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Attention: Mr Peter Mailula
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11 May 2022

Dear Sir

AME LTD RESPONSE TO DRAFT REGULATIONS REGARDING PROCESS AND PROCEDURES IN RESPECT OF APPLICATIONS, AMENDMENTS, RENEWALS, SURRENDER AND TRANSFER OF INDIVIDUAL LICENCES

AME Ltd is a listed company which holds an interest in several commercial broadcasting licensees ("AME"). We present our comments on the draft amendments ("Amendments") to the Regulations on Processes and Procedures in respect of Applications, Amendments, Renewals, Surrender and Transfer of Individual Licences, 2010, as amended in 2016 and as amended in 2018 ("Regulations") below, for your consideration.

When considering any change to the regulatory framework for electronic communications and broadcasting, ICASA is required to take account of the **public interest**. The 26 objects of section 2 of the Electronic Communications Act, 2005 ("ECA") read with the powers and duties conferred on ICASA under the ICASA Act, 2000 ("ICASA Act") are matters which ICASA must bear in mind when acting in the public interest. Of these, we consider subsections (a), (d), (e), (f), (g), (h), (i), (j), (k), (l), (o), (p), (r), (s), (y) and (z) to be of direct application to the process followed in making, and to the substance of, the Amendments. For your convenience, we have set out the provisions of these subsections on **Annexure A** to this letter.

Regulation is not an end in itself, it must have a purpose. To paraphrase the language of the Promotion of Administrative Justice Act, 2000, decisions which constitute "actions" (such as the Amendments) must be rationally connected to the purpose for which they are made, and the reasons given for them by the administrator, that is ICASA in this case.

The usual point of departure in making changes to or introducing new instruments into a regulatory framework is the need to adjust a scheme to take account of the passage of time and the workability of the scheme, or to prevent some harm or prejudice, and to promote some good or improvement, or any one or more of these goals. ICASA is specifically required to take account of the potential consequences of making or not making any changes on affected parties. This is generally referred to as a 'regulatory impact assessment'. When making regulations, it is therefore important to consider whether the regulations (or any parts of them) are necessary at all.

The OECD[1] says, "*Regulatory impact assessment (RIA) is a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives…It is an important element of an evidence-based approach to policy-making…OECD analysis shows that conducting RIA within an appropriate systemic framework can underpin the capacity of governments to ensure that regulations are efficient and effective in a changing and complex world*."[2]

Turning now to the Amendments, we note the following:

1. The explanatory memorandum annexed to the Amendments (also called the 'Reasons Document') provides in paragraph 1.2 that, "*The purpose of the amendments is to provide clarity on the Authority's processes and procedures with regards to Individual Licences*." Unfortunately, this does not provide the explanation one would expect from a regulator whose review of matters such as (i) patterns of behaviour in the market, (ii) obstacles or difficulties in current interpretation and application, (iii) number of queries from licensees or other affected parties, or (iv) trends in process in other countries by other regulators, has led

[1] Organisation for Economic Co-operation and Development.

[2] Regulatory impact assessment - OECD: This page provides links to the considerable research undertaken by the OECD on methodological issues and country experiences with the implementation of RIA and includes guidance material to improve the performance of RIA, its early integration with policy making and the promotion of more coherent regulatory policy across government.

them to believe these specific amendments are necessary and the only ones that should be made. The balance of the memorandum takes us no further. This is disquieting, particularly in light of point 2 below.

2. Trends worldwide are towards 'light touch regulation' and this is so also in South Africa, according to the National Integrated ICT Policy White Paper[3] at paragraph 2.2 which states,

    - "*Any interventions must be necessary to meet clearly defined public interest objectives.*
    - *Any interventions must be proportionate, consistent and evidence-based and determined through public consultation.*
    - *The policy maker and regulator must consider the least intrusive mechanism to achieve the defined public interest goal/s, and will consider, where appropriate, alternative models such as co-regulation and/or self-regulation.*
    - *The socio-economic and regulatory impacts of any action will be assessed and considered before imposing regulations, rules and/or conditions."*

    It is not obvious to us (as we will explain below) that ICASA has taken these policy objectives into account in drafting the Amendments.

3. Having regard to the fact that the Regulations run in tandem with the Regulations on Standard Terms and Conditions for Individual Licences, 2010 (also amended in 2016) ("Standard Terms Regulations"), we believe the two must say the same thing or at least not contradict one another, and nor should one create a process that is not reflected in the same way, in the other. ICASA proposes to amend these Standard Terms Regulations as well and comments from AME have been submitted to ICASA. We refer to these Standard Terms Regulations in this submission from time to time, to illustrate how the Amendments affect the Process Regulations, or ought to be brought in line with them. We hope that the processes within ICASA will run in tandem.

4. The explanatory memorandum is not aligned with the changes made in the Amendments, i.e. the explanatory memorandum doesn't accurately reflect the changes made, nor does it

[3] *Gazette* 40325 of 3 October 2016.

provide adequate reasons or explanations for those that have been made in the Amendments.

5. There are areas in the Process Regulations that ought to be considered for amendment that have not been amended. We have included our suggestions in this regard.

6. We now consider the Amendments in turn:

    a. The reason for the amendment to the definition of "**historically disadvantaged persons**" is a mystery. The explanatory memorandum to the Amendments says in paragraph 1.3.2 that it "*is amended to align it with the definition of historically disadvantaged persons in the Class Process and Procedure Regulations*"[4] (specifically the 2021 amendments) ("Class Process Amendment Regulations"). Those amendments provide in their own explanatory memorandum at paragraph 3.3 that,

    "*In terms of the definition of HDP, ISPA and WAPA submit that where the Authority wishes to define the initialism "HDP", the Authority should retain the reference to "Historically Disadvantaged Persons" as found in other Regulations for example the draft Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups and the application of the ICT Sector Code……*

    *"**Decision by the Authority**:*
    "The Authority concurs with ISPA and WAPA, the initialism of "HDP" is amended to reflect "Historically Disadvantaged Persons"."

    This reasoning is defective.

    (i) ICASA provides no reason for the change proposed in the Class Process Regulations as it seems to have misunderstood the argument by ISPA and WAPA in referring only to whether or not "HDP" is capitalised.

    (ii) What is more, the Regulations on Limitation on Control and Equity Ownership by Historically Disadvantaged Groups and the application of the ICT Sector Code Regulations, 2021 ("Ownership Regulations 2021")

[4] Class Licensing Processes and Procedures Amendments Regulations, dated 26 March 2021.

were in draft at the point in time when ISPA and WAPA submitted their comments, and these regulations were published by ICASA in final form only on 31 March 2021 i.e. after the publication of ICASA's explanatory memorandum in respect of the Class Process Regulations. So ICASA could not have taken the responses of ISPA and WAPA into account unless it had already made up its mind on the Ownership Regulations 2021.

(iii) This being the case, ICASA should have been more transparent in its explanation in the Class Process Regulations, because what has happened now is ICASA has failed to give a good and sufficient reason for changing the definition of "historically disadvantaged groups" in these Amendments.

(iv) The final Regulations on Limitation of Ownership by Historically Disadvantaged Groups, published on 31 March 2021, have NO explanation for and NO amendment of the definition of "*historically disadvantaged persons*".

(v) This is a very important lacuna in the regulatory framework as a whole, given that primary legislation, namely the Electronic Communications Act, 2005 ("ECA") requires ICASA to regulate equity ownership of licensees in relation to "*historically disadvantaged persons*", under section 9(2)(b).

(vi) In our view, until such time as ICASA explains and gives reasons for the amendment proposed to the definition of "*historically disadvantaged persons*" in the Amendments, the proposed amendment should be struck. At the same time, the amendment in the Class Process Regulations should be properly amended only when ICASA has formalised its reasons for the change to this definition.

(vii) Because these amendments should all be made, we have made a submission on this definition, set out in paragraph (b) below.

b. Our proposal for the definition of "**historically disadvantaged groups/individuals/persons**" is simple – leave the wording as it is, and as it has been since these Regulations were first published in 2010. We can find no good reason to amend it and ICASA has given none in any of the regulations in which the term is used (there is no explanation in the Class Process Regulations, nor in the

Ownership Regulations, 2021). The current meaning has been in place for over 12 years.

c. **Regulation 5(1A)** does not make sense. The amendment proposes that an applicant submit EITHER 1 soft copy of the original application "*electronically (i.e. by email)*" (which is already implied by the word 'soft') OR 2 hard copies (including an original) of the application AS WELL AS a 'soft' copy of the application using an external storage device.
    i. Why is the second option necessary? If the second option is intended to afford persons without access to the internet the opportunity to make submissions on paper, then why also require a "soft copy" on an external storage device?
    ii. The explanatory memorandum at paragraph 1.5.2 states that the amendment is aimed at "*streamlining" the process, making allowance for electronic submission where physical submission is not possible*" but in fact ICASA continues to require physical submission because it requires an external storage device in option 2.
    iii. Furthermore, the wording used in the explanatory memorandum is different from that used in the actual Amendment (the explanatory memorandum refers to "*a USB or a disc*" while the Amendment says "*external storage device*"). The two are at odds with one another.

d. **Regulation 5(5A)** unfortunately does not make sense either. It provides that ICASA does not have to consider an application if the applicant "*is in arrears with fees…. AND/OR is not compliant with any other applicable regulations or the Act*".
    i. Practically, this suggests that ICASA could refrain from exercising its powers under this regulation if an applicant does not meet both criteria.
    ii. Legally, the second criterion is incapable of application <u>unless ICASA has taken a decision under section 17 of the ICASA Act to refer a licensee to the Complaints and Compliance Committee ("CCC") and has taken a decision following their recommendations, that the licensee is non-compliant.</u>
    iii. If this process in (ii) is not followed, it might be possible for any unit within ICASA to randomly assert that a licensee is not compliant with something (which could be of the least important nature), and therefore that ICASA will

not consider an application by that licensee. This would obviously be unfair and unreasonable.

iv. The explanatory memorandum provides at paragraph 1.5.3 that this amendment is "*to ensure that Applicants/Registrants are in overall compliance with the relevant Regulations as well as to streamline requirements for Applications/Registrations*". This is not correct. These Amendments are in relation to regulations applying to individual licensees. There are no "registrations" or "Registrants" in the context of individual licensees. This term only applies to only class licensees and this Regulation doesn't deal with class licensees.

v. The statement that the amendment is to "*ensure overall compliance with the relevant Regulations*" makes no sense either – what are the "*relevant Regulations*" and what is "*overall compliance*"? Please see our comments at (ii) above for the only legally permissible option.

vi. Regulation 5(5A) must omit the second criterion or it must be amended, as indicated.

e. **Regulation 11(3)** again uses the phrase "AND/OR". This phrase does not provide certainty and it allows for the exercise of discretion by ICASA without any point of reference or explanation. Please see our argument in this regard raised in relation to regulation 5(5A) which applies here too as regards the use of the phrase "and/or".

f. **Regulation 12(b)** refers to the "*Compliance Procedure Manual Regulations*" in (b) but this reference is not defined.

i. In fact, we do not know why these regulations are referred to specifically as the words, "*any other applicable regulations*" are adequate to include the "Compliance Procedure Manual Regulations" and the specific reference can therefore be deleted.

ii. The sub-regulation also refers to "*or the Act*", so it is impossible to tell which of the 3 options (applicable regulations, the Compliance Procedure Manual Regulations, *OR* the ECA) ICASA is likely to choose – creating further uncertainty.

iii. Since the failure to comply with any 1 of these 3 will result in ICASA not considering an application, the consequences are serious, and all licensees should know, ahead of time, what their obligations are.

g. **Regulation 12(c)** refers to "*the percentage prescribed by the Act AND the Regulations in respect of the Limitation of Control and Equity Ownership by historically disadvantaged groups and the application of the ICT Sector Code, 2021*". This is not workable.

i. The ECA ("the Act") prescribes a percentage which is unlimited in section 9(2)(b) except by ICASA's own regulations made under section 4(3)(k) of the ICASA Act. The regulations (which we refer to as the Ownership Regulations 2021 for convenience) are not defined elsewhere, but as these are in fact the regulations that ICASA has passed under section 4(3)(k) of the ICASA Act, the percentage under the Ownership Regulations 2021 is the only percentage that is relevant here.

ii. Furthermore, one cannot have two percentages applying cumulatively, which is what the use of the word "and" implies.

iii. The explanatory memorandum provides that this Amendment is to apply to Applicants/Registrants and as we have indicated above, the term "Registrants" does not have relevance for individual licensees and should be deleted.

iv. In addition, the memorandum states, "*The referral to the HDG Regulations for any ownership and control requirement is to make allowance for any amendments that may take place in the HDG Regulations*." This reason omits to discuss the reference to the Act as well as the Ownership (HDG) Regulations, suggesting that perhaps the word "and" was an error. Again, we suggest the reference to the Act (ECA) be deleted.

h. The amendment proposed to **Regulation 13** which deals with surrender of a licence is lengthy and complex. The explanatory memorandum states that the reason for the amendment is to "*protect customers/listeners/viewers by providing timelines within which the licensee must inform customers/listeners/viewers of its intention to cease operations. The rationale for one calendar month in respect of payments is premised on how debtors are aged*."

i. We agree there is a need to protect customers, listeners and viewers and we agree that providing a timeline and explanation of the way in which a licensee will cease to provide service is useful. However, if a licensee is operating successfully and sustainably, it is unlikely it will need to surrender its licence, unless it is required to do so by ICASA.
ii. In this case, ICASA would in any event have notice of the intended surrender as ICASA will have required it.
iii. If the licensee is in such dire straits that it cannot continue to operate, then it may not be possible to give much notice at all to anyone. If a creditor, for example, brings an application to put a licensee into liquidation (which is not the same as business rescue), then the process is out of the licensee's hands and in the hands of the High Court.
iv. In paragraphs 1 and 2 of the introduction to this submission we refer to the need for impact assessments, for an assessment of the need and effect of a regulatory intervention, or in this case, a regulation. In our view, ICASA has not, in the explanatory memorandum, taken relevant factors into account, such as (iii) immediately above. It will be impossible for a licensee to continue to provide service if it is in liquidation (sub-regulation (3)). If it is in dire straits, it may be impractical or even impossible to give 2 months' notice to customers, listeners and viewers of its intention to cease providing services (sub-regulation (4)).
v. Having taken all of this into account, the 90-day period referred to in sub-regulation (2) is likely to be quite irrelevant in practise and likely incapable of implementation. It will also therefore be impossible to enforce.
vi. Similarly, if a licensee is in dire straits and must surrender its licence, then it may well owe money to ICASA which debt will have to be included in the creditors accounts to be prepared by the liquidators.
vii. We cannot think of any other scenario in which a licensee might wish to surrender its licence in circumstances when it will have the opportunity to use a 90-day lead time.
viii. It would be helpful to understand from ICASA <u>how often and how many licensees are surrendering their licences</u> without giving notice to ICASA or anyone else, in order for us to make an informed assessment about the need

for regulations 13(2) to (6). We suggest in the meantime that it is preferable to include a very simple obligation such as sub-regulation (1), with one other obligation to notify customers, listeners and viewers as soon as possible in writing and on as many platforms as possible, about its intention to close its doors.

i. The amendment to **regulation 14A** does not align with the requirements in the Standard Terms Regulations at regulation 2 in that these Regulations state that regulation 14A only applies to ECS and ECNS licensees where the nature of the services changes (sub-regulation (b)). In the Standard Terms Regulations, the changes appear to be included in relation to broadcasting services as well – putting these two Regulations in conflict with one another. Please advise which services the Regulations are intended to apply to.

j. The insertion of a **new regulation 14C** (which should probably be numbered 14B) is not aligned with sections 2(y) and (z) of the ECA.
    i. It is not for ICASA to determine, on the basis of a letter from a licensee, whether or not a transfer of a licence process is applicable.
    ii. A "letter" is not an acceptable way for ICASA to make determinations. Furthermore, this provision does not set out the criteria on which ICASA will assess the information in the "letter", and this is a fundamental omission in a regulation. As we have said before, regulation requires certainty.
    iii. The Regulations set out the requirements for licence transfers and it is for licensees to argue that they are before ICASA under the correct process. ICASA may then determine if that is correct, based on the facts before it. It is not for ICASA to interrogate licensees about their business, or to regulate "minute" changes in shareholding.
    iv. It is also the case that ICASA may not regulate what has gone before, so the requirement to provide details about "*shareholder changes since the issuance of the licence*" in sub-regulation 14C(1)(c) should be deleted. ICASA – as is the case with any administrator – does not regulate retrospectively.

v. To the extent that ICASA is concerned to maintain the level of shareholding by historically disadvantaged persons within licensees (or to move to broad-based black economic empowerment) it has already provided for this in the Standard Terms Regulations by removing reference to giving notice of "shareholding" changes. It has also provided for it in these Regulations by inserting regulation 11(4) as a condition of a licence transfer i.e. equity ownership by HDPs.

vi. If ICASA is concerned that licensees may somehow pull the wool over its eyes, then perhaps it could consider a regulation that provides for transfers of shares of less than 20% to require notice only (under regulation 14A) while transfers of shares of greater than 20% require notice under regulations 11 and 12.

vii. ICASA has yet to provide definitive regulations about changes in control, and we will provide our comments on these at the relevant time. For the time being, we agree with Annexure A to the Ownership Regulations, 2021, on the possible meanings of "control". However, this means that all references in the Amendments to "control", particularly in sub-regulations 14C(2) and (3) should be deleted.

viii. The cross-reference in regulation 14A to "*regulation 14C below*" should probably be a reference to regulation 14B.

ix. As a general comment, we strongly believe that ICASA will <u>disincentivise investment</u> in the South African ICT Sector if it ploughs forward with these proposed changes which are neither necessary, nor sensible in the current economy, and furthermore, they are not supported by any form of RIA or even a sensible explanation. The explanatory memorandum simply repeats the text of the Amendments – there are no reasons given for the changes.

7. There are numerous changes which are not currently proposed by ICASA, but necessary in our view, to align these Regulations with other regulations and in particular, the Standard Terms Regulations, but also to ensure that the Regulations have taken into account the work expected of a reasonable regulator, as explained in paragraphs 1 and 2 above:

a. The definition of "**applicant**" should be amended because currently the Regulations contemplate various applications, but there are others that might be made to ICASA that are not dealt with in the Regulations. However, one could expect them to be dealt with in this Regulation as well. One such example is an application for exemption from licensing which is dealt with under different regulations, and another such example is a person who has applied for radio frequency spectrum, also addressed under different regulations[5]. Both of these applications would result in there being an "applicant" but these regulations and these applications are not addressed in the Regulations under consideration. We suggest that the definition of "applicant" should be amended to read, "*a person who has submitted an application in terms of these Regulations*".

b. The definition of "**licensee**" can be omitted as it defined in primary legislation, namely the ECA.

c. The definition of "**transfer**" should be amended to align with all the other regulations that ICASA has amended and the proposed amendments to regulation 4(1)(c) and regulation 11 of these Regulations. The definition should read, "*means assign, cede or transfer or transfer control of a licence from one person to another*".

d. **Regulation 2(2)** is unnecessary. As we have explained in paragraph 6(a) above, these Regulations cannot and do not provide for all types of applications and processes. It is not necessary to set out the matters in relation to which the Regulations do NOT apply, but only those matters in relation to which the Regulations DO apply. This is standard legislative drafting practise.

e. **Regulation 9** has not been amended, however, it refers to Form C, which has been amended. Form C says in section 1.2, "*Nature of services authorised to be provided in terms of the Licence: Check the Reasons Document. Confirm the service to be provided*." There is no reference to Form C in the explanatory memorandum. We do not understand why, at this point in the application form, it is necessary to state the service "*to be provided*". At this point in the application form, the applicant is merely

[5] The "Regulations regarding Licence-Exempt Electronic Communications Networks, Electronic Communications Network Services and Electronic Communications Services in terms of Section 6 of the ECA", 2008; and the "National Radio Frequency Spectrum Regulations", 2015, as amended.

confirming its name and other particulars before it provides information relating to the amendments it seeks to its licence (which information is provided for in section 3 headed, "PROPOSED AMENDMENT TO LICENCE"). We suggest Form C be amended at section 1.2 to remove the entire italicised sentence above.

f. **Regulation 11(2)** gives ICASA the option, in its discretion, and "*as a matter of procedural fairness*", to publish notices of applications to transfer licences, invite interested persons to make submissions, and so on (sub-regulation 11(2)(a) to (d)).
    i. We consider it so important to ventilate all applications made to it – in the public interest – that we believe this regulation should indicate that ICASA will, in all cases, publish the notices of applications to transfer licences. We can think of no reason why ICASA would not publish such an application and it seems to have been ICASA's practise in the last decade, to do so. To approve such a transfer without public knowledge and participation would be to act potentially to prejudice interested parties.
    ii. We also note that sub-regulation (2)(a) does not refer to "*transfer control of*", and should accordingly be amended to bring it in line with amendments made to the heading of regulation 11 (and see paragraph 7(c) above).

g. **Regulation 12** requires amendment so that each reference to "transfer" also includes a reference to "*or transfer of control of*", as indicated above in relation to other regulations.

h. More importantly, **regulation 12(2),** inserted in the 2018 amendments, ought to be removed in light of the publication of the Ownership Regulations, 2021 (defined above). This is because they are at odds with ICASA's most recent amendments to exclude from the definition of "B-BBEE Contributor Status Level" any reference to Statement 102 and other deeming provisions in relation to ownership which are included in the ICT Sector Code.
    i. We say this because, first, ICASA cannot amend the ICT Sector Code, therefore it must either apply it in full or not at all. Second, ICASA cannot choose which of the ownership or equity provisions of the ICT Sector Code it will apply – it must apply all of them if it applies the ICT Sector Code. Third, ICASA has accepted that a wholly-owned state entity which is subject to the

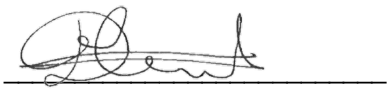
PFMA may be **deemed** to have met the ownership requirements of the Ownership Regulations 2021 by virtue of regulation 12(2) read with 12(1)(c), if it provides documentation proving either that a transferee or applicant (as the case may be) has been granted BBBEEE facilitator status, or has management and control by 60% black persons.

ii. Therefore, ICASA does in fact accept a deeming provision for ownership in one case, and must therefore accept a deeming provision in all cases, in line with the provisions of the ICT Sector Code. It would be administratively unfair to create an exception when all deemed ownership transactions are acceptable as equating to ownership in the ICT Sector Code.

iii. In our view, ICASA should first consider whether regulation 12(2)(b)(ii) is correct, since ICASA refers in the Regulations to "management and control" whereas the ICT Sector Code only refers to "management control" and it does not refer to management control in the context of equity ownership at all, but only in the context of the measurement of the contribution that management by black people allows for in the Code.

Please contact the writer for any further information or queries, and please note that we wish to participate in any hearings that ICASA may hold in relation to the Amendments.

Yours faithfully



D M TILTMANN
CHIEF EXECUTIVE OFFICER

ANNEXURE A:

SECTION 2 (SELECT OBJECTS OF THE ECA)

(a) promote and facilitate the convergence of telecommunications, broadcasting, information technologies and other services contemplated in this Act;…

(d) encourage investment and innovation in the communications sector;

(e) ensure efficient use of the radio frequency spectrum;

(f) promote competition within the ICT sector;

(g) promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services;

(h) promote the empowerment of historically disadvantaged persons, including Black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities;

(i) encourage research and development within the ICT sector;

(j) provide a clear allocation of roles and assignment of tasks between policy formulation and regulation within the ICT sector;

(k) ensure that broadcasting services and electronic communications services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in the Republic;…

(l) provide assistance and support towards human resource development within the ICT sector;…

(o) subject to the provisions of this Act, promote, facilitate and harmonise the achievement of the objects of the related legislation;

(p) develop and promote SMMEs and cooperatives;…

(r) promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public;

(s) ensure that broadcasting services, viewed collectively—

(i) promote the provision and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater for all language and cultural groups and provide entertainment, education and information;

(ii) provide for regular— (aa) news services; (bb) actuality programmes on matters of public interest; (cc) programmes on political issues of public interest; and (dd) programmes on matters of international, national, regional and local significance;

(iii) cater for a broad range of services and specifically for the programming needs of children, women, the youth and the disabled;…

(y) refrain from undue interference in the commercial activities of licencees while taking into account the electronic communication needs of the public; and

(z) promote stability in the ICT sector.