

REPUBLIC OF SOUTH AFRICA

BROADBAND INFRACO BILL

(As amended by the Portfolio Committee on Public Enterprises (National Assembly))
(The English text is the official text of the Bill)

(MINISTER FOR PUBLIC ENTERPRISES)

[B 26D—2007]

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GENERAL EXPLANATORY NOTE:

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

BILL

To provide for the transfer of shares, loan accounts, liabilities and guarantees in Broadband Infraco (Propriety) Limited from Eskom Holdings Limited to the State; to provide for the main objects and powers of Broadband Infraco (Proprietary) Limited; to provide for the borrowing powers of Broadband Infraco (Proprietary) Limited; to provide for servitudes and additional rights in favour of Broadband Infraco (Proprietary) Limited; to provide for the expropriation of land or any right in land by the Minister for Public Enterprises on behalf of Broadband Infraco (Proprietary) Limited; to provide for the conversion of Broadband Infraco (Proprietary) Limited; into a public company having a share capital incorporated in terms of the Companies Act, 1973; and to provide for matters connected therewith.

PREAMBLE

SINCE the State intends to expand the availability and affordability of access to electronic communications networks and services, including but not limited to underdeveloped and underserved areas;

SINCE the State wants to ensure that the bandwidth requirements for specific projects of national interests are met;

SINCE the State intends to acquire Broadband Infraco (Proprietary) Limited and its electronic communications infrastructure to enable the State to provide affordable access to electronic communications networks and services;

AND SINCE Broadband Infraco (Proprietary) Limited will require access to land and rights in land to maintain and expand its network in order to achieve its objects.

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

Definitions

1. In this Act, unless the context otherwise indicates—

“**Broadband Infraco Limited**” means Broadband Infraco Limited, a public company having a share capital incorporated in terms of the Companies Act;

“**Broadband Infraco (Proprietary) Limited**” means Broadband Infraco (Proprietary) Limited, a private company duly incorporated in terms of the Companies Act;

“**Companies Act**” means the Companies Act, 1973 (Act No. 61 of 1973);

“**Constitution**” means the Constitution of the Republic of South Africa, 1996;

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“conversion date” means the date determined by the Minister in terms of section 8(1);
“electronic communications” means electronic communications as defined in section 1 of the Electronic Communications Act;
“Electronic Communications Act” means the Electronic Communications Act, 2005 (Act No. 36 of 2005); 5
“electronic communications facility” means an electronic communications facility as defined in section 1 of the Electronic Communications Act;
“electronic communications network” means an electronic communications network as defined in section 1 of the Electronic Communications Act; 10
“electronic communications network service” means an electronic communications network service as defined in section 1 of the Electronic Communications Act;
“electronic communications service” means an electronic communications service as defined in section 1 of the Electronic Communications Act; 15
“Eskom” means Eskom Holdings Limited, a public company duly incorporated under the Companies Act, and any of its subsidiary companies;
“Expropriation Act” means the Expropriation Act, 1975 (Act No. 63 of 1975);
“Infraco” means Broadband Infraco (Proprietary) Limited and, with effect from the conversion date, Broadband Infraco Limited; 20
“Infraco claims” means all amounts owing by Infraco to Eskom as at midnight on the day immediately before the transfer date;
“Infraco interests” means those Infraco claims and assets, liabilities, rights or obligations determined in terms of section 3(1)(a) or 3(2), as the case may be, to constitute Infraco interests; 25
“Infraco shares” means all the shares in the capital of Infraco of which Eskom is, immediately before the transfer date, the registered and beneficial owner;
“Minister” means the Minister responsible for Public Enterprises;
“Public Finance Management Act” means the Public Finance Management Act, 1999 (Act No. 1 of 1999); 30
“State” means the Government of the Republic of South Africa acting through the Minister;
“this Act” includes any regulation made in terms of section 10;
“transfer date” means the date on which the transfer of shares and claims is finalised under an agreement between Eskom and the State; 35
“Transnet” means Transnet Limited, a company duly incorporated in terms of section 2 of the Legal Succession to the South African Transport Services Act, 1989 (Act No. 9 of 1989), and any of its subsidiary companies.

Objects of Act

2. The objects of this Act are to provide for the— 40
- (a) transfer of Infraco shares and Infraco interests from Eskom to the State;
 - (b) main objects and powers of Infraco;
 - (c) borrowing powers of Infraco;
 - (d) servitudes and additional rights in favour of Infraco;
 - (e) expropriation of land or rights in land by the Minister on behalf of Infraco; and 45
 - (f) conversion of Infraco into a public company with share capital.

Transfer of Infraco shares and Infraco interests

3. (1) The Minister and Eskom, with the concurrence of the Minister of Finance, must determine by agreement—
- (a) which Infraco claims and assets, excluding any licences required to operate a private telecommunications network, liabilities, rights or obligations of Eskom in connection with Infraco constitute Infraco interests; and 50
 - (b) the consideration payable for the transfer of Infraco shares and Infraco interests to the State.
- (2) If the Minister and Eskom cannot agree on any matter referred to in subsection (1), that matter must be finally determined by the Minister with the concurrence of the Minister of Finance. 55
- (3) With effect from the transfer date—
- (a) the State becomes the sole shareholder and member of Infraco; and

- (b) the Minister exercises all the rights attaching to Infraco shares and Infraco interests on behalf of the State, including the rights as shareholder and member of Infraco.

Main objects and powers of Infraco

4. (1) The main objects of Infraco are to expand the availability and affordability of access to electronic communications, including but not limited to underdeveloped and under serviced areas, in accordance with the Electronic Communications Act and commensurate with international best practice and pricing, through the provision of—
- (a) electronic communications network services; and
 - (b) electronic communications services.
- (2) For the purposes of section 33(1) of the Companies Act, none of the objects ancillary to the main objects of Infraco are excluded.
- (3) The powers of Infraco include the common powers contained in Schedule 2 to the Companies Act and none of those powers are excluded or qualified.
- (4) Subject to subsection (1), with effect from the transfer date the Minister may, in consultation with the Ministers of Finance and of Communications and subject to the Public Finance Management Act, in one or more transactions transfer the whole or any part of the shares, assets, rights, obligations or interests of the State in relation to Infraco to such transferees as the Minister and the Ministers of Finance and of Communications deem in the public interest.

Borrowing powers of Infraco

5. Subject to the Public Finance Management Act, Infraco may borrow money, issue a guarantee, indemnity or security or enter into any transaction necessary in order to achieve its objects referred to in section 4.

Servitudes

6. (1) For the purposes of this section, “servitude” means any servitude, lease, right of use or other real right in or over land in favour of Eskom and Transnet, which existed immediately prior to the commencement of this Act, for the conveyance or provision of electricity or electronic communications, for pipelines, railways, transport or electrical substations or for the construction, use and maintenance of electronic communications facilities or networks.
- (2) With effect from the transfer date and subject to subsection (3)—
- (a) every servitude is hereby extended so as to include the additional right to enter and use the land to which such servitude relates for the purposes of—
 - (i) using and maintaining existing electronic communications facilities and networks; and
 - (ii) constructing, erecting and maintaining further electronic communications facilities and networks, in order to provide electronic communications network services and electronic communications services;
 - (b) Eskom and Transnet must allow Infraco in respect of any servitude to—
 - (i) utilise such servitude in respect of the additional right referred to in paragraph (a) on such terms and conditions as may be agreed upon between Infraco and Eskom or Transnet, as the case may be, and in the absence of agreement, on such terms and conditions as the Minister may determine; and
 - (ii) utilise such servitude in respect of that additional right in favour of Infraco to provide electronic communications network services and electronic communications services in order to fulfil its objects and to exercise its powers under this Act and its founding documents; and
 - (c) Transnet must register servitudes in respect of land owned by Transnet in favour of Infraco.
- (3) (a) Compensation as contemplated in section 25(3) of the Constitution must be paid by Infraco in respect of the additional right contemplated in subsection (2)(a) to the registered owner of the land in question for the use of such additional right to the extent that the said additional right renders the servitude more onerous than the original servitude.

(b) Notice of the exercise or use of the additional right by Infraco in terms of subsection (2)(b) must be given by Infraco in writing to the registered owner of the land in question before the commencement of such exercise or use, either by personal service or by pre-paid registered post to the postal address of such owner, and the compensation contemplated in paragraph (a) is payable and must be assessed as at the date of such commencement. 5

(c) Sections 9, 10, 11, 12(3) and (4), 14 and 15 of the Expropriation Act apply with the changes required by the context in respect of any compensation claimed, compensation offered and the payment and determination of such compensation as if the notice contemplated in paragraph (b) were a notice of expropriation in terms of section 7 of the Expropriation Act: Provided that any reference in the said sections to compensation as provided for in section 12(1) and (2) of the Expropriation Act must be construed as a reference to the contents of section 25(3) of the Constitution. 10

(d) Section 7(7) applies to the assessment of the amount of compensation to which the owner of the land in question is entitled in terms of paragraph (a). 15

(e) The Registrar of Deeds must, upon the lodgement of the necessary deeds and documentation, make such entries or endorsements in or on any relevant register, title deed or other document in the Registrar's office or submitted to the Registrar as the Registrar considers necessary to give effect to subsection (2).

(4) All servitudes and additional rights existing in favour of Infraco at the time of any transfer in terms of subsection 4(4) shall continue to exist in favour of the third party transferee, subject to such terms and conditions as may have been agreed upon between Infraco and Eskom or Transnet, prior to the transfer to the third party transferee, provided that any such third party transferee shall not be entitled to further extend such servitudes as provided for in subsection (2). 20 25

Expropriation of land or right in land by Minister on behalf of Infraco

7. (1) If Infraco satisfies the Minister that it reasonably requires any particular land or right in land for public purposes or in the public interest and for the attainment of its objects and that it is unable to acquire such land or right in land on reasonable terms, the Minister may expropriate such land or right in land on behalf of Infraco, subject to the obligation to pay compensation as contemplated in section 25(3) of the Constitution. 30

(2) If the Minister expropriates any land or right in land on behalf of Infraco, Infraco becomes the owner thereof on the date of expropriation contemplated in section 7(2) of the Expropriation Act.

(3) The fees, duties and other charges that would have been payable by Infraco in terms of any law if it had purchased that property must be paid in respect of the expropriation of any land or right in land in terms of subsection (1). 35

(4) Infraco must refund all costs incurred by the Minister in the performance of his or her functions in terms of subsection (1).

(5) Subject to section 25(2) of the Constitution, sections 6, 7, 8, 9, 10 11, 12(3) and (4), 14, 15, 18, 19, 20, 21 and 23 of the Expropriation Act apply, with the changes required by the context, in respect of an expropriation in terms of subsection (1): Provided that any reference in the said sections to compensation as provided for in section 12(1) and (2) of the Expropriation Act must be construed as a reference to the contents of section 25(3) of the Constitution. 40 45

(6) Any unregistered right in respect of the expropriated land or right in land must be expropriated separately and the sections of the Expropriation Act referred to in subsection (5) apply with the changes required by the context to such expropriations.

(7) In assessing the amount of compensation contemplated in section 25(3) of the Constitution, to which a person is entitled, section 12(5) of the Expropriation Act must be applied inasmuch as it is just and equitable to do so: Provided that the reference to an unregistered right in respect of any other property in section 12(5)(e) of the Expropriation Act does not apply. 50

(8) This section applies to Infraco only for as long as the State is the majority shareholder in Infraco. 55

Conversion of Infraco into public company

8. (1) After the transfer date, the Minister may on behalf of the State request the Registrar of Companies in writing to convert Broadband Infraco (Proprietary) Limited into a public company having a share capital in accordance with the Companies Act.

- (2) The request must be accompanied by the memorandum and articles of association of the intended public company that must be—
- (a) framed in accordance with the Companies Act, but subject to this Act; and
 - (b) signed by the Minister on behalf of the State.
- (3) On receipt of the request and the memorandum and articles so signed, the Registrar of Companies must— 5
- (a) register the conversion of Broadband Infraco (Proprietary) Limited into a public company having a share capital, as well as its memorandum and articles; and
 - (b) issue an amended certificate of incorporation. 10
- (4) The name of the public company referred to in subsection (3)(a) shall be Broadband Infraco Limited.
- (5) No additional fee referred to in section 63(2) of the Companies Act is payable in respect of the registration of the memorandum and articles referred to in subsection (3)(a). 15
- (6) The Registrar of Companies must issue such directives and authorise such deviations from the regulations in force in terms of the Companies Act and the documents prescribed in terms thereof as he or she may consider necessary in order to give effect to this section.
- (7) Sections 32, 44(1), 54(2), 66, 190 and 344(d) of the Companies Act do not apply to Broadband Infraco Limited for so long as the State holds 75 per cent or more of the total issued ordinary shares in the company. 20

Effect of conversion

9. The conversion contemplated in section 8 does not affect—
- (a) the continued corporate existence of Infraco under the Companies Act; 25
 - (b) any rights, liabilities or obligations acquired or incurred by Infraco before the conversion date; and
 - (c) the terms and conditions of service of any employee of Infraco.

Regulations

10. The Minister may, by notice in the *Gazette*, make regulations regarding— 30
- (a) the procedure to be followed by Infraco in respect of a request to the Minister for the expropriation of land or a right in land contemplated in section 7 and in respect of the refunding of costs incurred by the Minister contemplated in section 7(4); and
 - (b) any ancillary or incidental administrative or procedural matter that it is 35 necessary to prescribe for the proper implementation or administration of this Act.

Amendment of laws

11. With effect from—
- (a) the transfer date, the Public Finance Management Act is hereby amended by 40 the insertion in Schedule 2 after item 11 of the following item:
“11A. Broadband Infraco (Proprietary) Limited”; and
 - (b) the conversion date, the Public Finance Management Act is hereby amended by the substitution in Schedule 2 for item 11A of the following item:
“11A. Broadband Infraco Limited”. 45

Short title and commencement

12. This Act is called the Broadband Infraco Act, 2007, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE BROADBAND INFRACO BILL, 2007

1. BACKGROUND

1.1 The Government of the Republic of South Africa (“Government”) represented by the Minister for Public Enterprises intends expanding the availability of broadband access to underdeveloped areas, thereby ensuring that the bandwidth requirements for specific projects of national interest are met. In order to achieve this, the Minister will acquire shareholding in Broadband Infraco (Proprietary) Limited (“Infraco”) from Eskom Holdings Limited (“Eskom”).

1.2 Investigations into the high broadband costs in South Africa compared to international counterparts revealed that connectivity providers other than Telkom Limited (“Telkom”) have a cost structure where up to 80% of costs comprise costs attributable to Tier 1 national backbone connectivity and Tier 3 international connectivity, both of which are supplied by Telkom. The logical conclusion was to intervene to address the national backbone and international connectivity cost structures. This is based on the assumption that if these costs are addressed, Tier 2 (the Local Metropolitan Area network and last mile) connectivity providers would quickly pass this on to the market as a result of competitive pressure.

1.3 The Bill also seeks to create flexibility for funding and private sector involvement by providing for the possibility that Infraco may be converted into a public company. Public companies are generally recognised as the optimal corporate form to access capital markets and enable future private sector investment, where necessary.

2. OBJECTS

The objects of the Bill are to provide for the—

- (a) transfer of Infraco shares and Infraco interests from Eskom to the State;
- (b) licensing of Infraco under the Electronic Communications Act, 2005 (Act No. 36 of 2005); and
- (c) conversion of Infraco into a public company with share capital.

3. BODIES CONSULTED

The Department of Public Enterprises has consulted—

- the National Treasury;
- the Department of Communications;
- the Independent Communications Authority of South Africa;
- the Department of Land Affairs; and
- Eskom Holdings Limited and Transnet Limited.

4. FINANCIAL IMPLICATIONS FOR STATE

The financial implications for the State will be a capitalisation amount of R975 million into Infraco.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the Department of Public Enterprises are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act. No. 41 of 2003), since it contains no provision pertaining to customary law or customs of traditional communities.