

REPUBLIC OF SOUTH AFRICA

BROADBAND INFRACO BILL

(To be introduced in the National Assembly (proposed as section 75): explanatory summary of Bill to be published in Government Gazette No. 0000 of [date])

(The English text is the official text of the Bill)

(MINISTER OF PUBLIC ENTERPRISES)

[B – 2007]

BILL

To provide for the establishment of Infraco Broadband (Proprietary) Limited and related matters.

Preamble

Since the State intends expanding availability of broadband access to underdeveloped areas and ensuring that the bandwidth requirements for specific projects of national interest are met;

And since, the State intends establishing Infraco Broadband with the purpose of owning communications infrastructure that will enable it to provide affordable access to broadband services,

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

Definitions

In this Act, unless the context otherwise indicates–

"Broadband Infraco Limited" means Infraco Broadband, a public company duly incorporated in terms of the Companies Act;

"Broadband Infraco (Proprietary) Limited" means Infraco Broadband, a limited liability company incorporated in terms of the Companies Act;

"Companies Act" means the Companies Act, 1973 (Act No. 61 of 1973);

"conversion date" means the date determined by the Minister in terms of the provisions 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) or any succeeding legislation regulating electronic communications;

"electronic communications network" means electronic communications network as defined in section 1 of the Electronic Communications Act;

"electronic communications network services" means electronic communications network services as defined in section 1 of the Electronic Communications Act;

"Eskom" means Eskom Holdings Limited, a public company duly incorporated under the Companies Act, and/or any of its subsidiaries;

"FSN" means the Full Services Network Assets comprising the national fibre optic network independently developed and deployed by Eskom and Transnet, respectively;

"Infraco" means Broadband Infraco (Proprietary) Limited, and with effect from the conversion date, Infraco Broadband Limited;

"Legal Succession Act" means the Legal Succession to the South African Transport Services Act, 1989 (Act No.9 of 1989);

"Minister" means the Minister of Public Enterprises;

"prescribed" means prescribed by Regulation in terms of section 10;

"PFMA" means the Public Finance Management Act, 1999 (Act No.1 of 1999);

"State" means the Government of the Republic of South Africa acting through the Minister;

"this Act" includes any Regulation in terms of section 10;

"Transnet" means Transnet Limited, a company duly incorporated in terms of section 2 of the Legal Succession Act and/or any of its subsidiaries;

"transfer date" means the date on which the shareholding in Infraco is transferred to the State.

Objects of Act

The objects of this Act are to—

- (a) provide for the acquisition of the shareholding in Infraco by the State;
- (b) provide for the transfer of the FSN from Eskom, Transnet and/or their subsidiaries; and
- (c) provide for the conversion of Infraco into a public company with share capital.

3. Establishment of Infraco

The State is authorised to acquire shareholding in Infraco by agreement between the State and Eskom.

4. Objects and powers of Infraco

The main object of Infraco is to provide affordable broadband access.

For the purposes of section 33(1) of the Companies Act, none of the objects ancillary to the main objects of Infraco are excluded.

The powers of Infraco are as set out in schedule 2 to the Companies Act and none of such powers are excluded or qualified.

With effect from the transfer date, the Minister may, in consultation with the Ministers of Finance and Communications, and in accordance with any applicable provision of the PFMA, 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, in such manner and on such terms and conditions as may be permitted in terms of any applicable provision of the PFMA.

5. Borrowing powers of Infraco

Subject to the PFMA, Infraco may borrow money or issue a guarantee, indemnity or security, or enter into any transaction necessary to achieve objects referred to in section 4.

6. Servitudes

With effect from the transfer date—

Infraco shall be the owner of the FSN; and

Infraco shall exercise all of the rights attaching to the FSN.

With effect from the transfer date:

For the purposes of this subsection, `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, telecommunications, pipelines, railways, transport or electrical substations or for the construction, use and maintenance of electronic communication networks.

Every servitude is hereby extended so as to include the additional right to use the land to which such servitude relates for purposes of using and maintaining existing electronic communications networks and of providing electronic communications network services, as well as the right of entry upon such land, and of constructing,

erecting and maintaining thereon further electronic communications networks.

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 subsection (b) on such terms and conditions as may be agreed upon between Infraco, Eskom and Transnet, as the case may be, and in the absence of agreement, on such terms and conditions as the Minister may determine;

(ii) utilise such servitude in respect of that additional right in favour of Infraco in order to provide electronic communications network services to fulfil its purpose and mandate under this Act and its founding documents.

Transnet shall register servitudes in respect of land owned by Transnet in favour of Infraco.

Compensation as contemplated in section 25(3) of the Constitution shall be payable by Infraco in respect of the additional right contemplated in paragraph (b) to the registered land owner concerned for the use of such additional right, to the extent that the said additional right renders the servitude more onerous than the original servitude.

Notice of the exercise or use of the additional right by Infraco in terms of subsection (c) shall be given by Infraco in writing to the registered owner of the land concerned 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 subsection (e) shall be payable and shall be assessed as at the date of such commencement.

Sections 9, 10, 11, 12(3) and (4), 14 and 15 of the Expropriation Act shall, with the necessary changes, apply in respect of any compensation claimed, compensation offer and the payment and determination of such compensation, as if the notice contemplated in subsection (f) 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 sections 12(1) and (2)

of that Act, will be construed as a reference to the contents of section 25(3) of the Constitution;

The provisions of section 7(7) apply to the assessment of the amount of compensation to which the owner is entitled in terms of subsection (e);

The Registrar of Deeds shall, upon the lodgement of the necessary deeds and documentation, register a notarial deed of amendment, as may be necessary for the purposes of recording the extension of a servitude in terms of subsections (b) and (c) and recording the registration of a servitude in terms of subsection (d).

7. Expropriation of land or a right in land by Minister on behalf of Infraco

(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 it 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.

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

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

(4) All costs incurred by the Minister in the performance of his functions in terms of subsection (1) shall be refunded to him by Infraco.

(5) Subject to section 25(2) of the Constitution, the following provisions of the Expropriation Act are applicable, with the necessary changes, in respect of an expropriation in terms of subsection (1), namely sections 6 to 11, sections 12(3) and (4) and

sections 14, 15, 18 to 21 and 23: provided that any reference in the said sections to compensation as provided for in sections 12 (1) and (2) of that Act, will be construed as a reference to the contents of section 25(3) of the Constitution;

(6) All unregistered rights with respect to the expropriated land or right in land, must be expropriated separately and the said sections of the Expropriation Act apply with the necessary changes to such expropriations.

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

(8) The provisions of this section 7 shall apply only for as long as the State is the majority shareholder in Infraco.

8. Conversion of Infraco into a public company

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

(2) The request must be accompanied by the memorandum of association and articles of association of the intended public company that must be—

framed in accordance with the Companies Act, but subject to this Act; and

signed by the Minister on behalf of the State.

(3) On the receipt of the request and the memorandum and articles so signed, the Registrar of Companies must –

register the conversion of Infraco into a public company having a share capital, as well as the memorandum and articles; and

issue an amended certificate of incorporation.

The name of the public company referred to in subsection (3) (a) shall be Infraco Broadband Limited.

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).

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.

The provisions of sections 32, 44(1), 54(2), 66, 190 and 344(d) of the Companies Act shall not apply to Infraco Broadband Limited for so long as the State holds not less than 75 percent or more of the total issued ordinary shares in Infraco.

Effect of conversion

- (1) The conversion contemplated in section 8 will not affect—

the continued corporate existence of Infraco under the Companies Act;

any of the rights, liabilities or obligations acquired or incurred by Infraco before the conversion date; or

the terms and conditions of service of Infraco's employees.

Regulations

The Minister may, by notice in the Government Gazette, make regulations regarding any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act, including 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 as contemplated in section 7 and financial provision by Infraco in

respect of all costs incurred or to be incurred by the Minister in the performance of his or her functions in terms of section 7(1).

11. Short title and commencement

This Act is called the Infrastructure Broadband Company Act, 2006 and comes into operation on a date determined by the President of the Republic of South Africa by proclamation in the Gazette.

MEMORANDUM ON THE OBJECTS OF THE BROADBAND INFRACO BILL

1. BACKGROUND

The Government of the Republic of South Africa ("Government") represented by the Minister of Public Enterprises intends expanding the availability of broadband access to underdeveloped areas and ensuring that the bandwidth requirements for specific projects of national interest are met. In order to achieve this the Government will establish a State-Owned Enterprise ("SOE"), Broadband Infraco (Pty) Ltd ("Infraco") that will acquire a national backbone fibre optic network ("FSN") from Eskom Enterprises (Pty) Ltd ("Eskom") and Transnet Limited ("Transnet") .

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 these 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 onto the market as a result of competitive pressure.

The most obvious structure to be used for this purpose is the fibre optic backbone known as the FSN.

1.4 The proposed model was an SOE (Infraco) that will own the FSN. Infraco is intended to earn an economic return sufficient to recover all costs and enable continued investment on the

infrastructure. The key advantage of Infraco is the assurance that sub-economic markets will be sufficiently covered enabling the delivery of government and other services via good quality and affordable broadband.

1.5 The Bill enables flexibility for funding, private sector involvement as well as a possible conversion 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 sought to be achieved through the enactment of the Bill are to provide for-

- (a) the acquisition by the State of shareholding in Infraco;
- (b) the acquisition of the FSN from Eskom, Transnet and/or any of their subsidiaries; and
- (c) the conversion of Infraco into a public company with share capital.

3. Bodies consulted

The Department of Public Enterprises has consulted –

National Treasury;

Department of Communications;

Independent Communications Authority of South Africa;

Department of Land Affairs; and

Eskom Holdings Limited, Eskom and Transnet.

4. Financial implications for State

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

5. Parliamentary procedure

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 ("the Constitution") since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

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 1(1)(a) of the Traditional Leadership and Government Framework Act, 2003, (Act. No.41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.