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Government Notice

OFFICE OF THE PRIME MINISTER

No. 155

2020

PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 6 of 2020: Communications Amendment Act, 2020.

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COMMUNICATIONS AMENDMENT ACT, 2020

EXPLANATORY NOTE:

_____ Words underlined with a solid line indicate insertions in existing provisions.

[] Words in bold type in square brackets indicate omissions from existing provisions.

ACT

To amend the Communications Act, 2009, so as to define certain words; to circumscribe the power to impose a regulatory levy in order to cover the regulatory costs of the Authority; to provide requirements and guidelines regarding the determination and imposition of the regulatory levy; to further regulate the imposition of a universal service levy; to further regulate the duty of telecommunications service providers to provide a confidential service and to provide for incidental matters.

(Signed by the President on 29 June 2020)

BE IT ENACTED as passed by the Parliament, and assented to by the President, of the Republic of Namibia, as follows:

Amendment of section 1 of Act No. 8 of 2009

1. Section 1 of the Communications Act, 2009 (in this Act referred to as the “principal Act”), is amended –

(a) by the insertion in subsection (1), after the definition of “regulation”, of the following definition:

“regulatory costs” means the operating expenses and capital costs, whether actual or properly estimated or projected, required by the Authority in the performance of its functions including, without limiting the foregoing generality, remuneration and other employment related expenditures and all other administrative expenditures and providing for reserves and other liabilities and expenditures required for the purposes of –

- (a) the pursuit of the objects of this Act set out in section 2 and the Authority set out in section 5;
- (b) developing and implementing communications industry policies;
- (c) rendering services to the communications industry;
- (d) fulfilling the communications policy objectives and any other requirements under this Act;
- (e) the regulation of the communications industry or for any communications regulatory purposes;”; and

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- (b) by the insertion in subsection (1), after the definition of “telecommunications services”, of the following definitions:

“‘this Act’ includes the regulations;”

“‘turnover’ means gross revenue or income derived from services or business which may be regulated by or under this Act;”.

Amendment of section 22 of Act No. 8 of 2009

2. Section 22 of the principal Act is amended by the substitution for paragraph (e) of subsection (1) of the following paragraph:

“(e) any [revenue] income received for services provided in the course of its activities;”.

Substitution of section 23 of Act No. 8 of 2009

3. The principal Act is amended by the substitution for section 23 of the following section:

“Regulatory levy

23. (1) With due regard to subsections (4) to (8), the Authority may by regulation, after having followed a rule-making procedure, impose a regulatory levy upon providers of communications services in order to defray its regulatory costs, which levy may take one or more of the following forms –

- (a) a percentage of the turnover of all or a prescribed class of the providers of communications services;
 - (b) a fixed amount payable by a prescribed class of providers of communications services in respect of a prescribed period;
 - (c) a fixed amount payable by a prescribed class of providers of communications services in respect of any customer to whom a prescribed class of service is rendered during that period;
 - (d) as a combination of the forms referred to in paragraph(a), (b) or (c) together with provisions prescribing the circumstances under which a prescribed form of the levy is payable;
 - (e) any other form that is not unreasonably discriminatory.
- (2) When imposing the levy, the Authority may by regulation –
- (a) impose different percentages or different fixed amounts depending on –
 - (i) the amount of turnover of the provider;
 - (ii) the category of communications services rendered by the provider;

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- (iii) the class of licence issued to the provider; or
 - (iv) any other matter that is in the opinion of the Authority relevant for such an imposition;
- (b) impose a fixed minimum amount payable by providers of communications services irrespective of the form of the regulatory levy as set out in subsection (1);
- (c) impose different forms of the regulatory levy, as set out in subsection (1), depending on –
- (i) the amount of the turnover of the provider;
 - (ii) the category of communications services rendered by the provider;
 - (iii) the class or type of licence issued to the provider; or
 - (iv) any other matter that is in the opinion of the Authority relevant for such an imposition;
- (d) prescribe –
- (i) with regard to the turnover of the providers of communications services, or with regard to their services or business, regulated by this Act, received or provided by the providers of communications services, the aspects thereof which are included or excluded for purposes of determining the regulatory levy or calculating the turnover of the provider concerned;
 - (ii) the period during which turnover, services or business must be received or provided to be considered for the calculation of the regulatory levy; and
 - (iii) without limiting the foregoing, the manner in which the regulatory levy is to be calculated:

Provided that the regulatory levy may not be imposed on turnover, services or business received or provided prior to the date on which the regulations imposing the relevant regulatory levy are published in the *Gazette*;

- (e) prescribe the periods and methods of assessment of the regulatory levy and the due date for payment thereof which may include payment in prescribed instalments: Provided that the regulatory levy may not be imposed on turnover, or services or business received or provided prior to the date on which the regulations imposing the relevant regulatory levy are published in the *Gazette*;

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- (f) prescribe the information to be provided to the Authority for the purpose of assessing the regulatory levy payable by the providers of communications services;
 - (g) prescribe penalties, which may include interest, for the late payment of the regulatory levy, or for providing false information or for the failure to provide information to the Authority relating to the assessment of the levy.
- (3) The objectives of the regulatory levy are –
- (a) to ensure income for the Authority which is sufficient to defray the regulatory costs thereby enabling the Authority to provide quality regulation by means of securing adequate resources;
 - (b) insofar as it is practicable, a fair allocation of cost among the providers of communication services;
 - (c) to promote the objects of this Act set out in section 2 and the objects of the Authority set out in section 5.
- (4) The principles to be applied with relation to the imposition of the regulatory levy are –
- (a) that the impact of the regulatory levy on the sustainability of the business of providers of communications services is assessed and if the regulatory levy has an unreasonable negative impact on such sustainability, that the impact is mitigated, in so far as is practicable, by means of the rationalisation of the regulatory costs and the corresponding amendment of the proposed regulatory levy;
 - (b) that predictability, fairness, equitability, transparency and accountability in the determination and imposition of the regulatory levy are ensured;
 - (c) that the regulatory levy is aligned with regional and international best industry practices.
- (5) When determining the form, percentage or amount of the regulatory levy, the Authority –
- (a) must duly consider, in view of its regulatory costs –
 - (i) the income it requires and the proportion of such income which should be funded from the regulatory levy in accordance with the objectives and principles set out in subsections (3) and (4) respectively, as projected over the period during which the regulatory levy will apply, and taking into consideration its relevant integrated strategic business plan and annual business and financial plans, including the operating budgets and capital budgets as set out in its annual business and financial plans, as contemplated in sections 13 and 14

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of the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019);

- (ii) income derived from any other sources;
 - (iii) the necessity to ensure business continuity by, amongst others, providing for reasonable reserves as set out in its plans contemplated in sub-paragraph (i);
 - (iv) the necessity to avoid, as far as is reasonably possible or predictable, the receiving of income from the regulatory levy in substantial excess of what is required to cover the regulatory costs;
 - (v) the necessity of managing any risks in the communications industry associated with the imposition of a regulatory levy;
 - (vi) any other fees, levies or charges which the providers of communications services are required to pay under this Act;
 - (vii) any other matter deemed relevant by the Authority in order to ensure that income derived from the regulatory levy is sufficient to defray its regulatory costs;
- (b) must, in order to maintain reasonable predictability and stability, avoid, unless there is good reason to do so, an increase in the regulatory levy or the introduction of a new regulatory levy in any period of 12 consecutive months;
- (c) may consider any other matter the Authority deems relevant.

(6) The Authority must before the expiry of five years from the last imposition of the levy or a last review under this section, review the regulatory levy to ensure that the levy is compliant with the requirements set out in this section and that there are no continued under- or over-recoveries.

(7) If the Authority has received regulatory levy income in excess of its regulatory costs, the Authority may retain such over-recovery but must set it off against the projected regulatory costs used for the next regulatory levy determination and imposition.

(8) If the Authority receives income from the regulatory levy less than its regulatory costs in a period during which such regulatory levy applied, or during a specific period, received no income from the regulatory levy for whatever reason, the Authority may, when determining and imposing the next regulatory levy –

- (a) adjust the regulatory levy, and determine a higher regulatory levy, to recover such under-recovery during the period during which the next regulatory levy will apply; or

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- (b) determine a once-off higher regulatory levy for the first period during which the next regulatory levy will apply in order to recover such under-recovery and for the remaining period or periods a different regulatory levy in accordance with subsection (5).

(9) The Authority may, subject to subsection (5)(b), withdraw or amend the regulatory levy imposed under this section and, in so far as they are applicable, the provisions of this section apply in the same manner, with the necessary changes, to such withdrawal or amendment.”.

Amendment of section 54 of Act No. 8 of 2009

4. Section 54 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

“(1) A dominant licensee and any other licensee designated by the Authority must keep separate accounts for its telecommunications activities, to the extent that would be required if the telecommunications activities in question were carried out by legally independent companies, so as to identify all elements of costs and [revenue] turnover, with the basis of their calculation and the detailed attribution methods used.”.

Amendment of section 56 of Act No. 8 of 2009

5. Section 56 of the principal Act is amended by –

- (a) the substitution for subsection (2) of the following subsection –

“(2) The Authority may by regulation, after having followed a rule-making procedure, impose a universal service levy to be paid into the Universal Service Fund by a prescribed class of providers of telecommunications services.”;

- (b) the substitution for subsection (3) of the following subsection:

“(3) The provisions of section [23(2) and 23(3)] 23(1), 23(2), 23(6) and 23(9) apply with the necessary changes required by the context to the universal service levy.”; and

- (c) the insertion after subsection (3) of the following subsections:

“(3A) The universal service levy imposed on a provider of telecommunications services may not exceed an amount which is more than five percent of the annual turnover of that service provider.

(3B) When determining the universal service levy, the Authority must give due consideration to –

- (a) the minimum set of services prescribed under section 57(1);
(b) the subsidies to be paid to licensees under section 57;

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(c) any under- or over-recoveries by the Universal Service Fund; and

(d) any other matter which the Authority deems relevant.”.

Amendment of section 75 of Act No. 8 of 2009

6. Section 75 of the Principal Act is amended by the insertion in paragraph (d) of the following subparagraphs after subparagraph (i):

- “(iA) subject to any procedural requirements that may be prescribed and any other law, information that is necessary to investigate an offence;
- (iB) the information is required because it is necessary to locate a person and it is necessary to locate the person concerned in the public interest, the national interest of Namibia or for the purposes of a criminal investigation or in the interest of the missing person;
- (iC) where the person concerned has consented or where it is reasonable under the circumstances to assume that the person would have consented and it is due to the urgency of the request or for another reason not possible to obtain the consent of the person concerned: Provided that a general consent in a contract is not valid consent for the purposes of this subparagraph;”.

Short title

7. This Act is called the Communications Amendment Act, 2020
