

REPUBLIC OF NAMIBIA

PARLIAMENT

COMMUNICATIONS AMENDMENT BILL

[Bill No. -2019]

EXPLANATORY NOTE:

- _____ Words underlined with a solid line indicate insertions in existing enactment.
- [] Words in bold type in square brackets indicate omissions from existing enactments.
-

BILL

To amend the Communications Act, 2009, so as to define certain words; to provide for the imposition of a regulatory levy to cover the regulatory costs of the Authority; to provide requirements and guidelines as regards the determination and imposition of a regulatory levy; to effect changes to the universal service levy as regards the maximum amount thereof and the determination of this levy; and to provide for incidental matters.

BE IT ENACTED by the Parliament 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 after the definition of “telecommunications services” of the following definition:

“turnover’ means gross revenue or income;”; and

- (b) by the insertion after the definition of “regulation” of the following definition:

“regulatory costs’ means the operating and capital costs and expenses (whether actual or properly estimated or projected) incurred by the Authority -

- (i) in the performance of its functions including, without limiting the foregoing generality, remuneration and other employment related costs and expenses and all other administrative costs and providing for reserves, contingency amounts and other similar liabilities, costs or expenses;
- (ii) in the pursuit of the objects of this Act and the Authority, as set out in sections 2 and 5 respectively;
- (iii) in developing and implementing communications industry policies;
- (iv) in rendering services to the communications industry;
- (v) in fulfilling the communications policy objectives and any other requirements under this Act;

- (vi) in general, with regard to the regulation of the communications industry or for any communications regulatory purpose;”.

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) with 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. Section 23 of the principal Act is amended by the substitution for section 23 with 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 as set out in this section in the following manner:

- (a) As a percentage of the turnover of providers of communication services derived from their communications services or business; or
 - (b) as a fixed amount in respect of the communications services or business of the providers of communication services or imposed upon the providers of communication services; or
 - (c) in any other manner that is not unreasonably discriminatory.
- (2) For purposes of subsection (1), the Authority may by regulation -
- (a) impose different percentages or different fixed amounts on different providers of communication services or categories of such providers;
 - (b) impose a fixed minimum amount payable by providers of communication 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), on different providers of communication services or categories of such providers;
 - (d) determine -
 - (i) with regard to the turnover of the providers of communication services, or with regard to the services or business received or provided by the providers of communication services, the aspects thereof which are included or excluded for purposes of determining the regulatory levy;

- (ii) the period during which such turnover, services or business was received or provided; and
- (iii) without limiting the foregoing, the manner in which such turnover is to be calculated,

subject thereto that the regulatory levy may not be imposed on turnover, services or business received or provided prior to the date on which a levy imposition commences;¹

- (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) subject thereto that the regulatory levy may not be imposed on turnover, services or business received or provided prior to the date on which a levy imposition commences;
 - (f) prescribe the information to be provided to the Authority for the purpose of assessing the regulatory levy;
 - (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 which is sufficient to defray the regulatory costs thereby enabling the Authority to provide quality regulation by means of securing adequate resources;
 - (b) to promote a fair allocation of cost amongst the providers of communications services subject thereto that such allocation may, but is not required to, be proportional;
 - (c) to promote the objects of this Act and the Authority as set out in sections 2 and 5.
- (4) The underlying principles of the regulatory levy determination procedures are:
- (a) To assess the cost of regulation to the providers of communication services;
 - (b) to ensure predictability, fairness, equitability, transparency and accountability in the determination and imposition of the regulatory levy;
 - (c) to align with regional and international best industry practices.
- (5) When determining the percentage or amount of the regulatory levy, the Authority -

¹ The purpose of this part of clause 23(3)(d) and as repeated in 23(3)(e), is to ensure that a regulatory levy can only apply forwards and not backwards – i.e. it cannot apply to turnover, services or business which happened prior to the promulgation and commencement of the regulatory levy regulations.

- (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 income 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 (hereafter called the “target income”), and taking into consideration its relevant operating budgets and capital budgets as set out in its annual business and financial plans as contemplated in section 19 of the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019);
 - (ii) any under- or over-recoveries incurred during any previous financial year during which the regulatory levy applied impacting on the target income;
 - (iii) income derived from any other sources;
 - (iv) ensuring business continuity by, amongst others, providing for reasonable reserves and any contingencies;
 - (v) the avoidance, as far as is reasonably possible or predictable, of receiving income from the regulatory levy in substantial excess of what is required to cover the regulatory costs;
 - (vi) managing the risks in the communications industry associated with the imposition of a regulatory levy;
 - (vii) any other fees, levies or charges which the providers of communication services are required to pay under this Act;
 - (viii) 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, in so far as possible, 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, if the regulatory levy is not amended during such period, at least once in every five year period, 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 successive under- or over-recoveries as contemplated herein.

(7) In the event where the Authority received a regulatory levy income in excess of its regulatory costs in a period during which the regulatory levy applied, the Authority may retain such over-recovery but must set it off against the target income of the next regulatory levy determination and imposition.

(8) In the event where the Authority, whether before or after the commencement of the Communications Amendment Act, 2019,² received 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 over the period during which the next regulatory levy will apply; or
- (b) determine a once-off higher regulatory levy for the first period during which the next regulatory levy 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) with 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 the insertion after subsection (3) with the following subsections:

- (a) by the substitution for subsection (3) of the following subsection:

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

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

² In this Amendment Bill where a reference in the amended text itself refers: (a) to “this Act”, the reference will be to the Communications Act, 2009, in its totality; (b) to this Communications Amendment Act of 2019, the reference will be to this Amendment Bill alone. A reference outside the amended text (i.e. thus text forming part of the Bill and not amending text) to “this Act” will be a reference to this Amendment Bill. The intention in this subsection is to refer to the commencement of the Amendment Bill of 2019 and not the Communications Act of 2009.

“(3A) Subject to subsection (3B), the universal service levy imposed on a provider of communication services may not exceed an amount which is more than five percent of the annual turnover of such service provider.

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

- (a) the minimum set of services prescribed under section 57(1);
- (b) the subsidies to be paid to licensees under section 57;
- (c) any under- or over-recoveries incurred by the Universal Service Fund;
- (d) any other matter the Authority deems relevant.”.

Short title and commencement

6. (1) This Act is called the Communications Amendment Act, 2019, and comes into operation on a date to be determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) for different provisions of this Act.

(3) The power to draft and make regulations authorised under this Act, including steps forming part of a rule-making procedure under the principal Act, may be exercised at any time after the passing of this Act as far as may be necessary for the purpose of bringing this Act into operation at the commencement thereof, subject thereto that such regulations made or issued may not come into operation until this Act comes into operation.