licensees"). This restriction should be removed, as these considerations apply to all categories of licensees

11.18. **Class licences (sections 16-19)**

11.18.1. These sections make provision for class licensees to apply to ICASA for authorisation (section 17), for ICASA to grant class licences (section 16), for ICASA to refuse applications for class licences (section 18) and for class licensees to notify ICASA (with written reasons) prior to ceasing to provide a service that is the subject of a class licence (section 19).

11.18.2. It is respectfully submitted that this fundamentally misconstrues what a class licence is, which by its very nature should not require the pre-approval of the regulator.

11.18.3. In this regard, it is respectfully submitted that the regulatory regime for class licences should be as follows:

11.18.3.1. ICASA's powers to prescribe class licence conditions should be subject to the usual notice and comment procedures set out in the PAJA;

11.18.3.2. ICASA should not be required to pre-approve class licences (otherwise these are, in effect, individual licences), although class licensees can be required to pre-register with ICASA;

11.18.3.3. ICASA should be empowered to take action against a class licensee (including by ordering a class licensee to discontinue providing a service) if the class licensee contravenes the provisions of the class licence, the Convergence Bill, or any related legislation or regulations;

11.18.3.4. a class licensee should merely required to deregister with ICASA in the event that such licensee ceases to provide services under the class licence.

12. COMMUNICATIONS NETWORKS AND COMMUNICATIONS FACILITIES (CHAPTER 4)

12.1. Overview

12.1.1. Chapter 4 of the Convergence Bill deals with the "rights of way" of network facility providers ("communication networks" and "communication facilities") in relation to the roll out of their networks.

12.1.2. Chapter 4 of the Convergence Bill essentially repeats the provisions of sections 69-77 of the Telecommunications Act, which previously applied only to Telkom. Chapter 4 does away with the reference to fixed line operators only and confers these rights on other infrastructure providers, which is appropriate in a converged regulatory framework.

12.1.3. Our primary concern with this portion of the Convergence Bill is that although there are references to the environmental regulatory framework in Chapter 4, more consideration needs to be given to potential conflict areas between Chapter 4 and environmental legislation and policy, as the Telecommunications

Act was enacted before many of the aspects of the new environmental framework had been finalised.

12.1.4. It is thus respectfully suggested that care should be taken to align Chapter 4 with the environmental legislation, but subject to the proviso that the administrative processes required in terms of the environmental legislation should not hamper network rollout. Below is a synopsis of where we anticipate some of the conflicts and synergies between the Convergence Bill and the environmental regulatory framework could potentially lie.

12.2. **Guidelines for rapid deployment of communications facilities (section 21)**

12.2.1. Section 21 has two parts to it:

12.2.1.1. section 21(1) empowers the Minister to develop guidelines for the rapid deployment and provisioning of communications facilities in consultation with the Minister of Provincial and Local Government as well as the "Minister of Environmental Affairs" (which designation should incidentally refer to the "Minister of Environmental Affairs and Tourism"); and

12.2.1.2. section 21(2) states that the guidelines should contain procedures for obtaining the necessary authorisations to effect the deployment of networks, as well as dispute resolution procedures.

12.2.2. As regards section 21(1), the SNO stakeholders respectfully question the need for the Minister's involvement in the determination of roll-outs of communications networks for the following reasons:

12.2.2.1. network rollout is largely an operational issue that should be left to the discretion of network operators, subject to any roll-out targets or universal access / universal service obligations contained in their licences; and

12.2.2.2. currently in the telecommunications context, the roll-out and universal service / universal access obligations of licensees are prescribed by ICASA in their telecommunication service licences. In this context, it is respectfully submitted that Ministerial involvement in this arena encroaches on the independence of ICASA.

12.2.3. In the event that the Minister's powers to publish guidelines in this regard is retained in the Convergence Bill, it should also be borne in mind that any

guidelines passed pursuant to section 21(1) should take into account the following legislative instruments:

12.2.3.1. the Constitution – particularly Chapter 3 (which mandates co-operative government and intergovernmental relations)[11] and section 24[12] of the Bill of Rights, which entrenches the right to a healthy environment as well as section 25, which precludes the arbitrary deprivation of property;[13]

12.2.3.2. the National Environmental Management Act 107 of 1998 ("NEMA") and the Environment Conservation Act 73 of 1989 ("the ECA"), particularly the environmental impact assessment ("EIA") provisions[14] and the processes and procedures in the legislation

[11] Chapter 3 of the Constitution provides as follows:

40 **Government of the Republic**

(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

(2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

41 **Principles of co-operative government and intergovernmental relations**

(1) All spheres of government and all organs of state within each sphere must—

(a) preserve the peace, national unity and the indivisibility of the Republic;

(b) secure the well-being of the people of the Republic;

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

(d) be loyal to the Constitution, the Republic and its people;

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

(h) co-operate with one another in mutual trust and good faith by—

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) co-ordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against one another.

(2) An Act of Parliament must—

(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and

(b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

…

[12] Section 24 of the Constitution provides as follows:

Everyone has the right—

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

[13] See specifically section 25(1) which states:

"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[14] In this regard, it should be noted that EIA's are currently regulated by sections 21 and 22 of the ECA. That position will soon to change when new draft regulations are accepted and promulgated under Chapter 5 (read together with section 50) of NEMA.

for the authorisation of activities that may have a detrimental effect on the environment;[15] and

12.2.3.3. section 7 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") (read with section 22(4) of the ECA) which allow for the review of administrative decisions by an aggrieved party.[16]

12.3. **Entry upon and construction of lines across land and waterways (section 22)**

12.3.1. Section 22(1)(b) of the Convergence Bill gives network facilities providers ("communication network service licensees") the right to construct and maintain communications networks and communications facilities. Furthermore, section 22(2) makes provision for such action to be taken in accordance with the applicable law and environmental policy of the Republic.

12.3.2. From an environmental point of view it should be borne in mind that the current regulations to the ECA[17] require an EIA to be conducted for the construction, erection or upgrading of structures associated with communication networks, including masts, towers and reflector dishes, marine telecommunication lines and cables and access roads leading to those structures, but not including above ground and underground telecommunication lines and cables and those reflector dishes used exclusively for domestic purposes.[18] Furthermore, an EIA is also required for the construction, erection and upgrading of ground cableways and associated structures.[19]

12.4. **Underground pipes for purposes of communications network services (section 23)**

12.4.1. Section 23 of the Convergence Bill stipulates that the provision of electricity supply lines must be supplied by means of an underground cable.

12.4.2. The provisions of this section should be read in conjunction with the Electricity Act 41 of 1987 ("the Electricity Act),[20] which places restrictions on the ownership of such cabling

[15] Currently, section 22 of the ECA makes provision for the procedures and processes to govern the authorisation of activities that may have a detrimental effect on the environment as contained in the regulations to the ECA. See also: Regulation 1182 of 5 September 1997, Activities: Detrimental Effect on the Environment

[16] In this regard, it should be noted that the draft EIA regulations are more detailed and impose similar procedural compliance requirements to PAJA.

[17] See: GNR 1182, 5 September 1997: Activities: Detrimental Effect on the Environment.

[18] Regulation 1(g) of GNR 1182, 5 September 1997 (above).

[19] Regulation 1(f) of GNR 1182, 5 September 1997 (above).

[20] Section 24 of the Electricity Act provides as follows:

24 Lines, meters and other apparatus are not fixtures

(1) Any lines, meters, fittings, works or apparatus belonging to an undertaker and lawfully placed or installed in or upon any premises not in his possession shall, whether or not fixed to any part of such premises, remain the property of and may be removed by such undertaker, and shall not be subject to the landlord's hypothec for rent of such premises, and are not liable to be taken in execution under any process of law or any proceedings in insolvency or liquidation against the owner or

12.5. **Pipes under streets (section 24)**

12.5.1. Section 24 of the Convergence Bill permits network facilities providers ("communication network service licensees") to construct and maintain pipes under streets, after reasonable written notice to the local authority, amongst other things.

12.5.2. In this regard, account should be taken of the need to co-ordinate the requirements of the Convergence Bill, when it becomes national legislation with the original law making powers of the municipal sphere of government.

12.6. **Removal of communications network facilities (section 25)**

12.6.1. Section 25 of the Convergence Bill permits network facility providers ("communication network service licensees") to move and remove existing communications facilities. Where communications facilities are situated on private property, the network facility provider ("communication network service licensee") is required to give advance written notice to the property owner before making any deviations or alterations in this regard.

12.6.2. Section 25(4) of the Convergence Bill gives network facility providers ("communication network service licensees") fairly wide powers to decide (in their sole discretion) whether or not the deviation or alteration is possible, necessary or expedient. In this regard, it is respectfully submitted that the discretion of network facility providers who have entered into collocation arrangements with other network facility providers to remove facilities at whim should be tapered by reference to the consent of the other affected network facility provider.

12.7. **Fences (section 26)**

12.7.1. Section 26 of the Convergence Bill permits network facilities providers ("communication network service licensees") to erect fences on land where communications networks and facilities have been constructed.

12.7.2. In this regard, it should be noted that there is existing legislation in place in the form of the Fencing Act 31 of 1963 ("the Fencing Act") that regulates the construction of fences and the fencing of farms and other holdings. In this regard, it is respectfully submitted that allowance should be made in the Convergence Bill for section 26 to be read in conjunction with the Fencing Act.

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occupier of such premises, provided adequate indication is given on such premises that such undertaker is the actual owner of such lines, meters, fittings, works or apparatus.

(2) For the purposes of this section and section 23, lines, meters, fittings and apparatus let, rented or disposed of by the undertaker on terms of payment by instalments shall, until such instalments have been paid, be deemed to belong to him.

13. RADIO FREQUENCY SPECTRUM (CHAPTER 5)

13.1. Overview

13.1.1. Chapter 5 of the Convergence Bill is meant to consolidate and harmonise Chapter IV of the IBA Act and Chapter IV of the Telecommunications Act, which is a welcome move. In this regard, Chapter 5 of the Convergence Bill borrows very heavily from Chapter IV of the Telecommunications Act, with some important differences which we will discuss in greater detail below.

13.1.2. Although the existing spectrum management framework has been largely functional up until now, there are a number of complex policy considerations that underpin the regulation of the spectrum in a converged environment, which have largely not been considered. This represents one example of where it would have been extremely helpful to have had the benefit of a Green Paper / White Paper process to identify the key policy drivers.

13.2. Policy considerations underpinning spectrum regulation in a converged environment

It is respectfully submitted that some of the policy considerations underlying the regulation of the spectrum in a converged environment include the following:

13.2.1. The international and domestic frequency band plans currently retain a distinction between telecommunications and broadcasting spectrum, which will become increasingly difficult to maintain as the effects of convergence become more pronounced. In this regard, the delivery of broadband services such as digital television, or fast Internet services over packet switched mobile networks will pose obvious challenges to regulators seeking to allocate spectrum to different services. Although this is a global problem that cannot be resolved in national legislation, this nevertheless needs to be borne in mind.

13.2.2. There are some important differences in the way in which spectrum is allocated and assigned in the telecommunications and broadcasting contexts that have not been considered in the Convergence Bill. Most notably, in the telecommunications environment, spectrum and service provision are licensed separately. This is not the case in the broadcasting environment where spectrum is assigned directly to broadcasting service licensees without the need to obtain a separate spectrum licence (see section 43 of the IBA Act).[21] In the broadcasting environment, the bundling of spectrum to the issue of service licences reflects the analogue mindset of allocating one frequency per specific service, which will no doubt become less of an issue with time as analogue

[21] Specifically, section 43(1)(a) which provides "Notwithstanding any provisions to the contrary in any other law, a licence granted and issued under this Chapter shall by itself entitle the licensee concerned to use the radio frequency or frequencies and the station or stations as specified in his or her licence for the purpose of providing the broadcasting services to which the licence relates."

systems are replaced with digital technology. It is respectfully submitted that in a converged environment, it is more appropriate to licence spectrum at the infrastructure layer rather than at the broadcasting service layer.

13.2.3. The Convergence Bill proposes to retain the current system of licensing spectrum on individual application as set out in Chapter 4 of the Telecommunications Act, although ICASA is empowered to grant exemptions. Internationally, many new and innovating methods of authorising spectrum use are being developed to facilitate the freeing up of spectrum for new services, none of which have been considered in the Convergence Bill. These include authorisation regimes such as spectrum auctions and the class licensing of spectrum, to mention but a few. Another concerning feature of the Convergence Bill in this regard is that sections 31(7)-(9) propose to give ICASA the open-ended power to withdraw a frequency licence without stipulating the time period in which licensees must take up use of the spectrum before running the risk of forfeiting their licences. No consideration has been given to other methods of incentivising the freeing up of the spectrum via mechanisms such as spectrum trading, for example.[22] Lastly, the time periods under sections 31(7)-(9) leading up to the forfeiture of a spectrum licence are severely constrained. ICASA is only required to give a licensee 30 days notice of its intention to withdraw a spectrum licence, and a licensee is given a mere 7 days to respond in writing. ICASA is not required to conduct an oral inquiry with the licensee and may confirm or revoke spectrum licences on the strength of a licensee's written representations alone.

13.2.4. Various sections in Chapter 5 indicate a bias in favour of digital technology. (See for example, sections 30(2)(c)-(d) and 34(3)(c)) Inasmuch as digital technologies improve the efficiency of spectrum usage, they should be encouraged. However, this is by no means a foregone conclusion, and will vary from band to band, depending on the particular application for which the spectrum is required. Although digitisation is a clear driver of convergence, this does not cater for the fact that new technologies may be developed in the future that may surpass digital technologies. We are thus of the view that caution should be exercised when referring to "digital technologies" in the Convergence Bill, where this would have the effect of detracting from the principle of technology neutrality.

[22] Spectrum trading is one means of reallocating "surplus" frequency in a market efficient way, obviously subject to regulatory constraints designed to prevent harmful interference between users and to otherwise prevent undesirable usage of the spectrum. The chief advantage of spectrum trading is that it allows licensees to exit a market if they want to, thus freeing up the spectrum for new market entrants. The chief risk is that licensees will bank their licences for future commercial gain rather than for their own immediate use. One way of putting a stop to this is to provide for the licence to lapse if the spectrum is not used within a specified period of time.

13.3. **Powers of the Minister in relation to the regulation of the spectrum**

13.3.1. Another worrying feature of Chapter 5 of the Convergence is that it confers upon the Minister certain powers of regulation over the spectrum, which it is respectfully submitted is problematic. Not only does this undermine the independence of ICASA, but this also detracts from the Minister's primary function of policy-making by bringing the Minister into the realm of regulation, which is rightfully ICASA's domain.

13.3.2. In this regard, the Convergence Bill specifically provides that the following powers and functions that currently exclusively vest in ICASA under the existing broadcasting and telecommunications legislation will be subject to Ministerial intervention:

13.3.2.1. ICASA is required to consult the Minister to incorporate the spectrum allocated by the Minister for the use of the security services into the band plan (see section 34(4)(c)(i));

13.3.2.2. ICASA must consult the Minister with a view to incorporating the government's current and planned uses of the spectrum, not only in respect of the needs of the security services (see section 34(4)(c)(ii));

13.3.2.3. ICASA must consult the Minister wherever it is required to co-ordinate a plan to migrate existing users to a new frequency band (see section 34(4)(c)(iii));

13.3.2.4. the Minister is empowered to finally approve the band plan (see sections 34(7)-(8);[23] and

13.3.2.5. the Minister (and not ICASA) is empowered to allocate spectrum for the exclusive use of the security services (see section 34(14)).[24]

13.4. **Spectrum licensing**

In relation to spectrum licensing, the following aspects of the licensing regime deserve brief mention:

13.4.1. The granting of radio frequency spectrum licences has been inappropriately housed in Chapter 3 (*Licensing*) which deals with service licences. This

[23] Under the Telecommunications Act and the IBA Act, ICASA is vested with the final authority to determine the band plan.

[24] Under section 30(5)(b) of the Telecommunications Act, the SANDF (South African National Defence Force) is required to obtain spectrum licence from ICASA.

becomes particularly problematic when it is considered that the Convergence Bill intends for a spectrum licence to be required in addition to any service licence contemplated in Chapter 3 (see section 31(2)). It is respectfully submitted that spectrum licensing should be dealt with under Chapter 5 and not under Chapter 3.

13.4.2. The Telecommunications Act currently provides for the issuing of "station licences" in addition to spectrum licences. The concept of a station licence has been omitted from the Convergence Bill which proposes to licence the spectrum only. It is not clear why this has been done, but we assume from Chapter 13 (*Transitional Provisions*)[25] that radio stations and radio apparatus are intended to treated as communications facilities, and that providers of the same will be licensed as network facility providers ("network communication service licensees") which we believe is appropriate.

13.4.3. Under the Telecommunications Act, ICASA is currently required to conduct examinations and issues certificates of proficiency to any person who uses or maintains a station.[26] This has been omitted from the Convergence Bill, which is a welcome move, as this will go some way towards easing the regulatory burden on ICASA and of eliminating unnecessary duplication where other non-telecommunications specific means of verifying technical proficiency already exist.

13.5. **Co-ordination to prevent harmful interference**

13.5.1. Another concerning feature of the Convergence Bill is that section 33 proposes to allow holders of spectrum licences to co-ordinate between themselves to prevent harmful interference, amongst other things. It is respectfully submitted that this would not be workable in practice.

13.5.2. As a departure point, the responsibility for frequency co-ordination should vest with ICASA and should not be delegated to users. Indeed, technical efficiency and the prevention of harmful interference constitute the cornerstone on which spectrum regulation is built. ICASA (and not individual licensees) is best placed to tackle the host of problems that are associated with the regulation of the spectrum such as the unauthorised use of frequencies, spillover signals from domestic users and neighbouring jurisdictions, channel radio interference, and finding the optimum location for antennae, to mention but a few.

[25] See specifically sections 85(3)(f)(vii)-(viii).

[26] See section 30(1)(b) of the Telecommunications Act.

13.6. **Frequency allocations versus frequency assignments**

13.6.1. Another problematic aspect of the Convergence Bill is that it confuses the related concepts of frequency allocations and assignments. In particular, there are various references in Chapter 5 to the "allocation" of frequencies by ICASA to individual licensees, which are inappropriate.[27] In this regard, frequency planning is supposed to be done at two levels:

13.6.1.1. At the primary level, frequency allocations are made in respect of specific services (such as fixed satellite services, mobile satellite services or broadcasting satellite services, for example) within an overall band plan. (The band plan is typically aligned with the Radio Regulations of the ITU by international agreement, with national adaptations based on domestic policy requirements).

13.6.1.2. At the secondary level, frequency assignments are made to individual licensees, and the channel plans are developed for the assignment of spectrum within specific bands. This is essentially an operational issue, and is not a matter of policy.

13.6.2. It is respectfully submitted that Chapter 5 of the Convergence Bill should be aligned with this process.

13.7. **Specific comments on Chapter 5**

13.7.1. We have deliberately refrained from commenting on the specific wording of the sections in Chapter 5 because so many of the fundamental underlying policy issues need to be resolved before Chapter 5 is reworked.

13.7.2. Nevertheless (and without being exhaustive), the following points bear mentioning:

13.7.2.1. The Telecommunications Act requires ICASA to "honour present and future commitments of the Republic in terms of international agreements and standards in respect of radio communication and telecommunication matters" (see section 28(2)(b)). This has been omitted from the Convergence Bill, and we submit that it should be included, but rephrased in less telecommunications specific terms.

13.7.2.2. In section 34(3)(a) of the Convergence Bill, reference has been made to the "defining" of the radio frequency bands. The use of

[27] See, section 31(7) of the Convergence Bill, for example, which authorises ICASA to withdraw a spectrum licence if the licensee fails to use the spectrum that has been "allocated" [assigned] to it.

this terminology does not make any sense. In this regard, it is suggested that the original wording of the equivalent section 29(2)(a) of the Telecommunications Act be reincorporated (namely that a "frequency band plan shall … define how the radio spectrum shall be used").

14. TECHNICAL EQUIPMENT AND STANDARDS (CHAPTER 6)

14.1. Chapter 6 of the Convergence Bill is based on Chapter VI of the Telecommunications Act, which deals with telecommunications equipment, suppliers and technicians. Sections 38-39 of the Convergence Bill substantially replicate sections 54-55 of the Telecommunications Act, which empower ICASA to prescribe technical standards and issue type approvals in respect of telecommunications equipment and facilities. In this regard, Chapter 6 has two parts to it:

14.1.1. section 35 empowers ICASA to type approve communications equipment and communications facilities, and also to issue type approval exemptions;

14.1.2. section 36 empowers ICASA to prescribe technical standards for the performance and operation of communications equipment and communications facilities.

14.2. The balance of Chapter VI of the Telecommunications Act as contained in sections 56-57 has not been incorporated into the Convergence Bill (these sections deal with the registration of equipment suppliers with ICASA and with the certification of technicians) which we believe is appropriate. The effect of this exclusion will be to ease the regulatory burden of ICASA in the long term, especially if there are other non-telecommunications specific certification processes in place that adequately cater for this.

14.3. By way of general comment, the term "technical equipment" in the heading of Chapter 6 is not a defined term in section 1 of the Convergence Bill. It is respectfully submitted that the heading should rather refer to "Type Approvals of Communications Facilities and Technical Standards" instead as "communications facilities" is a defined term in section 1.

14.4. The policy drivers behind requiring type approvals and the harmonisation of technical standards are essentially two-fold – namely to ensure the interoperability of networks and equipment, and also to preserve the integrity of networks by ensuring that unapproved equipment does not cause degradation to those networks. These are important objectives which we submit can be achieved in a less administratively onerous way than has been suggested in the Convergence Bill.

14.5. Unfortunately the current system of requiring ICASA to type approve equipment and to prescribe technical standards under the Telecommunications Act is administratively burdensome. A type approval process specifically can become a significant cost factor facing

equipment importers and network operators wishing to adopt a new technology if they have to seek type approval on a country-by-country basis. The SNO stakeholders believe that consideration should be given to easing the regulatory burden of ICASA in this regard. One way of doing this would be to permit ICASA to recognise other certifying agencies (both locally as in the case of the SABS (South African Bureau of Standards), for example, or internationally as in the case of ETSI (European Technical Standards Institute) for this purpose instead of type approving equipment or setting technical standards itself. (In this regard, it should be noted that the reference to type approvals by the European Union ("EU") in section 35(2)(a)(iii) is incorrect, as the EU is an intergovernmental organisation, not a certifying agency).

14.6. We understand that ICASA already *de facto* relies on type approvals conducted by other certifying agencies, except that ICASA is required to formally type approve equipment in addition to such other certifying agencies, which adds an unnecessary administrative step in the process. If our proposal for ICASA to formally recognise other certifying agencies is accepted, then this would have the effect that a type approval or standard that is granted by a recognised certifying agency would be deemed to be a type approval or standard granted by ICASA.[28] To achieve this, mechanisms would need to be incorporated into the Convergence Bill to empower ICASA to prescribe a list of recognised certifying agencies, as well as to accept applications from third parties to become recognised certifying agencies for this purpose.

14.7. As regards the type approval process specifically, we wish to raise the following points:

14.7.1. Section 35 of the Convergence Bill seems only to allow for two type approval authorisation methodologies, namely individual authorisations and exemptions. It is suggested that consideration be given to allowing ICASA to grant type approvals on a class basis as well. Not only would this go a long way to easing the regulatory burden on ICASA, but it would also help to introduce flexibility into the type approval regime.

14.7.2. The effect of Chapter 6 of the Convergence Bill will be to bring both broadcasting and telecommunications equipment under a single type approval / regime – with the effect that both broadcasting and telecommunications equipment would need to be type approved by ICASA. This is problematic because Chapter VI of the Telecommunications Act has no equivalent in the broadcasting context, as type approvals of broadcasting equipment are currently conducted by SABS rather than ICASA. We are concerned that the Convergence Bill should aim to simply, not complicate the type approval regime. If our proposals regarding the

[28] This is the approach that has been taken in Malaysia, for example. In that country, the MCMC (Malaysian Multimedia and Communications Commission) is empowered to register other certifying agencies (both inside and outside of Malaysia) for the purpose of certifying compliance with codes and standards. The Malaysian Act deems an approval by a registered certifying agency to be an approval by the MCMC (section 186).

recognition of certifying agencies are accepted, then broadcasting equipment will in any event not need to be type approved by ICASA in addition to SABS.

14.8. As regards the setting of technical standards, the SNO stakeholders respectfully submit that as a general principle, this should be left to industry self-regulation (or preferably industry co-regulation in conjunction with ICASA) as far as is possible, rather than imposing this burden on ICASA. It is suggested that ICASA should be given a residual power to intervene only in cases where industry self-regulation mechanisms fail. (See our comments on Chapter 10 (*Consumer Issues*) contained in paragraph 16.2.5 of this submission).

15. ACCESS REGIME – INTERCONNECTION AND FACILITIES LEASING (CHAPTERS 7 AND 8)

15.1. Interconnection and facilities leasing are a form of economic regulation that both have to do with access. Aside from the access regime, other aspects of economic regulation that are currently dealt with in the Telecommunications Act include issues such as general competition regulation, price regulation and regulatory accounting regulation. Currently, these issues are not grouped together in the Convergence Bill, even though they relate to the same broad theme area.

15.2. The chapters in the Convergence Bill dealing with interconnection and facilities leasing broadly have two aspects to them: namely:

15.2.1. the core provisions relating to the access regime (dealing broadly with access obligations, the promulgation of regulations dealing with access, the filing of access agreements and the notification of access disputes); and

15.2.2. provisions providing for the imposition of price controls on wholesale access in areas where no or insufficient competition exists.

15.3. In relation to pricing, one of the problems with the Convergence Bill is that the sections that deal with wholesale and retail price control rules are housed in different places.[29] It is the respectful submission of the SNO stakeholders that the price regulation mechanisms in the Convergence Bill should be consolidated into one section and housed in that portion of the Convergence Bill that deals with economic regulation.

15.4. In relation to the access regime, our primary concern is that the proposed access regime is very restrictive. One of the problems with the current formulation in the Convergence Bill is that access has been conceived of in very telecommunications specific terms. In particular, the concepts of “facilities leasing” and “interconnection” (which are generally associated with the telecommunications access regime) may be too sector-, service- and technology-specific for a convergence regime. Another problem is that the proposed interconnection framework in section 37(1) only applies to network facilities providers (“communication network service

licensees"), even though interconnection is also technically possible at the connectivity layer (by "communication service licensees") and at the application service layer.

15.5. The restrictive conceptualisation of the access regime becomes particularly problematic given that the scope of access regulation can be extended more broadly to include other issues such as access to conditional access systems and multiplex services for digital television services in the broadcasting context. A further omission in the Convergence Bill is that the status of access providers in the broadcasting signal distribution context has also not been harmonised with the telecommunications access regime. Under the current broadcasting legislation, Sentech is regarded as a common carrier and is obligated to provide signal distribution services to broadcasters who request this. Under the Convergence Bill, this guaranteed right of access appears to have been eliminated.

15.6. In order to circumvent some of these problems, the SNO stakeholders propose that a more neutral access regime be adopted, and that the access regime be extended across all service licence categories, namely network facilities providers ("communication network services"), connectivity providers ("communication services"), application services and broadcasting services.[30] If this approach is adopted, then Chapter 7 (Interconnection) and Chapter 8 (Facilities Leasing) of the Convergence Bill should be consolidated into one chapter that deals with access. Most of the provisions of these chapters currently overlap with each other in any event.

15.7. In order to maintain flexibility in the access regime, it is suggested that consideration be given to avoiding the inclusion of too much detail in the text of the legislation, and rather allowing ICASA to prescribe an access list by way of regulation that could potentially include both specified infrastructure and content related services, where necessary and appropriate. (This is the approach that has been adopted in Malaysia, for example).[31] This would allow for flexibility in the regulatory framework for the access regime to be expanded by way of regulation in the future.

15.8. If this approach is adopted, it is respectfully submitted that a skeleton framework should be maintained in the legislation that lays down all of the essential elements of a well thought out access regime (many of these elements have already been included in the Convergence Bill for which the drafters are to be commended), such as:

[29] See, for example, section 41 (which relates to interconnect pricing), section 46 (which relates to price controls over the leasing of facilities) and section 61 (which relates to retail and wholesale pricing generally).

[30] In the Malaysian Act, for example, "access" is conceptualised very broadly in relation to network facilities (infrastructure), network services (connectivity), application services and content services, which the SNO stakeholders believe is appropriate in a converged environment. See generally the Malaysian Communications and Multimedia Act, Chapter 3 of Part 6.

[31] The Malaysian Act does not list the specific activities that fall within the scope of the access regime. Rather, the Malaysian Communications and Multimedia Commission ("the MCMC") is empowered to prescribe an "access list" of facilities and services that are subject to the access regime. A copy of the access list can be sourced from the MCMC's website online at http://www.mcmc.gov.my/mcmc/registers/cma/comdeter/pdf/acclist.pdf.

15.8.1. empowering ICASA to impose asymmetrical access obligations on facilities and service providers who have significant market power or who wield control over essential facilities (the SNO stakeholders supports this approach);

15.8.2. empowering ICASA to prescribe an access list of facilities and services that are subject to the access regime (currently, the access regime is restricted to interconnection and facilities leasing, which the SNO stakeholders feel is too restrictive for the reasons set out above);

15.8.3. making provision for ICASA to prescribe advance regulatory guidelines to encourage the development of sound best practices in relation to the conclusion of access agreements;

15.8.4. empowering ICASA to resolve access disputes, including giving ICASA the reserve power to prescribe access terms and conditions in the event of the parties being unable to resolve the dispute (this has already been catered for in the Convergence Bill, which contains provisions relating to the notification of interconnection and facilities leasing disputes); and

15.8.5. requiring access agreements to be registered with ICASA in the interests of transparency (this has also been dealt with in the Convergence Bill, which requires interconnection and facilities leasing agreements to filed with ICASA).

15.9. One issue that bears particular mention is the determination of who an access provider should be. In this regard, there are a number of issues that need to be clarified as follows:

15.9.1. We have already made mention of the fact that it is unduly restrictive to restrict access obligations to certain categories of licensees (as has been done in the case of network facilities providers (“communication network service licensees”) in relation to interconnection). The Bill should be open-ended enough to allow for access obligations to be imposed on all classes of licensees where necessary and appropriate.

15.9.2. We have also indicated that the Convergence Bill is proposing to apply an asymmetrical system of access regulation (in terms of which the obligation to provide access will be imposed only on those players with significant market power or that have control over essential facilities), which the SNO stakeholders believe is appropriate. Unfortunately, no indication is given in the Convergence Bill as to the methodology that ICASA should use to determine who the access providers should be. In the current interconnection and facilities leasing guidelines, the determination of significant market power is determined with reference to a combination of percentage thresholds (currently the threshold is set at 35% market share of a relevant market), fact (ICASA may impose access

obligations on a firm that holds less than 35% but that nevertheless wields significant market power) and regulatory discretion (ICASA has the residual power to impose access obligations in other circumstances where it deems fit). It is suggested that a similar approach (of setting out the methodology for determining access obligations) be adopted in the Convergence Bill, as this facilitates regulatory certainty.

16. **BROADCASTING SERVICES (CHAPTER 9)**

16.1. The provisions of Chapter 9 are largely meant to substitute the equivalent provisions of the IBA Act, which the Convergence Act will replace. As indicated above, the Broadcasting Act will remain in force, with the principal purpose of regulating the affairs of the SABC.

16.2. In this regard, there are a number of provisions in the Broadcasting Act that pertain not only to the SABC but to broadcasting regulation more generally and that we suggest be consolidated and incorporated into the Convergence Bill. The provisions in the Broadcasting Act which should be substituted by the Convergence Bill are:

16.2.1. Chapter III – classification of broadcasting services;

16.2.2. Chapter V – commercial broadcasting services;

16.2.3. Chapter VI – community broadcasting services;

16.2.4. Chapter VII – signal distribution and multi-channel distribution services;

16.2.5. Chapter VIII – frequency spectrum directorate;

16.2.6. Chapter IX – advisory body to the Minister; and

16.2.7. Chapter X – skills development.

16.3. Moreover, the subject matter of certain sections of Chapter 9 has already been dealt with under other chapters of the Convergence Bill and should accordingly be removed from Chapter 9. Duplicate sections in Chapter 9 that should be dealt with elsewhere include the following:

16.3.1. section 51 (code of conduct for broadcasting service licensees) – if our proposal regarding co-regulation is accepted,[32] then section 51 should be consolidated into one chapter that deals with co-regulation; and

16.3.2. section 58 (broadcasting service objectives) – this should be dealt with under section 2 (objects of the Act).

[32] See our comments on Chapter 10 (*Consumer Issues*) contained in paragraph 17 of this submission.

16.4. In view of the tight deadlines imposed for the submission of comments on the Convergence Bill, we have not had the opportunity to make substantive detailed comments on Chapter 9 of the Convergence Bill but reserve the right to make more detailed comments at a later stage.

17. **CONSUMER ISSUES (CHAPTER 10)**

17.1. The SNO stakeholders support the principle of ensuring that consumers are protected, and also supports the principle of implementing price controls in respect of retail and wholesale tariffs where no or insufficient market competition exists.

17.2. Chapter 10 has two parts to it:

17.2.1. section 60 empowers ICASA to prescribe regulations setting out a consumer code of conduct, as well as to develop minimum standards for customer service charters for different categories of licences;

17.2.2. section 61 empowers ICASA to prescribe retail and wholesale tariffs in those areas of the market where no or insufficient competition exists.

17.3. As regards retail and wholesale pricing, section 61 is out of place in Chapter 10, and should be consolidated with the other portions of the Convergence Bill dealing with economic regulation, and in particular with price controls. Specifically, section 61 should be amalgamated with the relevant sections in Chapter 7 (Interconnection) and Chapter 8 (Communications Facilities Leasing) dealing with the prescription of wholesale tariffs.

17.4. Otherwise, section 60 envisages a fairly significant role for ICASA in relation to consumer protection. In particular, the Convergence Bill envisages that ICASA should prescribe customer service codes of conduct as well as to prescribe the minimum standards applicable to customer service charters. Unfortunately, the difference between the codes of conduct and the service charters is not entirely clear at this point. The increased role for ICASA in this arena is unlike the 2003 Convergence Bill, which envisaged a more facilitative rather than a prescriptive role for ICASA (the 2003 Convergence Bill envisaged that ICASA would co-ordinate the establishment Section 59 represents an attempt to establish a system of co-regulation for consumer services.

17.5. It is the respectful view of the SNO stakeholders that matters such as consumer protection should primarily be left to industry self-regulation, and that ICASA should have the power to intervene if industry self-regulation mechanisms fail (this is also known as co-regulation).

17.6. Very broadly speaking, there are three methods by which an industry can be regulated, all of which require a greater or lesser degree of government intervention. These are: statutory regulation, self-regulation and co-regulation.

17.7. The difference between the three regulation mechanisms is as follows:

17.7.1. *Statutory regulation* refers to the situation where the rules of the regulatory regime are contained in legislation or in regulations. This is the system of regulation for consumer protection that is currently being proposed by the Convergence Bill (where ICASA rather than the industry will take the lead in developing codes of conduct to protect consumers).

17.7.2. *Self-regulation* refers to the situation where there is no government involvement at all, but industry interest groups administer themselves according to their own (voluntary) codes of conduct. A good example of a self-regulatory mechanism is to be found in ISPA (Internet Service Providers Association of South Africa), which is not regulated by statute, but which nevertheless self-regulates the internet industry in South Africa. The main advantage of self-regulation is that it eases the regulatory burden and functions of the regulator. The chief disadvantage is that the penalties imposable under self-regulatory systems are largely not legally enforceable. However, this drawback can be easily alleviated by adopting a system of co-regulation between the industry and the regulator as explained in clause 17.7.3 below.

17.7.3. *Co-regulation* represents a hybrid between statutory regulation and self-regulation. Under a co-regulatory scheme, the industry (or specified interest groups within the industry) are left to develop their own codes of conduct and to regulate their own activities, which is the core of self-regulation. However, the self-regulatory core is underpinned by statute so as to ensure its effectiveness and enforceability. Co-regulatory systems can take a variety of forms, but generally tend to be complemented by statutory monitoring through independent regulators who have the power to monitor and enforce industry codes, but also ultimately to prescribe regulator-imposed codes of conduct where industry self-regulation fails or is insufficient.[33]

17.8. The principal advantage of co-regulation is that it may help to ease the burden on the regulator by encouraging the industry to bear increased responsibility for self-regulating its own activities. However, because co-regulatory mechanisms are enforceable, and because the regulator has the power to step in if self-regulation fails, this has the added advantage of ensuring that vital issues (such as consumer protection, for example) don't slip through the regulatory cracks.

17.9. Whether or not a particular activity lends itself to statutory regulation, self-regulation or co-regulation depends on factors such as on the nature of the activity, as well as degree of competition in the market. Certain issues such as access and interconnection, for example,

[33] Australia is a good example of a country that has made extensive use of co-regulatory mechanisms (see specifically part 6 of the Australian Telecommunications Act, 1997). In the UK, provision has also been made in the Communications Act, 2003 for co-regulation between the industry and OFCOM (Office of Communications). (See, for example, section 120 in relation to codes of conduct for premium-rated services).

require government regulation because of bottlenecks in the market with facilities provisioning. Other issues such as the internet or in our view, consumer protection issues, lend themselves more readily to self-regulation and co-regulation.

17.10. It is respectfully requested that the policy makers give some consideration to the adoption of a co-regulatory system to deal with issues such as consumer protection in South Africa. The way that we envisage that this would work would be as follows:

17.10.1. Industry interest groups should be encouraged to develop their own codes of conduct (self-regulation), which where applicable, should be registered with ICASA.

17.10.2. ICASA should have the residual power to enforce penalties under such codes or to direct compliance with a code in the event of a breach of the code (co-regulation).

17.10.3. As last resort, ICASA should have the reserve power to prescribe codes of conduct if there are no existing codes or if the existing codes are deficient.

17.10.4. In light of the above, it is recommended that Chapter 10 of the Convergence Bill be deleted in its entirety and that it be replaced or complemented by a comprehensive Chapter on co-regulation.

18. **GENERAL (CHAPTER 11)**

18.1. **Establishment of Communications and ICT Museum, information communication technology for government and other related services (section 62)**

18.1.1. Section 62 has two parts to it:

18.1.1.1. sections 62(1)-(5) provide for the establishment of a Communications and ICT Museum, and provide for the transfer of artifacts contained in the Telkom Museum on Telecommunication History to the new Communications and ICT Museum; and

18.1.1.2. sections 62(6)-(7) deal with government directory information services.

18.1.2. As regards the establishment of the Communications and ICT Museum, it is respectfully submitted that section 62(5) should be deleted as it is inappropriate to include this level of detail in a statute.

18.1.3. As regards government directory information services, this needs to be consolidated within section 66 which deals with directory services more generally. In addition, the SNO stakeholders respectfully submit that it is

inappropriate (and possibly also unconstitutional) to require licensees to accord government special treatment by providing government directory information services for free. In this regard, government directory information services should be treated as an ordinary directory service under section 66.

18.2. **Competition matters (section 63)**

18.2.1. It is respectfully submitted that section 63 is out of place in Chapter 11, as competition issues are an economic regulation issue. As a general principle, any provisions in the Convergence Bill dealing with general competition regulation should be grouped together with the other provisions relating to economic regulation.

18.2.2. ICASA and the Competition Authorities currently exercise co-jurisdiction in respect of competition-related matters affecting the communications sector. This system of co-jurisdiction is entrenched in section 3(1A) of the Competition Act 89 of 1998 ("the Competition Act"), and need not be repeated in sections 63(1)-(2). Sections 63(1)-(2) of the Convergence Bill should accordingly be deleted because they are repetitive.

18.2.3. A memorandum of understanding between the two regulatory bodies currently governs the manner in which the co-jurisdiction of ICASA and the Competition Authorities is regulated. At this point, the jurisprudence of concurrent jurisdiction is still in its infancy, and the problems and pitfalls associated with managing the co-regulatory relationship between ICASA and the Competition Authorities still needs to be ironed out.

18.2.4. Section 64(4) permits ICASA to prescribe regulations relating to the monitoring, investigation and enforcement of anti-competitive actions and complaints. This subsection also permits ICASA to prescribe regulations to protect consumer interests. We respectfully question the necessity of section 63(4) for the following reasons:

18.2.4.1. we assume that the ICASA Amendment Act will deal with the monitoring, enforcement and resolution of complaints, which renders it unnecessary to refer to this under this clause; and

18.2.4.2. if our proposal regarding co-regulation is accepted,[34] then it will be superfluous to deal with consumer protection under this clause.

[34] See our comments on Chapter 10 (*Consumer Issues*) contained in paragraph 17 of this submission.

18.3. **Offences and penalties (section 64)**

18.3.1. Section 64 only deals with the maximum penalties that are payable and the maximum prison sentences that should be imposed on natural persons. This section does not contain any provisions relating to the enforcement of penalties that are currently contained in the Telecommunications Act. Notably the following sections from the Telecommunications Act are missing from Chapter 11:

18.3.1.1. section 97 – production of a licensee's books and records;

18.3.1.2. section 98 – appointment of inspectors;

18.3.1.3. section 99 – powers of inspectors.

18.3.2. It is respectfully submitted that enforcement mechanisms need to be incorporated either into the Convergence Bill or into the ICASA Amendment Act (if this has not already been done).

18.3.3. We note that section 64 of the Convergence Bill does not contain an exhaustive list of statutory offences that will attract prosecution / the imposition of a penalty in terms of this clause (as is currently the case with section 67 of the IBA Act and sections 100 and 101 of the Telecommunications Act). Rather, section 64 leaves this open-ended by indicating that any breach of the Convergence Bill or the related legislation could attract. We have two principle concerns with this approach:

18.3.3.1. firstly, the maximum penalties imposable are very high, and may be disproportionate in relation to some of the more minor offences;

18.3.3.2. secondly, all contraventions of the Convergence Bill are deemed to be statutory criminal offences, which means that the courts (rather than ICASA) will have the jurisdiction to take action against offenders as a first port of call, including in respect of minor contraventions of the legislation.

18.3.4. Sections 100-102 of the Telecommunications Act currently incorporate a two-tiered system of adjudicating offences as follows:

18.3.4.1. section 100 empowers ICASA to investigate and adjudicate offences committed under the Act (except of course if the matter is listed as a statutory offence under sections 101(a)-(c) in which case the matter is directly justiciable by a court);

18.3.4.2. in terms of section 101, the only matters that are considered to be statutory offences justiciable by the criminal courts are if the offender fails to adhere any order handed down by ICASA in terms of section 100, or if the offender commits a serious contravention (listed sections) of the legislation.

18.3.5. It is respectfully submitted that this two-tiered approach should be retained in the Convergence Bill as the current reach of section 64 is too wide, with the exception that ICASA should be empowered to take action against licensees and non-licensees. (A major shortcoming of the Telecommunications Act is that it only gives ICASA jurisdiction over licensees).

18.4. **Numbering plans and number portability (section 65)**

18.4.1. It is respectfully submitted that section 65 is out of place in section 65. Numbering is an aspect of technical regulation. Other elements of technical regulation include spectrum regulation, type approvals and the setting of standards. Section 65 should therefore be grouped together with the other chapters in the Convergence Bill that deal with technical regulation. The same considerations also apply to carrier pre-selection (section 67) which is also a technical issue.

18.4.2. An omission in the current numbering plan is that no provision is made for the allocation of IP numbers. The current numbering plan is thus lagging behind technology developments such as voice over internet protocol ("VoIP"). It is therefore appropriate that section 65(1) makes provision for the allocation of numbers to accommodate various protocols as it is essential that the future numbering framework be as technology neutral as possible. In this regard, it is respectfully submitted that section 65(1)(a)(ii) should refer both to technologies and protocols, to accommodate technological advances in both.

18.4.3. One aspect that is unclear is why section 65 provides for the allocation of numbers to network facilities providers ("communication network service licensees") and connectivity providers ("communication service licensees"). This is problematic as:

18.4.3.1. it is not appropriate to allocate numbers to network facility providers ("communications network services licensees"), unless they also run services over their networks and deal with customers at a retail level (in which case they would need a connectivity licence ("communications service licence") or possibly also an application service licence to do so – and numbers would be allocated to them in their capacity as such,

rather than in their capacity as network facility providers); and

18.4.3.2. depending on whether application service licensees (such as the VANS providers who carry VoIP) are licensed at the connectivity layer (as "communications service licensees") or at the applications layer ("application service licensees"), the reach of section 65 may need to be extended to incorporate number allocations to application service licensees as well.

18.4.4. Given that numbers are a finite resource, we also recommend that section 65(1)(a) include a subsection (iii) that mandates ICASA to accommodate the demand for new and as yet unknown services as well as to cater for the growth of existing services.

18.4.5. Numbering and number portability are essential for effective competition. It is therefore recommended that section 65(4) should make reference to the need to prescribe a numbering plan that will promote effective competition.

18.4.6. As regards the pricing of numbers referred to in section 65(7)(a), it is respectfully submitted that the Convergence Bill should reflect that the numbering price regime should be predictable and non-discriminatory so as to ensure fairness and stability within the sector.

18.5. **Directory services (section 66)**

As indicated in paragraph 18.1.3 above, there should be no distinction between government directory services and other directory services.

18.6. **Carrier pre-selection (section 67)**

18.6.1. Carrier pre-selection is a technical issue that should be grouped with the other chapters in the Convergence Bill that deal with technical regulation. See our comments in paragraph 18.4.1 above in this regard.

18.6.2. The use of the label "carrier pre-selection" may be too limiting as we assume that the intention is to regulate both carrier selection (which would enable end users to select their carrier of choice either on an ad hoc / call-by-call basis or on a blanket basis in respect of all calls / all calls of a specific type) which would include carrier pre-selection. We accordingly recommend that the references to "carrier pre-selection" in section 67 be replaced with "carrier selection", which is a subset of carrier pre-selection.

18.6.3. As currently drafted, the reach of section 67 is confined to the connectivity layer ("communications service licensees"). Depending on whether application service

licensees (such as the VANS providers who carry VoIP) are licensed at the connectivity layer (as "communications service licensees") or at the applications layer ("application service licensees"), the reach of section 67 may need to be extended to application service licensees as well.

18.6.4. Section 67(1)(a) proposes to empower ICASA to prescribe regulations defining the relevant markets or market segments in which carrier selection ("carrier pre-selection") must be implemented, which may relate to national long distance and international communications services. It is respected that it is unnecessary to include this level of detail in the legislation, particularly as the concepts of "national long distance" and "international communications services" are not defined terms in section 1. However, it is respectfully submitted that the existing carrier selection ("carrier pre-selection") obligations contained in section 89C of the Telecommunications Act in respect of PSTS (public switched telecommunication licensees) should be grandfathered into the Convergence Bill.

18.7. **112 emergency centres (sections 68-71)**

18.7.1. It is respectfully submitted that sections 68 to 71 should be brought under the umbrella of one chapter dealing with 112 emergency centers – along the lines of Chapter X of the Telecommunications Act.

18.7.2. Section 68(4) imposes the obligation to carry calls to 112 emergency centers on network facilities providers ("communications network service licensees") and connectivity providers ("communications service licensees"). It is respectfully submitted that this may be problematic for the following reasons:

18.7.2.1. it is not appropriate to impose this obligation on network facility providers ("communications network services licensees"); and

18.7.2.2. depending on whether application service licensees (such as the VANS providers who carry VoIP) are licensed at the connectivity layer (as "communications service licensees") or at the applications layer ("application service licensees"), the reach of section 68(4) may need to be extended to include application service licensees as well.

18.8. **Licences granted in terms of IBA Act or Broadcasting Act (section 72)**

18.8.1. Section 72 has two parts:

18.8.1.1. section 72(1) seeks to prohibit broadcasting service licensees from using the spectrum until they are licensed at the connectivity layer ("communications service licence"); and

18.8.1.2. section 72(2) seeks to prohibit broadcasting service licensees from using any [communications] facilities until they obtain a network facility provider licence ("communications network service licence").

18.8.2. Section 72 deals with transitional arrangements relating to broadcasting service licensees and should be moved to Chapter 13 (*Transitional Provisions*).

18.8.3. Section 72 refers to the "conversion" of broadcasting service licences issued under the IBA Act / Broadcasting Act, which we respectfully submit is a misnomer. The provisions in the Convergence Bill dealing with the licensing and regulation of broadcasting services are largely a copy and paste of the current provisions of the IBA Act. The Convergence Bill also does not propose to harmonise content regulation, but to retain the current system of licensing for broadcasting services. There can therefore be no question of "converting" broadcasting licences to the new regime, as the licence categories will essentially remain the same.

18.8.4. If our understanding of the intention of the policy makers is correct, then it is respectfully submitted that the current broadcasting service licences should rather be grandfathered under the Convergence Bill, as this will spare ICASA the administrative burden of "converting" broadcasting services where such conversion is not strictly necessary. However, it will be necessary to amend such existing licences in order to unbundle the right to use the spectrum from the provision of the broadcasting service.

18.8.5. As indicated in our comments to Chapter 5 in paragraph 13.2.2 broadcasting service licences under the current regime are bundled together with the right to use the spectrum.[35] In relation to the spectrum it is submitted that in a convergent environment it is appropriate to:

18.8.5.1. licence spectrum and service provision separately from each other on an unbundled basis; and

18.8.5.2. assign spectrum at the connectivity layer (that is at the "communication network service" layer) rather than at the broadcasting service layer.

18.8.6. The implications of this for existing broadcasting licensees are that the spectrum component of their licences needs to be removed and licensed separately.

[35] See specifically, section 43(1)(a) of the IBA Act which provides:

> "Notwithstanding any provisions to the contrary in any other law, a licence granted and issued under this Chapter shall by itself entitle the licensee concerned to use the radio frequency or frequencies and the station or stations as specified in his or her licence for the purpose of providing the broadcasting services to which the licence relates."

However, the right to continue to use the spectrum pending the unbundling process needs to be preserved. The prohibition in section 72(1) on broadcasting service licensees using the spectrum without first obtaining a connectivity licence ("communications service licence") is therefore inappropriate and should be deleted. In this regard, it is respectfully submitted that consideration needs to be given to the timing of the unbundling process, and in particular, whether it is appropriate to embark on an unbundling process prior to the conversion of the broadcasting system from analogue to digital.[36]

18.8.7. It is respectfully submitted that the restriction in 72(2) on broadcasting licensees not making use of any communications facilities pending the conversion of their licences does not make any sense. Broadcasting services and broadcasting signal distribution are already licensed separately under the broadcasting legislation. Broadcasting service licensees do not operate communications networks, only broadcasting signal distributors do. Section 72(2) therefore needs to be deleted in its entirety.

19. UNIVERSAL SERVICE AGENCY (CHAPTER 12)

19.1. General comments

19.1.1. Chapter 12 of the Convergence Bill is largely a copy and paste of Chapters VII-VIII of the Telecommunications Act, with some differences. In this regard, we note that it is not intended at this stage to combine the Universal Service Agency ("USA") (whose mandate is currently confined to universality in the telecommunications context) and the Media Development and Diversity Agency ("MDDA") (which is the functional equivalent of the USA in the broadcasting context).[37]

19.1.2. It is submitted that care needs to be taken to ensure that the obligations of broadcasters are not duplicated in Chapter 12, as they already make significant contributions to the MDDA. In this regard, section 74(1)(a) needs to be amended to make it clear that the mandate of the USA only extends to infrastructure-related services to the express exclusion of broadcasting services.

19.1.3. Without taking a firm view on the matter, we respectfully question the need to retain the USA as a separate statutory body alongside ICASA. We also query

[36] In the broadcasting analogue environment, it is common to assign one frequency per specific service. These analogue-based regulations are being undermined by the advent of digitisation. Digital broadcasting systems allow for numerous services to be carried on a single frequency with that same frequency being re-used at numerous sites in single frequency networks, also referred to as "multi-channel distribution" in the Broadcasting Act.

[37] As regards content services, universality issues have already been dealt with in the broadcasting legislation, regulations and the licence conditions of licensees, as well as in the Media Development and Diversity Act 14 of 2002 ("the MDDA Act").

whether it would result in less duplication of administrative entities if the USA were to be absorbed into ICASA.

19.2. **Functions of Agency (section 74)**

19.2.1. Section 74(1) lists the primary objectives of the USA which include the facilitation of schemes to provide "telecommunications services." It is submitted that the reference to telecommunications services is inappropriate in a convergence statute of this nature.

19.2.2. Section 74(3) empowers the Minister to make determinations in the *Gazette* regarding what constitutes universal service and universal access. In order to eliminate co-regulation between the Minister and ICASA, it is respectfully submitted that it should be ICASA that has this power, and not the Minister.

19.3. **Application of money in Universal Service Fund (section 80)**

19.3.1. Section 80(2) empowers ICASA to define under-serviced areas by way of regulation. This is a new stipulation which is not currently contained in the Telecommunications Act, but which we believe is appropriate.

19.3.2. Section 80(4) permits the Minister to determine who qualifies for assistance from the Universal Service Fund ("USF") by way of notice in the *Gazette.* It is respectfully submitted that this power should vest in ICASA rather than the Minister as this is a regulatory function rather than a policy making function.

19.4. **Contributions to Universal Service Fund**

Section 81(1) imposes USF contribution obligations on all Chapter 3 licensees, including broadcasting service licensees. As indicated above, broadcasting service licensees already contribute to the MDDA, and should be excluded from the requirement to contribute to the USF.

20. **TRANSITIONAL PROVISIONS (CHAPTER 13)**

20.1. **General comments**

20.1.1. Chapter 13 contains extensive provisions regarding the reregulation and conversion of existing licences and regulations to bring them into line with the Convergence Bill. We are concerned that Chapter 13 may be incomplete as it does not deal with other transitional matters such as existing inquiries and pending disputes. Also, little or no reference has been made to the grandfathering of existing type approvals and spectrum licences in Chapter 13.

The scope of Chapter 13 should be extended to deal with these other transitional issues.

20.1.2. Chapter 13 also requires ICASA to embark of a large-scale licence conversion and reregulation process that will consume a large portion of its resources. In this regard, we are concerned that the 12-month time frame for the completion of the conversion process is unrealistic. These time limits need to be extended.

20.1.3. As a general principle it is submitted that the transitional arrangements should allow for the changeover from the current regulatory regime to the new regime to cause as little disruption to licensees as possible. Therefore, provision needs to be made in Chapter 13 for the continuing validity of existing licences, regulations and the like, even if the deadlines for conversion / reregulation are not met.

20.2. **Licence conversions (section 85)**

20.2.1. Our chief concern with section 85 is that it does not give any real clarity as to how existing licences (such as PSTS, MCTS, VANS, USALs, PTNs and the like) will be converted under the new licensing regime. In order to facilitate regulatory certainty and stability in the sector, it is respectfully submitted that it is vital that this be clarified upfront. It is also submitted that the licensing methodology in respect of each also be clarified as soon as possible.

20.2.2. Another cause for concern is the repeated references to the "conversion" of broadcasting service licences issued under the IBA Act / Broadcasting Act, which we respectfully submit is a misnomer. As indicated in our comments to section 72 contained in paragraph 18.8 of this submission, the provisions in the Convergence Bill dealing with the licensing and regulation of broadcasting services are largely a copy and paste of the current provisions of the IBA Act. There can therefore be no question of "converting" broadcasting licences to the new regime, as the licence categories will essentially remain the same. We therefore submit that the existing broadcasting service licences should be grandfathered under the Convergence Bill, subject to the proviso that they will need to be amended to provide for the unbundling of the spectrum.

20.2.3. As regards sections 85(3)(e)-(f), we have some concerns that the mapping of the old licence categories to the new licence categories has been misunderstood. To take a few examples:

20.2.3.1. section 85(3)(e)(iv) states that a common carrier will be licensed as a connectivity provider ("communications service") under the new regime. A common carrier is not a recognised licence category under the existing broadcasting legislation. Rather, the

concept of a common carrier has to do with access. In this regard, Sentech has been licensed as a broadcasting signal distributor under the IBA Act, but has certain common carrier obligations to provide broadcasting signal distribution service to broadcasting licensees who request this;

20.2.3.2. section 85(3)(f) fundamentally confuses the distinction between communications facilities (which on their own are not required to be service licensed, but which may need to be type approved or be coupled with a spectrum licence) and communications networks (namely infrastructure systems or series of communications facilities, which do require a service licence). Leading on from this, it is appropriate, for example to require the owner of a PLMN (public land mobile network – or MCTN as it is referred to in section 85(3)(f)(v)) or a PSTN (public switched telecommunication network) to hold a network facility provider licence ("communications network service licence"). However, it is not appropriate to require the owner of a radio station or radio apparatus to do so;

20.2.3.3. section 85(3)(i) makes reference to short-term radio frequency spectrum licences, which once again confuses the distinction between service licences and spectrum licences.

20.2.4. it is submitted that these should be replaced by a comprehensive conversion table along the following lines (this table is not meant to be exhaustive but to provide an example for illustrative purposes of how we submit that this should be done):

New / old licence category	Network facility provider licence ("communications service licence")	Connectivity licences ("communications services licensees")	Application service licensees
PSTS	× (PSTN)	×	×
MCTS	× (PLMN)	×	×
USALs	×	×	×
Multimedia	×	×	×
Carrier of carriers	×	×	–
VANS	?	?	×
PTNs	?	×	×
Broadcasting signal distribution	×	×	?
Multichannel distribution	×	×	?
International telecommunication services	×	×	–

New / old licence category	Network facility provider licence ("communications service licence")	Connectivity licences ("communications services licensees")	Application service licensees
Local access telecommunication services	×	×	–
National long distance telecommunication services	×	×	–
GMPCS (global mobile personal communications by satellite)	× (satellite earth station)	×	? (depends on the nature of the service rendered – satellite telephony as opposed to satellite internet)

20.3. This table is subject to the proviso that whether or not a particular licensee will only need to obtain a network facility provider licence ("communications network service licence") if that licensee also operates a network.

20.4. Section 85(7) states that ICASA may not grant any exclusivity rights in any converted licence. The SNO stakeholders are concerned about this, the SNO licensing process was premised on the promise that there would be a three year duopoly period during which Telkom and the SNO would be the only licensed national facilities providers, pending the opening up of the market to competition.

21. **Existing regulations**

21.1. Section 87 stipulates that ICASA must convert all regulations to the new regulatory regime within 12 months. We are concerned that this time period is too short for the reasons given above.

21.2. We also respectfully submit that express provision must be made in section 87 for the existing regulations to remain valid and in force until their amendment or repeal under the Convergence Bill.

22. **LEGISLATION TO BE REPEALED OR AMENDED (SCHEDULE)**

22.1. We will deal with our specific drafting comments on the Schedule when the public hearings take place before Parliament.

22.2. One issue that does bear mentioning is that Schedule 1 of the 2003 Convergence Bill, proposed to amend section 15 of the ICASA Act to permit ICASA to retain a portion of service licence fees, spectrum fees, etc that it receives. We are of the view that this proposed amendment should be retained in the ICASA Amendment Act, as this will go a long way towards ensuring that ICASA remains independent.

23. INTRODUCTORY PROVISIONS (CHAPTER 1)

23.1. Definitions (section 1)

23.1.1. Before dealing with specific definitions, we have a number of general comments as set out below:

23.1.1.1. Certain terms that have been defined in the definitions section have not been used consistently in the Convergence Bill. In particular, the term “communications service” has been used both in a generic sense to refer to all service licensees and has also been used to refer specifically to connectivity providers.

23.1.1.2. Certain terms that have been defined in section 1 have not been used in the text of the Convergence Bill. As a general rule, words that are seldom or never used in the body of the legislation do not be defined. Examples of definitions that have been defined but not used include the following: “commercial broadcasting”, “community broadcasting”, “financial interest”, “free-to-air service” and “sound broadcasting service”. These definitions have been copied and pasted from the broadcasting legislation and should be deleted unless it is proposed to incorporate the outstanding portions of the Broadcasting Act not relating to the SABC into the Convergence Bill (as has been suggested in paragraph 16 above), in which case they will need to be retained.

23.1.1.3. Certain of the definitions cross refer to currently non-existent definitions in the ICASA Act, which we assume will be incorporated into the ICASA Amendment Act. Examples of this include the definitions for “Complaints and Compliance Committee” and “investigation unit”. It has been impossible to comment on these definitions without having any reference to the underlying amendment legislation.

23.1.1.4. Certain definitions have been omitted which we believe ought to be included in section 1 – such as, for example, the concepts of “historically disadvantaged individual” / “historically disadvantaged group”, which have been used extensively in Chapter 3.

23.1.2. We now turn to our specific comments in relation to the definitions in section 1 which have been set out below.

23.2. **Specific comments on the definitions in section 1**

23.2.1. **"apparatus"**

In our view, it is unnecessary to include a separate definition for "apparatus" as section 1 already contains a definition for "communications facilities" which is meant to be all encompassing, and which includes a reference to "apparatus" already. This definition should accordingly be deleted.

23.2.2. **"application"**

23.2.2.1. The definition of an application in section 1 of the Convergence Bill essentially replicates the definition of a VANS in section 1 of the Telecommunications Act, which is not particularly helpful as it does not give a clear indication of what the essence of an application is.

23.2.2.2. In its most simple conception, an application service provider is an entity that offers its clients (be they enterprises or individuals) access over the internet to applications, information services and related services that would otherwise have to be located in their own computer systems. In this regard, examples of applications include: remote access for the users of an enterprise, or an off premises local area network to which mobile users can be connected with a common file server, and other specialised applications that would be expensive to install and maintain within an enterprise's computer system. Application services need not necessarily be outsourced (although with individuals and smaller enterprises this will usually be the case), but can also be provided in-house.[38]

23.2.2.3. The current definition of an "application" in the Convergence Bill only hints at what the essence of an application service is. We suggest that the definition of an application be reworked to incorporate these essential elements, namely that an application service consists of the provision of access to information services by means of connectivity services ("communications services") over communication networks.

[38] See the definition of an application service provider at "Whatis.com"

23.2.3. **“carrier pre-selection”**

23.2.3.1. As currently drafted, the definition only refers to the connectivity layer (that is, carrier selection / pre-selection between “communications service licensees”). Depending on whether VANS providers who carry VoIP are licensed at the connectivity layer (as “communications service licensees”) or at the applications layer (as application service providers), it may be necessary to broaden the reach of this definition to cover application service licensees as well.

23.2.3.2. The use of the label “carrier pre-selection” may be too limiting as we assume that the intention is to regulate both carrier selection (which would enable end users to select their carrier of choice either on an ad hoc / call-by-call basis or on a blanket basis in respect of all calls / all calls of a specific type) which would include carrier pre-selection. We accordingly recommend that the label “carrier selection” be used instead of “carrier pre-selection” and that the body of the definition include reference to carrier pre-selection, which is a subset of carrier selection.

23.2.4. **“class licence”**

Section 1 defines a class licence to mean “a licence authorising a person to provide a class of communications services”. It is respectfully submitted that this definition fails to deal with the core nature of a class licence. A class licence is a blanket authorisation that permits a licensee to provide services on a pre-approved basis, for so long as the services are provided in accordance with the terms and conditions of the class licence. This definition needs to be amended to reflect this.

23.2.5. **“communications”**

23.2.5.1. The definition of “communications” in section 1 of the Convergence Bill is very similar to the definition of “telecommunications” in the Telecommunications Act, which is not particularly helpful. The major difference with the definition in the Convergence Bill is that makes reference to the transmission of data, text, visual images and signals, whereas the definition in the Telecommunications Act refers to signals only. The essential element of a communication consists of a signal that is transmitted or received electronically. The definition needs to be amended to reflect this.

23.2.5.2. The exclusion of "content services" from the definition of "communications" does not make any sense, because one of the key drivers of convergence is the increased ability of different infrastructures (including telecommunications and broadband networks) to carry content, including broadcasting services (which are a subset of content services).

23.2.5.3. We can only assume that the intention behind the exclusion was to ensure that content services (other than broadcasting services) did not fall into the net of regulation. However, we do not believe that the inclusion of content in the definition of communications will result in extending the regulatory reach of the Bill to non-broadcasting content, for so long as the regulation of content is excluded elsewhere in the legislation – either by defining a broadcasting service restrictively to exclude non-broadcasting content such as online / internet content, or to exclude non-broadcasting content from the application of the Convergence Bill.

23.2.6. **"communications facility"**

23.2.6.1. This definition is intended to be all encompassing in its reach and should replace and incorporate all other definitions in section 1 referring to other types of communications facilities – including the definitions for "apparatus" and for a "radio station". For the avoidance of doubt, a "radio station" should also be included in the list of possible communication facilities.

23.2.6.2. The current manner in which the list in subsections (a)-(m) has been drawn up suggests that the list is exhaustive, and that it does not accommodate technology developments in the future. In order to counter this, we recommend that the words "'communications facility' means any …" at the beginning of this definition be replaced with the words "'communications facility' includes any …"

23.2.6.3. Another problematic aspect of this definition is that subsection (iv) includes "associated services" within the definition of a communications facility. It is respectfully submitted that this confuses the distinction between a service (such as conveying signals or providing applications over a network) and a facility (which consists of equipment). It is thus suggested that subsection (iv) be deleted.

23.2.7. **"communications network"**

23.2.7.1. Section 1 defines a communications network to include the following elements:

(a) transmission systems and associated communications facilities;

(b) "other equipment" (which is superfluous, as this is already included within the concept of a "communications facility"); and

(c) "interfaces, protocols and software" (which is incorrect as this is not equipment).

23.2.7.2. It is respectfully submitted that the references to "other equipment, interfaces, protocols and software" should be deleted.

23.2.7.3. We also question the need to list the elements of a communications network (as has been done in subsections (i)-(iii)) as these are communications facilities or components that collectively make up a communications network. We also think that it is contrary to the principle of technology neutrality to refer to technologies such as "switching" in this definition.

23.2.7.4. An inexplicable feature of this definition is that it defines a communications network with reference to content distribution networks at the end of the definition. The reference to content transmission networks is unduly limiting and should be deleted.

23.2.7.5. Moreover, the current definition of a "communications network" in section 1 also does not adequately capture the essence of what a communications network is, which is a <u>system or series of network facilities</u> used principally for or in connection with the provision of communications services, but excluding end user equipment. This is necessary to distinguish between individual facilities (for which a network facility provider licence is not required) and networks (which need to be licensed).

23.2.8. **"communications network service"**

23.2.8.1. The label "communications network service" is meant to refer to the network facility provision layer. Unfortunately, the label is confusing because it confuses the difference between the

provision of networks and the provision of services, which is namely as follows:

(a) facilities providers lay down the basic infrastructure, be it of dark fibre, wireless transmission masts, etc;

(b) service providers provide transmission, application services and content services over their networks.

23.2.8.2. It is therefore incorrect to refer to network facility providers as service providers, even though in practice, many vertically integrated players in the market will typically tend to provide their own networks as well as to run services over those networks.

23.2.8.3. We also question the inclusion of resale in this definition, as the concept of resale can refer broadly not only to the resale of facilities or services.

23.2.8.4. It is therefore recommended that the term "communications network service" be replaced with the term "network facilities provision" instead.

23.2.9. **"communications service"**

23.2.9.1. This term is defined to refer to a service which consists of the conveyance of communications over communications networks, including transmissions over broadcasting transmission networks, but excluding content services.

23.2.9.2. It is submitted that the exclusion of content services but not broadcasting signal distribution is non-sensical because broadcasting services are a subset of content services and not the other way around. This definition thus contradicts itself.

23.2.9.3. Moreover, we do not see any reason to exclude the transmission of non-broadcasting content from the ambit of this definition for the reasons mentioned in paragraph 23.2.5.2 above. Also, the inclusion of content transmission services within the ambit of this definition will not have the effect of casting the net of regulation to include non-broadcasting content, for so long as regulation in the Convergence Bill is confined to broadcasting content only.

23.2.9.4. Finally, we have concerns with the use of the label "communications service" to refer to the switching and routing of

signals at the connectivity layer. Our reasons are that the term "communications service" lends itself to generic use, and moreover, has in fact been used in a generic sense in the Convergence Bill to refer to all the service licensees generally. Moreover, the term "communications service" is confusing, because the label does not reflect the service that it is meant to describe.

23.2.9.5. It is our respectful submission that:

(a) the term "communication service" should be defined as a generic term that refers to all the categories of service licensees (namely, network facilities providers, connectivity providers, application service providers and broadcasting service providers); and

(b) another label be used to refer to the switching and routing of traffic at the connectivity layer. Other more descriptive terms that have been used to refer to the connectivity layer in other jurisdictions include "network services" (Malaysia) and "carriage services" (Australia).

23.2.10. **"content"**

The current definition of content is very wide, and could potentially extend to content that is not transmitted, stored, etc over communications networks. We recommend that content be confined to any sound, text, still or moving picture, or any other audio or visual representation or combination of these that is transmitted, stored, etc <u>over a communications network</u>, but still subject to the proviso that private communications between customers are excluded.

23.2.11. **"end user"**

By way of general comment only, we note that there has been an inconsistent use of terms in the Convergence Bill to refer to end users. The various terms used include: customers, consumers and subscribers. These need to be harmonised with each other.

23.2.12. **"end user equipment"**

The definition of "end user equipment" in section 1 is drafted too vaguely to be really helpful. Internationally, countries in other jurisdictions have circumvented this problem by defining the concept of customer equipment with reference to the concept of a "network boundary". Generally speaking, network facilities falling on

the end user side of the network boundary are treated as customer equipment. Possibly a similar approach should be adopted in the Convergence Bill to achieve greater clarity in this regard.[39]

23.2.13. **"essential facility"**

For the sake of consistency across legislative instruments, we suggest the definition of an essential facility in the Convergence Bill be aligned with that contained in section 1 of the Competition Act, which defines an essential facility to refer to "an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers [end users]".[40]

23.2.14. **"individual licence"**

The term "individual licence" has been defined in section 1 with cross-reference to section 5 of the Convergence Bill. However, Chapter 5 does not provide a clear indication of what an individual licence is, neither should the individual licensing methodology be confined to the service licences referred to in section 5 but could also extend to spectrum licences (which we submit should be dealt with separately under Chapter 5). It is respectfully submitted that the definition should reflect the core elements of what an individual licence is, namely a licence in respect of which the pre-approval of the regulator is required.

23.2.15. **"licence area"**

The definition of "licence area" has been restricted to the geographic coverage areas of broadcasting service licensees. This is too limiting if provision is to be made to grant regional infrastructure-based licences (such as has been done with the under serviced area licensees ("USALs") under the Telecommunications Act). It is therefore recommended that the reference to broadcasting be deleted from this definition.

23.2.16. **"number portability"**

We note that the definition refers to numbers allocated to connectivity providers ("communications service licensees") only. It is unclear where internet telephony fits into this. In particular, it is uncertain at this stage whether existing VANS providers providing VoIP services will be licensed as connectivity providers ("communications licensees") or application service providers or both. If it is

[39] See, for example, sections 1 and 128 of the Malaysian Act, and section 21 of the Australian Telecommunications Act, 1997 ("the Australian Act").

[40] The Convergence Bill uses the term "end user" rather than "customer".

intended to licence VoIP provision at the application layer, then the definition of number portability will need to be extended to cater for this.

23.2.17. **"radio"**

The current definition of "radio" in the Convergence Bill is out of line with the current definition in the Telecommunications Act which reflects the definition used in the ITU Radio Regulations. It is accordingly suggested that the current definition in the Telecommunications Act be retained, which defines "radio" to mean "an electromagnetic wave which is propagated in space without artificial guide and having a frequency below 3000 GHz"

23.2.18. **"radio frequency spectrum"**

In our view, the current definition is too wordy, and we recommend that it be cut down. At its very minimum, the radio frequency spectrum refers to spectrum that is used as a transmission medium for wireless communications. The remainder of the definition (which refers to frequency bands for security services and broadcasting services) is superfluous and should be deleted.

23.2.19. **"radio frequency spectrum licence"**

The definition refers only to individual licences, which is inappropriate if allowance is made for spectrum to be class licensed in accordance with our recommendations in paragraph 13.2.3 above.

23.2.20. **"radio station"**

In our view, it is unnecessary to include a separate definition for a "radio station" as section 1 already contains a definition for "communications facilities" which is meant to be all encompassing. This definition should accordingly be deleted.

23.2.21. **"retail"**

23.2.21.1. We are of the view that it would be far more appropriate to refer to "retail tariffs" in this definition, as the relevant sections of the Convergence Bill that refer to "retail" do so in the context of pricing. This would also have the effect of simplifying the definition.

23.2.21.2. If this suggestion is accepted, then the terminology in the various sections that deal with the prescription of wholesale and retail tariffs (specifically sections 41, 46-7 and 61) will need to be harmonised, as different terms have been used to refer to the

same concept – including retail / wholesale rates / pricing and tariffs.

23.2.21.3. Accordingly, the definition would need to be amended to state: "'retail tariffs' means the rates that [communications service licensees][41] charge to end users".

23.2.22. **"subscriber"**

It is unclear what the difference is between a subscriber and an end user. This needs to be clarified.

23.2.23. **"wholesale"**

23.2.23.1. We suggest that the label be changed to "wholesale tariffs" for the reasons set out in paragraph 23.2.21 above. Moreover, we are of the view that the definition does not adequately capture the essence of a wholesale service, namely a service provided by one licensee to another licensee.

23.2.23.2. We also respectfully submit that it is too restrictive to confine the concept of "wholesale" to network facilities providers ("communications network services licensees") and the connectivity layer ("communications licensees"). If our suggestion in paragraph 15 above to broaden the access regime to potentially include things such as wholesale content, then the current definition of "wholesale" in section 1 is clearly too narrow.

23.2.23.3. We are of the view that the definition should be amended to read as follows: "'wholesale tariffs' means the rates that [communications service licensees][42] charge to other [communications service licensees]".

23.3. **Objects of Act (section 2)**

23.3.1. The objects listed in section 2 consist of a mix of objects that have been copied from the existing legislation as well as objects that are specific to the topic of convergence.

23.3.2. As a general comment, some of the objects that are listed are too broad and too vague and need to be tightened up. Other of the objects deal with topics that are

[41] Note that we have used the term "communications service licensees" in a generic sense, and not only to refer to the connectivity layer.

[42] Note that we have used the term "communications service licensees" in a generic sense, and not only to refer to the connectivity layer.

not covered in the Convergence Bill and therefore need to be deleted. Some of the objects deal with content services, which will only be appropriate if the scope of the Convergence Bill is extended more extensively to content regulation.

23.3.3. To the extent that it is proposed to retain the existing legislation, care should be taken with the deletion of objects in the existing legislation that mirror the objects in the Convergence Bill, otherwise unintended consequences may result.

23.3.4. We will comment on those specific sections of the Convergence Bill that the SABC considers to be problematic as set out below.

23.3.4.1. **Convergence of telecommunications, and broadcasting signal distribution (section 2(a))**

Section 2(a) lists one of the principal objects as the promotion and facilitation of convergence between telecommunications, broadcasting and signal distribution, which is appropriate given that the primary purpose of the legislation is to harmonise the infrastructure regulation regime. We note that broadcasting has been omitted from this section, even though the scope of the Convergence Bill extends to broadcasting services (even if the legislation does not seek to harmonise content regulation).

23.3.4.2. **Access to communications networks (section 2(f))**

We also respectfully submit that it is too restrictive to confine the concept of access to communications networks. Not only does this exclude access to connectivity services ("communications services"), but it our suggestion in paragraph 15 above to broaden the access regime to potentially include things such as content, then this section is clearly too narrow.

23.3.4.3. **Ensuring information security (section 2(q))**

The privacy and security of electronic communications is an issue that does not fall within the scope of the Convergence Bill, but is covered by other legislation, notably the Electronic Communications and Transactions Act 25 of 2002. This section therefore needs to be deleted.

23.3.4.4. **Quality and pricing of services (sections 2(m)-(n))**

Sections 2(m)-(n) are repetitive of each other and need to be consolidated into one section.

23.3.4.5. **Diversity in ownership and control of licensees (sections 2(k) and (v))**

These sections mandate diversity of ownership and control in the provision of communications services (used in the generic sense, which includes infrastructure-related services and broadcasting services) broadly (section 2(k)) and then more narrowly in respect of commercial and community broadcasting services (section 2(v)). It is respectfully submitted that section 2(v) is repetitive of / already subsumed by section 2(k) and should accordingly be deleted.

23.3.4.6. **Access to signal distribution for content providers / content receivers (sections 2(x) and (y))**

This objective is already covered by section 2(f) which deals with access to infrastructure-based services already (of which broadcasting signal distribution is a subset). Sections 2(x) and (y) should therefore be deleted.