

Electronic Communications Act

Bill No. of 2009

To be presented by
the Minister for Information Communications and Technology

An Act
entitled

ELECTRONIC COMMUNICATIONS ACT

ENACTED by the King and the Parliament of Swaziland.

An Act to provide a framework for the further development of electronic communications networks and services in Swaziland.

PART I
PRELIMINARY

Short title and commencement

1. This Act may be cited as the Electronic Communications Act, 2009 and shall come into force on the date of publication in the Gazette.

Application

2. This Act is establishing and is applicable to the regulation of electronic communications and all matters ancillary thereto.
3. This Act shall not apply to the content of messages transmitted through any electronic communications network.
4. The provisions of this Act shall be without prejudice to the operation of any other law regulating services provided using electronic communications, content and broadcasting, audiovisual policy or radio and telecommunications terminal equipment.

Interpretation

5. In this Act unless the context indicates otherwise-

"access" means the making available of facilities and/or services, to another licensee, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services. It covers inter alia access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop), access to physical infrastructure including buildings, ducts and masts; access to relevant software systems including operational support

systems, access to number translation or systems offering equivalent functionality, access to fixed and mobile networks, in particular for roaming, access to conditional access systems for digital television services; access to virtual network services;

"Act" means this Act and includes any regulations made there under unless the context otherwise requires;

"associated facilities" means those facilities associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services through that network and/or service. It includes conditional access systems and electronic program guides;

"Commission and "the competent commission" means the Swaziland Communications Commission established under the Swaziland Communications Commission Act;

"cable television networks" means any mainly wire-based infrastructure established primarily for the delivery or distribution of radio or television broadcast to the public;

"closed user group" means a group of persons who have common business or other common economic or social interest, other than the provision of a public electronic communications service;

"conditional access system" means any technical measure and/or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or other form of prior individual authorization;

"decision" includes any directive, determination, licence condition, measure, requirement or specification however so described made by the Commission;

"dominant position" means a position of economic strength enjoyed by a licensee either individually or jointly with others affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers;

"electronic communications network" means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit-switched and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

"electronic communications service" means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in the Electronic Commerce Act, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;

"end-user" means a person who has contracted for, or who requests, any communications service.

"equipment" includes any equipment or machinery however so described;

"Gazette" means the Government Gazette;

"interconnection" means the physical and logical linking of public communications networks used by the same or a different licensee in order to allow the users of one licensee to communicate with users of the same or another licensee, or to access services provided by another licensee. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators;

"international gateway operator" means an person providing or licensed to provide a public electronic communications network which includes an international connection;

"licensee" means a person licensed to provide a public communications network/service or an associated facility in accordance with this Act;

"local loop" means the physical circuit connecting the network termination point at the subscriber's premises to the main distribution frame or equivalent facility in the fixed public telephone network;

"Minister" means the Minister responsible for Information Communications and Technology;

"network termination point" means the physical point at which an end user is provided with access to a public communications network; in the case of networks involving switching or routing, the network termination point is identified by means of a specific network address, which may be linked to an end user number or name;

“person” means any individual, partnership, association, joint venture, trust, company or corporation;

“private electronic communications service” means electronic communications services provided exclusively for transmission and reception by one person or its employees or among persons under common ownership or control or their employees;

"provision of an electronic communications network" means the establishment, operation, control or making available of such a network;

"public electronic communications network" means an electronic communications network used wholly or mainly for the provision of publicly available electronic communications services;

"public pay telephone" means a telephone available to the general public, for the use of which the means of payment may include coins and/or credit and/or debit cards and/or pre-payment cards, including cards for use with dialing codes;

"public telephone network" means an electronic communications network which is used to provide publicly available telephone services; it supports the transfer between network termination points of speech communications, and also other forms of communication, such as facsimile and data;

"publicly available electronic communications service" means an electronic communications service available to the public;

"publicly available telephone service" means a service available to the public for originating and receiving national and international calls;

"satellite earth station network" means a configuration of two or more earth stations which interoperate by means of a satellite;

"universal services" means the minimum set of services of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price as may be defined under regulations made under this Act;

“value added services” means:

- i. the manipulation of the format, content, code, protocol, or other aspect of information transmitted via electronic communications by a user;
- ii. the provision of information to a user, including the restructuring of information transmitted by a user. Value added services are not electronic communications although they may be offered over electronic communications facilities;
- iii. the offering of stored information for interaction by a subscriber;

Duties of the Swaziland Communications Commission in respect of public communications networks and services

6. The Swaziland Communications Commission established under the Swaziland Communications Commission Act shall be the competent Commission to regulate electronic communications under this Act and to enforce the provisions of this Act.
7. (1) In the regulation of electronic communications in Swaziland, the Commission shall ensure:
 - (a) the provision of a wide range of public electronic communications networks and services;
 - (b) as far as practicable, access to any person to install or operate any electronic communications network or to provide any electronic communications service in the Kingdom of Swaziland in compliance with this Act.
- (2) The Commission may establish ownership limitations in order to ensure sufficient numbers of unaffiliated market participants, and may take appropriate actions and measures to ensure such participation in the event of market failure.

**PART II
POWERS AND DUTIES OF THE MINISTER**

Powers of the Minister

8. The Minister shall establish, develop and revise a policy and regulations for the national electronic communications sector within the Kingdom of Swaziland.

Duties of the Minister

9. To this end, the Minister's duties shall be the following:
 - (a) to define the general national strategy for the electronic communications sector in the country, including plans for the sector's development and expansion;
 - (b) to define and monitor the policy related to the promotion of universal access and universal service within the Kingdom of Swaziland for the purpose of expanding the scope of coverage of electronic communications in such a way as to meet the requirements of economic and social development in the country;
 - (c) to monitor the implementation of the Kingdom of Swaziland's commitment to international treaties in the electronic communications and information technology sectors;

- (d) to safeguard the Kingdom of Swaziland's interests with respect to other countries, regional and international organisations, unions, and commissions concerned with electronic communications;
- (e) in cooperation with the Commission, other Ministries, and concerned parties, to supervise the representation of the Kingdom of Swaziland before official bodies as described in subsection (d);
- (f) to promote the advancement of research and development in the areas of electronic communications and to encourage the setting of advanced education and training programmes in electronic communications; and
- (g) upon recommendation of the Commission, or on the Minister's own initiative, to present draft laws and regulations to Cabinet for any matter relating to electronic communications.

Coordination with other entities in the sector

10. In carrying out the Ministerial tasks described above, the Minister may:
- (a) request input from and coordinate with other Ministries, the Commission, and other stakeholders as appropriate;
 - (b) notify the Commission of the government policy that is to apply in relation to the sector and to ensure that the policies are implemented.

PART III
LICENSING OF THE ELECTRONIC COMMUNICATIONS
NETWORKS AND SERVICES

Requirement for operation of public and private electronic communications networks and services

11. (1) No person shall operate a public electronic communications network or provide a public electronic communications service in the Kingdom of Swaziland or between any place in Swaziland and any other place except in accordance with a license issued by the Commission in accordance with this Act.
- (2) The Commission may recommend regulations to the Minister exempting the operation or provision of certain public electronic networks and/or services from the requirement of holding such licence.
12. (1) A person operating an electronic communications network used solely to provide private electronic communications services or closed user group services and value added services, the list of which shall be determined by the Commission:

- (a) is not required to obtain a licence in accordance with this Act, except where the Commission determines that the circumstances require the licensing thereof;
 - (b) shall obtain a frequency licence if its network provides a radio communication service or uses radio frequency spectrum;
 - (c) shall not use such network for resale, and shall not transfer, assign or sublet its rights to such network, or cede with control thereof;
 - (d) shall obtain a licence in accordance with this part of the Act if it intends to operate a public electronic communications network or to provide a public electronic communications service; and
 - (e) is not restricted to carrying voice only or data only or to any other such use.
- (2) Notwithstanding any other provision of this Act, the Commission may require that any person or class of persons operating a specific type of electronic communications network or providing a specific type of electronic communications service that is exempted from obtaining a licence under sections 11(2) or 12, must inform the Commission with the details of the provision of such electronic communications network and/or service within one (1) month of commencing operations.

Categories of electronic communications licenses

13. (1) The Commission may issue electronic communications licenses under two (2) general categories:
- (a) general licenses; and
 - (b) individual licenses.
- (2) The provision of any public voice telephony service, and the operation of any television network, may only be authorized under an individual license.

Application for a general licence

14. (1) The Commission shall issue a decision, to be published on its website and on the Gazette, specifying:
- (a) the procedure by which any person wishing to operate an electronic communications network or to provide an electronic communications service requiring a general licence may apply to the Commission;
 - (b) the information which should be provided to the Commission at the time of initial application or subsequently; and
 - (c) the administrative fee payable.
- (2) In establishing licensing procedures and evaluating applications, the Commission shall act in an open, transparent and non-discriminatory manner.

- (3) Subject to the provision of subsection (4), any person providing the necessary proof that it meets the conditions established and published by the Commission in the said decision shall qualify to obtain a general license.
- (4) The Commission shall have the power to reject the application if:
 - (a) the information submitted is not complete or if it is not submitted in strict compliance with the requirements set out in the decision and/or with this Act;
 - (b) if information provided is discovered to be false or inaccurate;
 - (c) if the applicant has an outstanding license fee or any other outstanding amounts due to the Commission;
 - (d) if an applicant's previous licence had been revoked or suspended, even outside the Kingdom of Swaziland;
 - (e) the Commission suspects that the applicant or any person directly involved in the applicant's business may reasonably pose a threat to public trust, public security or public order.
- (5) Evaluation of the application will be completed within four (4) weeks from the date of submission. The applicant must submit any information requested by the Commission during the evaluation process, and failure to do so within three (3) months from the date of request will result in a rejection of the application.
- (6) Prior to completing its evaluation, the Commission shall publish a non-confidential version of the proposed license for consultation in accordance with section 35 of the Swaziland Communications Commission Act and shall consider any representations made to it concerning the draft.
- (7) After completion of evaluation by the Commission, the applicant will be informed whether the application was accepted or otherwise, and in the case of rejection, shall be given a reasoned decision.
- (8) In cases where the application is accepted, and upon payment of the appropriate licence fee, the final version of the licence shall be published on the Commissions' website and in the Gazette and shall come into effect within thirty (30) days of publication of the final version.
- (9) A person dissatisfied with a decision of the Commission may have recourse to the measures established under section 53 of the Swaziland Communications Commission Act.
- (10) Any person operating or providing an electronic communications network or service before formal acceptance from the Commission shall be liable to a daily penalty not exceeding fifteen thousand Emalangeni (E15,000).

Applications for an individual licence

15. (1) The Commission shall issue a decision, to be published on its website and on the Gazette, specifying:
 - (a) the kinds of individual licenses which may be applied for;
 - (b) the procedure by which any person wishing to obtain a particular individual licence may apply with the Commission;
 - (c) the information which should be provided to the Commission at the time of initial application or subsequently;
 - (d) the criteria according to which each application will be determined;
 - (e) the administrative fee payable; and
 - (f) whether or not the issue of such a license is in the public interest.
- (2) In establishing licensing procedures and evaluating applications, the Commission shall act in an open, transparent and non-discriminatory manner.
- (3) The Commission shall have the discretion to grant or reject an application for an individual license taking into consideration:
 - (a) the market for the licence being requested;
 - (b) the published criteria by which the license will be issued;
 - (c) whether or not the issue of such a license is in the public interest.
- (4) The Commission shall have the power to reject the application if:
 - (a) the information submitted is not complete or if it is not submitted in strict compliance with the requirements set out in the decision and/or with this Act;
 - (b) if information provided is discovered to be false or inaccurate;
 - (c) if the applicant has an outstanding license fee or any other outstanding amounts due to the Commission;
 - (d) if an applicant's previous licence had been revoked or suspended, even outside the Kingdom of Swaziland;
 - (e) the Commission suspects that the applicant or any person directly involved in the applicant's business may reasonably pose a threat to public trust, public security or public order.
- (5) Evaluation of the registration will be completed within six (6) months from the date of submission. The applicant must submit any information requested by the Commission during the evaluation process, and failure to do so within three (3) months from the date of request will result in a rejection of the application.
- (6) Where the individual license to be issued is to be limited in number, the Commission:

- (a) shall publish a consultative document providing a detailed explanation of the reasons for the proposed limitation and consider any representations made to it on the matter;
 - (b) may make use of competitive or comparative selection procedures.
- (7) The Commission shall prescribe rules and procedures that shall ensure that only bona fide bidders participate in bidding.
 - (8) Prior to completing its evaluation, the Commission shall publish a non-confidential version of the proposed license for consultation in accordance with section 35 of the Swaziland Communications Commission Act and shall consider any representations made to it concerning the draft.
 - (9) After completion of evaluation by the Commission, the applicant will be informed whether the application was accepted or otherwise, and in the case of rejection, shall be given a reasoned decision.
 - (10) In cases where the application is accepted, and upon payment of the appropriate licence fee, the final version of the licence shall be published on the Commissions' website and in the Gazette and shall come into effect within thirty (30) days of publication of the final version.
 - (11) A person dissatisfied with a decision of the Commission may have recourse to the measures established under section 53 of the Swaziland Communications Commission Act.
 - (12) Any person operating or providing an electronic communications network or service before formal acceptance from the Commission shall be liable to a daily penalty not exceeding fifteen thousand Emalangeni (E15,000).

Amendment of a electronic communications licence

- 16. (1) A licence may be amended:
 - (a) by the written agreement of the parties; or
 - (b) by the Commission, where force majeure, national security considerations, changes in national legislation or the implementation of international obligations require amendment; or
 - (c) where the Commission, taking into account the public interest, otherwise deems amendment necessary to achieve the objectives of this Act.
- (2) Before amending a licence, the Commission shall give the licensee notice in writing of the proposed amendment, giving reasons for the amendment and the date by which the amendment shall take effect, and shall give the licensee the opportunity to make submissions within the timescales, not being less than one (1)

month, which the Commission may specify. Such submissions may include proposed alternatives to the amendment.

- (3) Notwithstanding the provision of subsection (2), the Commission may cause the immediate amendment of a licence where there is, or is likely to be, a risk to national security, or where immediate amendment is essential to the public interest.
- (4) A person dissatisfied with a decision of the Commission may have recourse to the measures established under section 53 of the Swaziland Communications Commission Act.

Monitoring and enforcement of electronic communications licenses

17. (1) The Commission shall ensure that electronic communications networks and services are provided in accordance with:
 - (a) the terms and conditions of the relevant licence;
 - (b) this Act or other law which the Commission is entitled to administer; and
 - (c) any decision issued by the Commission.
- (2) The Commission shall investigate any suspected breach of such licence condition/s, law/s or decision/s in accordance with section 40 of the Swaziland Communications Commission Act, and may subsequently take action as it deems fit in accordance with section 50 of the same Act.

**PART IV
RIGHTS AND OBLIGATIONS OF LICENSEES**

Rights pertaining to the licensee

18. A licensee is entitled to:
 - (a) provide the electronic communications networks and/or services as described in his licence;
 - (b) negotiate and obtain interconnection to and where applicable, access from, another licensee authorized to provide a publicly available electronic communications network;
 - (c) have its application for the necessary rights of use of radio frequencies and/or numbers considered;
 - (d) request the Commission to issue a standardized declaration to facilitate the exercise of rights to install facilities and rights of interconnection;
 - (e) have its application for the necessary rights to install facilities considered; and

- (f) be given an opportunity by the Commission to be designated to carry out universal service obligations.

Obligations pertaining to a licensee

19. A licensee is obliged to:

- (a) comply with the provision of this Act and all national laws and all decisions of the Commission, unless specifically exempted by the Commission;
- (b) comply with the conditions listed in its licence;
- (c) pay to the Commission any charges due in accordance with this Act, with any other relevant law, or as stipulated in the licence document;
- (d) comply with any request for information that the Commission may make from time to time, in accordance with this Act or the Swaziland Communications Commission Act, in the form and within the timelines specified by the Commission;
- (e) submit to the Commission a copy of its annual report for each financial year;
- (f) comply with any relevant compulsory standards as may be established from time to time, for the provision of services, technical interfaces and, or network functions;
- (g) comply with any notices or guidelines that the Commission may issue with respect to standards and any relevant voluntary standards that may be adopted by internationally recognized standardization bodies;
- (h) comply with any radiation emission standards adopted and published by the International Commission for Non-Ionising Radiation Protection (ICNIRP) or any other appropriate standards as may be specified by law or by the Commission;
- (i) comply with any decisions issued by the Commission in relation to electromagnetic radiation and harmful interference and ensure that the network and all services at all times comply with the technical and performance standards generally accepted by the industry or as may be prescribed by the Commission or accepted by the Commission as being adequate to ensure the limitation of exposure of the general public to electromagnetic fields;
- (j) comply with all requirements related to legal interception as may be established under the Act or any Commission decision;
- (k) refrain from transferring, assigning or selling a licence granted to it under this Act or cede control in the operations of the licence or merge with another person or licensee without prior approval in writing of the Commission; and
- (l) comply with any decisions issued by the Commission and make arrangements for the provision or rapid restoration of communication services in the event of, or during a major disaster in order to ensure communications between emergency services and the competent authorities and broadcasts to the general public;

Additional obligations pertaining to a licensee holding a licence for the provision of publicly available electronic communications networks

20. In addition to the obligations established under section 19, a licensee holding a licence for the provision of a publicly available electronic communications network is obliged to:
- (a) negotiate and grant interconnection to its network under reasonable terms when requested to do so by another licensee holding a licence for the provision of a publicly available electronic communications network;
 - (b) ensure that the capacity, quantity and features of the network are sufficient for providing and maintaining an efficient communications network;
 - (c) ensure that the network is sufficient for and compatible with such international electronic communications services as the Commission may specify; and
 - (d) ensure the security of the network and any extension thereof;
 - (e) ensure that the network is capable of providing calling-line identification facilities as specified by the Commission; and
 - (f) ensure that the network does not cause harmful interference with the lawful use or operation of any electronic communications network and/or services.

Additional obligations pertaining to a licensee holding a licence for the provision of publicly available electronic communications services

21. In addition to the obligations established under section 19, a licensee holding a licence for the provision of publicly available electronic communications services is obliged to:
- (a) provide such services efficiently, complying with the standards for quality generally accepted in the industry or as may from time to time be specified by the Commission;
 - (b) notify the Commission and publish by notice in the media when the services are to be interrupted for the installation or repair or the changing of apparatus;
 - (c) establish an efficient mechanism for receiving complaints and repairing failures in its networks and in the services provided; and
 - (d) provide an end-user subscribing to services with a written contract containing the specifications, terms and conditions of the service and shall provide such services to end-users in accordance with such contract;
 - (e) ensure that any changes to the terms and conditions of the service are subjected to the Authority's prior approval, and implemented subject to conditions laid down by the Authority.

22. In addition to the obligations established under sections 19 and 21, a licensee holding a licence for the provision of publicly available telephony services is obliged to:
- (a) ensure that the service is capable of originating and receiving national and international calls;
 - (b) ensure that the service is capable of giving end-users access to emergency services through a number or numbers in a national or international telephone numbering plan;
 - (c) abide by number portability obligations as may be specified by the Commission.

Additional obligations pertaining to a licensee holding a licence for the provision of an international gateway

23. An international gateway operator shall at all times:
- (a) adopt appropriate measures to safeguard the integrity and resiliency of the network elements utilised to provide international connectivity;
 - (b) secure the availability of capacity, or have in place alternative measures, sufficient to ensure an adequate level of uninterrupted international connectivity.

Commission decisions, guidelines and regulations relating to licensee rights and obligations

24. The Commission may issue decisions, guidelines and/or recommend regulations to the minister in relation to any of the rights and obligations established above, making further specifications thereto.

Breach of licensee obligations

25. Failure by a licensee to abide by any of the conditions relevant to it as established in sections 19 to 23, or any Commission decision relating thereto, shall constitute an infringement of this Act and shall be investigated in accordance with section 40 of the Swaziland Communications Commission Act, and sanctioned in accordance with section 50 of the same Act.

PART V
LICENSEES HOLDING A DOMINANT POSITION
ON THE MARKET

Obligations of dominant licensees

26. In addition to the obligations established under Part IV of this Act, a licensee holding a dominant position on the relevant market may be subjected to specific regulatory obligations arising out of the nature of its dominant position, as established under this part of the Act.

Market definition, analysis and determination of dominance

27. (1) The Commission shall, in accordance with the principles of competition law, periodically define relevant markets appropriate to national circumstances, in particular relevant geographic markets and it shall carry out an analysis of such relevant markets.
- (2) Where the Commission determines that a market is effectively competitive, it shall not impose or maintain the regulatory obligations established in this part of the Act.
- (3) Where the Commission determines that a relevant market is not effectively competitive, it shall identify and designate licensees with a dominant position in that market and shall impose upon such licensees the appropriate regulatory obligations established in sections 28 to 32.
- (4) Any obligations imposed by the Commission under this part of the Act shall be:
- (a) based on the nature of the problem identified;
 - (b) objective, transparent, proportionate and non-discriminatory,
 - (c) implemented in accordance with the consultation procedure established under section 35 of Swaziland Communications Commission Act.

Obligation of access to, and use of, specific network facilities

28. (1) The Commission may, in accordance with section 27, impose obligations on licensees to meet reasonable requests for access to, and use of, specific network elements and associated facilities, in particular, in situations where the Commission considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.
- (2) Operators may be required *inter alia*:

- (a) to interconnect networks or network facilities;
 - (b) to give third parties access to specified network elements and/or facilities, including unbundled access to the local loop;
 - (c) to negotiate in good faith with other licensees requesting access;
 - (d) not to withdraw access to facilities already granted;
 - (e) to provide specified services on a wholesale basis for resale by third parties;
 - (f) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;
 - (g) to provide co-location or other forms of facility sharing, including duct, building or mast sharing;
 - (h) to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks; and
 - (i) to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;
- (3) The Commission may attach conditions covering fairness, reasonableness and timeliness to any obligations imposed under subsections (1) and (2).
- (4) When considering whether to impose the obligations referred to in subsections (1) and (2), the Commission shall in particular take into account the following factors:
- (a) the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved;
 - (b) the feasibility of providing the access proposed, in relation to the capacity available;
 - (c) the initial investment by the facility owner, bearing in mind the risks involved in making the investment;
 - (d) the need to safeguard competition in the long term; and
 - (e) where appropriate, any relevant intellectual property rights.

Obligation of non-discrimination

29. (1) The Commission may, in accordance with section 27, impose obligations of non-discrimination, in relation to interconnection and/ or access.
- (2) Obligations of non-discrimination shall ensure, in particular, that the licensee:
- (a) applies equivalent conditions in equivalent circumstances to other licensees providing equivalent services; and
 - (b) provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners.

Obligation of transparency

30. (1) The Commission may, in accordance with section 27, impose obligations for transparency in relation to interconnection and/or access, requiring licensees to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices.
- (2) The Commission may, in particular where a licensee has obligations of non-discrimination in accordance with section 29, require that licensee to publish a reference offer, which shall be sufficiently unbundled to ensure that other licensees are not required to pay for facilities which are not necessary for the services requested, giving a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices. The Commission shall, furthermore, be able to impose changes to reference offers to give effect to the obligations imposed under the Act and under these regulations.
- (3) The Commission may specify the precise information to be made available, the level of detail required and the manner of publication.

Obligation of accounting separation

31. (1) The Commission may, in accordance with section 27, impose obligations for accounting separation in relation to specified activities related to interconnection and/or access.
- (2) Without prejudice to the generality of subsection (1), the Commission may require a vertically integrated company to make transparent its wholesale prices and its internal transfer prices, especially to ensure compliance where there is a requirement for non-discrimination under section 29, or, where necessary, to prevent unfair cross-subsidy and, where it does so the Commission may specify the format and accounting methodology to be used.
- (3) In accordance with the procedure established in section 47 of the Swaziland Communications Commission Act, the Commission may require that accounting records, including data on revenues received from third parties, are provided on request, in order to facilitate the verification of compliance with obligations of transparency and non-discrimination.
- (4) Subject to the protection of the confidentiality of any information which the Commission considers confidential, the Commission may publish any information obtained by it under subsection (3) to the extent that the Commission considers that such information would contribute to an open and competitive market.

Obligation of cost orientation and price controls

32. (1) The Commission may, in accordance with section 27, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the licensee concerned might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users.
- (2) When considering the imposition of obligations under this subsection (1) the Commission shall at all times take into account the investment made by the licensee in electronic communications networks or services or associated facilities which the Commission considers relevant and shall allow the licensee a reasonable rate of return on adequate capital employed, taking into account the risks involved.
- (3) The Commission shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and to maximize consumer benefits. In this regard the Commission may also take account of prices available in comparable competitive markets.
- (4) Where a licensee has an obligation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs, including a reasonable rate of return on investment, shall lie with the licensee concerned. For the purpose of calculating the cost of efficient provision of services, the Commission may use cost accounting methods independent of those used by the licensee. The Commission may require a licensee to provide full justification for its prices and may, where appropriate, require prices to be adjusted.
- (5) The Commission shall ensure that, where implementation of a cost accounting system is mandated in order to support price controls, a description of the cost accounting system is made publicly available, showing at least the main categories under which costs are grouped and the rules used for the allocation of costs.
- (6) Compliance with the cost accounting system shall, at the choice of the Commission, be verified by the Commission, or by a suitably qualified independent body approved by the Commission.
- (7) The Commission shall cause to be published annually a statement concerning compliance with any cost accounting system imposed this section.

PART VI UNIVERSAL SERVICE OBLIGATIONS

Availability of universal service

33. (1) The Commission, in consultation with the Minister, shall develop annual objectives with the purpose of ensuring that the services mentioned in section 34 are made available, at the quality specified, to all end-users in the Kingdom of Swaziland, including those with disabilities, independently of geographical location, and, in the light of specific national conditions, at an affordable price.
- (2) The Commission shall determine the most efficient and appropriate approach for ensuring the implementation of universal service as established in subsection (1).

Elements constituting the universal service

34. (1) The services to be made available in accordance with section 33 are the following:
- (a) the provision of a connection to the public telephone network at a fixed location, at an affordable price, upon request, which connection must be capable of allowing end-users to make and receive local and international calls, facsimile communications, and data communications, at data rates that are sufficient to permit functional internet access, taking into account prevailing technologies used by the majority of subscribers, and technological feasibility;
 - (b) the provision of a comprehensive directory of subscribers in a form approved by the Commission, whether printed or electronic or both, as the Commission may determine, and updated at least once (1) in each year;
 - (c) the provision of a comprehensive telephone directory enquiry service;
 - (d) the provision of public pay telephones sufficient to meet the reasonable needs of end-users in terms of the geographical coverage, the number of telephones, the accessibility of such telephones to disabled users and the quality of service; and
 - (e) the introduction of specific measures for disabled users and low income users.
- (2) The Commission may issue decisions, guidelines and/or recommend regulations to the Minister in relation to any of the rights and obligations established above, including provisions regarding the tariffs and quality of the services mentioned in subsection (1), making further specifications thereto.

Designated licensee

35. (1) Where the services mentioned in section 34 are not already being provided commercially at the at the quality specified and at affordable prices, to all end-

users within the Kingdom of Swaziland, the Commission may designate one or more licensees for such period as it may specify, to provide the services mentioned in section 34, so that the whole of the national territory can be covered.

- (2) The Commission may designate different licensees or sets of licensees to provide different elements of universal service and/or to cover different parts of the national territory.
- (3) In designating a licensee under subsections (1) and (2), the Commission shall adopt an efficient, objective, transparent and non-discriminatory designation procedure whereby no licensee is excluded beforehand from being designated. The designation procedure adopted shall ensure that the universal service obligations are provided in a cost-effective manner.

Funding of the universal service

36. (1) The Commission shall estimate the cost of achieving these objectives, update its cost estimates annually and report its findings to the Minister.
- (2) The Commission shall consider any request made by a designated licensee to receive funding for the net costs of meeting the obligation for which he is designated. In each such case the Commission shall determine whether the provision of the service by the designated licensee making the request is imposing an unfair burden on such licensee, and shall accordingly amend or retain the licensee's obligations.
- (3) The Commission may make it a condition of a grant of a license that every provider of public electronic communications services shall contribute to a universal access fund.
- (4) The proceeds of the fund shall be used for the development and expansion of electronic communications networks and services in areas where there are no services and to provide access to the widest number of users including those with disabilities.

Provision for co-ordination with Rural Access Fund

37. In the event that the Government of the Kingdom of Swaziland decides to establish a donor-supported Rural Access Fund (RAF), providing grant support to co-fund priority investments increasing the access of the rural population to basic infrastructure services, such as electricity and electronic communications, the Minister in consultation with the Commission shall develop a policy for the manner in which the funds from Rural Access Fund are to be used in conjunction with the connection targets fixed in the tariff approval procedures.

PART VII RADIO FREQUENCY MANAGEMENT

Frequency management

38. (1) The Commission shall be responsible for managing the efficient and effective use of radio frequency spectrum, including spectrum and orbital locations used by satellite services, and in doing so shall:
- (a) in collaboration with the Minister, and after consultation with all major stakeholders including the sound and television broadcasting industries in accordance with section 35 of the Swaziland Communications Commission Act, establish a national frequency allocation plan which may be revised periodically as necessary;
 - (b) assign radio frequency spectrum or groups of radio frequency spectrum in accordance with the national frequency plan and with publicly available national policies;
 - (c) monitor the use of the radio frequency spectrum for purposes of eliminating harmful interference, ensuring efficient usage, planning of radio frequency spectrum allocation and radio frequency spectrum assignment, and for making spectrum-occupancy related information available to industry and consumers;
 - (d) in collaboration with the Minister, make and publicize decisions necessary for the management and the use of the radio frequency spectrum;
 - (e) in collaboration with the Minister, establish fees for the use of the radio frequency spectrum;
 - (f) in the allocation and assignment of radio frequency spectrum, give due regard to the requirements of safety and emergency services;
 - (g) where necessary, specify compatibility standards for the interoperability of radio frequency equipment and ensure that the standards are adhered to; and
 - (h) represent the country in international fora on matters regarding radio frequency spectrum management.
- (2) In carrying out its functions under subsection (1) the Commission shall take into account international agreements, treaties and conventions to which the Kingdom of Swaziland is a party, as well as frequency allocation plans adopted by countries within the region.
- (3) The Commission shall allocate and assign radio frequency spectrum to:

- (a) persons possessing a licence to provide electronic communications, radio and broadcasting networks, and/or services;
 - (b) government departments; and
 - (c) private and amateur wireless operations licensees.
- (4) The Commission will, as may be required, allocate certain frequencies for use by government entities in furtherance of the public interest. As necessary, the Commission also may inhibit or obstruct the use of other non-designated radio frequencies, on a temporary basis, for use by government entities.

Requirement for a radio frequency spectrum licence

39. (1) With the exception of broadcast receivers, no person shall use any radio frequency spectrum that has not specifically been allocated to that person through a licence issued by the Commission in accordance with the national radio frequency plan.
- (2) The Commission may grant or refuse any application for a radio frequency spectrum licence based on applicable policies and regulations.
- (3) On the granting of a radio frequency spectrum licence, the Commission shall cause to be published in the Gazette a notice to that effect.
- (4) The terms of a radio frequency spectrum licence shall be made available for public scrutiny at the office of the Commission and may be reproduced by the Commission, at the request of any member of the public, on payment of the specified fee.
- (5) The Commission may, for the purpose of assigning radio frequency spectrum, use competitive bidding procedures if it determines that it would be in the public interest where:
- (a) a licence is to be granted to a new applicant; or
 - (b) competing and mutually exclusive applications have been filed by qualified applicants.
- (6) The Commission shall prescribe rules and procedures that shall ensure that only bona fide bidders participate in bidding.
- (7) Where an application for a frequency spectrum licence is rejected, the Commission shall notify the applicant in writing, giving reasons for the refusal.
- (8) Where it appears to the Commission that the frequency spectrum licence contains information relating to national security or other international obligations, the Commission shall withhold that information from public scrutiny.

- (9) A frequency spectrum allocation shall be consistent with the national radio frequency plan established by the Commission and shall confer the right on the licensee to use a certain frequency band or bands subject to such conditions as may be set out in the frequency spectrum licence.
- (10) Subject to the other subsections of this section, the Commission shall determine all frequency allocations on a non-discriminatory basis.

Obligations with respect to frequency authorisations

- 40. (1) Every holder of a frequency licence shall:
 - (a) pay the fees specified by the Commission for the use of the radio frequency spectrum as established in the licence;
 - (b) only use the authorised radio frequency spectrum band specified in the licence and strictly adhere to the service or type of network or technology for which the licence has been granted;
 - (c) not transfer the right to use the radio frequency spectrum without the prior written approval of the Commission;
 - (d) upon request made by the Minister and subject to any enactment collaborate, with the Government in matters of national security; and
 - (e) strictly adhere to all the conditions in the radio frequency spectrum licence and all other laws or Commission decisions.
- (2) A person owning or holding a significant interest in the holder of a frequency spectrum licence shall not sell, transfer, charge or otherwise dispose of his interest in such holder, or any part of his interest, unless the prior written approval of the Commission has been obtained.
- (3) A holder of a frequency spectrum licence shall not, unless the prior written approval of the Commission has been obtained:
 - (a) cause, permit or acquiesce in a sale, transfer, charge or other disposition referred to in subsection (2);
 - (b) issue or allot any shares or cause, permit or acquiesce in any other reorganisation of its share capital that results in:
 - (i) a person acquiring a significant interest in such holder, or
 - (ii) a person who already owns or holds a significant interest in the holder, increasing or decreasing the size of his interest.
- (4) The approval of the Commission required under subsections (1), (2) and (3) shall not be unreasonably withheld.

Amendment of a frequency licence

41. (1) A frequency licence may be amended:
- (a) by the written agreement of the parties; or
 - (b) by the Commission, where force majeure, national security considerations, changes in national legislation or the implementation of international obligations require amendment; or
 - (c) where the Commission, taking into account the public interest, otherwise deems amendment necessary to achieve the objectives of this Act.
- (2) Before amending a frequency licence, the Commission shall give the licensee notice in writing of the proposed amendment, giving reasons for the amendment and the date by which the amendment shall take effect, and shall give the licensee the opportunity to make submissions within the timescales, not being less than one (1) month, which the Commission may specify. Such submissions may include proposed alternatives to the amendment.
- (3) Notwithstanding the provision of subsection (2), the Commission may cause the immediate amendment of a frequency licence where there is, or is likely to be, a risk to national security, or where immediate amendment is essential to the public interest.
- (4) A person dissatisfied with a decision of the Commission may have recourse to the measures established under section 53 of the Swaziland Communications Commission Act.

Monitoring and enforcement of frequency spectrum licences

42. (1) The Commission shall ensure that radio frequency spectrum is used in accordance with:
- (a) the terms and conditions of the relevant licence;
 - (b) this Act or other law which the Commission is entitled to administer; and
 - (c) any decision issued by the Commission.
- (2) The Commission shall investigate any suspected breach of such condition/s, law/s or decision/s in accordance with section 40 of the Swaziland Communications Commission Act, and may subsequently take action as it deems fit in accordance with section 50 of the same Act.

PART VIII MANAGEMENT OF NUMBERS

National numbering plan and allocation of numbers

43. (1) The Commission shall establish and manage the national numbering plan for electronic communications services, and shall control the assignment of all national numbering resources. In doing so it shall ensure that adequate numbers and numbering ranges are provided for all publicly available electronic communications services.
- (2) The Commission shall grant rights of use for numbers and number ranges according to procedures that are objective, transparent and non-discriminatory.
- (3) In developing the numbering plan referred to in subsection (1), the Commission shall preserve, to the extent feasible, the assignment of numbers made before the commencement of this Act.
- (4) The Commission may attach conditions to rights of use for numbers to ensure efficient and effective management of all numbering resources. Such conditions may include, but are not limited to, procedures by which providers of electronic communications services may assign or re-assign numbers to users.
- (5) The Commission shall establish fees for the use of the numbers.
- (6) The Commission shall, subject only to any limitation that may be specified by the Minister on grounds of national security, periodically publish the main elements of the national numbering plan and subsequent additions or amendments thereto in the Gazette.

PART VIII REGULATION OF EQUIPMENT

Regulation of electronic communications equipment

44. (1) The Commission shall adopt technical standards which must be made applicable to all electronic communications equipment and customer premises equipment in order to avoid harm which may be caused by such equipment to electronic communications networks or services, public health, safety or the environment.
- (2) The Commission shall ensure that the regulation of equipment and any standards it may adopt shall be no more than the minimum necessary to ensure the safe and efficient provision of electronic communications networks and services.

- (3) In setting standards under this part of the Act, the Commission shall take into account standards enacted by countries within the region and, where feasible, coordinate with such countries in the setting of standards through participation in international standards-setting bodies, or through consideration of the policies adopted by industry standards-setting organizations.
- (4) The Commission may recommend regulations to the Minister specifying type approval for all electronic communications equipment used for providing an electronic communications service, for operating or connecting to a electronic communications system, or for terminal equipment.
- (5) A person licensed to provide an electronic communications network or service, or who supplies electronic communications equipment, shall not use or supply, as the case may, be any electronic communications equipment that does not comply with the technical standards prescribed by the Commission.
- (6) The Commission shall investigate any suspected breach of subsection (5) in accordance with section 40 of the Swaziland Communications Commission Act, and may subsequently take action as it deems fit in accordance with section 50 of the same Act.

Regulation of radiocommunications equipment

45. (1) No person shall make, buy, sell or control any equipment for radiocommunications, or any apparatus intended to be used as a component part of such equipment, without a licence issued for such purpose by the Commission.
- (2) No person shall sell or give any such apparatus to any person who has not obtained a licence as mentioned in subsection (1).
- (3) The Commission may recommend regulations to the Minister exempting the operation or provision of certain public electronic networks and/or services from the requirement of holding such licence.
- (4) A licence granted under this section may be issued subject to such terms, conditions and limitations as the Commission may think fit, including in particular limitations as to the equipment which may be installed or used under such licence and the places where, the purposes for which, the circumstances in which and the persons by whom the equipment may be used.
- (5) A licence granted under this section may be revoked, or the terms, conditions or limitations thereof varied by notice in writing by the Commission served on the holder of the licence or by a general notice, applicable to licences of the class to which the licence in question belongs, published in the Gazette.

- (6) The Commission may establish the fees to be paid for a licence issued under this section, which fees shall be included in the licence and published in the Gazette.
- (7) The Commission shall investigate any suspected breach of subsections (1) and (2), or a breach of any condition in a licence issued under this section, in accordance with section 40 of the Swaziland Communications Commission Act, and may subsequently take action as it deems fit in accordance with section 50 of the same Act.

PART X

ACCESS TO AND USE OF PUBLIC AND PRIVATE PROPERTY

Access to and use of public property

46. (1) Subject to the provisions of this section, a licensee providing an electronic communications network or service to the public may place any cables and wires, or carry out other works either below, above or by the side of any public property, including Swazi Nation Land, and may dig, construct or maintain thereon any trenches, pits, poles, stays, brackets and all other accessories essential to the proper working of the electronic communications systems; provided that in doing so it does not interfere duly with the use and enjoyment of such public property.
- (2) For the purposes of this section, 'public property' shall include roads, streets, road reserves, buildings, railways, footpaths, water ways and lands reserved for public purposes.
- (3) Prior to carrying out any of the works mentioned in subsection (1), a licensee shall obtain the necessary approval from the relevant authority having jurisdiction over such works.
- (4) Where approval is denied or where no authority is charged with authorizing such use, a licensee shall appeal to the Minister for land, whose decision shall be final.
- (5) The Commission shall consult with the Minister responsible for land to establish procedures regarding the terms and conditions necessary for approval to use public property, including, but not limited to, the use of conduits, towers and other structures as may be in existence and such terms and conditions shall include consideration for the reinstatement of lands to be returned to original condition.
- (6) The procedures referred to in subsection (5) shall be fair, reasonable and non-discriminatory.
- (7) When establishing the procedures referred to in subsection (5), the Minister responsible for land shall consider the following factors:

- (a) the efficient and economic use of public resources;
 - (b) the security of officials and operations that take place on such property;
 - (c) public safety and convenience;
 - (d) the economic, social and aesthetic benefits of the proposed use of the land;
and
 - (e) compliance with applicable environmental laws and policies;
- (8) A public electronic communications service provider shall not convey or in any way transfer any public land or right of way to any public land, including Swazi Nation Land, without the prior written approval of the Minister responsible for lands.
- (9) The provisions of this section shall apply equally to approvals of conveyances or transfers of public land by the Minister responsible for lands.

Use of private property

47. (1) Where the acquisition or use of any private property by a licensee is reasonably required for the purposes of providing an electronic communications network or service to the public and no reasonable alternatives to such acquisition or use exist, the licensee shall:
- (a) provide notice of the proposed acquisition or use to the owner of the property and other property owners who reasonably could be expected to be affected by the proposed acquisition, and seek their written comments on the proposed acquisition; and
 - (b) obtain the consent of the property owner to the acquisition or use of such property.
- (2) In the absence of such consent or on failure to agree to terms of purchase or use, the licensee may apply to the relevant authority having jurisdiction over such matters, to intervene as it deems best, either by causing such authority to acquire the property under applicable expropriation laws, or by enforcing the use of the property under other applicable laws.
- (3) In reviewing the application, the relevant authority may impose terms and conditions on the licensee that may include just and reasonable compensation, under the applicable laws, for the acquisition or use of the property and for any damage or loss that the owner may sustain under such acquisition or use.
- (4) The licensee shall indemnify the relevant authority against all the costs of acquisition of the property under expropriation laws or other costs incurred to enforce usage of such property, including amounts payable to the owner of the property to be acquired or used.

**PART X
REPEALS, SAVINGS AND
TRANSITIONAL PROVISIONS**

Repeals and savings

- 48.(1) The Minister shall, by notice published in the Gazette revoke the regulatory powers and functions of the Swaziland Posts and Telecommunications Corporation, and consequently repeal the Swaziland Posts and Telecommunications Act, 1983 after due legislative process.
- (2) Notwithstanding subsection (1), anything done by the Swaziland Posts and Telecommunications Corporation under the repealed Act shall be deemed to have been done under this Act.
- (3) The Minister shall, by notice published in the Gazette revoke the regulatory powers and functions of the Swaziland Television Authority, and consequently repeal the Swaziland Television Act, 1983 after due legislative process.
- (4) Notwithstanding subsection (3), anything done by the Swaziland Television Authority under the repealed Act shall be deemed to have been done under this Act.

Prior licenses and other persons providing electronic communications networks and services

- 49.(1) The Commission shall issue new licences to existing licensees lawfully providing electronic communications networks or services consistent with the provisions of the Act immediately before the commencement date, provided that all material terms of the previous license shall be conformed to this Act.
- (2) Such new licences shall be issued within ninety (90) days after the coming into force of this Act, and existing licensees shall continue to provide services under the prior licence until the date of renewal of their licence.

Other persons providing electronic communications networks and services

- 50.(1) Any person providing electronic communications services for which there was no requirement to be licensed before the commencement of this Act, and which services are required to be licensed under this Act, shall apply for a license within thirty (30) days after the coming into force of this Act.
- (2) Such persons shall continue to provide services pending the Commission's determination of the application.

- (3) Any person who fails to apply for a license within the thirty (30) day period mentioned in subsection (3) and continues to provide services notwithstanding such failure, shall be committing a breach of section 11(1) of this Act.

Pending Applications

- 51.(1) All application for licenses pending before entry into force of this Act shall be transferred to the Commission for determination in accordance with this Act.
- (2) Applicants shall be afforded an opportunity to amend their applications to conform to the provisions of this Act.
