Submission to the Portfolio Committee on Telecommunications and Postal Services

Draft Electronic Communications Amendment Bill, 2018

Government Gazette No. 41880 dated 31 August 2018

PART A

1. BACKGROUND

1.1. The National Integrated ICT Policy (the "**ICT Policy**") was published on 3 October 2016. The Electronic Communications Amendment Bill was first published in *Government Gazette* 41261 on 17 November 2017 ("**2017 Amendment Bill**"), which proposed various amendments to the Electronic Communications Act, 36 of 2005 ("**ECA**" or "**Principal Act**"), and was indicated as one of the pieces of legislation envisaged by the Department of Telecommunications and Postal Services (the "**DTPS**" or "**Department**") to enable implementation of the ICT Policy.

1.2. Interested parties were invited to provide written comments on the 2017 Amendment Bill within 30 calendar days from the date of publication, which date was subsequently extended to 31 January 2018. Telkom SA SOC Limited ("**Telkom**") submitted its comments on 31 January 2018.

1.3. The Department also gave notice that it would host a stakeholder consultative workshop on 06 and 07 March 2018, where certain selected stakeholders who made written submissions would be called upon to make oral representations.

1.4. Subsequent to the first round of submissions by interested parties, the revised Electronic Communications Amendment Bill was published in Government Gazette 41880 of 31 August 2018 ("the EC Amendment Bill"). A Parliamentary briefing was held on 9 October 2018 in this regard, and further public hearings was scheduled from 20 November until 30 November 2018. Telkom welcomes this opportunity to provide comments on the Amendment Bill to Parliament.

1.5. Telkom has prepared this submission in respect of the amendments proposed in the EC Amendment Bill and accordingly sets out in this submission the following:

1.5.1. an executive summary of Telkom's comments regarding the amendments proposed in the EC Amendment Bill, covering key themes proposed therein; and

1.5.2. section-specific comments and proposals that provide detail in respect of Telkom's concerns and recommendations on the EC Amendment Bill.

2. EXECUTIVE SUMMARY

2.1. Telkom supports the following key arguments pertaining to spectrum:

2.1.1. Spectrum assignment – must promote competition; specifically, the ability of small players to compete.

2.1.2. Spectrum trading – must be subjected to oversight on competition.

2.1.3. Spectrum planning – Minister assuming spectrum planning function, including development of the national radio frequency plan, as this is a continuation of the WRC process and implementation of national policy.

2.1.4. Policy certainty is necessary – clarity is important on the legal effect and status of national policy pertaining to radio frequency spectrum.

2.2. Telkom has the following concerns regarding spectrum related matters:

2.2.1. Universal service and access obligations should not be imposed retrospectively on existing spectrum licences. Asymmetrical obligations must be considered based on market share and scale in order not to further entrench the duopoly. Rural first obligations are more onerous for smaller players without presence in these areas.

2.2.2. There is no need for regulatory approval for refarming of spectrum as this will curtail or delay market development (e.g. moving 3G to 4G).

2.2.3. Obligation to purchase capacity from the WOAN – this obligation is not based on any study or scientific analysis.

2.3. Regarding the Wireless Open Access network (WOAN):

2.3.1. The creation of the WOAN is a deliberate policy intervention; the WOAN must be viewed from the perspective of the intention to promote service-based competition and break down the barriers to entry in wholesale mobile infrastructure.

2.3.2. All unassigned HDS to be assigned to the WOAN to ensure that it meets policy objectives.

2.3.3. A hybrid model is likely to destroy value; successful bidders of spectrum

will experience downward pressure on price and unlikely to receive a positive Return on Investment (ROI).

2.3.4. Prices charged by the WOAN must be non-discriminatory.

2.3.5. A departure from the ICT Policy must be informed by a detailed market study on how competition will be infused into the South African mobile market. It noted that ICASA has started an inquiry into mobile broadband services (Government Gazette No. 42044 dated 16 November 2018).

2.3.6. ICASA must conduct a market study to determine how the licensing of spectrum may be used to promote competition, including licensing of the WOAN.

2.4. Wholesale open access principles:

2.4.1. Wholesale Open Access principles must be targeted to address market failure and its application nuanced.

2.4.2. Parliament must consider “wholesale open access” as procompetitive remedy at the hands of the Authority and not as a rule of general application.

2.4.3. The Authority should have powers to impose wholesale open access to any player with Significant Market Power (SMP) and where there is competition failure.

2.4.4. Telkom does not support Wholesale Open Access principles applied to the fixed services as there is already intense competition in the market.

2.4.5. Telkom supports market reviews and proposes regular review of wholesale open access principles.

2.4.6. Active infrastructure sharing must only be mandated where SMP has been identified.

2.5. Rapid deployment:

2.5.1. Telkom supports the lowering of regulatory, policy and administrative bottlenecks to facilitate rapid deployment.

2.5.2. Telkom is however concerned that the DTPS will be unable to impose obligations and uniform rates on municipalities given their constitutional protection / have recourse where municipality refuses to make provision for the installation of Electronic Communication Networks.

2.5.3. Telkom is of the view that the single trench policy should only be applicable to new deployments.

2.6. Jurisdictional issues ICASA and Competition Commission

2.6.1. Differences in the methods and approaches to competition matters by the Commission and ICASA result in different outcomes, causing confusion for stakeholders and forum shopping.

2.6.2. Telkom proposes, rather than an MOU, which has proven unsuccessful, a legislative framework that clarifies the roles of all relevant regulators – the Commission, ICASA and (where relevant) the National Consumer Commission.

2.7. Universal service Obligations

2.7.1. All universal service obligations (USOs) must be equitable and commensurate with the size of the licensee.

2.7.2. Telkom already has extensive legacy USOs, which have not been reviewed by ICASA, and which must be taken into account when determining new obligations.

3. MAIN ISSUES

3.1. RADIO FREQUENCY SPECTRUM

Considering the importance of spectrum in consideration of the EC Amendment Bill, Telkom herewith provides detailed introduction to radio frequency spectrum and the key issues pertaining to its management.

Introduction

3.1.1. Radio frequency spectrum is defined in the ECA as follows:

> ***"radio frequency spectrum"*** *means the portion of the electromagnetic spectrum used as a transmission medium for electronic communications and broadcasting*

3.1.2. The electromagnetic spectrum is a continuous spectrum of frequencies and is commonly divided into seven broadly defined groups called radio waves, microwaves, infrared, visible light, ultraviolet, X-rays and gamma rays. These are depicted in Figure 1.

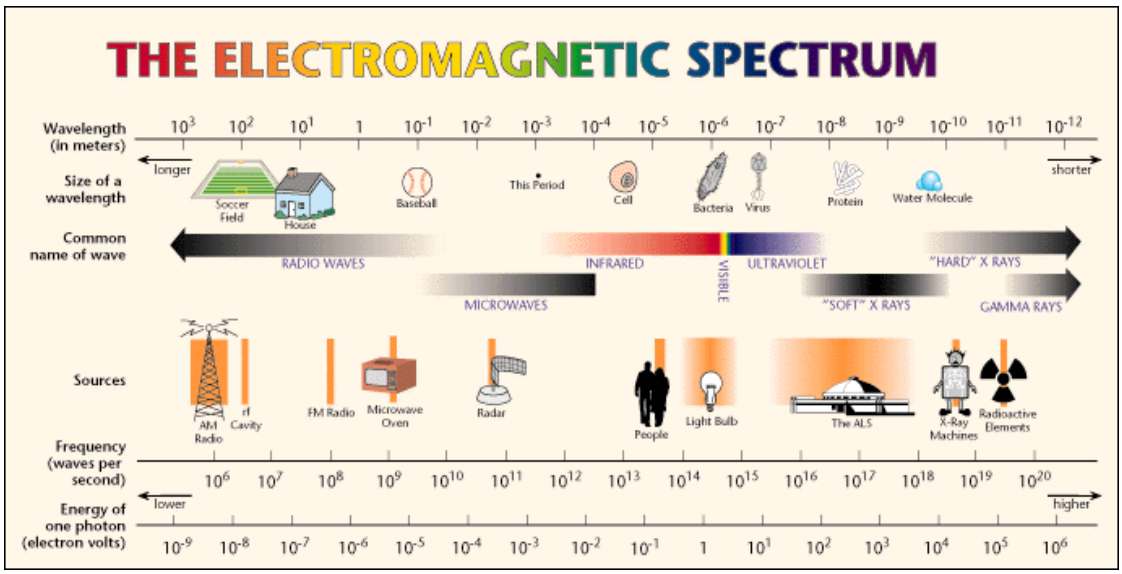


Figure 1: The electromagnetic spectrum

3.1.3. The lower portion of the electromagnetic spectrum is used for communication purposes (i.e. radio waves and microwaves) and have a frequency below 3000 GHz. "Radio" is defined in the ECA as follows:

> ***"radio"*** *means an electromagnetic wave which is propagated in space*

without artificial guide and having a frequency below 3000 GHz

3.1.4. The radio frequency spectrum i.e. the electromagnetic spectrum below 3000 GHz, is regulated internationally by the International Telecommunication Union ("**ITU**") and nationally. The ITU is the United Nations specialised agency for information and communication technologies (ICT's).

3.1.5. Although the electromagnetic spectrum above 3000 GHz can and is also used for certain communications (e.g. infrared remote controls and optical radio systems), this spectrum is generally not regulated.

3.1.6. The radio frequency spectrum ("**spectrum**") therefore refers to the medium over which wireless communications occurs; i.e. it allows communications to occur between a transmitter and receiver without the use of conductors.

3.1.7. The use of the radio frequency spectrum is carefully managed to ensure that there is no harmful interference between the various users. To manage the use of the radio frequency spectrum, radio frequency bands below 3000 GHz have been "allocated" to various radiocommunication services. "Allocation" and "radio frequency band" are defined in the ECA as follows:

"allocation"*, in relation to a frequency band, means the entry in the Table of Frequency Allocations of a given frequency band for the purpose of its use by one or more terrestrial or space radio-communication services or radio astronomy service under specified conditions*

"radio frequency band" *means a specified range of frequencies for use by one or more persons authorised to use the band*

3.1.8. Internationally, the entire radio frequency spectrum has been allocated to various radiocommunication services in the ITU Radio Regulations. These allocations are contained in the Table of Frequency Allocations (Article 5) of the Radio Regulations. Spectrum allocations are updated every three to four years at an ITU World Radiocommunication Conference ("**WRC**") based on international changes in demand and to cater for new technological advances and developments.

3.1.9. The ITU Radio Regulations is an intergovernmental treaty and is binding on its members. South Africa ratified the final acts of WRC-15 (the latest conference) and therefore also all preceding conference decisions.

3.1.10. In terms of the ITU Radio Regulations (edition of 2015), South Africa is part of ITU Region 1, which includes Europe, Africa and Russia, amongst others, as indicated in Figure 2 below. South Africa therefore follows the allocations and generally the use of spectrum in line with Region 1.

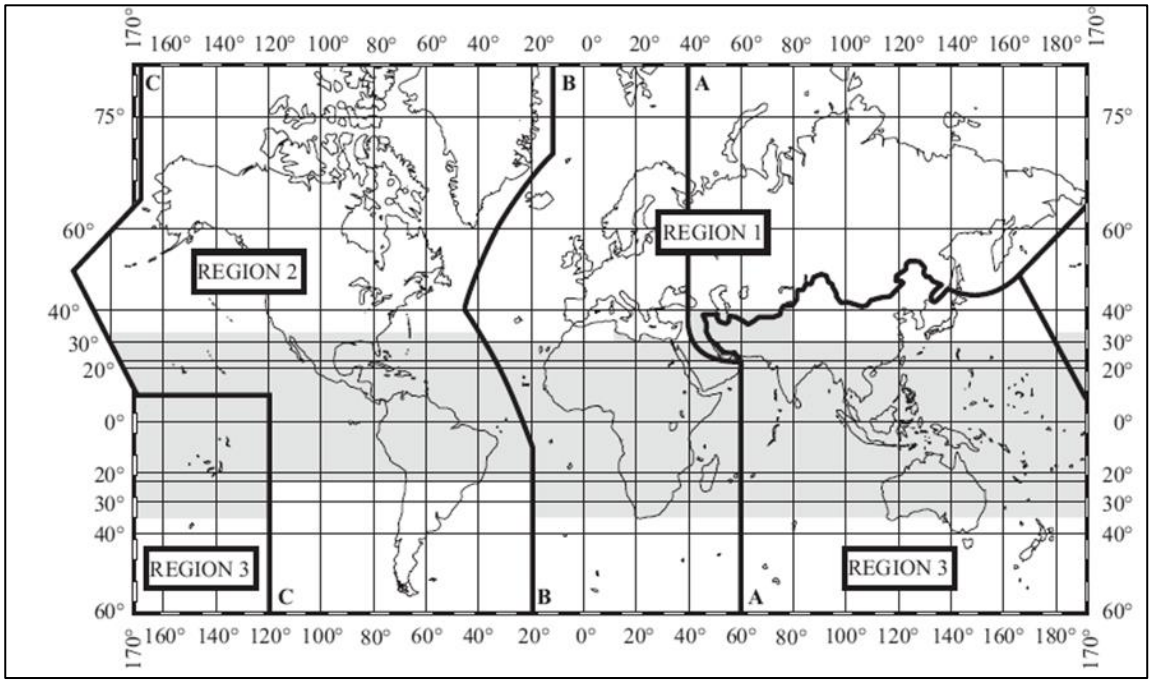


Figure 2: ITU Radio Regions

3.1.11. The National Radio Frequency Plan, ("**NRFP**"), also known as the "Table of Frequency Allocations", is defined in the ECA as follows:

> ***"radio frequency plan"*** *means the national radio frequency plan contemplated in section 34 that includes, but is not limited to—*
>
> *(a) a table of frequency allocations for all bands below 3 000 GHz taking into account the ITU table of allocations, in so far as such allocations have been adopted and agreed upon by the Republic, which may include designations of certain utilisations" and*
>
> *(b) a plan, as applicable, for the migration of systems and*

equipment of existing users within specific radio frequency bands, including radio frequency bands for security services, to different frequency bands

3.1.12. The latest NRFP was published by the Authority on 25 May 2018 in Government Gazette No. 41650 (Notice 266 of 2018). This NRFP was prepared following the conclusion of WRC-15, which was held 2 to 27 November 2015 in Geneva, Switzerland.

3.1.13. The main purpose of the NRFP is to indicate which radiocommunication services may operate in a specific frequency band both internationally and nationally. The ITU defined more than 40 different radiocommunication services have been identified in the ITU Radio Regulations Article 5 including fixed, mobile, broadcasting, broadcasting satellite, fixed satellite, mobile satellite, Earth exploration satellite, radio navigation, etc. Some services are sub-divided, for example the mobile service is divided into land mobile, maritime mobile and aeronautical mobile. Mobile cellular systems such as GSM and LTE operate within the land and maritime mobile service.

3.1.14. Whereas the frequency allocations in South Africa will align with the international frequency allocations, the country can choose which service or services to implement in a specific frequency band.

3.1.15. The NRFP therefore lists all frequency bands that could potentially be used for mobile services in South Africa. However, not all mobile frequency bands can be used for mobile cellular services. Whereas some mobile bands are used for other types of mobile services such as maritime ship-to-shore and push-to-talk radios, the NRFP also lists those mobile frequency bands that have been identified specifically for International Mobile Telecommunications ("**IMT**") on a global, regional or country basis. IMT bands are used for cellular type voice and data systems. IMT is addressed further below.

3.1.16. The "Mobile service", "land mobile service" and "maritime mobile service" are defined by ITU and in the NRFP as follows:

*"**Mobile service**": A radiocommunication service between mobile and land stations, or between mobile stations*

"Land mobile service": *mobile service between base stations and land mobile stations, or between land mobile stations*

"Maritime mobile service"*: mobile service between coast stations and ship stations, or between ship stations, or between associated on-board communication stations; survival craft stations and emergency position-indicating radiobeacon stations may also participate in this service.*

3.1.17. An extract from the NRFP for the frequency range 1710 – 1930 MHz is reproduced in Figure 3 below as an example of the allocation of radiocommunication services in a specific frequency band.

3.1.18. Per Figure 3, the frequency range 1710 - 1930 MHz has been allocated to both fixed and mobile services in Region 1 and in South Africa. It is also indicated that the frequency bands 1710 - 1785 MHz paired with 1805-1880 MHz, which is commonly referred to as the 1800 MHz frequency band, is used for IMT. This is indicated in Figure 3 as "IMT1800". The IMT1800 application is typically used for mobile cellular services such as GSM, UMTS and LTE. Additional rules applicable to the frequency range and various frequency bands within this range is also reflected in the table.

ITU Region 1 allocations and footnotes	South African allocations and footnotes	Typical Applications	Comments
1 710-1 930 MHz	**1 710-1 930 MHz**		
FIXED	FIXED	DECT FWA (1880 – 1900 MHz) FWA TDD (1900 – 1920 MHz) Fixed Broadband data applications (1 785 – 1 805 MHz)	
MOBILE 5.384A 5.388A 5.388B	MOBILE 5.384A 5.388A NF9	IMT1800 MTX (1710 – 1785 MHz) DECT Cordless telephones (1880 – 1900 MHz) IMT1900 TDD (1900 – 1920 MHz) IMT2100 MTX (1920 – 1980 MHz)	Paired with BTX 1805 – 1880 MHz. GG No.34172, dated 31 March 2011 (Annex B) as is or as amended IMT TDD applications (Future) Paired with BTX 2110 – 2170 MHz.
5.149 5.341 5.385 5.386 5.387 5.388	5.149 5.341 5.385 5.388		

IMT1800

Figure 3: Extract from NRFP for frequency range 1710 – 1930 MHz

3.1.19. Following the allocation of the frequency band to mobile, and its identification for IMT, the Authority will assign parts of the band to licensees. These assignments are then used to build networks and provide services. By way of an example, the assignments in 1800 MHz frequency band is reflected in Figure 4 below. In this case, 2x12 MHz bandwidth has been assigned to each of Neotel (Liquid), MTN, Telkom, Cell-C, Vodacom and WBS (Rain). The 1800 MHz frequency band has been fully assigned; no further assignments are possible in this band.

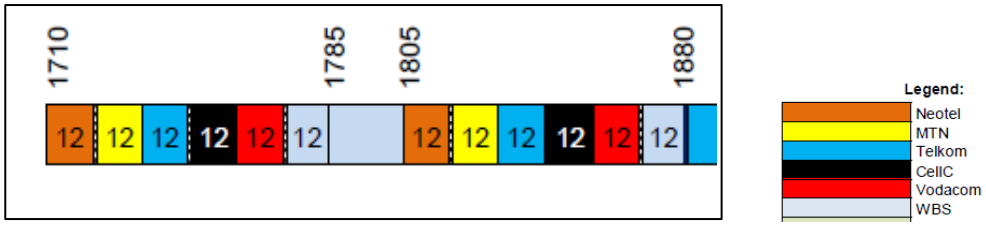


Figure 4: Assignment of 1800 MHz frequency band

3.1.20. Whereas the spectrum up to 3000 GHz is managed by the Independent Communications Authority of South Africa (**"ICASA"** or **"the Authority"**) and can be used for various radiocommunication services, in South Africa the spectrum below approximately 90 GHz is typically used for communications purposes, or is planned for such use in the near future. This upper limit to spectrum use for ICTs is mainly due to the poor propagation characteristics of frequencies in the higher frequency bands and due to technological constraints.

3.1.21. Whereas there is in theory a substantial amount of spectrum available in the radio frequency spectrum below 3000 GHz, or even when considering only the frequency range below 90 GHz, only certain frequency bands are allocated for use by mobile services. Of all mobile frequency bands, only a few bands have been identified for IMT deployment. These are discussed later.

3.1.22. Use of the mobile/IMT frequency bands by other services also limit its availability. For example, the 700 MHz and 800 MHz frequency bands are still occupied by broadcasting services and can only be used for mobile services once the digital television migration project has been completed (analogue transmissions terminated and digital-to-digital restacking completed).

<u>What makes spectrum suitable for commercial IMT network deployment</u>

3.1.23. IMT systems are defined in ITU-R Recommendation M.1224-1 as follows:

"International Mobile Telecommunications (IMT) systems" *are mobile systems that provide access to a wide range of telecommunication services including advanced mobile services, supported by mobile and fixed networks, which are increasingly packet-based.*

3.1.24. The primary global technology used today for the provision of mobile voice and data services is based on the 3GPP (3rd Generation Partnership Project) family suite of standards. The 3GPP standards form part of the IMT standards adopted by the ITU and include, amongst others, GSM (Global System for Mobile), UMTS (Universal Mobile Telecommunication System), HSPA (High Speed Packet Access) and LTE (Long Term Evolution).

3.1.25. To provide mobile services based on IMT standards, such as GSM and LTE, it is essential to have access to the internationally or regionally harmonised IMT frequency bands as listed above. These have been identified and harmonised worldwide, or at least within Region 1, and adopted and made available in South Africa of such operation. The degree to which the use of a frequency band is harmonised globally is a key consideration when assessing the suitability of spectrum for IMT network deployment. Although any frequency band can in theory be used for IMT, only the harmonised bands are built into mobile handsets and devices, which makes these specific frequency bands a necessity for building mobile networks.

3.1.26. Spectrum harmonisation refers to the uniform allocation of frequency bands across regions, under common technical and regulatory conditions. Adhering to the internationally harmonised frequency bands have several advantages including:

- Lower costs for consumers as devices (mobile instruments or handsets) can be manufactured for a global market, thereby achieving economies of scale;
- Providing a larger pool of devices driven by a larger international market;
- Allowing roaming or the ability to use the device around the globe;
- Facilitating cross-border coordination of mobile frequency bands and better management of harmful interference.

3.1.27. IMT spectrum harmonisation starts with the ITU identifying a specific frequency band for IMT, which signals to regulators and operators around

the globe that the frequency band has been earmarked for purposes of IMT network deployment. IMT identification will generally lead to the international or regional development of IMT services, which in turn will lead to standardised equipment, economies of scale, enhanced international roaming capabilities, etc., as indicated above.

3.1.28. Frequency bands are identified for IMT in South Africa in National Footnote 9 ("**NF9**") in the NRFP. Further details pertaining to these frequency bands, including frequency ranges, bandwidth, WRC Resolution, ITU Radio Regulations Footnote, etc., are also contained in NF9.

3.1.29. Per the NRFP, a limited number of mobile frequency bands have been identified for IMT deployment in South Africa. These are listed in NF9 of the NRFP and reflected below as Figure 5.

3.1.30. The conditions for the use of these frequency bands for IMT, for example the migration of legacy services, the licencing method to be followed (e.g. beauty contest, auction, etc.), time when available for IMT deployment, etc., are specified in the appropriate Radio Frequency Spectrum Assignment Plans ("**RFSAP**"), which was published in Government Gazette No. 38640 on 30 March 2015, and updated on 4th May 2015.

3.1.31. As indicated above, the spectrum below 90 GHz is typically used for commercial purposes. However, only spectrum between about 400 MHz and 4 GHz is currently used for mobile communications. This range is sometimes referred to as the "sweet spot" as it allows for the provision of personal mobile voice and data services as provided by mobile cellular systems. This range also provides a good balance between spectrum required for "coverage" and "capacity"; these are further discussed below. The spectrum sweet spot for mobile communications is indicated in Figure 6 below.

Band	Frequency band		RR FN	Channel Plan	WRC Resolution/s
450 MHz	450 – 470 MHz		5.286AA	Recommendation ITU-R M.1036	224 (Rev. WRC-15)

700 MHz	694 – 790 MHz		5.312A and 5.317A	Recommendation ITU-R M.1036	224 (Rev.WRC-15) and 760 (WRC-15)
800 MHz	790 — 862 MHz		5.316B and 5.317A	Recommendation ITU-R M.1036 (A3)	224 (Rev. WRC-15) and 749 (Rev. WRC-15)
900 MHz	880 – 915 MHz // 925 – 960 MHz		5.317A	Recommendation ITU-R M.1036 (A2)	224 (Rev. WRC-15) and 749 (Rev. WRC-15)
1500 MHz	1 427-1 518 MHz		5.341A, 5.346, and 5.346A	Recommendation ITU-R M.1036[13]	223 (Rev. WRC-15), 750 (Rev. WRC-15), and 761 (WRC-15)
1800 MHz	1710 – 1785 MHz // 1805 – 1880 MHz		5.384A	Recommendation ITU-R M.1036 (B2)	223 (Rev. WRC-15)
1900 MHz	1900 – 1920MHz		5.388	Recommendation ITU-R M.1036 (B4)	Resolution **212 (Rev.WRC-15)**
2100 MHz	1920 – 1980 MHz // 2110 – 2170 MHz		5.388	Recommendation ITU-R M.1036 (B1)	212 (Rev. WRC-07) and 223 (Rev. WRC-12)
2100 MHz (TDD)	1900 – 1920 MHz, 2010 – 2025 MHz		5.388	Recommendation ITU-R M.1036 (B1)	212 (Rev. WRC-07) and 223 (Rev. WRC-12)
2300 MHz	2300 – 2400 MHz		5.384A	Recommendation ITU-R M.1036 (E1)	223 (Rev. WRC-12)
2600 MHz	2500 – 2690 MHz		5.384A	Recommendation ITU-R M.1036 (C1)	223 (Rev. WRC-12)
3500 MHz	3300 – 3400 MHz		5.429B	Recommendation ITU-R M.1036[14]	223 (Rev. WRC-15),

Figure 5: List of IMT frequency bands identified in South Africa

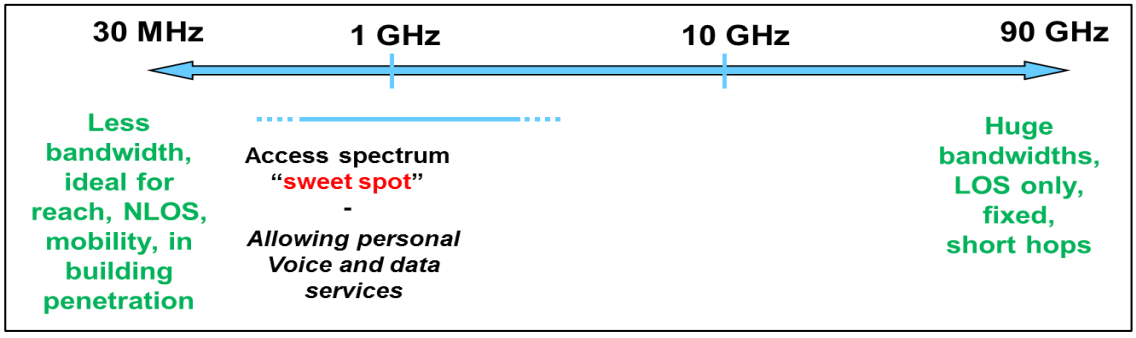


Figure 6: Spectrum "sweet spot"[1]

[1] LOS = line of sight / NLOS = non line of sight

3.1.32. An important consideration for spectrum suitability is the propagation characteristics of a frequency band. Spectrum above 1 GHz is generally more suitable for providing more bandwidth or capacity. Although frequency bands below 1 GHz is generally considered more suitable for coverage, all spectrum can in theory be used for capacity and coverage but with technical, operational and economic implications. For example, deploying a network in the higher frequency bands requires more base stations, which means more capital, additional backhaul links and site acquisitions.

3.1.33. Lower frequencies also have better in-building penetration capabilities, which is necessary to provide better quality services within buildings. Furthermore, fewer base stations are required to cover a certain area with, for example 700 MHz compared with 2100 MHz, which has a substantial impact on the capital and operational requirements of building and maintaining a network. This is presented in Figure 7 below.

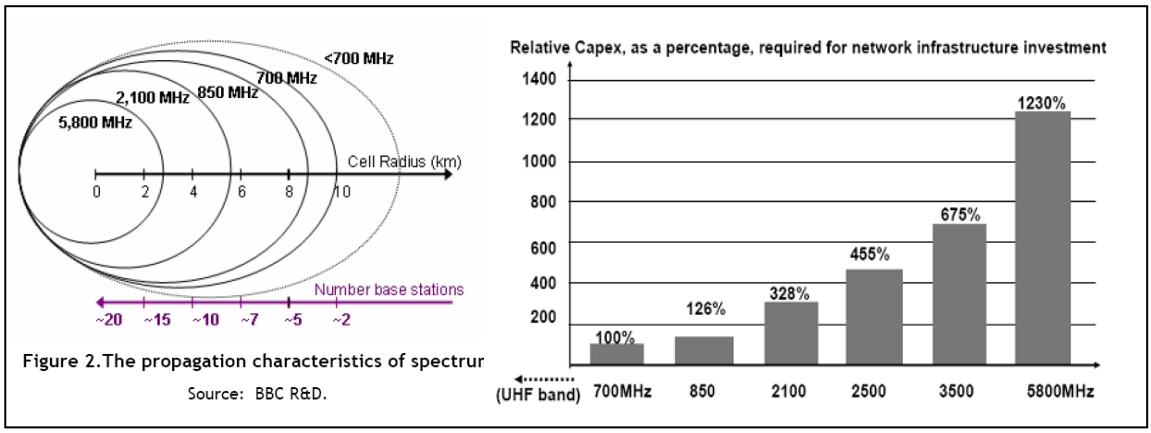


Figure 7: The propagation characteristics of spectrum

3.1.34. As set out in Figure 7, deploying for example a network in 2100 MHz will require 328% more base stations compared to deploying a network using the 700 MHz frequency band.

3.1.35. Having access to base stations is a critical component for mobile network deployment. Apart from the costs associated with building base stations, issues such as obtaining EIAs (Environmental Impact Assessments) could restrict the rollout of base stations, especially in urban and peri-urban areas. The problem increases exponentially when deploying a network in the higher frequency bands, which requires more base stations to cover

the same area, and for the late market entrants.

3.1.36. It is important for providers of mobile services to have access to both "coverage" and "capacity" frequency bands to provide national services with sufficient capacity and quality. Telkom is currently the only national mobile operator without access to sub 1 GHz spectrum.

3.1.37. The status regarding other sub 1 GHz IMT frequency bands are:

- The 700 MHz and the 800 MHz frequency bands will become fully available only after the completion of analogue to digital television migration. The exact date when these bands will be available nationally is not clear but is expected to be after 2020.

- The 900 MHz frequency band has been fully assigned by the Authority to the three incumbent mobile operators namely Vodacom, MTN and Cell-C (each have been assigned 2x11 MHz). No spectrum is currently available in this frequency band. ICASA has decided that a new spectrum assignment arrangement in the 900 MHz, which creates an additional 2x5 MHz, is to be achieved by 31 March 2020 (see RFSAP, Government Gazette No. 38640, Notice 275 of 2015). An ITA will be issued to award the additional 2x5 MHz spectrum when the in-band migration has been completed after 2020. This spectrum bandwidth is useful for voice deployment but very limited at a time where broadband networks are deployed.

- The 450 MHz frequency band is occupied by many different radiocommunication services and will probably become available only around 2020 following a very complex, expensive and lengthy migration process.

High Demand Spectrum

3.1.38. Harmonised IMT frequency bands are commonly referred to as "high demand spectrum" ("HDS") due to the high demand for access to these frequency bands. In some cases, the demand exceeds the amount of spectrum available leading to spectrum scarcity. This is particularly true for IMT frequency bands.

3.1.39. A scarcity of high demand spectrum can be attributed to the limited number of harmonised IMT frequency bands, the large number of operators requiring access to IMT spectrum, the delays in assigning existing IMT spectrum (such as 700 MHz, 800 MHz and 2600 MHz) and the exponential growth in data traffic, which requires additional spectrum.

3.1.40. Not all IMT frequency bands are equal in terms of suitability for commercial network deployment. In some IMT frequency bands, the equipment, specifically handsets, are either not yet commercially available or have not yet developed to a point where these are produced on a mass scale. Mass scale production is necessary to reach economies of scale, which generally leads to cheaper devices and more affordable services and improved roaming.

3.1.41. Mobile user devices, such as handsets, are equipped with specific IMT frequency bands in response to international demand; not all IMT frequency bands are built into all user devices, especially for newly identified frequency bands. Some IMT bands are therefore more valuable for operators.

3.1.42. Frequency bands below 1 GHz, such as 700 MHz, 800 MHz and 900 MHz, are also in high demand as they allow network providers to build mobile networks with less capital and at the same time achieving better quality of services (better in-building penetration and fewer coverage “gaps”). Nevertheless, these lower frequency bands must be augmented with higher frequency bands to ensure that the network can cater for bandwidth requirements, especially in hot spots such as dense urban areas.

Future radio frequency spectrum

3.1.43. WRC-19 will consider additional frequency bands for the 5th generation of mobile services or IMT-2020/5G. WRC-15 identified 11 frequency bands to be studied for possible 5G use. These frequency bands are indicated in Figure 8.

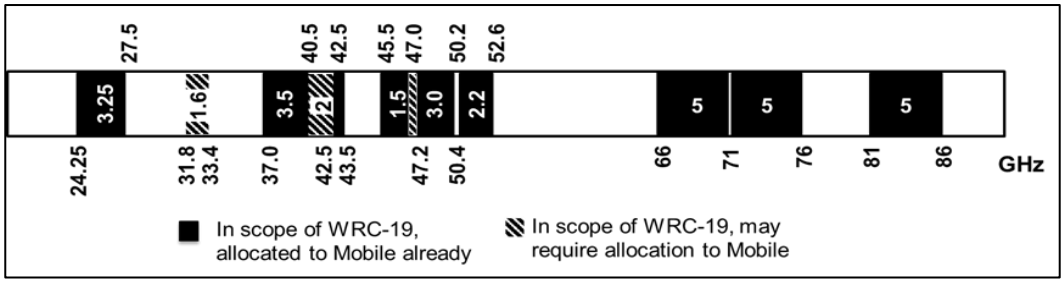


Figure 8: Frequency bands to be considered at WRC-19 for 5G

3.1.44. ITU-R conducted frequency sharing and compatibility studies between the proposed 5G systems and existing radiocommunication systems operating in the same and adjacent frequency bands. WRC-19 will decide which frequency bands to be used for 5G, noting that all these frequency bands are used by other services and that migration of these systems may therefore be required to implement 5G.

3.1.45. The decisions of WRC-19 will take effect on 1 January 2021. Network equipment and devices will follow thereafter.

Radio frequency spectrum and constitutional rights

3.1.46. The mobile communication services that radio frequency spectrum supports are vital to South Africa's economic development and the improvement of the quality of life of its citizens. The proper management of radio frequency spectrum therefore implicates a range of protected rights and freedoms enshrined in the Constitution, including:

- The right to equality in section 9;
- the right to freedom of expression in section 16(1), which includes the right to receive and impart information and ideas;
- the right to freedom of trade and occupation in section 22; and
- the right to education in section 29.

3.1.47. In *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd*,[2] the Constitutional Court expressly acknowledged the link between electronic communication services, including mobile telecommunication services,

[2] 2015 (6) SA 440 (CC) at paras 120-123.

and the promotion of fundamental rights, as set out below:

The primary object of the [Electronic Communications] Act is to regulate electronic communications in the public interest. Section 2 sets out its ancillary objects. These include open, fair and non-discriminatory access to broadcasting services and communication networks so as to encourage investment and innovation in the communications sector. The purposes of the Act encourage the realisation of fundamental rights, in particular the right to equality, education, access to information and freedom of trade, occupation and profession. Fast and reliable electronic communication services have the potential to improve the quality of life of all people in South Africa. They do so through increasing the availability of texts, audio and other media at schools, universities and colleges, and boosting business and employment opportunities. Anyone who has seen a teenager using a mobile telephone or other electronic devices to access the internet for homework, research or inquiry will understand the statute's objectives…The statute is designed…to bring our country to the edge of social and economic development for rural and urban residents in a world in which technology is so obviously linked to progress. The spirit and purport of the Bill of Rights command that the Act must be interpreted to promote access to fundamental rights rather than to hinder them. That is our clear duty here.

3.1.48. In advancing these fundamental rights, the assignment and use of high demand IMT radio frequency spectrum specifically is very important. This is because of the growing demand for high-speed mobile broadband services in South Africa and the use of mobile as the primary means to deliver communications and access to the internet.

3.1.49. Given the significance of this spectrum as a scarce national resource that is essential for the realisation of rights, careful management, and specifically the assignment of spectrum, is essential.

Radio frequency spectrum and its impact on competition

3.1.50. The assignment of HDS to the WOAN and/or the market will have far-reaching implications for the ICT sector in general and for competition, broadband access and the cost to communicate specifically.

3.1.51. Mobile telephony in South Africa is now over 25 years old. At inception, the two early mobile operators enjoyed supportive legislative, policy and regulatory interventions. For instance, wholesale voice termination rates were skewed in their favour. It is estimated that Telkom subsidised Vodacom and MTN by over R70bn through this asymmetric regulatory environment which favoured these two entities as new entrants. A combination of the favourable regulatory environment and the early-mover advantage contributed to the current duopolistic structure of the mobile market.

3.1.52. Today, more than 75% of mobile subscribers in South Africa are subscribed to MTN and Vodacom. Over 80% of the gross revenues are also shared between these two operators. Each of them has over 10 000 base stations across the country compared to the 4 000 that Telkom currently has. Telkom, as the legacy telecommunications services provider, is still saddled with a high and stubborn cost structure. For instance, Telkom had obligations to roll out its copper network to unprofitable areas. The costs of maintaining this network remains. Telkom has over 18 000 employees, which is higher than the total employee complement of MTN and Vodacom combined.

3.1.53. Despite the introduction of new players such as Cell C, Liquid (formerly Neotel) and Rain (formerly WBS), there has been no significant impact on the market structure nor its dynamics. In 2013, the South Africa Connect Policy identified the need to promote competition in the mobile sector.[3] It is part of its objective to create a fair and competitive environment, particularly enabling service-based competition through the enforcement of the wholesale access regulations to dominant market players' networks and mandatory open access to infrastructure rolled out through public investment.

3.1.54. Most South African citizens rely on their mobile devices to access the Internet. The 2013 SA Connect Policy acknowledges this fact and states as follows:

The slow deployment of fixed broadband services (ADSL), and its

[3] SA Connect Policy (Government Gazette No. 37119 dated 6 December 2013).

relatively high costs, meant that over the last five years mobile broadband rapidly became the primary form of broadband access; rather than providing a complementary service to fixed broadband as it has done in mature economies. Despite this take-off in mobile broadband, South Africa's broadband penetration remains poor compared to that of other lower-middle-income countries.[4]

3.1.55. To meet the growing demand for mobile broadband, mobile network operators need access to spectrum to build networks that can deliver the speed and quality as required by the market. The forecasted growth in mobile data by consumers and business customers is illustrated in Figures 9 and 10 below, which indicate the projected exponential growth in data demand between 2015 and 2020 for consumers and businesses.

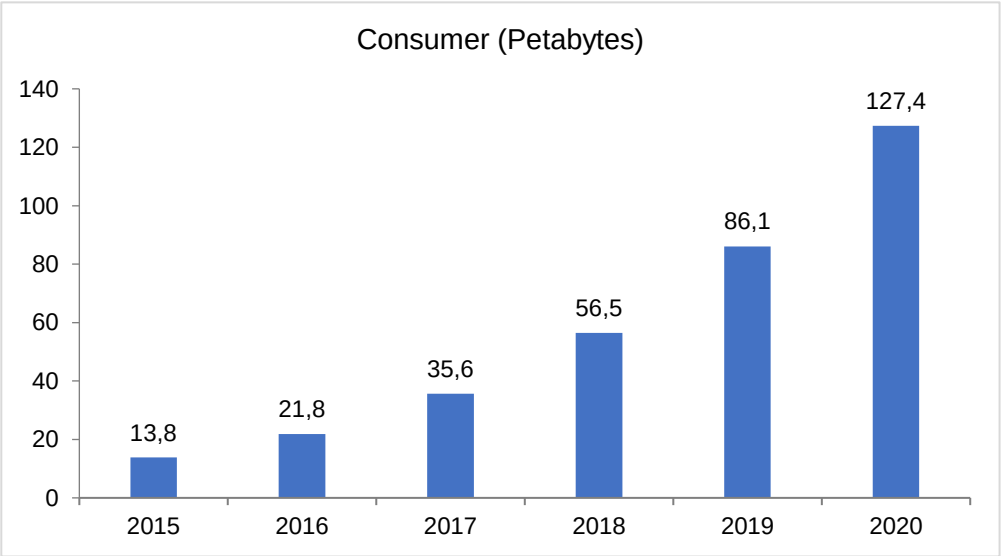


Figure 9: Expected growth in mobile data in South Africa (consumer) – petabytes. Source - Cisco 2016

[4] See n 3 above (SA Connect Policy) at Executive summary

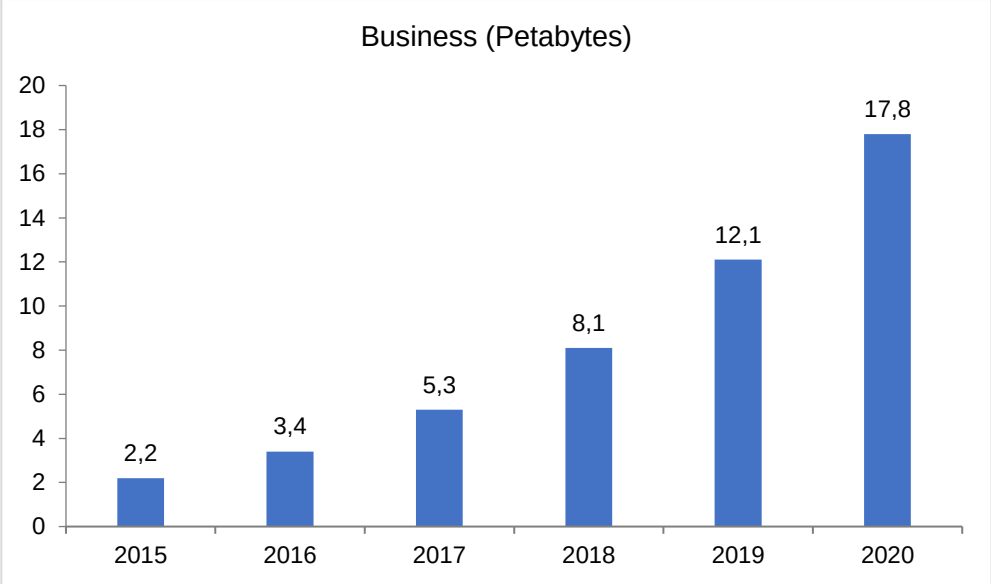


Figure 10: Expected growth in mobile data in South Africa (business) – petabytes. Source - Cisco 2016

3.1.56. The effective assignment of IMT spectrum is pivotal in allowing mobile operators to compete in the market. Additional spectrum allows operators to expand their networks, or provide new and additional services, without having to invest as extensively in infrastructure such as RAN (Radio Access Network) sites and backhaul.

3.1.57. New radio frequency spectrum that will be brought into the market on auction or other assignment methodology will determine market structure and the feasibility of operators, specifically the smaller operators, to compete in the market. If large bandwidth of additional spectrum is assigned to the duopoly, they will be able to further entrench their dominance, which will perpetuate the status quo.

3.1.58. The 700 MHz and 800 MHz represents the last significant licensing of spectrum with coverage capability (sub 1 GHz) that will arise for a very long time. It is critical for Telkom to obtain access to a portion of this spectrum to ensure its long-term viability in providing high quality mobile services at competitive prices.

3.1.59. The importance of spectrum to address inequality and enhance competition has been highlighted by Econex in their report (attached hereto as Annexure A), as follows:

"Frequency spectrum is a national resource, and policy makers have an obligation to ensure maximum public value from its use and to ensure that it enhances economic equality. The policy framework within which it is licenced must therefore promote inclusive economic growth and investment, which is critical for addressing inequality and facilitating socio-economic transformation.

As the ICT Policy points out, effective competition in the mobile market is a prerequisite for attaining the goal of economic growth through increased access to affordable mobile communication services. As a key input into mobile services, access to HDS is therefore critical for achieving the objectives set out in the national broadband policy. HDS must be used as a public good to support the broader policy objectives of open access, reducing costs and spurring service-based competition".

Radio frequency spectrum control including frequency band planning

3.1.60. Telkom supports the spectrum control and planning functions, including the preparation of the national radio frequency plan ("**NRFP**"), to move to the Minister of the DTPS. Spectrum management or administration must reside with the Authority.

3.1.61. Spectrum band planning is an extension of the ITU World Radiocommunication Conference ("**WRC**") process, which is also under control of the Minister of the DTPS.

3.1.62. Decisions pertaining to spectrum allocations taken at a WRC amounts to national policy decisions on the future use of spectrum in South Africa. Examples include:

- When South Africa decided to support the allocation of the 700 MHz and 800 MHz frequency bands to mobile services, it necessitated the migration of broadcasting services from these bands to allow for mobile use. This decision was coordinated between the Ministers of the DTPS and the DOC at the time, as it had huge implications for both the mobile and broadcasting sectors, requiring national coordination and support.

- When South Africa decided not to support the 3.7 GHz (3600-3800

MHz) and 28 GHz (27.5-30 GHz) frequency bands for mobile services to protect the continued use of satellite services in these frequency bands, this was a national policy decision. Deviation from such policy decisions by the Authority should not be allowed at the time of implementation through the development of the NRFP; therefore, it is best that the Minister of the DTPS conclude on this matter of national importance by developing the NRFP in line with South Africa's position and decisions taken at a WRC.

3.1.63. The Minister is also the custodian of spectrum use by Government entities such as aviation, maritime, science, security services (such as the national defence force and police services), etc. Having this responsibility, the Minister of the DTPS is best positioned to develop the NRFP to ensure a balance between commercial and government use of the radio frequency spectrum.

3.1.64. Developing the NRFP also has an impact on the bilateral coordination of spectrum use, not only with our neighbouring countries and SADC (South African Development Community), but also internationally, considering the use of spectrum for space and other global radiocommunication systems. This function, and responsibility, already resides with the Minister of the DTPS.

3.1.65. Development of the SADCregional frequency band plan, follows from the ITU WRC and must be aligned with the NRFP, to the extent possible. This multi-lateral agreement is part of the Minister's responsibilities. The SADC band plan feeds back into the NRFP, which should then also be implemented by the Minister to ensure that national policy decisions, as adopted at a WRC, are maintained.

3.1.66. Specific comments pertaining to spectrum band plan development and spectrum control are contained in Part B of Telkom's submission.

Spectrum Trading

3.1.67. Telkom supports trading of spectrum subject to strict competition and regulatory scrutiny by the Authority and the Competition Commission. Regulatory scrutiny is essential considering the tremendous impact that spectrum may have on the market and competition, especially where HDS

is involved.

3.1.68. In addition to competition rules such as rules pertaining to major transactions, where HDS is involved in the proposed transaction, both the Competition Commission and the Authority must investigate the proposed transaction. If non-HDS is involved, regulatory scrutiny by the Authority should suffice as such transactions will probably have less impact on competition and since non-HDS is not limited.

3.1.69. If spectrum trading is not allowed, Mergers and Acquisitions (M&As), where spectrum will change ownership or control, cannot be approved. If M&As cannot occur, it will negatively impact the market especially for smaller operators to be able to compete more effectively with the duopoly namely Vodacom and MTN.

3.1.70. Any transaction involving those with significant market power (SMP), i.e. Vodacom and MTN, must be scrutinised thoroughly to ensure that such transactions does not negatively impact competition in the market or further entrench the duopoly.

3.1.71. Specific comments pertaining to spectrum trading are contained in Part B of Telkom's submission.

Spectrum Refarming

3.1.72. The EC Amendment Bill proposes a move away from the internationally accepted model of technology neutrality to a system of command and control where changes in the use of spectrum must be approved by the Authority. Such move may stifle innovation due to the potential delays it may bring in deploying technology upgrades, such as moving from 3G to 4G.

3.1.73. The proposed introduction of section 31D, where licensees will require regulatory approval for refarming their spectrum, could have a negative impact on the market and operators' ability to introduce new technologies.

3.1.74. A key question to consider is the definition of refarming. The term refarming is defined differently in different jurisdictions and is also used interchangeable with terms such as migration, repurposing or redeployment.

3.1.75. In Europe, spectrum refarming is defined as:

> ***"Refarming"*** *means the recovery of spectrum from its existing users for the purpose of reassignment, either for new users, or for the introduction of new spectrally efficient technologies*

3.1.76. Further, refarming in Europe applies across three levels, namely allocation, application and technical. These are indicated below in Figure 11, extracted from Electronic Communication Committee (ECC) Report 16. The EC Amendment Bill is proposing that refarming takes place on the second level. This is further discussed below.

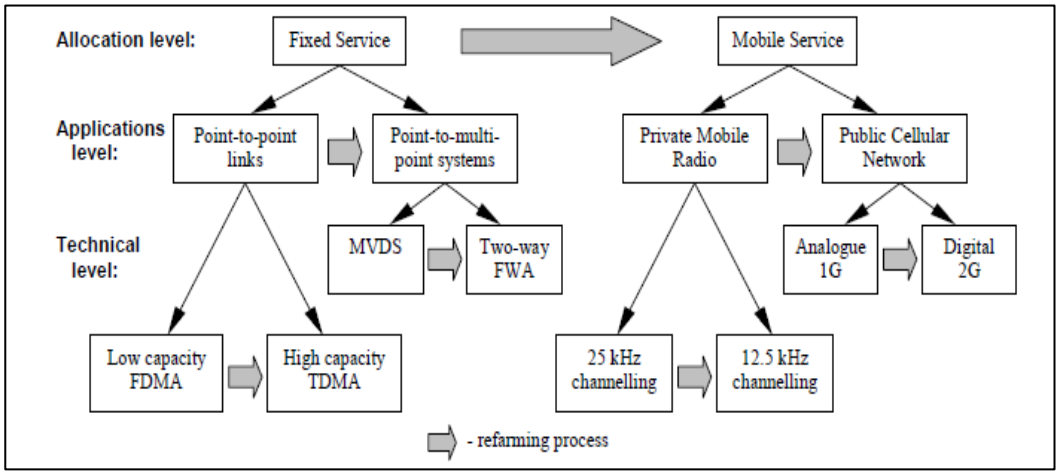


Figure 11: Examples of spectrum refarming process at different levels

3.1.77. The ITU defines spectrum redeployment (or refarming) in ITU-R Recommendation SM.1603 as:

> ***"Spectrum redeployment (spectrum refarming)"*** *is a combination of administrative, financial and technical measures aimed at removing users or equipment of the existing frequency assignments either completely or partially from a particular frequency band. The frequency band may then be allocated to the same or different service(s). These measures may be implemented in short, medium or long time-scales.*

3.1.78. The GSMA or GSM Association defines refarming as follows:

> ***"Refarming"*** *is the term used for the process governing the repurposing of frequency bands that have historically been allocated for 2G mobile services (using GSM technology) for new generation of mobile*

technologies, including both third generation (using UMTS technology) and fourth generation (using LTE technology)

3.1.79. In the ECA, within the definition of "radio frequency plan", reference is made to a plan "*…for the migration of systems and equipment of existing users within specific radio frequency bands, including radio frequency bands for security services, to different frequency bands.*" (Own emphasis).

3.1.80. The definitions used in Europe and provided in ITU Recommendation SM.1603, are similar to the definition of frequency migration as applied in South Africa, as contained in the ECA under the definition of "radio frequency plan". Telkom is of the view that the process of migration of systems and equipment from a frequency band to a new frequency band (and which necessitates the need to change the radio frequency spectrum licence) is distinctly different from what is proposed as "refarming" of spectrum. Telkom view of refarming is more aligned to the definition as provided by the GSMA (see above). For refarming, an amendment of the radio frequency spectrum licence is not required.

3.1.81. Frequency refarming is therefore the repurposing of a frequency bands for new generation technologies (e.g. changing the use of a frequency band from 2G to 3G or to 4G) while migration of systems and equipment is where same is moved to a new frequency band (which would require the licence to change).

3.1.82. Frequency refarming is the re-utilisation of existing assigned (or licensed) spectrum for a different use, while remaining within the parameters of the licence and ensuring that no harmful interference is caused to other licensees.

3.1.83. Referring to Figure 9, refarming occurs on the technical level, e.g. where there is a change from 2G to 3G. Since both 2G and 3G (and 4G) are part of the definition of IMT, such changes should generally be allowed without the need for regulatory approval. ICASA's regulations dealing with the use of IMT frequency bands also allow for changes within the IMT family of standards. Refarming of IMT spectrum has taken place for many years.

3.1.84. As indicated above, and considering Figure 9, the EC Amendment Bill

proposes that refarming takes place on the second level i.e. the "application" level. Telkom cannot support the use of "application" in the definition as it may have unintended consequences since this word is also used within the NRFP (3rd column is labelled "Typical applications"). Changes in applications should not be allowed without regulatory consideration as such changes may have implications for frequency sharing between radiocommunication services and may result in harmful interference to other licensees.

3.1.85. For example, changing the use of a frequency band, which is allocated to the fixed services, from point-to-point (PTP) links to Fixed Wireless Access (FWA) (which implies a change in application of the band) changes the sharing dynamics between services, which requires new processes and procedures to be developed to avoid harmful interference. Such a change in application will require regulatory intervention to protect other licensees.

3.1.86. Changes in application may also have a negative impact on competition to the extent that spectrum acquired for one purpose (e.g. links) is repurposed for another (e.g. mobile broadband), which may bring imbalance in the spectrum holdings between competitors in the delivery of services.

3.1.87. Spectrum licences are currently assigned on a technically neutral basis, which gives licensees certain rights in terms of deploying radio equipment in the assigned spectrum. Maintaining the principle of technology neutrality is a critical element in regulating telecommunications. J Maxwell *et al*, examined the term "technology neutrality" in Computer and Telecommunications Review 2014 and identified three meanings for technology neutrality, depending on the context, as indicated below.

"***Meaning 1:*** *technology neutrality means that technical standards designed to limit negative externalities (e.g. radio interference, pollution, safety) should describe the result to be achieved, but should leave companies free to adopt whatever technology is most appropriate to achieve the result.*

Meaning 2: *technology neutrality means that the same regulatory*

principles should apply regardless of the technology used. Regulations should not be drafted in technological silos.

Meaning 3: *technology neutrality means that regulators should refrain from using regulations as a means to push the market toward a particular structure that the regulators consider optimal. In a highly dynamic market, regulators should not try to pick technological winners*".

3.1.88. Current spectrum licences are generally technology neutral. Further, although there is no indication on the licence as to what "application" must be deployed, the spectrum configuration generally indicates the specific application (e.g. PTP link or FWA), which is also captured in the NRFP. It is not clear how the transition to the new regime will be implemented. This uncertainty applies equally in relation to the period prior to the necessary regulations being prescribed. It is also noted that licensees have not deployed the same application in similar frequency bands so it is not clear which application will be the "standard" for each frequency band. Reassessing and amending all spectrum licences will also involve a tremendous administration exercise by the Authority, given that there are several thousands of licences.

3.1.89. Whereas Telkom agrees with the objective of avoiding a negative impact on competition through the proposed regulation of spectrum refarming, Telkom is concerned that it could curtail, or as a minimum, delay the efforts of the operators to introduce, for example, faster broadband services (e.g. moving from 4G to 5G technology) and thus reducing investments, or as a minimum, delay such efforts. It should be acknowledged that the availability of 4G (LTE) services in South Africa is due to the licensees being able to refarm existing spectrum licenses, which were initially issued for 2G and 3G services.

3.1.90. Considering the above, Telkom recommends that all provisions pertaining to refarming be removed from the Bill. The internationally accepted regime of technology neutrality must be retained. This is necessary, not only for the WOAN, but also for the incumbent operators to ensure effective competition and efficient use of spectrum. If provisions pertaining to refarming must be retained, Telkom recommends that any party intending to refarm spectrum should notify the Authority accordingly. If the Authority

has concerns regarding the impact on competition due to the proposed refarming, it should have an opportunity to intervene to ensure that competition is not negatively impacted.

Obligations attached to radio frequency spectrum licences

3.1.91. The EC Amendment Bill proposes the addition of a new section dealing with universal access and universal service obligations ("**obligations**") associated with radio frequency spectrum licences (section 31A of the EC Amendment Bill). Although Telkom supports the principle of attaching obligations to spectrum licences, the specific proposals in section 31A are highly concerning to Telkom as they may have unintended consequences and have huge implications for smaller licensees.

3.1.92. Firstly, in terms of the EC Amendment Bill, the Authority must impose obligations on new and existing spectrum licences. Imposing obligations on existing spectrum licences retrospectively, may have dire consequences for the licensees of such spectrum licences. The legality of such action will also have to be considered.

3.1.93. Spectrum assignments, specifically for mobile frequency bands, are monetised through the deployment of networks and services based on a long-term business case (i.e. 10 to 15 years). In developing the business case, all criteria including obligations are considered to ensure that a positive return on investment is achieved. If new or additional obligations are imposed on such spectrum licences, a licensee may have a negative return on investment. Investor confidence may be affected and may result in the licensee holding back some investment, especially in the less profitable areas, to compensate for the additional/changed obligations.

3.1.94. Secondly, the proposal to attach obligations an all spectrum licences is concerning. Spectrum licences are issued for many radiocommunication services such as point-to-point radio links, satellite systems, maritime radio, scientific applications, etc. Thousands of spectrum licences have been issued. Designing, imposing and monitoring obligations to all spectrum licences will be a hugely burdensome exercise for the Authority. The identification of appropriate obligations which must be related to the specific use of that frequency licence) may also be a challenge. The

benefits obtained through such obligations may even outstrip the administrative costs in designing, implementing and monitoring these obligations.

3.1.95. Thirdly, imposing “similar” obligations on licensees even for the same frequency band may have negative consequences especially for smaller operators. For example, if the same obligations are imposed on Vodacom and Telkom when assigning a new frequency band (e.g. 700 MHz frequency band), it will be much easier (from a time and cost perspective) for Vodacom to comply with such obligations compared to Telkom. This is considering the network scale of Vodacom compared to Telkom (Vodacom has more than 12000 base stations located nationally, whereas Telkom has only 4000 base stations located mainly in urban and peri-urban areas). Telkom depends on roaming services in the rural and other areas where it has not deployed its own network.

3.1.96. This situation is exacerbated by obligations such as rural-first rollout before using the specific frequency band in urban areas. In this example, Telkom will potentially have to build thousands new base stations in rural areas (even though it has a market share of less than 5%) before it can use the spectrum in the urban area. Vodacom, on the other hand, will meet the obligation in a much shorter period (and require substantially less capital) and then continue using the spectrum in the urban areas. The duopoly will be further entrenched in such case. Vodacom may even use their existing networks in these areas to achieve these obligations. Smaller operators may even be excluded from the licencing process (e.g. auction) if the obligations are too onerous to achieve, allowing those with current SMP to obtain all/most of the new spectrum and further entrenching their dominance and marker power. Such outcome will have a negative effect on competition and the costs to communicate.

3.1.97. Fourthly, not achieving imposed obligations may lead to a withdrawal of the spectrum licence. The risk associated with such action is far greater for smaller operators compared to those already controlling 80% of the market.

3.1.98. Fifthly, those with market and network scale will be able to achieve obligations much easier compared to the smaller operators. Scale

includes number of base stations, subscriber base, global operations, cheaper imports of equipment and devices, leverage through their international scale, more distribution outlets, etc.

3.1.99. Sixthly, Telkom continues to carry legacy obligations associated with its fixed network. These include maintenance of copper networks in non-profitable areas and coin boxes.

3.1.100. In conclusion, Telkom recommends that obligations be limited to new and HDS licences only. Further, considering the above reasons, obligations should be imposed based on market share and scale, even when considering the same or similar frequency bands.

Mandatory spectrum policy implementation

3.1.101. In terms of the EC Amendment Bill, the Minister of the DTPS is responsible for developing policies and policy directions pertaining to, amongst others, radio frequency spectrum matters. In terms of section 3(4) of the ECA, ICASA must consider policies and policy directions issued by the Minister of the DTPS when exercising its powers including prescribing regulations.

3.1.102. However, per the EC Amendment Bill, regulations prescribed by ICASA pertaining to “radio frequency spectrum” and “radio frequency spectrum fees” must be in accordance with the policies and policy directions issued by the Minister. Whereas spectrum fees are very specific, “radio frequency spectrum” is very broad and potentially includes any matter related to spectrum.

3.1.103. ICASA therefore has no discretionary power in any matter relating to spectrum and must implement all policies and policy directions pertaining to spectrum (and spectrum fees). The independence of the Authority in this regard is therefore removed.

3.1.104. ICASA inherited the rights and obligations of the erstwhile IBA from the Constitution. ICASA cannot act independently from national policy. In terms of section 3(2) of the EC Act, when policy is being made the Minister consults ICASA. ICASA, in exercising its powers and performing its duties in terms the ECA and the related legislation, must consider policies made and policy directions issued by the Minister. When issuing a policy or

policy direction the Minister must consult ICASA and, to obtain the views of interested persons, publish the text of such policy or policy direction by notice in the Gazette.

3.1.105. If ICASA acts independently of national policy, it places the DTPS, which is at the executive level of government, in conflict with ICASA as an unelected structure.

3.1.106. Telkom is concerned regarding the above proposal (as proposed in section 4(1A) of the EC Amendment Bill). This proposal may have far reaching consequences for the industry and must be reconsidered. Furthermore, the part referring to "radio frequency spectrum" should either be deleted or be made more specific. In terms of section 3 of the ECA, the Minister may make policies on matters of national policy applicable to the ICT sector, consistent with the objects of the ECA and of the related legislation in relation to certain matters, including RFS, as well as any other policy which may be necessary for the application of this Act or the related legislation. These sections are inelegantly drafted resulting in unintended effects.

Deemed operator due to IMT spectrum holdings

3.1.107. According to section 44(3A)(b) (Wholesale Open Access Regulations), any licensee with access to IMT spectrum is immediately classified as a deemed entity. In terms of section 43 (Obligation to provide wholesale open access), a deemed entity must comply with wholesale open access principles such as active infrastructure sharing, wholesale regulated rates and specific network and population coverage targets. See also Telkom's comments on obligations in the section titled "*Obligations attached to radio frequency spectrum licences*".

3.1.108. Telkom recommends that the determination of a deemed entity must be based on the outcome of a market study done by the Authority. The EC Amendment Bill also proposes that the Authority conducts a market study in terms of section 67(3A) of the ECA. Therefore, it is premature to conclude that an IMT spectrum holding automatically implies that the licensee is a deemed entity; such determination can only be made following a market study, which will consider all relevant factors.

3.1.109. Further, Telkom is of the view that the proposed open access obligations must only apply to those entities with significant market power (SMP). Attaching these onerous obligations to smaller operators just because they have an IMT assignment will work against the objectives of improving competition and reducing the costs to communicate. On the other hand, those with SMP and scale in the mobile market, as confirmed through the proposed market study, should be forced to comply with the proposed obligations.

Licensing framework for wireless open access network service

3.1.110. Telkom continues to support the creation of a viable WOAN. The latter is an ideal vehicle to level the playing field in mobile communications and challenge the power of the current duopoly. It should be designed in a manner that will lower the barriers to entry for smaller operators to effectively compete with Vodacom and MTN. For example, through the WOAN, smaller players will be able to expand their network coverage without incurring the associated CAPEX, especially in rural areas. It further presents the possibility for obtaining network capacity more cost-effectively, and to prevent infrastructure duplication.

3.1.111. The ICT Policy is premised on earlier findings by the Minister of the DTPS that the mobile sector is highly concentrated and duopolistic. It is for this reason that the policy proposes that all the currently unassigned spectrum be assigned to a Wireless Open Access Network ("**WOAN**").

3.1.112. To ensure the viability of the WOAN, Telkom supports the National Integrated ICT Policy that all unassigned High Demand Spectrum (HDS) should be assigned to the WOAN. No HDS should therefore be assigned outside of the WOAN.

3.1.113. At the time of consultation on the 2017 Amendment Bill, Telkom proposed a high level WOAN construct, which can be practically and viably implemented in South Africa. Telkom's submission in this regard is attached as Annexure B, which also includes its Annexure A (Proposed WOAN model). Telkom's proposal set out technical and commercial critical success factors for supporting a viable WOAN.

3.1.114. It is Telkom's contention that the proposed hybrid model, as crafted in the

draft policy and policy directions recently published by the Minister of the DTPS[5], where it is proposed that some spectrum will be assigned to the WOAN and some to the market, will not address the competition concerns. Instead, the hybrid model is likely to entrench the duopoly and result in the failure of the WOAN.

3.1.115. Furthermore, over regulating the WOAN could lead to artificial price reductions, which if coupled with very small margins, could potentially lead to smaller players having to leave the market and market destruction. This will strengthen the power of the duopoly.

3.1.116. Telkom is of the view that the licensing of HDS must be preceded by a comprehensive market inquiry into the mobile sector, which study must be conducted by ICASA. Telkom's submission to the Minister pertaining to the draft policy and policy directions are attached as Annexure C. In this submission, Telkom recommended that the Authority consider both technical and commercial aspects to ensure a successful WOAN.

Spectrum management with a long-term view

3.1.117. The management of HDS, including the assignment therefore, must be done with a long-term view. Spectrum assignments are used to build networks based on a 10 to 15-year business plan. Business plans are developed considering all input parameters, including obligations such as network rollout targets, bandwidth/speed and quality, spectrum fees, market dynamics including competitor dynamics, forecasted growth in data, etc. These factors are considered for the full term of the business case.

3.1.118. Changes to these input parameters will have an impact on the business case and the licensees return on investment. If severe, it may cause the business case to fail, resulting in the licensee halting investment, especially in economically marginal areas. Whereas the licensee must manoeuvre between changes in the market, regulatory changes must be implemented with caution. Specific issues to be avoided, or be prevented without proper assessment, during the licence tenure include:

[5] Government Gazette No. 41935 dated 27 September 2018

- Substantial increases in spectrum fees above normal inflation.
- Imposing new obligations on existing spectrum licences.
- Awarding new HDS spectrum without due consideration of possible market and competition implications.
- Allowing spectrum trading or sharing involving HDS and specifically involving those with SMP to proceed without thorough scrutiny.
- Changing the definition of broadband every two years where such definition is included in the licence terms and conditions.

3.1.119. ITU-R Report SM.2015 states that, "…*if spectrum resources are to adequately support national goals and objectives, long-term planning is essential*". This report further advocates that long-term planning should endeavour to:

- make today's decisions on spectrum planning strategies in view of their consequences for the future,
- identify the impact of past decisions on the future,
- periodically adjust decisions to changing circumstances.

3.2. THE WHOLESALE OPEN ACCESS NETWORK (WOAN)

Policy context

3.2.1. The ICT Policy, published on 3 October 2016, emphasises the need for more competition in the ICT sector, to reduce prices and stimulate economic growth. The ICT sector is an important enabler of economic growth and bottlenecks in this sector must be addressed as a matter of urgency. The ICT Policy envisaged that certain changes to legislation must be made to fulfil the stated policy goals. It also envisioned that the ICT Policy will fundamentally change the structure of the market to promote service-based competition and reward infrastructure-sharing.

3.2.2. Chapter 9 of the ICT Policy deals with the policy frameworks to address supply-side challenges in transforming South Africa into an "inclusive,

people-centred and developmental digital society." It sets out the open access policy, spectrum policy, and a policy framework for licencing unassigned HDS to a WOAN. Several specific goals for spectrum policy are highlighted, including:

- To allow for effective service-based competition and to ensure accessible, affordable, high quality and reliable services for consumers;
- To increase network coverage, and enable the rapid deployment of broadband infrastructure and services across all areas of the country;
- To promote shared and equal access to broadband infrastructure;
- To remove barriers to competition and innovation in the provision of broadband services; and
- To foster innovation and development of applications and services.

3.2.3. Several the policy objectives highlighted throughout the chapter are directly linked to these goals. For instance, encouraging service-based competition, which will increase consumer choice of services and service providers, reduce costs and increase innovation; reducing market entry barriers and enabling the sharing of infrastructure and scarce resources, thereby reducing the duplication of infrastructure; promoting broadband coverage in rural areas and underserviced areas; and promoting innovation that addresses national developmental challenges and goals.

3.2.4. In addition, the ICT Policy sets out a number of broad policy objectives for the regulation of the ICT sector in general. According to the ICT Policy, there is an obligation to ensure maximum public value from frequency spectrum as a national resource, and to ensure that it enhances equitable outcomes. The policy framework must therefore promote inclusive economic growth and investment, which is critical for addressing inequality and facilitating socio-economic transformation. Among these broader objectives for the ICT sector are the following:

- Equality: All South Africans must have affordable access to

communications infrastructure and services and the capacity and means to access, create and distribute information.

- Accessibility: Services, devices, infrastructure and content must be accessible for all sectors of the population, so that all can equally enjoy and benefit from communication services;

- Economic Growth: Policy must facilitate access by all South Africans to quality communication infrastructure and services to enable economic growth, employment and wealth creation;

- Investment: Policy must promote and stimulate domestic and foreign investment in ICT infrastructure, manufacturing, services, content, and research and development;

- Innovation and Competition: Innovation, fair competition and equitable treatment of all role players must be facilitated to ensure a range of quality services are available to end-users and audiences.

3.2.5. Section 2 of the EC Amendment Act adds the following important objectives that need to be achieved by the ECA:

- *redress the skewed access by a few to economic and scarce resources, such as radio frequency spectrum, to address the barriers to market entry;*

- *promote service-based competition and avoid concentration and duplication of electronic communications infrastructure;*

- *promote an environment of wholesale open access to electronic communications networks on terms that are effective, transparent and non-discriminatory;*

redress market dominance and control.

3.2.6. The ICT Policy envisaged an open access regime in which all unassigned spectrum should be allocated to a Wireless Open Access Network ("WOAN") that is to provide wholesale open access on regulated terms. This recommendation was captured in the 2017 EC Amendment Bill. A public consultation followed, and the Council for Scientific and Industrial Research ("CSIR") was commissioned to conduct a study to determine

the spectrum requirements for the WOAN to ensure its viability. On 22 August 2018 the DTPS through a Cabinet decision adopted a hybrid policy in terms of which part of the HDS will be reserved/assigned to the WOAN and the remainder will be assigned to the market. The EC Amendment Bill stipulates that the Minister in consultation with the Authority should determine "which unassigned high demand spectrum must be reserved for assignment to the wireless open access network service licensee" (s31E(1)(b)(2)) and "must issue radio frequency spectrum licences for unassigned high demand spectrum not reserved for assignment to the wireless open access network service licensee" (s31E(4)).

3.2.7. Following the 2017 Amendment Bill, on 27 September 2018 the Minister published Draft Policy Directions on the licencing of unassigned high demand spectrum ("the Draft Policy Directions") which dealt with (a) the licensing of the WOAN (individual electronic communications network service license and spectrum license), and (b) the assignment of the remaining HDS spectrum to the market. These draft policy directions deviate from the intention in the EC Amendment Bill, i.e. that all remaining HDS should be assigned to the WOAN. It proposes a hybrid model, where some of the spectrum will be assigned via an auction and some will be assigned to the WOAN. This might however undermine the viability of the WOAN, which will destroy value for the industry.

3.2.8. Below, Telkom will analyse whether the WOAN as envisioned in the EC Amendment Bill will assist to achieving the broader policy goals set out above, promote economic growth and improve access to services.

The viability of the WOAN

3.2.9. The EC Amendment Bill conceptualises the WOAN as an entity holding a wireless open access licence which must, except in the case of technical inability, provide wholesale open access in accordance with general open access principles. The WOAN should enable service-based competition and should engage in active infrastructure sharing, charge wholesale rates as prescribed by the Authority, and comply with specific network and population coverage targets.

3.2.10. An important benefit of the WOAN, if correctly designed, is that it creates

a fair way of allowing operators to access the currently unassigned HDS. To meet the growing demand for mobile data, MNOs need networks that can deliver the speed and quality required by the market. Access to HDS is crucial in this regard. If the WOAN fails and the incumbents by virtue of their “deeper pockets” obtain the best of the spectrum not allocated to the WOAN, this would put the smaller players (Cell C and Telkom Mobile) at a competitive disadvantage. Their only alternative to increase coverage would be to build more RAN sites, putting them at a clear cost disadvantage. It is therefore of utmost importance that the WOAN is designed in a manner that allows it to be viable. If the WOAN is designed in a manner that does not allow it to become a viable wholesale operator, it will, in the event that it fails, leave the late entrants in a significantly disadvantaged position. If the WOAN is not viable, meaning that smaller MNOs are not able to obtain capacity from it and the incumbent MNOs get access to preferred spectrum which allows them to add capacity to their networks immediately, they will have a significant advantage which will serve to entrench the duopolistic market structure.

3.2.11. Further to this point, the WOAN should be implemented and in operation first to address the competition failure in the market before any HDS spectrum is released to industry. This way the incumbent MNOs have to utilise the WOAN to resolve their capacity constraints. If an auction for HDS spectrum occurs before the WOAN is operational, the incumbent MNOs will further entrench their duopoly by securing enough spectrum for their needs and will not support the WOAN, affecting the viability of the WOAN.

3.2.12. The following is in our view, necessary to ensure the viability of the WOAN: allocation of sufficient spectrum, regulation of wholesale open access prices of the WOAN from inception, population and network coverage targets be set at an appropriate level and the necessity for a market study to be undertaken.

Allocation of spectrum

3.2.13. The ICT Policy was based on earlier findings by the DTPS that the mobile sector of the market is highly concentrated and duopolistic. It is for this reason that the policy proposed that all the currently unassigned spectrum

be assigned to the WOAN.

3.2.14. In this regard, Telkom supports the WOAN as a strategic policy intervention to address access to mobile wholesale infrastructure. In Telkom's view, the WOAN can only meet the objectives of national policy if it has access to all the unassigned high demand spectrum (HDS). If it does not, the WOAN will be unable to address the high level of concentration in the mobile market and competition concerns - instead, it is likely to entrench the existing duopoly. It will not be economically, commercially nor technically possible for the WOAN to deliver on its policy mandate to increase competition if all the unassigned spectrum is not licensed to it.

3.2.15. An insufficient allocation of spectrum to the WOAN will not promote fair access to spectrum and service-based competition, but rather encourage infrastructure-based competition and entrench the current duopoly in the mobile market, in contrast with the policy objective of increasing service-based competition as set out in the ICT Policy.

3.2.16. If all the available HDS spectrum is assigned to the WOAN, however, the incumbent mobile network operators (MNOs) can purchase capacity from the WOAN at wholesale rates, thus alleviating their demand for more spectrum whilst giving rise to new Mobile Virtual Network Operators (MVNOs) and increasing competition in the mobile market. The WOAN will then also be in a position to contribute to economic growth and development whilst having the ability to maintain its business and gradually bridge the gap in the digital divide.

3.2.17. Telkom believes that the proposal in the EC Amendment Bill to assign a portion of HDS spectrum to the WOAN and assign the remaining HDS spectrum to industry via an auction process will ultimately result in an unsuccessful and unviable WOAN. An insufficient allocation of spectrum to the WOAN will not promote fair access to spectrum and service-based competition, but rather encourage infrastructure-based competition and entrench the current duopoly in the mobile market, in contrast with the policy objective of increasing service-based competition as set out in the ICT Policy.

3.2.18. The introduction of a wholesale open access player is crucial to levelling the playing field, especially for smaller mobile networks (MNOs) such as Telkom Mobile, and if this ends up as a 'lost opportunity', it will simply further entrench the current duopoly market structure. Accordingly, Telkom does not support a weak 'hybrid' WOAN which lacks the full power to carry out its objectives and may become a costly white elephant. The effect of a weak 'hybrid' WOAN that will further entrench the duopoly and if WOAN wholesale rates are not regulated, maintain high barriers to entry and leave the smaller market players at a further disadvantage due to the additional regulations introduced to all HDS spectrum holders. The broader policy goals of promoting economic growth and improving access to services will then not be achieved.

Wholesale open access prices of the WOAN should be regulated from inception

3.2.19. The EC Amendment Bill stipulates that the WOAN should comply with wholesale open access principles, including active infrastructure sharing, charging wholesale rates as prescribed by the Authority, and comply with specific network and population coverage targets (section 19A(4)(b)). By virtue of its access to HDS, the WOAN will have Significant market Power (SMP) in the market for wholesale open access from inception[6]. If the price at which it offers access to its network is not regulated, it will therefore be in a position to charge monopoly prices. This will defeat the purpose of the WOAN to help reduce prices in the telecommunications sector. It is therefore necessary that the wholesale access price the WOAN charges will have to be regulated from the start. These prices should account for e.g. the population coverage targets that the WOAN should achieve. The onus will be on the Authority to set these targets at a rate high enough to allow the necessary infrastructure investments are made, but not so high as to unnecessarily increase the cost of wholesale access in the market.

Population and network coverage targets should be set at the appropriate level

3.2.20. The ICT Policy also envisaged that deemed entities must meet specific

[6] ECA (2005) Section 67(5): "A licensee has significant market power with regard to the relevant market or market segment where the Authority finds that the particular individual licensee or class licensee -
(a) is dominant;
(b) has control of essential facilities; or
(c) has a vertical relationship that the Authority determines could harm competition in the market or market segments applicable to the particular category of licence".

network and population targets set by ICASA, which align with national policy goals to achieve affordable, high-quality national broadband access at designated speeds. Because spectrum creates a bottleneck, the idea is that a shared approach will reduce duplication and the inefficiency that arises from the building and operation of multiple networks. It will encourage service-based competition in a way that the current oligopoly does not. Both the 2017 Amendment Bill and the EC Amendment Bill include compliance with specific network and population targets as part of the open access obligations.

3.2.21. It is vital that the coverage targets be set at a reasonable level. In the context of the WOAN, initial network and population coverage targets that are overly ambitious will increase the WOAN's costs and undermine its business case. Once the WOAN has been established as a sustainable entity, it will be able to expand its network and population coverage targets.

Market study

3.2.22. Telkom proposes that the DTPS directs ICASA to conduct a comprehensive market study in order to determine which terms and conditions, and what level of support, is required to ensure an effective and technically and economically sustainable WOAN which will promote competition and support the object and purpose of the ICT Policy. The failure to conduct such a market study may have the unintended result that substantial capital is wasted on a WOAN which is ultimately unsuccessful.

3.3. WHOLESALE OPEN ACCESS

Policy context

3.3.1. Chapter 9 of the ICT Policy deals with open access to infrastructure and supply-side challenges. It identifies various fundamental problems in the mobile market, such as ineffective competition, bottlenecks in sharing infrastructure, unnecessary duplication of infrastructure (especially in urban areas), and the inefficient use of scarce resources (e.g. spectrum). Multiple networks have been rolled out across the country, with deployment skewed towards urban areas, where infrastructure duplication

is widespread. In the mobile market, competition is limited by access to scarce frequency spectrum resources. These market problems increase the costs of broadband provision and limit access to broadband services. The ICT Policy argues that the key to overcoming these challenges is a policy of wholesale open access.

3.3.2. The ICT Policy envisions that the enforcement of a wholesale open access regime will facilitate lower costs and more efficient networks that use the latest technologies and are able to deliver high-quality affordable services. One of the concerns of the current market is that network roll-out is skewed towards urban areas, with few prospects of expanding access to modern broadband services in rural and less affluent areas. According to the ICT Policy, three key challenges have resulted in this skewed network roll-out: an ineffective regulatory regime, a concentrated broadband infrastructure market and high prices. If these challenges persist, the national ICT policy objectives will not be achieved.

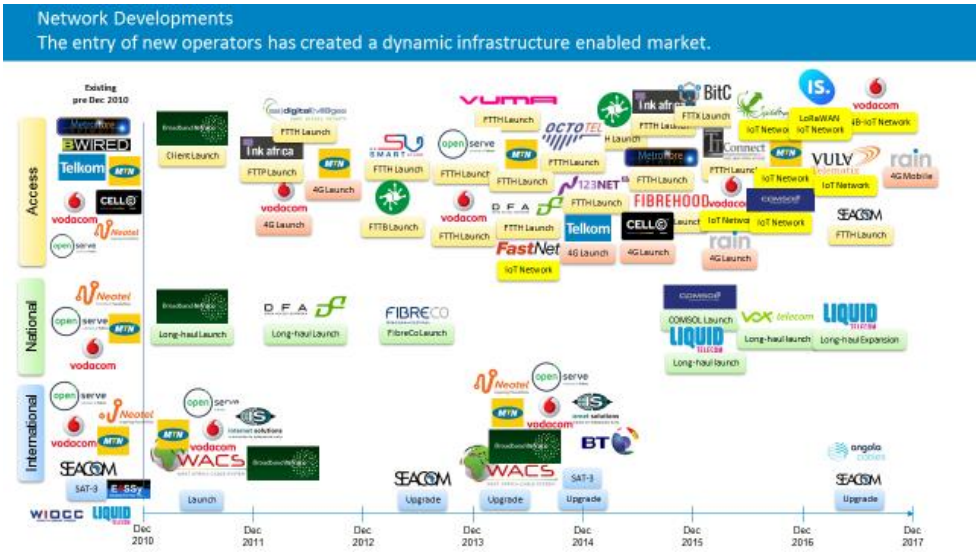
3.3.3. The ECA already provided for an open infrastructure-sharing regime that obliged every licensee to interconnect on request and ECNS licensees to provide access to EC facilities, on negotiated terms, unless the request was unreasonable. Operators with significant market power (SMP) also faced additional open access obligations. The process outlined for addressing SMP however required a market review. It involved the definition of a relevant market, a test of whether the market was competitive, an analysis of an operator's market power and its potential to behave in an anticompetitive manner by abusing its market power. If this was found to be the case, regulatory interventions could be implemented. This regulatory process is broadly aligned with global regulatory best practice.

Open access principles

3.3.4. Telkom supports the application of wholesale open access principles in the mobile context on the basis that this will decrease mobile network expansion costs and facilitate service-based competition.

3.3.5. Telkom is however concerned that applying wholesale open access principles to fixed services may be counterproductive and increase

barriers to entry where Telkom believes that there is already intense competition in this market. The emergence of new entrants at each level of the supply chain. is evidenced in the diagram below:



3.3.6. From the diagram, since 2010 there has been significant entry at each level of the fixed value chain with new fixed fibre network operators increasingly investing in network infrastructure and facilitating increased levels of competition at the retail layer. For example: in 2017 there were 199 internet service provider (ISP) brands in the South African market, up from 136 in 2010. Such market dynamics are reflective of well-functioning competitive markets where there is no need for regulatory intervention. It is therefore proposed that any reviews and cost determinations are not necessary in the fixed space, but should rather be focused on markets where market failure has been identified after a market review.

3.3.7. Cost-based pricing has the potential to stifle infrastructure deployment by disincentivising investment, thereby negatively affecting jobs and economic development. Furthermore, legislation in section 43 of the ECA already provides for wholesale open access which enables service-based competition through the obligation to lease electronic communication network services. Telkom supports the implementation of cost-oriented pricing as proposed in section 47 of the Amendment Bill. Whilst Telkom welcomes the replacement of the concept of cost-based pricing with cost-oriented pricing as proposed in section 47 of the Amendment Bill. It contends that given the dynamic characteristics of competition in the fixed space, regulating wholesale pricing and setting wholesale rates may have

the unintended consequence of stifling rather than promoting investment and competition in the sector.it Telkom therefore also proposes that that the regulations contemplated in Section 47 be reviewed more regularly than is contemplated in the Bill, if they are included in the final Act without following a market review process.

3.3.8. Cost-based pricing has the potential to stifle infrastructure deployment by disincentivising investment, thereby negatively affecting jobs and economic development. Furthermore, legislation already provides for wholesale open access which enables service-based competition. Telkom supports the implementation of cost-oriented pricing as proposed in section 47 of the EC Amendment Bill. Whilst Telkom welcomes the replacement of the concept of cost-based pricing with cost-oriented pricing as proposed in section 47 of the EC Amendment Bill. It contends that given the dynamic characteristics of competition in the fixed space, regulating pricing and setting wholesale rates may have the unintended consequence of stifling rather than promoting investment and competition in the sector.it therefore also proposes that that the regulations contemplated in Section 47 be reviewed more regularly than is contemplated in the Bill, if they are included in the final Act.

The determination of deemed entities is too wide

3.3.9. Identifying a market normally starts with identifying the product/service that is being considered and then determining whether there are close substitutes for that particular good or service at more or less the same price. The relevant product/service market would then be the identified product/service and its close substitutes. This would constitute the relevant product/service market from a competition perspective. Only once the product/service market has been identified, is it possible to proceed to determine the different players in that market, and then to determine whether there is a dominant player in that particular relevant market. The challenge that emerges from the ICT Policy, is that it makes a leap of faith into determining an infrastructure market without first determining the precise product/services that constitutes the market within which the problem exists.

3.3.10. The ICT Policy argues that, to encourage infrastructure sharing and open access in a concentrated broadband infrastructure market, these principles need to be applied to operators that control critical resources or have SMP. Accordingly, an access provider is “deemed” an open access network if it displays any of the following characteristics: it has SMP in the relevant infrastructure market; it controls an essential facility; it has a network that constitutes more than 25% of the total infrastructure in that market; or it has a scarce resource, such as frequency spectrum, assigned to it for its exclusive use.

3.3.11. In terms of the EC Amendment Bill, an ECNS license holder can be considered a deemed entity:

- If the ECNS license holder has SMP; or
- If the ECNS license holder's network constitutes more than 25% of total electronic communication infrastructure in such market
- If the ECNS license holder controls an essential facility or
- If the ECNS license holder controls a scarce resource such as radio frequency spectrum that is identified for international mobile telecommunications

3.3.12. A licensee that controls high demand spectrum will thus by definition have SMP and be classified as a deemed entity. Deemed entities will have to engage in (i) active infrastructure sharing, (ii) at wholesale rates as prescribed by the Authority in terms of section 47 (i.e. they must be cost-oriented, as opposed to cost-based in the 2017 Amendment Bill), (iii) with specific network and population coverage targets.

3.3.13. For the determination of deemed entities, the EC Amendment Bill proposes that ICASA must first define the relevant infrastructure markets. An ECNS licensee will be considered a “deemed entity” if it has SMP, or if it has an electronic communications network that constitutes more than 25% of the total EC infrastructure in the defined relevant market. There are some problems with this proposed determination. SMP is defined in Section 67 of the ECA, with one of the conditions of SMP being dominance. A dominant firm is defined in the Competition Act (section 7)

as a firm with a market share of at least 45%, or 35% unless it can show that it does not have market power, or less than 35% but with market power. The 25% cut-off therefore does not correspond to the normal thresholds for dominance and runs contrary to the ideal to achieve closer alignment between the Authority and the Competition Commission.

3.3.14. Furthermore, the EC Amendment Bill does not make clear on what basis the 25% of electronic communications infrastructure will be measured. For instance, it could refer to 25% in terms of value, or 25% in terms of network coverage. If it refers to 25% in terms of value, should depreciation be taken into account? If it refers to coverage, what type of network elements are to be included, and will different networks (e.g. 2G, 3G and 4G) be considered as part of the same or separate markets? Moreover, defining relevant markets in the telecommunications sector can be complex, due to rapid technological change and convergence. This could delay the process whereby licensees are identified as deemed entities and wholesale open access is granted or enforced.

3.3.15. Telkom suggests that the regulations will be easier to implement and enforce and clearer to interpret if they only apply to ECNS licensees with SMP in a relevant market, irrespective of their market shares. Relying on SMP makes it easier to align policy between the competition authorities and ICASA. It will also create less uncertainty or room for regulatory arbitrage (whereby players search for loopholes that allow them to circumvent regulations). Imposing additional obligations should therefore be limited to those network operators with SMP, rather than including all those with access to HDS.

3.3.16. Further concern with the conditions for the determination of deemed entities, in that any ECNS licensee that controls an essential facility or scarce resource, such as frequency spectrum, will also be considered a deemed entity. If all licensees with frequency spectrum are determined “deemed entities”, it would mean that even small licensees without SMP in any market, would be mandated to comply with open access policies. This means that all mobile operators – irrespective of their market shares – will have to engage in active infrastructure sharing, wholesale rate regulation based on cost-oriented principles, and will have to comply with specific network and population coverage targets.

The current definition of wholesale open access unnecessarily imposes regulation on players who are not dominant, including wholesale price regulation

3.3.17. Telkom could be exempted from providing wholesale open access, if it does broadcasting signal distribution or multi-channel distribution services. All spectrum is however not equal in terms of its propagation and capacity characteristics, and the cost of network rollout is influenced by the spectrum frequency bands to which an operator has access. An MNO that is at a spectrum disadvantage relative to its competitors needs to invest more in its Radio Access Network (RAN) to achieve the same amount of coverage. It is important that the conditions imposed on MNOs classified as deemed entities need to take account of these underlying cost differences

3.3.18. Telkom has argued that the implementation of wholesale open access principles should decrease mobile network expansion costs and facilitate service-based competition in the mobile market. While the South African mobile telecommunications market is dominated by two incumbents, whose position will further be entrenched if they are assigned more spectrum, the same does not apply to the fixed market. This is already largely the case in the fixed-line market where the provision of wholesale access is part of the business case of many fibre operators and where it is clear that prices for consumers have decreased.

3.3.19. The fixed broadband market is characterised by fierce competition, as evidenced by new entry and decreasing prices. Regulating a competitive market is an ineffective use of state resources and could introduce inefficiencies into the system. In addition, the FTTH market functions based on open access, where FTTH providers such as Openserve compete to sell network access to ISPs. With pricing set a national level, this market is highly competitive. Applying open access principles to fixed services may therefore be counterproductive and increase barriers to entry, where there is already effective competition in this market. More concerning though is that ECNS licensees are all now required to provide open access services or lease electronic communication facilities at regulated wholesale prices, which is a highly intrusive regulatory approach, which should only be implemented based on evidence in the

specific market, and only if price regulation is the most appropriate remedy to resolve the market problem.

Active infrastructure sharing should only be mandated where SMP has been identified

3.3.20. Per the ICT Policy, active infrastructure sharing can allow assigned spectrum to be used more efficiently by giving more service providers access to spectrum, resulting in increased consumer choice and competition. The ICT Policy states that active infrastructure sharing can include national roaming, Radio Access Network (RAN) sharing, and providing MVNOs access to operators' networks.

3.3.21. The EC Amendment Bill states that operators determined as deemed entities in the wholesale open access regulations should *inter alia* comply with active infrastructure sharing.

3.3.22. The conditions imposed on deemed entities in relation to active infrastructure sharing may have very different implications for large and small MNOs. Under the EC Amendment Bill all operators with assigned spectrum are considered as deemed entities and hence will need to comply with active infrastructure sharing. The net effect that active infrastructure sharing will have on an operator will be a function of (a) the revenue that it can generate from it; (b) the impact that it will have on the quality of its network; and (c) the cost that it must pay to engage in active infrastructure sharing on the network of other MNOs.

3.3.23. The above again points to the importance of only classifying licensees with SMP as deemed entities.

Review of wholesale open access regulations

3.3.24. The EC Amendment Bill calls for a review of the regulations every three years, compared to every two years in the 2017 Amendment Bill. Given the regulatory costs associated with determining wholesale rates we agree that the three-year review period should be preferred. A cost-study is an extensive exercise, and needs to include a cost study methodology, the identification of an appropriate cost model, data collection, the calculation of the cost of the network components and the cost of providing the service, and the validation of the service cost. The Authority will have

to determine which cost methodology and cost model would be most appropriate, to make sure that the access prices are set at the correct level. Network access is an important input into downstream mobile services, and access prices are reflected in the retail tariffs at which services are sold. If the price of obtaining wholesale access is too high, this will translate into higher retail prices, running counter to the policy objectives of the ICT Policy.

3.3.25. The regular reviews and cost determinations will be easier to perform if limited to markets where market failure has been identified after a market review (as determined in section 67) and where entities with SMP have been defined. It is important that the Authority coordinate these reviews with the Competition Commission, which may further reduce the associated costs.

3.4. **RAPID DEPLOYMENT**

3.4.1. Rapid deployment refers to the process of gaining access to and using property to deploy electronic communications networks. According to the ICT Policy, there are currently no uniform nationwide requirements for granting permits and authorisations for the rollout of electronic communications network infrastructure, such as towers and ducts, or for the use of existing public infrastructure. There are few legislated or regulated deadlines for granting these permits and landowners have wide discretion to dictate terms for access to their property. This delays network rollout and increases costs, as well as causes legal disputes between operators and landowners. If this situation is not addressed, it will hamper the implementation of the national broadband policy. Any delays in the rollout of critical broadband infrastructure will undermine national policy goals.

3.4.2. The open access regime outlined in the ICT Policy complements the rapid deployment regime. Through the effective sharing of infrastructure, licensees can avoid many of the costs and delays associated with new wayleave and permit applications. Open access and infrastructure sharing mechanisms reduce unnecessary and inefficient duplication and promote rapid deployment.

3.4.3. In terms of the ICT Policy, the purpose of the Rapid Deployment policy is to provide a simplified, streamlined and coordinated framework, supported by clear strategies and measures, to fast-track infrastructure deployment. The policy sets out the principles that govern the rights of all parties involved and addresses the following challenges in relation to rapid deployment: the need to balance the rights of ECNS licensees to enter onto property to deploy critical broadband infrastructure with those of public and private landowners; the duplication of infrastructure and its negative impacts on the environment; and the lack of coordination between large numbers of affected stakeholders across different sectors (i.e. the three levels of government, various regulators and operators).The ICT Policy further set our definitive timelines to fast track applications. Procedures for rapid deployment should take no more than a month from the submission to the final decision, and, if any delay will be experienced, entities must communicate with applicants within a month. These definitive timelines do not appear to have been adopted in the 2018 Amendment Bill. Telkom supports the lowering of regulatory, policy and administrative bottlenecks to facilitate rapid deployment.

3.4.4. While there has been significant clarification in respect of the Rapid Deployment National Coordinating Centre and Steering Committee's respective roles in the EC Amendment Bill, it remains clear that its powers over municipal decision-making remains limited. This is in line with the constitutional assignment of exclusive jurisdiction afforded to municipalities in respect of municipal planning and infrastructure.

3.4.5. Telkom is further concerned that the DTPS will not be positioned to address issues that arise regarding increases in wayleave charges to unreasonable or exorbitant amounts. Municipalities are constitutionally protected from having national organs of state intrude on the performance of municipal roles in respect of areas of municipal competence. It is therefore unclear as to how the DTPS will impose obligations and uniform rates on municipalities given their constitutional protection. It is further unclear what recourse and/or enforcement measures are available in the case where a municipality refuses to make provision for the installation of electronic communications networks and facilities.

3.5. SINGLE TRENCH POLICY

3.5.1. Regarding the single trench policy, Telkom proposes that the single trench policy should be applicable only to new deployments. A trench is only dug when deploying an infrastructure network, hence only new infrastructure network deployments will require trenches and should thus follow a single trench policy as prescribed. The existing outside plants of telecommunication networks were designed and dimensioned for single network service providers and therefore multiple service providers cannot be accommodated.

3.6. INTERNATIONAL ROAMING

3.6.1. The EC Amendment Bill stipulates that the Authority must prescribe international roaming regulations, including SADC regulations. It is however unclear whether the Authority has the necessary jurisdiction to do so. The EC Amendment Bill further notes that the regulations "must be conditional on reciprocal terms and conditions", which "means that the [ECS] provider of another country must offer similar tariffs" as those offered by the South African ECS provider. It is however unclear what would constitutive "similar" tariffs and how this would account for ECS providers of different scale. Multijurisdictional large mobile operators which also have operations in South Africa, for instance, may due to their scale be able to offer other providers in SADC more favourable tariffs in return for reciprocal rates. This will allow them to attract more customers to their networks by offering better prices for roaming. While this may reduce roaming prices for customers in the short term, it will serve to entrench the dominance of the large operators. It is therefore important that the international roaming regulations are developed in a manner that does not discriminate against smaller players which face higher costs for international roaming, typically due to lower traffic volumes.

3.6.2. The EC Amendment Bill further states that "the regulations may include rate regulation for the provision of roaming services, including without limitation price controls on wholesale and retail rates as determined by the Authority" (section 42A(3)(b)). Telkom cautions against price regulation at the retail level. The European Commission notes that "[by] intervening at the wholesale level, [National Regulatory Authorities] can ensure that as

much of the value chain is subject to the competition process as possible, thereby delivering the best outcomes for end-users". If retail price regulation is considered necessary, it should only be implemented as an interim and last resort measure once it has been established that wholesale price regulation would not have the desired outcomes. Please find attached the Econex report submitted to the DTPS during the 2017 Amendment Bill submission, which outlines how other jurisdictions have implemented international mobile roaming (Annexure D).

3.7. COMPETITION COMMISSION AND THE SECTOR REGULATOR

Policy context

3.7.1. Chapter 6 of the ICT Policy refers to Innovation and Fair Competition, highlighting that "both ex ante and ex post competition interventions can play a crucial role in limiting the digital divide through addressing market inefficiencies, promoting investment in the ICT sector and facilitating investment".[7] In terms of interventions into the market through market reviews, the ICT Policy stipulates that [the Authority] "will be required to consult with the Competition Commission before finalizing and publishing the market reports and reviews".8 It further states that the "government will explicitly encourage more meaningful cooperation between the sector regulation and competition authorities, while ensuring that this in no way blurs the separation of roles between the Competition Commission and the sector regulator and ex ante and ex post competition regulation."[9]

3.7.2. In terms of mergers and acquisitions, the ICT Policy notes that both the competition and sector specific regulators have responsibilities for the approval of horizontal and vertical transactions in the ICT sector, and thus calls for increased coordination between the different regulators in this regard.

3.7.3. The EC Amendment Bill stipulates that the Authority should enter into a concurrent jurisdiction agreement with the Competition Commission (the "Commission") (section 67A(1)) and that such agreement should include a mechanism to facilitate consultation between the authorities on market

[7] National ICT Policy ICT Policy p.40.
[8] Id., p. 42.
[9] Id., p. 43.

definition, market reviews and mergers. It further stipulates the conditions under which the Authority should enter a concurrent jurisdiction agreement with the Commission. Specifically, it states that the Authority and the Commission must put in place mechanisms that will facilitate consultation, information sharing, and the management of complaints, market reviews, market definitions, and other relevant matters between the parties (section 67A(2)).

Proposed legislative framework to govern jurisdictional issues

3.7.4. Telkom supports the greater alignment and interaction between the sector regulator (ICASA) and the Competition Commission as proposed in the ICT Policy and in the EC Amendment Bill for reasons of clear and coherent competition policy and consistent regulatory regime. It is also a welcome relief from the sometimes incoherent and inconsistent regulatory regime emanating from the memorandum of understanding entered into between the Competition Commission and ICASA which was published in Government Gazette Notice 1747 of 2002 on 20 September 2002 (the "MOU"). The MOU has not kept up with the developments in the ICT sector and has failed to ensure the consistent application of the principles of the Competition Act as envisaged in the MOU.

3.7.5. Telkom acknowledges that the Competition Commission and ICASA share the common goal of protecting and enhancing social/economic welfare and that their degree of independence must be respected. Telkom remains concerned however that differences in the methods and approaches to competition matters by the Competition Commission and ICASA would result in different outcomes.

3.7.6. The MOU instead of ensuring a uniform coherent framework to investigate mergers and complaints has at times resulted red tape and at times inordinate delays with the finalisation of investigation mergers and complaints that fall within the concurrent jurisdiction of the Competition Commission and ICASA. The fact that the MOU is silent on market inquiries has for example, led to the Competition Commission to conduct the Data Services Market Inquiry without involving ICASA.

3.7.7. The early involvement of ICASA would have been beneficial to the Competition Commission in that ICASA as the sector regulator would be

in a strong position to advise on the identification and status of markets on which Data Services Market Inquiry should focus on.

3.7.8. The MOU has not been a model of clarity success and has regrettably resulted in more uncertainty, forum shopping and delays. The abandoned merger between Vodacom Proprietary Limited and Neotel Proprietary Limited placed the MOU in sharp focus as both regulatory bodies appear to have come to different conclusions on that matter.

3.7.9. Telkom is concerned that no timeframe has been set out in the EC Amendment Bill for the Competition Commission and ICASA to conclude the concurrency agreement which will replace the MOU. This effectively means that the MOU will continue to regulate this concurrent relationship with no clear timeline in mind to facilitate the co-operation on mergers, complaints and market reviews or inquiries. The fact that the MOU appears to be silent on market inquiries means that a risk is created in terms of which the Competition Commission and ICASA would run parallel market inquiries which causes regulatory uncertainty. Absent a concurrency agreement, it is not clear how the Competition Commission and ICASA will co-operate on market inquiries and reviews as envisaged by the EC Amendment Bill.

3.7.10. Telkom has assessed the experience in other jurisdictions from which South Africa may draw lessons from and asserts that the overriding principle should be regulatory certainty and stability without the usurping of each other's powers. We emphasise that the Telkom proposal is in line with clause 4.2.3.2 of the MOU which contemplates that a Joint Working Committee constituting of the representatives of the Competition Commission and ICASA must advise the management of the Competition Commission and ICASA on issues affecting competition in the telecommunications and broadcasting sectors which advice shall be on, but not limited to international approaches to issues of jurisdictional overlap between a competition authority and a telecommunications and/or broadcasting regulator.

3.7.11. Currently the absence of clearly defined roles of the Competition Commission and ICASA in regulatory matters results in a great deal of subjectivity as to which of the two authorities can be more effective in

handling specific cases. It slows down the resolution of anti-competitive practices and allows for forum shopping and legal and jurisdictional challenges if contradictory findings are made by the two authorities.

3.7.12. The role of the National Consumer Commission, which may be relevant in certain instances, is also unclear. This also adds to the confusion and uncertainty in respect of those matters that all three bodies may have concurrent jurisdiction. The National Consumer Commission is unlikely to be vested with the required expertise to deal with competition law matters.

3.7.13. The necessity of clarity and a strict timeline to conclude the concurrency agreement is further supported by the fact that, in certain cases, a court set aside ICASA's decision as ICASA had failed to consider the competition effects of its decision. Closer cooperation between the Competition Commission would eliminate the need for parallel inquiries as has happened recently where ICASA and the Commission were simultaneously conducting a priority markets inquiry where mobile broadband, inter alia, has been identified as a priority market for review while the Commission's Data Services Market Inquiry is in process. Such duplication increases uncertainty and the regulatory burden.

3.7.14. Considering lessons learned from other jurisdictions on concurrency to promote regulatory certainty, Telkom recommends that the EC Amendment Bill provide for a legislative framework which clarifies the roles of all relevant regulators - the Competition Commission, ICASA and (where relevant) the National Consumer Commission, with regards to matters where these entities have jurisdiction.

3.7.15. Although there is a Memorandum of Understanding between the Competition Commission and the National Consumer Commission, Telkom has the same concerns as raised regarding the MOU. This must be by way of a public consultation process to ensure public participation which will contribute to regulatory and legal certainty. It should further allow for the streamlining of merger approvals.

3.7.16. Telkom draws parliament's attention to the model that has been followed in the United Kingdom. The United Kingdom parliament promulgated legislation to govern the relationship between its sector regulators and the

competition regulator, the Competition and Markets Authority (the “CMA”). This is a useful model for South Africa to consider.

3.7.17. Based on the United Kingdom model, Telkom proposes that a concurrency agreement clearly setting out boundaries between the respective mandates of the relevant regulators, as well as the understanding of respective competencies to ensure that each body is given a mandate that is best suited to it. It thus avoids duplication of processes and prevents delays in finalising matters.

3.7.18. Based on the United Kingdom model, Telkom proposes that a concurrency body be established to replace the Joint Working Committee contemplated in the MOU called the Telecoms Competition Concurrency Body (“the TCCB”). This body would constitute senior councillors of ICASA and executive members of the Competition Commission or any other name that may be appropriate. The TCCB must be chaired by either the chairperson of either ICASA or the Commissioner of Competition Commission.

3.7.19. The position of chairperson can revolve every 5 years between ICASA and the Competition Commission. The terms of the concurrency agreement should provide for, for among others, which authority would be best placed to lead in each case and the timelines to deal with issues where there is overlapping jurisdiction.

3.7.20. The United Kingdom’s concurrency arrangements refer to the powers given to the sector regulators to apply aspects of competition law in their industry. These powers are set out in the United Kingdom Competition Act 1998. These powers refer to powers to investigate and act against:

3.7.20.1. firms engaging in anticompetitive agreements (e.g. price fixing, cartels, etc); and

3.7.20.2. abuse by firms of their dominant market position (e.g. imposing unfair prices or trading conditions; limiting production markets or technical developments to the detriment of consumers, etc).

3.7.21. The concurrency regime in the United Kingdom is a model to deal with conflicting mandates between competition authority and sector regulators.

The CMA has concurrent powers under specific consumer protection legislation and within the framework of competition law for the information and technology communications sector. The sector regulators are required to consider whether the use of their competition law powers is more appropriate than using sector specific regulatory powers before acting.

3.7.22. The concurrency regulatory regime is enhanced by the Enterprise and Regulatory Reform Act 2013 (the "ERRA") which encourages the sector regulators to consider the use of their ex post competition powers before using their direct ex ante regulatory powers.

3.7.23. This is important as it ensures that a consistent and coordinated approach is taken for concurrent matters and to decide which body is best placed to lead in each case. The current Memorandum of Understanding between the Competition Commission and ICASA does not provide for this approach and is the reason for protracted litigation, forum sharing and delays with processing mergers in the information and communication technology space.

3.7.24. The ERRA sets out institutions and mechanisms for co-operation between the CMA and the sector regulators over concurrency policy, procedures and case allocation. The ERRA led to the establishment of the United Kingdom Competition Network (the "UKCN").

3.7.25. The UKCN is the independent forum to facilitate communication and cooperation between the regulators and the CMA. It coordinates the use of competition powers and concurrency in the United Kingdom. The UKCN ensures the coordination of cases and exchanges of specialist CMA and regulator staff on a case-by-case basis through bilateral coordination. This means that the sector regulator can second its employee to the CMA to assist with an investigation of a merger or a prohibited practice instead of taking a leading role that may lead to a duplication of processes and delays.

3.7.26. Another important feature of the concurrency regime that has led to the success thereof, is that the ERRA empowers the Secretary of State (we anticipate that this will be the Minister responsible for competition law in

South Africa) to make an order to remove the competition functions from the sector regulator if he or she considers that it is appropriate to do so for the purpose of promoting competition, within any market or markets in the United Kingdom for the benefit of consumers. We do caution that such a power if it were to be adopted in South Africa, must be used with circumspection.

3.7.27. The ERRA allows the CMA, in certain circumstances, to take over a case from a concurrent regulator. This should not be seen as usurping the powers of the regulator as it would facilitate the expeditious resolution of cases.

3.7.28. Another added benefit of the concurrency regime model in the United Kingdom relates to how market studies are conducted to avoid duplication. While the sector regulators have the power to conduct market investigations references to the CMA with respect to activities in their sectors, the sector regulator and CMA can work together on the market investigation to avoid any duplication. The drafters of the EC Amendment Bill must take this into account as it will ensure that outcomes of the market review by ICASA and market inquiries by the Commission do not conflate or lead to unintended outcomes and uncertainty.

3.7.29. Telkom is of the view that the United Kingdom approach ensures that issues such as forum shopping and delays with processing matters are eliminated, promotes competition, enhances consumer welfare and bring certainty to a fast-developing market.

3.7.30. Telkom proposes that a draft bill clarifying the roles of the various regulators as contemplated above should be published for public comment within three months of the coming into operation of the Electronic Communications Amendment Act.

3.7.31. The concurrent jurisdiction agreement must provide for the following:

3.7.31.1. the establishment of the TCCB or equivalent;

3.7.31.2. the Competition Commission remaining the primary authority on competition matters with ICASA providing additional support

through for example, seconding councillor/s to the Competition Commission to expedite concurrent jurisdiction matters;

3.7.31.3. timelines to deal with investigations of mergers and other complaints (to the extent that there is overlapping jurisdiction);

3.7.31.4. the TCCB must be chaired by either the chairperson of ICASA or the Competition Commissioner (the position of chairperson can revolve in every five-year term between ICASA and the Competition Commission);

3.7.31.5. which organ would be better placed to lead in each case and the timelines to deal with issues where there is overlapping jurisdiction;

3.7.31.6. secondment of the Competition Commission and / or ICASA's economists, as applicable, to each other's investigation teams on a case by case basis when there is a matter in which both the competition and the sector regulator has jurisdiction; the circumstances in which the Competition Commission can take over a matter from ICASA where there is overlapping jurisdiction must be provided;

3.7.31.7. the terms of co-operation for market reviews and market inquiries (including collaborating on market studies where applicable to avoid duplication) must be provided;

3.7.31.8. decisions by the Commission should be binding on ICASA and vice versa where both regulators are involved, save for instances where it is evident that a decision is so patently unreasonable that it cannot be allowed to stand;

3.7.31.9. consultation by the Commission with ICASA before publishing its annual report only in respect of those matters in which the regulators exercised concurrent jurisdiction; and

3.7.31.10. collaboration between the Commission and the National Consumer Commission on matters affecting the interests of consumers and matters of common interest as contemplated in the Consumer Protection Act and the ICASA Act.

3.7.32. The remedies or proposals by Telkom as envisaged in paragraph 3.7.31 above are not exhaustive of the measures that the legislature may implement to streamline the concurrency regime. As mentioned above, this must take place in such a manner that a regulator's powers are not usurped but a rather complemented more effectively and efficiently.

3.8. **B-BBEE**

3.8.1. Telkom recommends the full alignment between the B-BBEE Act, the ICT Sector Code and the ECA. Telkom proposes that adequate provision should be made to allow licensees to comply with all elements of the ICT Sector Code.

3.8.2. Telkom is of the view that industry will need more time to ensure compliance with the provisions of the B-BBEE ICT Sector Code, which are extensive. In this regard Telkom proposes that firms be afforded time to comply with ICASA regulations on the B-BBEE sector code after a period of 12 months has expired from the date of promulgation of such regulations.

3.8.3. Telkom recommends that the following factors be considered as appropriate to apply the ICT Sector Code:

3.8.3.1. ICASA must determine the minimum requirements or targets of achievement for B-BBEE achievement as a licensing requirement;

3.8.3.2. the minimum requirements should be prescribed as a particular minimum B-BBEE status level of contribution, by regulation e.g. ICASA prescribes that licence applicants are to demonstrate the attainment of a B-BBEE Status Level 6; and

3.8.3.3. the way applicants are to determine their B-BBEE Status Level of Contribution should then be determined by a B-BBEE Verification Agency in terms of the ICT Sector Code, resulting in a B-BBEE certificate being issued.

3.9. QUALITY OF SERVICE – CONSUMER ISSUES

3.9.1.1. Quality is important in the ICT sector and it is therefore important that a new section 69A is included that provide for quality of service issues, in line with ITU and international best practice. It empowers the Authority to prescribe regulations that must be reviewed at least every three years. It provides the type of quality of service standards that must be included in the regulations such as broadband download and upload speeds and latency, call quality, time frames for service installations etc. The amendments place obligations on the Authority and licensees towards the promotion of awareness of the quality of service standards. Importantly, as required under SA Connect, an obligation is placed on the Authority to monitor and advise the Minister on the review of national broadband policy targets, and compliance with broadband quality of service standards.

3.10. UNIVERSAL SERVICE OBLIGATIONS AND ADDITIONAL LICENCE TERMS AND CONDITIONS

3.10.1. Telkom contends that any additional USOs contemplated should not add any undue regulatory burden on operators. Telkom already has extensive USOs and makes a contribution to the Universal Service Fund. These USOs which were imposed on Telkom under a previous regulatory regime are more onerous than those of similarly licensed operators, and should be taken into account when proposing additional USOs. In addition, Telkom contends that additional USOs on spectrum licensees only be applied to HDS licensees with significant market power.

3.10.2. The EC Amendment Bill proposes that the Authority may, by regulation, make provision of the designation of licensees to whom USOs are to be applicable and may prescribe additional terms and conditions in respect of the relevant USOs on such designated licensees. Telkom submits that it already carries onerous USOs, which other similarly licensed operators do not have, such as the maintenance of basic voice and public payphone

services. Regrettably, the Authority has to date failed to review Telkom's legacy USOs despite reviewing the USOs of the MNOs in 2014.[10]

3.10.3. In this regard, Telkom proposes that the allocation of USOs should be based on a market study which identifies market access gaps; that the allocation of USOs be equitable amongst licensees; and that the Authority should quantify the financial impact of legacy USOs prior to prescribing any new and or additional obligations. This approach must be supported by a USO allocation, funding and management model which is properly designed to ensure alignment between regulation and ICT policy objectives.

3.10.4. USO projects can be funded by means of a government subsidy from the Universal Service and Access Fund (USAF) or any such relevant fund. These projects should be contracted in a fair, open and transparent basis.

3.10.5. Further, Telkom is of the view that imposing additional obligations on all "deemed" operators should be limited to the dominant MNOs with significant market power (SMP), rather than imposing additional obligations on all those with access to HDS.

3.10.6. Telkom contends that the USOs should not add any undue regulatory burden on operators. Telkom already has extensive USOs and makes a contribution to the Universal Service Fund. These USOs which were imposed on Telkom under a previous regulatory regime are more onerous than those of similarly licensed operators, and should be taken into account when proposing additional USOs. In addition, Telkom contends that additional USOs on spectrum licensees only be applied to HDS licensees with significant market power.

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should be based on a market study which identifies market access gaps; that allocation be equitable amongst licensees; and that the Authority should quantify the financial impact of legacy USOs prior to prescribing any additional obligations.

3.10.8. This approach must be supported by a USO allocation, funding and management model which is properly designed to ensure alignment between regulation and ICT policy objectives.

3.10.9. Further, Telkom is of the view that imposing additional obligations on all “deemed” operators should be limited to the dominant MNOs with significant market power (SMP) rather than including all those with access to HDS.

3.10.10. USO projects can be funded by means of a government subsidy from the Universal Service and Access Fund (USAF) or any such relevant fund. These projects should be contracted in a fair, open and transparent basis.

PART B: SECTION-SPECIFIC AMENDMENTS AND PROPOSED WORDING

4. SECTION 1: DEFINITIONS

4.1. Insertion after the definition of "Authority" of the following definition:

"'**B-BBEE ICT Sector Code**' means the Broad-Based Black Economic Empowerment Information, Communications and Technology Sector Code, a sector code on broad-based black economic empowerment, issued in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);"

[FORMATTING NOTE: Telkom to confirm whether the sections on which it does not wish to comment should be retained for completeness or removed]

4.2. Substitution for the definition "**broadband**" of the following definition:

"'**broadband**' means an always available, multimedia capable connection with a minimum download speed and quality as determined every two years by the Minister responsible for Telecommunications and Postal Services by notice in the *Gazette*, following recommendations by the Authority;"

Telkom Commentary

Telkom's view is that it would not be ideal for the Minister to prescribe, upon ICASA's recommendation, quality standards for the availability of broadband. Operators differentiate based on quality of service, which encompasses various characteristics including latency, jitter etc. There is further no definition of the term 'quality' in this context. A further concern is the contradiction that appears in section 69A(2)(a) of the Amendment Bill, in that it is ICASA and not the Minister that must prescribe broadband upload and download speeds and latency – thus it is not aligned with power of Minister to prescribe minimum download speed and quality. Telkom proposes that standards for broadband speeds should remain with ICASA. ICASA must also prescribe quality of service standards considering the guidelines of the ITU. Section 69A(3) does not mention Ministerial guidelines. Telkom is further also of the view that it is not necessary to review the broadband speeds every two years; this could be done as and when needed. Reviewing broadband speed every two years may create uncertainty especially if the minimum broadband speed has been included in the terms and conditions of a licence or as an obligation. In addition, it is important that, in addition to ICASA, the industry is also consulted when the Minister determines the minimum download speed as they are best positioned to understand technology capabilities and operational limitations.

Telkom Proposed Amended Wording

*"'**broadband**' means an always available, multimedia capable high speed internet connection with a minimum download speed [~~and quality~~] as determined every two years by the Minister responsible for Telecommunications and Postal Services by notice in the Gazette, following recommendations by the Authority and consultation with industry;"*

4.3. Insertion after the definition of "Competition Act" of the following definition:

"'**Competition Commission'** means the Competition Commission established by section 19 of the Competition Act;"

4.4. Insertion after the definition of "free-to-air service" of the following definition:

"'**general open access principles'** means providing wholesale open access on terms that are effective, transparent and non-discriminatory;"

Telkom Commentary

Please refer to the definition of "**wholesale open access**" below for Telkom's concerns in respect of the definition of "**general open access principles**". The rationale for Telkom's proposed amended wording as provided immediately hereunder, is also explained under the definition of "**wholesale open access**".

Telkom Proposed Amended Wording

*"'**general wholesale open access principles**" means [~~providing wholesale open access on terms that are effective, transparent and non-discriminatory~~] the sale, lease or otherwise making available of an electronic communications network or an electronic communication service to an electronic communications network licensee or an electronic communications service licensee or person exempt from a licence on general open access principles;"*

4.5. Insertion after the definition of "harmful interference" of the following definition:

"**'high demand spectrum'** means spectrum where—
(a) the demand for access to the radio frequency spectrum resource exceeds supply; or
(b) radio frequency spectrum is fully assigned,
as determined by the Minister responsible for Telecommunications and Postal Services, by notice in the *Gazette*, after consultation with the Authority;"
Telkom Commentary

Whereas the Minister must consult with the Authority when determining high demand spectrum (HDS), there is no indication that the Minister will consult with industry (see section 31E(1) of the Amendment Bill (High Demand Spectrum), which similarly does

not indicate prior industry consultation). Considering the huge effect that declaration of spectrum as "high demand spectrum" will have on licensees specifically and industry in general, ICASA and the Minister must consult industry before declaring spectrum as HDS. Declaring spectrum that is already in use as HDS will have far-reaching consequences for licensees. Since HDS may be subjected to a higher spectrum fee structure, wholesale open access obligations (as the licensee will be considered a deemed entity), a competitive award processes, etc., it is imperative that the categorisation thereof is performed with utmost certainty and through thorough consultation.

The proposed definition, although seemingly straightforward, may be very difficult and controversial to apply in practice. Considering provision (a), it is unclear how the Minister will determine whether demand for a specific frequency band exceeds supply, given that "spectrum demand" is a highly subjective variable that constantly changes and that can be manipulated by prospective spectrum licensees. Provision (b) is also problematic since it does not draw a distinction between localised and national assignments. In its current form, provision (b) may result in frequency bands that are fully assigned within a small geographic area (such as Gauteng) being designated as HDS although this band is still available in the rest of the country. This poses the unintended consequence of high frequency microwave bands falling under the ambit of HDS. To cater for all these variables, consultation with industry is essential.

Considering the above, Telkom therefore also recommends that ICASA must conduct a market review to determine if demand for access to the radio frequency spectrum exceeds supply, before spectrum is declared as HDS. If a radio frequency spectrum band is "fully assigned", such frequency band could be included in the market review to determine if demand does exceed the supply. Condition (b) could therefore be included in condition (a).

Telkom Proposed Amended Wording

*"**high demand spectrum**" means spectrum where,*
[~~(a)~~] pursuant to a market study, ICASA has determined that the demand for access to the radio frequency spectrum resource exceeds supply [~~; or~~
~~(b) radio frequency spectrum is fully assigned~~,] as determined by the Minister responsible for Telecommunications and Postal Services, by notice in the Gazette, after consultation with the Authority and interested persons;"

4.6. Deletion of the definition of "ICT Charter"

4.7. Insertion after the definition of "multi-channel distribution service" of the following definition:

"'**National Consumer Commission'** means the National Consumer Commission established by section 85 of the Consumer Protection Act, 2008 (Act No. 68 of 2008);"

4.8. Insertion after the definition of "person" of the following definition:

"'**persons with disabilities'** means persons with long-term physical, psychosocial, intellectual, neurological or sensory impairments which, in interaction with various barriers, hinder their full and effective use of electronic communications and broadcasting devices, services and technologies on an equal basis with others;"

4.9. Insertion after the definition of "radio frequency spectrum licence" of the following definitions:

"'**radio frequency spectrum refarming'** means the re-use of an assigned frequency band for a different application, and "spectrum refarming" has a similar meaning;

'radio frequency spectrum sharing' means the simultaneous usage of a specific radio frequency or radio frequency spectrum band in a specific geographical area by different radio frequency spectrum licensees in order to enhance the efficient use of spectrum, and "spectrum sharing" has a similar meaning;

'radio frequency spectrum trading' means the transfer, by a licensee, of ownership or control of the rights, in full or in part, held under a radio frequency spectrum licence by way of a sale, lease or sub-letting to a third party, and "spectrum trading" has a similar meaning;"

Telkom Commentary

"**radio frequency spectrum refarming**" –
Telkom is concerned that the use of the word "application" in the definition will lead to unintended consequences as also explained in Part A of Telkom's submission. As indicated, this term is also used within the table of frequency allocation (as prescribed in terms of section 34 of the ECA). Changing "applications" should not be part of "refarming". Rather, refarming should take place on a technical level where one technology is changed to another, while staying within the parameters of the licence.

The use of the word "technology" is more appropriate as refarming occurs on the technical level as indicated in Part A of our submission. However, the use of the word "technology" has its own implications and must be further considered. For example, 3GPP standards for mobile networks are upgraded as "releases"; changing from, for example, release 13 to release 14, may or may not be considered a technology change. Also, "upgrading" from, for example 3G to 4G may be done by implementing only some features of a release. The word "technology", if used, may therefore have to be defined in the context of refarming. One possible way of addressing this is for the Authority to define this in the regulations to be developed as per section 31B of the EC Amendment Bill.

Furthermore, the definition should also contain the concept of single frequency channel in addition to frequency band.

"**radio spectrum frequency sharing**" –
Telkom is of the view that the use of the word "simultaneous" may create a problem when considering systems that share spectrum on a time basis. Telkom therefore proposes the deletion of the word "simultaneous".

"**radio spectrum frequency trading**" – Telkom supports the proposed definition.

Telkom Proposed Amended Wording

*"'**radio frequency spectrum refarming'** means the re-use of an assigned frequency band for a different [~~application~~] technology, and "spectrum refarming" has a similar meaning;*

*'**radio frequency spectrum sharing'** means the [~~simultaneous~~] usage of a specific radio frequency or radio frequency spectrum band in a specific geographical area by different radio frequency spectrum licensees in order to enhance the efficient use of spectrum, and "spectrum sharing" has a similar meaning;*

4.10. Insertion of the insertion after the definition of "radio station" of the following definitions:

"**'Rapid Deployment National Co-ordinating Centre'** means the Centre established in terms of section 20A(2);"
"'Rapid Deployment Steering Committee' means the Committee established in terms of section 20A(3);"

Telkom Commentary

Please refer to sections 20A – 20K below for Telkom's comments in respect of rapid deployment co-ordination, steering, procedures and streamlined processes.

4.11. Insertion after the definition of "retail" of the following definitions:

"'**SA Connect'** means the South Africa's National Broadband Policy, 2013, published in Government *Gazette* No. 37119 of 06 December 2013, under Government Notice No. 953;
'SADC' means Southern African Development Community;
'SADC Roaming decisions' means the decisions agreed to by SADC Ministers responsible for Telecommunications, Postal Services and ICTs in pursuit of the objectives of the Protocol on Transport, Communications and Meteorology in the Southern African Development Community Region, 1996, which Protocol was adopted in terms of the Treaty of the Southern African Development Community of 1992;
'sector-specific agencies' means the South African Maritime Safety Authority and the Civil Aviation Authority;"

Telkom Commentary

Please refer to Chapter 7A: Section 42A below for Telkom's comments in respect of international roaming and SADC jurisdictional issues.

4.12. Insertion after the definition of "service licence" of the following definition:

"**'SIP'** means a strategic integrated project designated in terms of section 8 of the Infrastructure Development Act, 2014 (Act No. 23 of 2014);"

4.13. Addition of the following definitions:

"'**wholesale open access'** means the sale, lease or otherwise making available an electronic communications network service or electronic communications facility by an electronic communications network service licensee on a wholesale basis on general open access principles, and, to the extent applicable, the additional wholesale open access principles provided in sections 19A(4)*(b)*, 20H(2)*(a)*(ii), and 43(1A) and (1B);
"**'wireless open access network service'** means an electronic communications network service provided on a wholesale open access basis and on open access principles, as contemplated in section 19A; and
'wireless open access network service licensee' means a person to whom a wireless open access network service licence has been granted in terms of section 19A;"

Telkom Commentary

"The definition of "wholesale open access" must be aligned with the definition of "wholesale" in the ECA, which includes both electronic communications network services and electronic communications services. "Wholesale" is defined in the Principal Act as ''the sale, lease or otherwise making available an electronic communications network service or an electronic communications service by an electronic communications network service licensee or an electronic communications service licensee, to another licensee or person providing a service pursuant to a licence exemption.'' Telkom is concerned that the definition of "wholesale open access" only refers to electronic communications network services ("**ECNS**") and not electronic communications services ("**ECS**") as well, and as such is misaligned with the definition of "wholesale" in the ECA.

Telkom is further concerned that the wording proposed in the EC Amendment Bill to define "wholesale open access" includes the sale, lease, or otherwise making available, of an electronic communications network service or electronic communications facility [our emphasis] by an electronic communications network service licensee on a wholesale basis on general open access principles. The definition however excludes the sale, lease, or otherwise making available of an electronic communications service. This implies the unbundling of an ECNS or electronic communications service and making available the facilities which constitute the service, which is not always technically possible and poses risks to network integrity and security. Telkom is of the view that ECNS licensees should not be restricted to offering their products only on a wholesale basis and at regulated prices.

Telkom's commentary regarding the WOAN is provided in terms of Section 19A of the Amendment Bill.

5. **SECTION 2: OBJECT OF ACT**

5.1. Insertion the insertion after paragraph *(c)* of the following paragraphs:

"(cA) redress the skewed access by a few to economic and scarce resources, such as radio frequency spectrum, to address the barriers to market entry;
(cB) promote service-based competition and avoid concentration and duplication of electronic communications infrastructure;
(cC) promote an environment of wholesale open access to electronic communications networks on terms that are effective, transparent and non-discriminatory;
(cD) redress market dominance and control;"

Telkom Commentary

The move away from infrastructure-based competition to service-based competition to stimulate competition in the electronic communications market is welcomed. This Telkom understands to be the centrepiece of the amendment to the Principal Act. The inclusion of 'electronic communication facility' in the definition of "**wholesale open access**" is concerning to Telkom in respect of the layers 2 and 3 of the Open Systems Interconnection Model ("**OSI Model**"). While there is no specific reference to the OSI Model in the Amendment Bill or at which layers unbundling will occur, Telkom is concerned that substantively, what the Amendment Bill is trying to achieve is the unbundling of network components which will still occur by the inclusion of the wording 'electronic communication facility'. While Telkom supports the opening of wholesale access to electronic communications networks, this must exclude infrastructure at layers 2 and 3 of the OSI Model as this will be unnecessarily intrusive and will have a negative effect on competition, especially in the fixed line market which is characterised by a high level of competition. Regulating pricing in the fixed line market would stifle investment in this market It is against that background that the level at which access is given is clarified to exclude layers 2 and 3 of the OSI Model. This is more so in that Telkom already provides wholesale open access at level 3 and above in terms of the OSI Model and thus there is no need to require open access at layer 3. In respect of layer 2, there are various access and security difficulties associated with providing open access, as it contains key infrastructure (including in Telkom's case, copper cabling) that are susceptible to possible damage by third parties. Thus, blanket access would have unintended consequences and stifle investment in the fixed market: a market that is highly dynamic and characterised by significant investments by new entrants, especially in fibre.

5.2. Substitution for paragraph (i) of the following paragraph:

"*(i)* encourage research**, [and]** development and innovation within the **[ICT sector]**

electronic communications and broadcasting sectors;"

5.3. Substitution for paragraph *(p)* of the following paragraph:

"*(p)* develop and promote SMMEs and cooperatives, and market entry by SMMEs;"

Telkom Commentary

Telkom is committed to developing and promoting SMMEs and cooperatives, and market entry by SMMEs.

6. SECTION 3: MINISTERIAL POLICIES AND POLICY DIRECTIONS

6.1. Substitution in subsection 3(1) for paragraph *(e)* of the following paragraph:

"(e) **[guidelines for]** the determination by the Authority of licence and spectrum fees associated with the award of the licences contemplated in Chapter 3 and Chapter 5, including incentives that may apply to individual licences where the applicant makes binding commitments to construct electronic communications networks and provide electronic communications services in rural and underserviced areas of the Republic;"

Telkom Commentary

Telkom recommends that the determination by ICASA of licence and spectrum fees must be based on market studies and supported by Regulatory Impact Assessments. Although the Minister's powers to make policy may be subject to public consultation, this is not necessarily sufficient. There is a need to control or limit license and spectrum fees being imposed on licensees; if not licensees may face excessive licence and spectrum fees imposed by Government to generate money for the fiscus.

Telkom Proposed Amended Wording

*"(e) **[guidelines for]** the determination by the Authority of licence and spectrum fees associated with the award of the licences contemplated in Chapter 3 and Chapter 5 pursuant to a market study and supported by a Regulatory Impact Assessment, including incentives that may apply to individual licences where the applicant makes binding commitments to construct electronic communications networks and provide electronic communications services in rural and underserviced areas of the Republic;"*

6.2. Insertion in subsection 3(2) after paragraph (b) of the following paragraph:

"(bB) universal service or universal access obligations or both, having identified any access gaps;"

Telkom Commentary

Telkom welcomes the addressing of the "access gap" principle in the allocation of USOs. Telkom already has extensive and cumbersome USO obligations which were imposed under the previous regulatory regime, before the entry of the MNOs and the licensing of numerous electronic communications operators who all have the same ECS and ECNS licenses. Telkom has duly complied and will comply with those USO obligations, even though Telkom's market share in the fixed line market has declined substantially since 2008.

Telkom is carrying the same legacy USO obligations it carried 10 years ago while its market share in the fixed line market has continued to decline while the MNOs and numerous electronic communications operators who have continued to claw this market share away from Telkom have substantially less USO obligations than Telkom even if they compete on an even basis with Telkom.

This presupposes that Telkom's USO obligations would have de facto more onerous USO obligations regardless of its position in the market, even if it does not have significant market power in that market.

Therefore, the fact that Telkom already has extensive USO obligations must be considered before any additional USO obligations are imposed on Telkom. A further imposition of USO obligations on Telkom without considering the changes that have taken place since the previous dispensation would be unequitable and would unnecessarily hinder the ability of Telkom to comply with its current USO obligations which ought to have been relaxed considering the change in circumstances since 2008.

Accordingly, Telkom reiterates that any additional USO obligations to be imposed on ECS and ECNS licensees must be clearly defined, together with the duration of such USOs.

The process to arrive at these USO Obligations must be clearly outlined. In that regard Telkom proposes that, among others–

- USO obligations should also be limited to HDS assigned to dominant licensees with significant market power; and
- In all cases ICASA must conduct a market study and a public consultation process before any new USO obligations are imposed on licensees.

This will ensure the process to impose the USO obligations is fair, transparent and equitable. Telkom also recommends that the funds from the Universal Service and Access Fund or similar fund must be used to fund the USO obligations.

6.3. Insertion in subsection 3(2) after paragraph (c) of the following paragraph:

"(*cC*) compliance with international obligations;"

6.4. Substitution in subsection 3(2) for paragraph (d) of the following paragraph:

"(d) **[guidelines for]** the radio frequency spectrum and the determination by the Authority of spectrum fees including incentives, spectrum fee exemption and spectrum fee reductions that may apply; and"

Telkom Commentary

Telkom recommends that ICASA's determination on spectrum fees must only be made after having conducted a comprehensive regulatory impact assessment ("**RIA**"). This RIA must be transparent and involve all affected licensees. As indicated in Part A, Telkom is concerned that the term "radio frequency spectrum" is very broad. Considering that the Authority must implement all spectrum related policies and policy directions (see proposed section 4(1A), this gives the Minister of DTPS total control on any spectrum related matter. Telkom recommends that the reference to "radio frequency spectrum" be deleted; alternatively, this term should be limited in scope. See also Part A of Telkom's submission.

Telkom Proposed Amended Wording

*"(d) **[guidelines for]** and the determination by the Authority of spectrum fees including incentives, spectrum fee exemption and spectrum fee reductions that may apply, pursuant to a regulatory impact assessment; and"*

6.5. Substitution in subsection 3(2) for paragraph (e) of the following paragraph:

"(e) any other matter which may be necessary to give effect to ICT related national policy or for the application of this Act or the related legislation."

7. SECTION 4: REGULATIONS BY AUTHORITY

7.1. Substitution in subsection 4(1) for paragraph *(d)* of the following paragraph:

"(d) generally, the **[control of the]** use of the radio frequency spectrum, radio activities and the use of radio apparatus, in line with the radio frequency plan."

7.2. Insertion after subsection 4(1) of the following subsection:

"(1A) *(a)* Despite section 3(4), any regulations prescribed by the Authority on radio frequency spectrum and radio frequency spectrum fees must be in accordance with the policies and policy directions issued by the Minister in terms of section 3(1)(e) and 3(2)(d).
(b) The Authority must amend any regulations on existing radio frequency spectrum and radio frequency spectrum fees which are in force when the Minister issues a policy direction in terms of section 3(2)(d), within six months after the Minister issues such policy direction."

Telkom Commentary

Through the addition of this provision, the powers of the Minister are completely unrestricted regarding radio frequency spectrum and spectrum fees. In terms of section 3(4) of the ECA, the Authority "must consider" policies and policy directions

when prescribing regulations; in the case of radio frequency spectrum matters, ICASA will have no discretion when drafting regulations pertaining to these two issues and therefore their independence on matters pertaining to the radio frequency spectrum will be removed.

Further, when considering sub-section 4(1A)(b), the Authority must review existing regulations, within 6 months "when the Minister issues a policy or policy direction in terms of section 3(2)(d)". It seems therefore that the intent is that this provision will only apply to new policies and policy directions issued after the promulgation of the EC Amendment Bill. Therefore, the revision of regulations to align with, for example, the ICT Policy will not be required. Considering the scope and extend of this Policy, Telkom agrees that it should not be required to amend all spectrum related regulations to align with the ICT Policy. Retrofitting all the principles as espoused in the Policy will have huge ramifications on the industry. For example, the ICT Policy states that all currently assigned HDS must be returned; if the Authority attempts to give effect to this, it will create tremendous market uncertainty and will result in licensees stop investing in networks. Market shares of listed companies will be affected negatively.

Telkom therefore recommends that section 4(1A) be deleted. If retained, section 4(1A)(b) must be retained unchanged to ensure that this provision is not retrofitted considering previously issued policies and policy directions.

Telkom also proposes an editorial amendment regarding the placement of the word "existing" in sub-section 4(1A)(b), as provided below.

Telkom Proposed Amended Wording:

As indicated, Telkom proposes that section 4(1A) be deleted. If retained, the following amendments are proposed:

"(1A) (a) Despite section 3(4), any regulations prescribed by the Authority on ~~radio frequency spectrum and~~ radio frequency spectrum fees must be in accordance with the policies and policy directions issued by the Minister in terms of section 3(1)(e) and 3(2)(d).
(b) The Authority must amend any regulations on existing ~~radio frequency spectrum and~~ radio frequency spectrum fees which are in force when the Minister issues a policy direction in terms of section 3(2)(d), within six months after the Minister issues such policy direction."

8. SECTION 5: LICENSING

8.1. Substitution in subsection 5(9) for paragraph *(b)* of the following paragraph:

> "(b) promote broad-based black economic empowerment including the empowerment of women and the youth and persons with disabilities, in accordance with the requirements of the **[ICT charter]** B-BBEE ICT Sector Code."

9. **SECTION 8: TERMS AND CONDITIONS FOR LICENCES**

9.1. Substitution in subsection 8(2) for the words preceding paragraph (a) of the following words:

"Such standard terms and conditions **[may include,]** must, in the case of individual licences, and may, in the case of class licences, include, but are not limited to – "

Telkom Commentary

Telkom emphasises that the imposition of USOs as proposed in the amendment of section 8(2)(g), as a licence condition must be exercised with caution and consider the historical and legacy USO obligations imposed on Telkom. The USO obligations carried by Telkom are not carried by other operators and there is no reason for Telkom to carry more USO obligations than its peers as the fixed line market has continued to even out with more competitors having entered the market since 2008.

These new entrants do not have the same USO obligations, if any, as the ones imposed on Telkom. These firms do not have any additional USO obligations imposed on them and continue to enjoy the benefits that come with their licences without any reciprocal USO obligations.

It is in that regard that regard, Telkom submits that there is no rationale for imposing USO obligations on class licensees. Any universal access and universal service obligations set out in licensees' standard terms and conditions must consider the historical and current universal access and universal service obligations of existing licensees, or the imposition of same will not be fair and equitable between licensees due to Telkom's legacy USOs which are not carried by any other licensed operator.

As mentioned in terms of section 3(2)(bB) of the Amendment Bill, the process to arrive at these USO Obligations must be clearly outlined. In that regard Telkom proposes that, among others–

- USO obligations should also be limited to HDS assigned to dominant licensees with significant market power; and
- in all cases ICASA must conduct a market study and a public consultation process before any new USO obligations are imposed on licensees.

Telkom Proposed Amended Wording

Telkom proposes the amendment of section 8(2)(g) as follows:
"(g) any universal access and universal service obligations, taking into account the historical and current universal access and universal service obligations of existing licensees;"

9.2. Insertion deletion in subsection 8(2)*(d)* of the word "and" at the end of subparagraph (iii), and the insertion after subparagraph (iii) of the following subparagraph:

"(iiiA) informing subscribers and end-users about the quality of service standards

contemplated in section 69A; and"

Telkom Commentary

It is not clear how the process to ascertain quality of service standards will be initiated and there is no definition for "quality of service". The words "quality of service" is open ended and is subjective. Empowering ICASA to prescribe regulations on quality of service would have the unintended consequence of precluding operators from differentiating between their customers. Licenced operators must be informed and be given opportunity to make representations before ICASA informs subscribers and end-users about the quality of service standards. Any process by ICASA to inform subscribers and end-users about the quality of service standards must be based on a market review. Telkom notes that various issues including quality of service issues are dealt with in the End User Subscriber Quality Regulations Charter.

9.3. Substitution for subsections (3) and (4) of the following subsections, respectively:

"(3) The Authority may prescribe additional terms and conditions that may be applied to any individual licence or class licence **[subject to the provisions of Chapter 10]**.
(4) The Authority **[may]** must by regulation make provision for the designation of licensees to whom universal service and universal access obligations are to be applicable and **[may]** must prescribe additional terms and conditions in respect of the relevant universal service and universal access obligations on such designated licensees."

Telkom Commentary

ICASA must look at the impact on the market (preferably a market review) before seeking to impose any additional standards and conditions. Any additional standards and conditions must be quantified and be related to the purpose sought to be achieved. Please see previous comments regarding USOs. Telkom notes the proposed insertion of section 8(4A) which contemplates that a review of the regulations governing USOs is conducted at least every five years. Telkom submits that the five-year period is not adequate to address its concerns on imposition of USOs as ICASA can simply impose them each year and then only review them after every five years. The rationale to review the regulations governing USOs every five years is not clear and would likely lead to Telkom having even more onerous USO obligations despite the historical and legacy obligations that it is saddled with. Therefore, a market study must be conducted by ICASA before any USO obligations are imposed on any licensee with historical and legacy obligations being considered.

Telkom Proposed Amended Wording

Telkom suggests that the wording "subject to the provisions of Chapter 10" be retained in section 8(3).

Telkom proposes the following amended wording in respect of section 8(4):

"*(4) The Authority **[may]** must by regulation make provision for the designation of licensees to whom universal service and universal access obligations are to be applicable and **[may]** must prescribe additional terms and conditions in respect of the relevant universal service and universal access obligations on such designated licensees, taking into account the current universal service and universal access obligations of such licensees.*"

9.4. Insertion after subsection 8(4) of the following subsection:

"(4A) The Authority must review the regulations contemplated in subsection (4) at least every five years and the review must include an assessment of—
(a) the appropriateness of target levels set in universal service and universal access obligations;
(b) the timelines set for achieving such targets;
(c) the level of service to be provided; and
(d) mechanisms to enforce compliance, including reporting frameworks."

Telkom Commentary

Telkom supports the proposed review by ICASA, but proposes that, considering the dynamic nature of the ICT sector, such review should take place every three years, alternatively on shorter intervals to keep up with the latest and dynamic developments in the ICT sector. The shorter intervals would also assist ICASA (after a comprehensive market review) in the determining the appropriateness and target levels set in universal service and universal access obligations of services to avoid a situation where Telkom carries burdensome and obsolete USOs which no other similarly licensed operator carries.

Telkom Proposed Amended Wording

"(4A) The Authority must review the regulations contemplated in subsection (4) at least every three years…"

9.5. Addition of the following subsection:

"(6) The Authority must, by regulation, make provision for obligations applicable to electronic communications network service licensees for the rapid deployment of electronic communications networks or facilities and must prescribe additional terms and conditions for such licences."

10. **SECTION 9: APPLICATION FOR AND GRANTING OF INDIVIDUAL LICENCES (READ WITH THE SCHEDULE TO THE ACT)**

10.1. Substitution in subsection (2) for paragraph (b) of the following paragraph:

"(b) include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as **[may be]** prescribed under section 4(3)(k) of the ICASA Act;"

10.2. The following amendments are inserted in the Schedule to the Principal Act: Independent Communications Authority of South Africa Act No. 13 of 2000: The substitution for paragraph (k) of the following paragraph –

"(k) **[may]** must make regulations **[on empowerment requirements]** to apply the B-BBEE ICT Sector Code to existing and new licences, exemptions including spectrum assignment to promote broad-based black economic empowerment within 12 months of the promulgation of the Electronic Communications Amendment Act, 201…."

Telkom Commentary

The ICT Sector Code contains the ICT Sector Scorecard assigning the elements and weighting for scoring, namely, Ownership, Management Control, Employment Equity, Skills Development, Preferential Procurement, Enterprise Development, Socio-Economic Development Initiatives. Telkom emphasises the need to align the ICT Sector Code, the ECA and other relevant B-BBEE legislation. For instance, the prioritisation of compliance with the ICT Sector Code is discretionary in that ICT stakeholders are afforded the opportunity to structure their business and operations within varying recognition levels. The end result of the ICT Scorecard measurement is the allocation of a particular B-BBEE status level of contribution which the measured stakeholder wishes to attain, based on operational sustainability and fiscal feasibility. In terms of the proposed amendment to section 9(2)(b) of the ICASA Act, as read with the proposed amendment to section 4(3)(k) of the ICASA Act, ICASA must prescribe regulations: to apply the ICT Sector Code for existing and new licences, exemptions or other authorisations including spectrum assignment to promote B-BBEE, within 12 months of the promulgation of the Amendment Act. The ICT Sector Code provides intricate formulation of B-BBEE recognition levels for the weighting and compliance targets of the elements. It is anticipated that the regulations published for the promotion of B-BBEE (including the empowerment of women, youth and persons with disabilities) must consider the ICT Sector Code, which is a complex measuring instrument or tool in a varied application based on a measured entity's business structure. Telkom recommends that the following factors be considered as appropriate to apply the ICT Sector Code:

- ICASA must determine the minimum requirements or targets of achievement for B-BBEE achievement as a licensing requirement (i.e. a B-BBEE contributor status);
- the minimum requirements should be prescribed as a minimum B-BBEE status level of contribution, by regulation e.g. ICASA prescribes that licence applicants are to demonstrate the attainment of a B-BBEE Status Level 6;
- the way applicants are to determine their B-BBEE Status Level of Contribution is then determined by a B-BBEE Verification Agency in terms of the ICT Sector Code, resulting in a B-BBE certificate being issued; and

In this way, the appropriate way the ICT Sector Code, being a discretionary instrument is intended to apply to measured entities is given effect to, as a mandatory licence requirement under the ECA, read with the ICASA Act.

Telkom is further concerned that industry will need more time to ensure compliance with the provisions of the B-BBEE ICT Sector Code, which are extensive. In this regard Telkom proposes that firms be afforded time to comply with ICASA regulations on the B-BBEE sector code after a period of 12 months has expired from the date of promulgation of such regulations.

Telkom Proposed Amended Wording

The substitution of section 4(3)(k) of the ICASA Act as follows:
"By the substitution in section 4(3) for paragraph (k) of the following paragraph –
(k) ***[may]*** *must make regulations* ***[on empowerment requirements]*** *to prescribe the minimum B-BBEE Status Level of Contribution of licence holders that is determined in terms of the B-BBEE ICT Sector Code for existing and new licences, exemptions or other authorizations including spectrum assignment to promote broad-based black economic empowerment within 12 months of the promulgation of the Electronic Communications Amendment Act, 201…., provided that compliance with such regulations only becomes mandatory after the lapse of a further 12 months of publication".*

11. SECTION 10: AMENDMENT OF INDIVIDUAL LICENCE

11.1. Addition in subsection 10(1) of the following paragraph:

"(i) if the amendment relates to the rapid deployment of electronic communications networks or facilities, as contemplated in chapter 4."

Telkom Commentary

The proposed amendment introduces an additional circumstance for amendment of an individual licence – i.e. if it relates to rapid deployment. Telkom is of the view that any such proposed amendment must be pursuant to a market review and that it should be funded be the universal service and access fund.

12. **SECTION 13: TRANSFER OF INDIVIDUAL LICENCE OR CHANGE OR OWNERHSIP**

12.1. Substitution for subsection 13(5) of the following subsection

"(5) The regulations contemplated in subsection (3) must be made with due regard to the objectives of this Act, the related legislation and, where applicable, any other relevant legislation."

Telkom Commentary

The same comments as above under section 9(2)(b) applies with the necessary changes to the transfer of licences or changes in ownership.

13. **CHAPTER 3A: SECTION 19A: LICENSING FRAMEWORK FOR WIRELESS OPEN ACCESS NETWORK**

13.1. Insertion of the following Chapter in the principal Act after Chapter 3:

"**CHAPTER 3A**
LICENSING FRAMEWORK FOR WIRELESS OPEN ACCESS NETWORK SERVICE

Licensing of wireless open access network service

19A. (1) The Authority must ensure that a wireless open access network service licence and a radio frequency spectrum licence is issued to a wireless open access network service licensee. The applicant for a wireless open access network service licence —

(a) must be a consortium of persons that participate voluntarily;

(b) must comply with the empowerment requirements contemplated in section 9(2)(b);

(c) must include diversity of ownership and control to ensure meaningful participation of all entities involved;

(d) must include effective participation by targeted groups, including women, youth and persons with disabilities;

(e) may not be dominated or controlled by any single entity;

(f) may not be a public entity under the Public Finance Management Act, 1999 (Act No. 1 of 1999);

(g) may not have members in the consortium that either separately or collectively possess a market share of more than 50% in electronic communication services.

(2) If any member of the consortium applying for the wireless open access network service licence provides electronic communications services, the Authority must require functional separation between such electronic communications services and the member's participation in the wireless open access network service licence, which must be provided by an independently operating business entity.

(3) A wholesale open access agreement entered into between the wireless open access network service licensee and any member of the wireless open access network service licensee that provides electronic communications services, must be in accordance with the wholesale rates contemplated in subsection 4(b)(ii) and any wholesale open access requirements prescribed by the Authority to ensure non-discrimination.

(4) A wireless open access network service licensee must—
(a) except in case of technical inability, provide wholesale open access, upon request, to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of a wholesale open access agreement entered into between the parties, in accordance with the general open access principles;
(b) in addition to the requirement in paragraph (a), comply with the following wholesale open access principles on its electronic communications network:
(i) Engage in active infrastructure sharing;
(ii) charge wholesale rates as prescribed by the Authority in terms of section 47; and
(iii) comply with specific network and population coverage targets.
(5) The Minister responsible for Telecommunications and Postal Services must issue a policy direction to the Authority in terms of section 5(6), directing the Authority to issue an invitation to apply for the wireless open access network service licence and radio frequency spectrum licence.
(6) The Authority must, in terms of section 9, issue an invitation to apply for the wireless open access network service licence and radio frequency spectrum licence.
(7) The Authority must determine—
(a) the terms and conditions, including universal service and access obligations; and
(b) incentives such as—
(i) reduced or waived spectrum fees;
(ii) refraining, for a specific period, from prescribing the wholesale rates that can be charged by the wireless open access network service licensee, notwithstanding the provisions of subsection (4)(b)(ii),
which will apply to the wireless open access network service licensee, in accordance with policies or policy directions issued by the Minister responsible for Telecommunications and Postal Services, if any.
(8) The Authority must—
(a) consider imposing regulatory remedies on the wireless open access network service licensee, to ensure effective service-based competition, and to avoid any anti-competitive effects; and
(b) perform strict regulatory oversight."

Telkom Commentary

Telkom made extensive comments pertaining to the proposed Wireless Open Access Network (WOAN) in Part A of this submission. Telkom's comments provided immediately below relate to the specific proposals contained in section 19A of the EC Amendment Bill. Sections 19A(1), 19A(5) and 19A(6) of the EC Amendment Bill pave the way for the assignment of a wireless open access network service licence and radio frequency spectrum licence, through an ITA pursuant to a policy direction issued by the Minister of the DTPS, to the wireless open access network licensee. This appears to contemplate such assignment as a once-off event. In Telkom's view, the issuing of a wireless open access network service licence may proceed as a once off, however, adequate provision must be made in section 19A to allow for subsequent assignments of additional spectrum to the WOAN following the initial assignment. This is to cater, for example, for the WOAN to provide 5G services using mmWave frequency bands, amongst others.

In terms of section 31E(1), the Minister will determine what constitutes HDS and what should be reserved for the WOAN "*within 6 months after the commencement of the EC Amendment Act, and thereafter as required*" (own emphasis). Section 31E therefore allows for the WOAN to be assigned additional HDS spectrum. Additional HDS to be reserved for the WOAN (after the initial determination) will be assigned in terms of section 19A; however, this section does not specifically allow for the Minister to issue further policy directions for the assignment of additional HDS to the WOAN.

Telkom is of the view that sections 19A(5) and 19A(6) do not necessarily promote the establishment of a viable and sustainable WOAN. Although the Minister of the DTPS will determine the amount of spectrum to be reserved for the WOAN in terms of section 31E, the principle of ensuring that the WOAN receives sufficient spectrum must be captured in section 19A, in a manner that does not limit the invitation to a 'once-off event'.

Telkom recommends the amendment of the aforementioned provisions to advance the following, which are considered critical success factors for the WOAN:

- The WOAN shall be assigned sufficient spectrum bandwidth in a range of sub 1 GHz and above 1 GHz frequency bands to deliver high quality wholesale services nationally;
- The WOAN shall be assigned additional high demand spectrum in line with traffic demands and its deployment of next generation broadband technologies.

The requirement contained in section 19A(1)(a) that the licensee of the WOAN must be a consortium is at odds with the conventional function and legal structure of companies in South Africa. In the first instance, the use of the word "consortium" is problematic as in South African business parlance refers to partnership as understood in law. This seems to suggest that the licensee can only be made up of a group of companies who come together as partners or consortium members to the exclusion of an incorporated partnership where various parties set up a fit for purpose company as shareholders. There seems to be no plausible explanation why the legislature would seek to prescribe the legal arrangements between the shareholders and/or members of the licensee.

The provisions of section 19A(1)(e) prohibiting control of the licensee by a single entity is inconsistent with South African company law. The structure of companies in South Africa pursuant to the Companies Act and the common law is that the affairs of companies are directed and managed by directors appointed by the shareholders. The directors of the company are legally bound to act in the best interest of the company by exercising their fiduciary duties and observing the standard of director's conduct in terms of the common law and as codified in the Companies Act. The idea that a major shareholder may have undue influence on a company or the licensee in this instance is at odds with the tenets of company law which dictates that directors should act in the best interest of the company which should not be misconstrued to mean the narrow interests of the company's shareholders.

The addition of section 19A(1)(f) (i.e. excluding public entities under the PFMA from participation in the WOAN) may also have unintended consequences. Whereas it is understandable (and supported) that the proposed WOAN is a commercial and privately-owned company, specifically excluding government entities such as Sentech and Broadband Infraco should be reconsidered. In many instances, such entities are positioned to operate commercially as business enterprises.

The intention of section 19A(1)(g) is also not clear and must be reconsidered. Although it is understandable and supported that companies with SMP are excluded from participation in the WOAN, this should be restricted to those with SMP in the relevant market i.e. in the mobile market. Having SMP in another market (such as fixed) should not exclude one from participating in the WOAN that will provide mobile wholesale open access. Also, 50% should be changed to SMP as determined through a market review conducted by the Authority.

In light of the above, Telkom recommends that sections 19A(1)(a), 19A(1)(e), 19A(1)(g) and 19A(2) be removed to allow the licensee to function within the confines of company law.

The reference to "*A wireless open access network service licensee"* in sub-section 19A(4) seems like an editorial mistake and should be amended to "*The wireless open access network service licensee*". In terms of section 19A the intention of the EC Amendment Bill (and the ICT Policy) is to license a single wireless open access network.

In accordance with section 19A(4)(b)(ii), regulated wholesale rates are a pre-requisite for the operationalisation of the WOAN. This provision is potentially motivated by the view that ex-ante regulation of the WOAN is necessary to advance specific public interest objectives such as enhanced levels of service-based competition. However, section 19A(7)(b)(ii) proposes the delayed imposition of regulated wholesale rates for an unspecified period, as a means of conferring a regulatory incentive to the private WOAN entity. This provision permits the WOAN to charge potentially high wholesale prices over a prolonged period, which is a positive for private-sector business but may hinder service-based competition. It is evident that sections 19A(4)(b)(ii) and 19A(7)(b)(ii) are contradictory and endeavour to advance competing respective public and private sector objectives. Given that the ECA is centred on public interest objectives, Telkom is of the view that such objectives should always prevail. Telkom therefore does not support the regulatory incentive of delayed imposition of regulated wholesale rates as envisioned in provision 19A(7)(b)(ii) and recommends the deletion thereof.

Provision 19A(8)(a) of the EC Amendment Bill states, *inter alia*, that the Authority must consider imposing regulatory remedies on the wireless open access network services licensee, to ensure effective service-based competition, and to avoid any anti-competitive effects.

Whereas the role of the WOAN is necessary to ensure effective competition in the mobile market, it is critical that all currently unassigned spectrum be assigned to the WOAN. It is therefore important that, before considering assignment of unassigned HDS, the competitive effects of any spectrum assignment be determined through a market study, taking into consideration the ability of smaller players to compete.

It may be found that a hybrid model, although justifiable on technical grounds, is not able to address the market failure which has resulted because of the entrenchment of the duopoly. This has resulted in smaller firms not being able to compete effectively and gain market share.

Telkom is of the view that a thorough market study is critical before considering any assignment of currently unassigned high demand spectrum to ensure that competition is achieved.

Furthermore, it is necessary, when determining the incentives for the WOAN that these do not result in unintended consequences, such as unnecessary value destruction and destabilisation of the market.

A dynamic competitive market is a critical building block to achieve the numerous objectives of the WOAN which will benefit the industry and the country at large given that access to ICT services is a crucial enabler of development. Especially in areas such as education, health, social services and the financial and information sectors of the economy.

Telkom recommends that section 19A(8) includes the requirement of a market study by the Authority, prior to imposing any regulatory remedies. The market study must also include an analysis of the impact of the WOAN on market dynamics beyond short term gains. Such a study needs to ensure that the value of the industry is not destroyed, especially regarding the commercial viability of smaller firms which require a return on investment to be sustainable and grow. Taking into consideration that the market is currently effectively a duopoly.
The requirement for a market study is in line with section 67(4) of the ECA.

The addition of section 19A(8)(b) is not clear and needs further clarification. Does this refer to regulatory oversight on the WOAN in general or does it refer to the issues referred to in the preceding provision namely 19A(8)(a)? Telkom recommends that this provision be deleted or further expanded.

14. CHAPTER 4: RAPID DEPLOYMENT OF ELECTRONIC COMMUNICATIONS NETWORK AND ELECTRONIC COMMUNICATIONS FACILITES

14.1. Substitution of the following heading for the heading to Chapter 4 of the Principal Act:

"**RAPID DEPLOYMENT OF ELECTRONIC COMMUNICATIONS NETWORKS AND ELECTRONIC COMMUNICATIONS FACILITIES**"

14.2. Substitution of the following section for section 20 of the Principal Act:

"**Definitions and application**
20. (1) In this Chapter, unless the context indicates otherwise—
'land' includes any property or premises, street, road, footpath, railway or waterway in the Republic of South Africa.
(2) The Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), applies to information provided by electronic communications network service licensees under this Chapter, where the information was supplied in confidence by the licensee: Provided that, to the extent that the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) does not apply, any person receiving information provided by electronic communications network service licensees under this Chapter, must treat such information as confidential, where the information was supplied in confidence by the licensee, except as permitted in terms of this Act."

Telkom Commentary

Telkom supports the insertion of section 20(2) in the Amendment Bill with specific regard to the confidential treatment of information. Telkom emphasises that the information that network operators are required to provide should be qualified. Only information that would suffice for legislated purposes should be requested – any request outside the scope of a legislated purpose may be considered unlawful and reviewable. Furthermore, Telkom recommends that information submitted should have 'limited time' from when it can be submitted to protect commercially sensitive information. See further commentary under section 20C below.

14.3. Insertion of section 20A in the Principal Act:

"**Role of Minister responsible for Telecommunications and Postal Services**
20A. (1) The Minister responsible for Telecommunications and Postal Services must provide oversight over the implementation of this Chapter and liaise with other Ministers responsible for matters affected by the rapid deployment of electronic communications networks and facilities.
(2) The Minister responsible for Telecommunications and Postal Services must establish a Rapid Deployment National Co-ordinating Centre as a division within the Department of Telecommunications and Postal Services.
(3) The Minister responsible for Telecommunications and Postal Services must establish a Rapid Deployment Steering Committee to oversee the activities of the Rapid Deployment National Co-ordinating Centre.
(4) The Rapid Deployment Steering Committee consists of—
(a) the Director-General of the Department of Telecommunications and Postal Services or his or her delegate;

(b) no more than two representatives of the Authority, nominated by the Authority, that will serve as ex officio members;
(c) representatives of departments and other organs of state across all three spheres of government responsible for granting of approvals, authorisations, licences, permissions or exemptions to deploy electronic communications networks and facilities; and
(d) such other members as the Minister responsible for Telecommunications and Postal Services may determine."

Telkom Commentary

Telkom proposes that the Rapid Deployment National Co-ordinating Centre ("**RDNCC**" or "**the Centre**") is established as an independent body as it will consist of representatives from operators, SALGA and other departments which do not fall under the DTPS.

14.4. Insertion of section 20B in the Principal Act:

"**Role of Rapid Deployment National Co-ordinating Centre**
20B. (1) The Rapid Deployment National Co-ordinating Centre must support, promote and encourage the rapid deployment of electronic communications networks and facilities, including between and amongst electronic communications network service licensees, municipalities, relevant authorities and relevant SIPs.
(2) The Rapid Deployment National Co-ordinating Centre must co-operate with local municipalities to promote and encourage fast tracking of rights of way and way-leave approvals and provide guidance on application processes and application templates for rights of way and wayleaves.
(3) The Rapid Deployment National Co-ordinating Centre must—
(a) oversee the establishment of common wayleave application systems based on an understanding of common information requests across municipalities, including the automation thereof;
(b) oversee the creation of a geographic information system database and mapping of all fibre deployments and other electronic communication network and facility deployments in co-operation with the Authority and other stakeholders;
(c) oversee the co-ordination of infrastructure rollout, including between and amongst electronic communications network service licensees and participate in other infrastructure co-ordination forums such as SIPs;
(d) oversee the engagement with relevant industry bodies dealing with rapid deployment or any aspect thereof; and
(e) provide advice to electronic communications network service licensees on the deployment of electronic communications networks and facilities on an expedited basis."

Telkom Commentary

Telkom recommends that the words "and facilities" in section 20B(1) be deleted as electronic communications deployment includes facilities making it superfluous.

Processing timelines

Furthermore, Telkom recommends the approval process and timelines contained in the ICT Policy are adhered to, to ensure that rapid deployment imperatives are given effect to. In this regard, the ICT Policy determines that where possible, notification and application procedures for rapid deployment should take no more than 30 days, from the date of complete application submission to date of final decision by the relevant entities.

Telkom is concerned that the interface between the Rapid Deployment National Co-ordinating Centre and the municipalities to fast track the right of way and approvals should be clarified. In terms of section 20B(2), the Centre and the municipalities, the new proposed obligation of the Centre is to "co-operate with local municipalities to promote and encourage fast tracking of rights of way and way-leave approvals".

Enforcement and municipal co-operation

This duty on the Centre to "co-operate", as opposed to the Centre enforcing or requiring the municipalities to undertake certain tasks or obligations in rapid deployment processes, appears due to the protection owed to local municipalities in terms of Schedules 4 and 5 of the Constitution. In this regard, the functional areas of competence of municipalities – municipal planning, municipal roads and public works are assigned as areas of municipal competence. In other words, municipalities are constitutionally protected from having national or provincial organs of state intrude on the exercise of municipal decision-making powers for functional areas of municipal competence. Given this constitutional protection, it is unclear from the Amendment Bill, how the DTPS intends to enforce compliance with rapid deployment policies.

Wayleave charges

Telkom is further concerned that the DTPS will not be astutely positioned to address issues that arise regarding increases in wayleave charges to unreasonable or exorbitant amounts. Telkom recognises that municipalities are constitutionally protected from having national organs of state intrude on the performance of municipal roles in respect of areas of municipal competence.

It is therefore unclear as to how the DTPS will impose obligations and uniform rates on municipalities given their constitutional protection. It is further unclear what recourse and/or enforcement measures are available in the case where a municipality refuses to make provision for the installation of electronic communications networks and facilities.

Telkom proses amended wording to section 20B(4) below.

Landowners at municipal, provincial and national level

In Telkom's view, the Centre's intervention or the regulation of processes between electronic communication network service licensees and landowners at municipal, provincial and national level, may assist to accelerate rapid deployment imperatives and streamlining of processes.

Telkom recommends that the process to obtain approvals and/or permits from landowners to access their land or facilities must be simple and efficient and that the time period in which the landowners at municipal, provincial and national government levels must act on all such requests must be set out clearly. More specifically, Telkom recommends that all requests must be processed and finalised within 30 days from the date that a written request is made by a licensee.

Telkom Proposed Amended Wording

Telkom proposes the addition of section 20B(4) as follows:
(4) The Rapid Deployment National Co-ordinating Centre must, subject to its obligations in subsection (2), promote uniformity in prices charged by municipalities for wayleave applications; provided that prices charged for wayleave applications and the processing of rapid deployment of electronic communications networks and facilities which takes place at municipal level may only be enforced to the extent agreed upon between the municipality and the Rapid Deployment National Co-ordinating Centre.

14.5. Insertion of section 20C in the Principal Act:

"**'Role of Authority'**
20C. (1) The Authority must prescribe rapid deployment regulations, which must include –
(a) the structure of the geographic information system database contemplated in section 20B(3)(b), its security and the manner in which it can be accessed, determined in consultation with the Rapid Deployment National Co-ordinating Centre;
(b) obligations applicable to electronic communications network service licensees for the rapid deployment of electronic communications networks or facilities;
(c) alternatives to new deployment of electronic communications networks and facilities, in order to use suitable existing electronic communications networks and facilities;
(d) processes and procedures to enable a landowner to object to the Authority at least 14 days before the electronic communications network service licensee commence with the activity, if the proposed electronic communications network or facility will cause significant interference with the land;
(e) high sites that are not technically feasible for access and use by an electronic communications network service licensee for the deployment of electronic communications networks and facilities that promote broadband;
(f) processes and procedures that enable single trenching for fibre in each geographic location where it is technically feasible to do so; and
(g) guidelines on reasonable access fees that may be charged by landholders to electronic communications network service licensees for deploying electronic communications networks or facilities that are intrusive.
(2) The regulations contemplated in subsection (1) must provide for procedures and processes for the Authority to resolve disputes that may arise between an electronic communications network service licensee and any landowner on an expedited basis,

in order to satisfy the public interest in the rapid rollout of electronic communications networks and electronic communications facilities.
(3) The Authority must ensure that electronic communications network service licensees—
(a) provide information on existing and planned electronic communications networks and facilities, including alterations or removal thereof, as contemplated in this Chapter, to the Rapid Deployment National Co-ordinating Centre for inclusion into the geographic information system database: Provided that information on existing electronic communications networks and facilities must be provided within 12 months of the coming into operation of the Electronic Communications Amendment Act, …. and that information on planned electronic communications networks and facilities, including alterations or removal thereof, must be provided within 30 days of such planning, alteration or removal;
(b) provide information on existing and planned electronic communications networks and facilities to the Authority;
(c) seek out alternatives to new deployment of electronic communications networks and facilities, notably through the sharing or leasing of existing facilities;
(d) contribute to research and development on new deployment methods;
(e) co-ordinate activities, wherever appropriate, avoiding anti-competitive behaviour; and
(f) advise landholders, in writing, of their right to recourse through the Authority.

Telkom Commentary

In respect of section 20C(1)(f), Telkom proposes that the single trench policy should be applicable only to new deployments. A trench is only dug when deploying an infrastructure network, hence only new infrastructure network deployments will require trenches and should thus follow a single trench policy as prescribed. The existing outside plants (OSP) of telecommunication networks were designed and dimensioned for single network service providers and therefore multiple service providers cannot be accommodated.

For commentary on section 20C(1)(g), please refer to Telkom's comments under section 20K regarding the determination of reasonable access fees that may be charged by landholders, and the effects of the of dispute resolutions processes on Telkom's operations.

As addressed in terms of section 20(2) of the Amendment Bill, with specific regard to section 20C(3)(a), Telkom recommends that the information that network operators provide be qualified. Only information that would suffice for co-ordination purposes and information on existing networks. Information on planned networks should have 'limited time' from when it can be submitted to protect commercially sensitive information.

Telkom Proposed Amended Wording

Telkom proposes the following amendment to section 20C(1)(g):

"(g) guidelines on reasonable access fees that may be charged by landholders to electronic communications network service licensees for deploying electronic communications networks or facilities that are intrusive, subject to an appropriate market studies for the determination of reasonable access fees."

14.6. Insertion of section 20D in the Principal Act:

Right to enter and use property

20D. (1) Electronic communications network service licensees have the right to enter upon and use public and private land for the deployment of electronic communications networks and facilities, subject to subsection (5).

(2) Electronic communications network service licensees are entitled to select appropriate land and gain access to such land for the purposes of constructing, maintaining, altering or removing their electronic communications networks or facilities.

(3) Electronic communications network service licensees retain ownership of any electronic communications networks and facilities constructed.

(4) Property owners may not cause damage to electronic communications networks or facilities.

(5) An electronic communications network service licensee must, for the purposes of subsection (1)—

(a) give 30 calendar days notice, in writing, of its proposed property access activity to an owner and, if applicable, occupier of the affected land, which must—

(i) specify the reasons for engaging in the activity;

(ii) specify the date of commencement of such activity;

(iii) outline the objection process to its plans; and

(iv) provide environmental, health and safety information, as may be applicable;

(b) provide all information required by the application process, if any, and obtain a wayleave certificate from the relevant authority, noting that the exercise of rights by the electronic communications network service licensee is subject to by-laws that regulate the manner in which a licensee should exercise its powers, though the by-law may not require the municipality's consent;

(c) exercise due care and diligence to minimise damage, which must include acting according to good engineering practice, and taking all reasonable steps to restore the property to its former state, including the repair of damages caused;

(d) ensure the design, planning and installation of the electronic communications network or facility, follow best practice and comply with regulatory or industry standards;

(e) take all reasonable steps to ensure the activity does not compromise or impede a public utility's ability to exercise its powers or perform its functions;

(f) update the geographic information system database about the type and location of electronic communications networks and facilities deployed as contemplated in section 20C(3)(a); and

(g) uphold the principle of wholesale open access and infrastructure sharing and seek out alternatives to new deployment of electronic communications networks and facilities in accordance with the rapid deployment regulations prescribed by the Authority, in order to use suitable existing electronic communications networks and facilities.

(6) A landowner may object to the Authority in the prescribed manner at least 14 days before the electronic communications network service licensee commence with the activity and only if the proposed electronic communication network or facility will cause significant interference with the land.

Telkom Commentary

Telkom recommends that if a landowner is an ECNS licensee, the applicant ECNS licensee and the landowner must enter a service level agreement to ensure that disputes are minimised and provide for ICASA as final arbiter in the case of a dispute.

Telkom Proposed Amended Wording

Telkom proposes the following amendment to section 20D by the addition of subsection (7) as follows:

"(7) Where a landowner is an electronic communications network service licensee, –

(a) such landowner may object to the Authority in the prescribed manner at least 14 days before the electronic communications network service licensee contemplated in section 20G commences with the activity;

(b) the Authority in considering the objection, may resolve that access must be granted on condition that the parties enter into a service level agreement to regulate the activities and provide for the Authority as the final arbiter in the event of disputes arising."

14.7. Insertion of section 20E in the Principal Act

Access to high sites for radio-based systems

20E. (1) For the purpose of this section "high site" means any structure or feature, constructed or natural, including buildings, whether used for public or private purposes, which is suitable for radio-based systems.

(2) An electronic communications network service licensee may access and use any high site for the deployment of electronic communications networks and facilities that promote broadband, except for high sites that are not technically feasible for this purposes, as may be prescribed by the Authority.

(3) An owner of a high site may not refuse access to an electronic communications network service licensee for the installation of electronic communications networks and facilities that promote broadband: Provided that such installation must be in accordance with any reasonable requirements of the owner.

Telkom Commentary

Telkom recommends that any agreement entered into for access to high sites must provide for dispute resolution by ICASA in the event that an owner of a high site refuses access.

Telkom Proposed Amended Wording

Telkom recommends the amendment of section 20E by the addition of subsection (4):

"(4) Any agreement entered into between the owner of a high site and an electronic communications network service licensee to access and use a high site, must provide for appropriate dispute resolution clauses and include the Authority as the final arbiter for disputes arising from such agreement".

14.8. Insertion of section 20F in the Principal Act

"Single trenching
20F. The Authority must, in order to ensure a single trench for fibre in each geographic location where it is technically feasible to do so, prescribe the processes and procedures that enable a single trench for fibre under the rapid deployment regulations."

Telkom Commentary

Telkom recommends that a prescribed timeline must be implemented as to when ICASA would prescribe the processes and procedures that enable a single trench for fibre under the rapid deployment regulations. These processes and procedure should adhere to the 30-day timeline similarly recommended in terms of section 20J of the Amendment Bill, detailed below. Telkom recommends further that the single trench enabling policy should only apply to new deployments. Furthermore, regarding a single trenching policy for fibre, technical feasibility may not always be the only consideration for not rolling out network - financial/economic constraints and the efficient use of Telkom's resources may also be critical criteria to consider. The single trenching criteria should therefore include financial/economic considerations and the efficient use of resources, electronic communications networks and services.

Telkom Proposed Amended Wording

Telkom proposes the amendment of section 20F as follows:

"Single trenching
20F*. The Authority must, in order to ensure a single trench for fibre in each geographic location where it is technically feasible to do so, prescribe the processes and procedures, which may not exceed a 30-day period, that enable a single trench for fibre for new deployments, under the rapid deployment regulations."*

14.9. Insertion of section 20G in the Principal Act

Access to buildings
20G. Electronic communications network service licensees may access any building with multiple tenants, whether used for public or private purposes,—
(a) to inspect the building to determine whether it is suitable for deployment of electronic communications networks and facilities;
(b) to deploy electronic communications networks and facilities for such building or subscribers outside the building;
(c) to maintain electronic communications networks and facilities located in or on the

building; or
(d) to provide electronic communications services.

14.10. Insertion of section 20H in the Principal Act

"Adequately served
20H. (1) For the purposes of this section, **'adequately served'** means an electronic communications network that enables the provision of electronic communications services, including voice services and broadband services at the quality and speeds provided in SA Connect or any subsequent amendment of such quality and speeds, and has already been deployed within premises, such as a gated complex, an office park, a shopping mall or a block of flats, by an electronic communications network service licensee (referred to in this section as the **"access provider").**
(2) (a) The access provider must, in respect of the adequately served premises—
(i) except in case of technical inability, provide wholesale open access, upon request, to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption, in accordance with the terms and conditions of a wholesale open access agreement entered into between the parties, in accordance with the general open access principles;
(ii) charge wholesale rates as prescribed by the Authority in terms of section 47; and
(iii) establish a co-location facility at a suitable point within the premises or such other suitable place as the Authority may determine, at which all access seeking licensees may install their own electronic communications facilities or equipment so as to interconnect with the electronic communications network of the access provider, or that the access seeking licensee may use those facilities of the access provider as would enable it to provide services, as requested.
(b) An occupant within the adequately served premises is not obliged to receive an electronic communications service from the access provider and may select and receive a service from any electronic communications service provider of choice.
(3) No electronic communications network or facility may be deployed in adequately served premises, except with the approval of the Authority.
(4) The Authority must prescribe the procedure and criteria that will be used by the Authority to consider applications for approval, as contemplated in subsection (3), with due regard to the policy objective to promote service-based competition."

Telkom Commentary

Section 20H(2)(a)(iii) of the Amendment Bill provides for the access provider to "establish a co-location facility a suitable point within the premises or such other suitable place as the Authority may determine". Telkom is concerned that the Authority is not best placed to determine a suitable co-location facility, which should instead be determined by the operators. In addition to this, please see Telkom's comments in para 3.2 above re the determination by the Minister of broadband speeds. In terms of section 20H(3), the Authority has been granted the power to approve the deployment of electronic communication networks or facilities in adequately served premises. Regarding co-location & interconnection, ICASA has now been given the power to

determine the points of interconnection on Telkom's network. This compromises Telkom's rights which allow it to construct, maintain and operate its own network as efficiently as possible, including designating points of interconnection on its network and ensuring the most efficient use of its network. Please refer further to Telkom's further concerns under section 20K, regarding the prohibition on the deployment of network, while dispute resolution is being awaited.

Telkom Proposed Amended Wording

Telkom proposes the following amendment of subsection 20H(2)(a)(iii) as follows:
"(iii) establish a co-location facility at a suitable point within the premises [~~or such other suitable place as the Authority may determine~~], at which all access seeking licensees may install their own electronic communications facilities or equipment so as to interconnect with the electronic communications network of the access provider, or that the access seeking licensee may use those facilities of the access provider as would enable it to provide services, as requested."

14.11. Insertion of section 20I in the Principal Act:

"Emergency
20I. No entity may refuse access to any site or charge a fee for access to any site for the deployment of electronic communications network or facilities during a state of emergency, declared in terms of the State of Emergency Act, 1997 (Act No. 64 of 1997)."

14.12. Insertion of section 20J in the Principal Act:

"**Application process or procedure**
20J. (1) The Rapid Deployment National Co-ordinating Centre must engage with departments and other organs of state across all three spheres of government responsible for the granting of approvals, authorisations, licences, permissions or exemptions to deploy electronic communications networks and facilities to promote and encourage that all applications and related processes for approval, authorisation, licence, permission or exemption and processes relating to any consultation and participation required by the relevant laws, required for the deployment of electronic communications networks and facilities must, in order to expedite the matter, run concurrently.
(2) The Rapid Deployment National Co-ordinating Centre must keep updated information on the application processes and minimum information requirements for an approval, authorisation, licence, permission or exemption and processes relating to any consultation and participation required by the relevant laws, required for the deployment of electronic communications networks and facilities.
(3) The Rapid Deployment National Co-ordinating Centre must propose co-ordinated, efficient and streamlined processes for the granting of an approval, authorisation, licence, permission or exemption, in consultation with the relevant authorities, to enable rapid deployment of electronic communications networks and facilities.
(4) The Rapid Deployment National Co-ordinating Centre must consult with the

relevant authorities to promote and encourage the alignment of the said processes.
(5) The Rapid Deployment National Co-ordinating Centre must promote and encourage consistency in the time taken by the relevant authorities to grant approvals for the deployment of electronic communications networks and facilities."

Telkom Commentary

Telkom recommends that a timeline for the streamlined processes contemplated in section 20J(3) of the Amendment Bill be specifically prescribed as per the timelines proposed in the ICT Policy. Where possible, notification and application procedures for rapid deployment should take no more than 30 days, from the date of complete application submission to date of final decision by the relevant entities (see page 98 of the ICT Policy); and decision- making entities must be required to communicate with applicants, within the 30-day period, if any delay will be experienced, including providing reasons for the delay (see page 98 of the ICT Policy). Furthermore, while the RDNCCC 'must engage', 'must propose', 'must consult', and 'must promote', with the relevant authorities, however the RDNCC has no real powers over the relevant authorities to ensure strict compliance with the proposed efficient, streamlined processes and timelines in order to achieve the goal of Rapid Deployment. Given the introduction of a single trench policy, it will be challenging to keep requests for authorisation as confidential, however, the indications should be required to be made on the type of information that should be kept confidential.

Telkom Proposed Amended Wording

Telkom proposes the substitution of subsection 20J(5) as follows:
"(5) The Rapid Deployment National Co-ordinating Centre must promote and encourage consistency in the time taken by the relevant authorities to grant approvals for the deployment of electronic communications networks and facilities, which processes may not exceed 30 days; provided that prompt notice is to be given to applicants where authorities will exceed the 30 day period, which notice must be delivered within the initial 30 day period, including the reasons for the delay."

14.13. Insertion of section 20K in the Principal Act:

Fees, charges and levies
20K. (1) No access fee may be charged by landholders to electronic communications network service licensees for deploying electronic communications networks or facilities in cases where the electronic communications networks or facilities are not intrusive, such as buried or overhead cabling, that does not constitute a cost to the landholder, or deprive the landholder of its own use of the land.
(2) (a) Reasonable access fees may be charged in cases where more intrusive electronic communications networks or facilities, such as masts, are erected on property.

(b) In such cases any access fee must be reasonable in proportion to the disadvantage suffered and must not enrich the landowner or exploit the electronic communications network service licensee.
(3) In the case of any dispute on access fees, the reasonableness of the access fees must be determined by the Authority on an expedited basis.
(4) A landholder is entitled to reasonable compensation agreed to between the landholder and the electronic communications network service licensee, for any financial loss or damage, whether permanent or temporary, caused by an electronic communications network service licensee entering and inspecting land, or installing, deploying or maintaining electronic communications networks or facilities.
(5) In the case of any dispute on compensation, the reasonableness of the compensation must be determined by the Authority on an expedited basis.
(6) An electronic communications network service licensee may not continue to deploy electronic communications networks and facilities while awaiting the resolution of the dispute by the Authority."

Telkom Commentary

Telkom is particularly concerned regarding the prohibition contained in section 20K(6) on the deployment of electronic communications networks and facilities, while awaiting the resolution of what constitutes 'reasonable compensation' by the Authority. This prohibition has the potential to significantly intrude on Telkom's rights to construct, maintain and operate its own network in an efficient manner. Telkom recommends that section 20K(6) in this regard, is deleted.

Further, Telkom recommends further that ICASA regularly undertakes appropriate market studies to appropriately determine to determine guidelines on what constitutes "reasonable access fees" in terms of section 20C(1)(g) and "the reasonableness of compensation" that assist in its dispute resolution adjudication as per section 20K(5).

Alternatively, Telkom recommends that if the deletion of section 20K(6) is not a viable possibility, that the parties to the dispute must be required to adhere to the outcome of ICASA's market determination of reasonable access fees as minimum compensation, and that the deployment of electronic communications networks resumes. In this way, Telkom recommends that any further dispute regarding what is considered reasonable compensation (over and above market determination) is referred to for resolution by the Authority – without the suspension of deployment.

Telkom Proposed Amended Wording

Telkom proposes that section 20K(6) is deleted.

Alternatively Telkom proposed that section 20K(5) is amended as follows:

"(5)(a) In the case of any dispute on compensation, the reasonableness of the compensation must be determined by the Authority on an expedited basis.

(b) The Authority must conduct market studies or reviews on regular intervals to obtain a market-related input or information that will assist in its expedited determination of the reasonableness of compensation contemplated in subsection (a)".

14.14. Repeal of sections 21, 22 and 23 in the Principal Act

[SECTION 21 (RAPID DEPLOYMENT OF ELECTRONIC COMMUNICATIONS FACILITIES)

(1) The Minister must, in consultation with the Minister of Cooperative Governance and Traditional Affairs, the Minister of Rural Development and Land Reform, the Minister of Water and Environmental Affairs, the Authority and other relevant institutions, develop a policy and policy directions for the rapid deployment and provisioning of electronic communications facilities, following which the Authority must prescribe regulations.
(2) The regulations must provide procedures and processes for-
(a) obtaining any necessary permit, authorisation, approval or other governmental authority including the criteria necessary to qualify for such permit, authorisation, approval or other governmental authority; and
(b) resolving disputes that may arise between an electronic communications network service licensee and any landowner, in order to satisfy the public interest in the rapid rollout of electronic communications networks and electronic communications facilities.
(3) The policy and policy directions contemplated in subsection (1) must be made within twelve (12) months of the coming into operation of the Electronic Communications Amendment Act, 2014.]

SECTION 22 (ENTRY UPON AND CONSTRUCTION OF LINES ACROSS LAND AND WATERWAYS

(1) An electronic communications network service licensee may -
(a) enter upon any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic;
(b) construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic; and (c) alter or remove its electronic communications network or electronic communications facilities, and may for that purpose attach wires, stays or any other kind of support to any building or other structure.
(2) In taking any action in terms of subsection (1), due regard must be had to applicable law and the environmental policy of the Republic.

SECTION 23 (UNDERGROUND PIPES FOR PURPOSES OF ELECTRONIC COMMUNICATIONS NETWORK SERVICE)

(1) If any local authority and an electronic communications network service licensee agree that the provision of the electricity supply and electronic

communications network services to a particular area must be provided by means of an underground cable, that local authority may on any premises within the said area, when installing such cable for an underground electricity supply line on the said premises, provide a conduit pipe or other facility for the installation of an underground electronic communications facility from a point of connection on the street boundary to a building on those premises, in accordance with the requirements of the electronic communications network services licensee.
(2) The cost of the provision of the said conduit pipe or other facility -
(a) is payable to the local authority in question; and
(b) is, for the purpose of any law, considered to be fees payable by the owner of the premises in question to the local authority in respect of the installation of the electricity supply line.]

Telkom Commentary

Please refer to Telkom's comments in respect of the rapid deployment of electronic communications networks and facilities in terms of the proposed addition of section 20K of the EC Amendment Bill in respect of determining reasonable access fees and the implications of disputes in this regard on Telkom's deployment operations.

14.15. **SECTION 24: PIPES UNDER STREETS**

14.15.1. Substitution in subsection 24(1) for the words preceding paragraph *(a) of* the following words

"An electronic communications network service licensee may, after **[providing thirty (30) days]** prior written notice to the local authority or person owning or responsible for the care and maintenance of any street, road or footpath—"

14.15.2. Substitution for subsections 24(2) and (3) of the following subsections, respectively:

"(2) The local authority or person to whom any such water, gas or electricity pipe belongs or by whom it is used is entitled, at all times while any work in connection with the alteration in the position of that pipe is in progress, to supervise that work.
(3) The licensee must pay all reasonable expenses incurred by any such local authority or person in connection with any alteration **[or removal]** <u>of water, gas or electricity pipes</u> under this section or any supervision of work relating to such alteration."

14.16. **SECTION 25: REMOVAL OF ELECTRONIC COMMUNICATIONS NETWORK FACILITIES**

14.16.1. Substitution for subsection 25(1) of the following subsection:

"(1) If an electronic communications network service licensee finds it necessary to move any electronic communications facility, pipe, tunnel or tube constructed upon, in, over, along, across or under any land, railway, street, road, footpath or waterway, owing to any alteration of alignment or level or any other work on the part of any public authority or person, the reasonable cost of the alteration or removal must be borne by that local authority or person."

14.16.2. Substitution for subsections 25(4), (5), (6), (7) and (8) of the following subsections, respectively:

"(4) If any deviation or alteration of an electronic communications network facility, pipe, tunnel or tube constructed and passing over any private property is desired on any ground other than those contemplated in subsection (1) or (2), the owner of the property must give the electronic communications network service licensee written notice of 28 days, of such deviation or alteration.

(5) The electronic communications network service licensee must decide whether or not the deviation or alteration contemplated in subsection (4) is possible, necessary or expedient.
(6) If the electronic communications network service licensee agrees to make the deviation or alteration as provided for in subsection **[(3)]**(4), the cost of such deviation or alteration must be borne by the person at whose request the deviation or alteration is affected.

(7) If, in the opinion of the electronic communications network service licensee, the deviation or alteration contemplated in subsection (4) is justified, the licensee may bear the whole or any part of the said cost.

(8) Where a dispute arises between any owner of private property and an electronic communications network service licensee in respect of any decision made by an electronic communications network services licensee in terms of subsection (4), such dispute must be **[referred to the Complaints and Compliance Committee in accordance with section 17C of the ICASA Act]** resolved by the Authority on an expedited basis, as contemplated in section 20C(2)."

14.17. **SECTION 27: TREES OBSTRUCTING ELECTRONIC COMMUNICATIONS NETWORK FACILITIES**

14.17.1. Substitution for subsection 27(2) of the following subsection:

"(2) In the event of failure to comply with a notice referred to in subsection (1) **[(b)]**, the electronic communications network service licensee may cause the said tree or vegetation to be cut down or trimmed as the electronic communications network service licensee may consider necessary."

14.18. **SECTION 28: HEIGHT OR DEPTH OF ELECTRONIC COMMUNICATIONS**

NETWORK FACILITIES

14.18.1. Repeal of section 28 in the Principal Act

[28. Height or depth of electronic communications network facilities

(1) (a) Aerial electronic communications networks or electronic communications facilities along any railway or public or private street, road, footpath or land must be at the prescribed height above the surface of the ground.

(b) The electronic communications network service licensee must place electronic communications networks and electronic communications facilities, pipes, tunnels and tubes at the prescribed depth below the surface of the ground.

(2) If the owner of any private land proves to the satisfaction of an electronic communications network service licensee that he or she is obstructed in the free use of his or her land because of the insufficient height or depth of any electronic communications network or electronic communications facility, pipe, tunnel or tube constructed by the electronic communications network service licensee, the electronic communications network service licensee may, subject to the provisions of sections 22 and 25, take such steps as he or she may consider necessary for giving relief to that owner.

(3) In taking any action in terms of this section, due regard must be had to the environmental laws of the Republic.]

15. **CHAPTER 5: RADIO FREQUENCY SPECTRUM**

15.1. Insertion of the following section in Chapter 5 of the principal Act before section 30:

"Functions of Minister responsible for Telecommunications and Postal Services
In this Chapter, unless the context indicates otherwise—
"Minister" means the Minister responsible for Telecommunications and Postal Services
29A. The Minister is responsible for—
(a) representing the Republic on radio frequency spectrum at international, multi-lateral and bi-lateral level;
(b) representing the Republic at the ITU, including radio frequency spectrum planning, allocation, and international co-ordination of radio frequency spectrum use;
(c) issuing policies and policy directions in relation to radio frequency spectrum, subject to section 3;
(d) the development of the radio frequency plan, including the allocation of spectrum for the exclusive use by national security services, as contemplated in section 34;
(e) the establishment of a National Radio Frequency Spectrum Planning Committee,

as contemplated in section 34A;
(f) co-ordination across Government, including sector-specific agencies;
(g) co-ordination with the Minister responsible for Communications on issues relating to spectrum that has been allocated to the broadcasting services; and
(h) any other matter relevant to radio frequency spectrum that is necessary or expedient for the proper implementation or administration of this Act or the related legislation."

Telkom Commentary

Telkom supports the definition of "Minister" proposed in terms of Chapter 5, however Telkom recommends that such definition should be appropriately placed under section 1 (Definitions). The term "Minister" is used throughout the EC Amendment Bill and it is therefore more appropriate to add this to section 1.

15.2. Substitution of the following section for section 30 of the principal Act:

"**[Control] Administration of radio frequency spectrum**
30. (1) In carrying out its functions under this Act and the related legislation, the Authority **[controls, plans,]** administers and manages the **[use]** assignment, **[and]** licensing, monitoring and enforcement of the radio frequency spectrum use **[except as provided for in section 34]**.
(2) **[In controlling, planning, administering, managing, licensing and assigning the use of the radio frequency spectrum, the]** The Authority must, in the performance of the functions contemplated in subsection (1)—
(a) comply with the applicable standards and requirements of the ITU and its Radio Regulations, as agreed to or adopted by the Republic, as well as with the national radio frequency plan contemplated in section 34 and ministerial policies and policy directions, as contemplated in section 3;
(b) take into account modes of transmission and efficient utilisation of the radio frequency spectrum, including allowing shared use of radio frequency spectrum when interference can be eliminated or reduced to acceptable levels as determined by the Authority, subject to section 31C;
(c) give high priority to applications for radio frequency spectrum where the applicant proposes to utilise digital electronic communications facilities for the provision of broadcasting services, electronic communications services, electronic communications network services, and other services licensed in terms of this Act or provided in terms of a licence exemption;
(d) do assignment planning **[plan]** for the conversion of analogue uses of the radio frequency spectrum to digital, including the migration to digital broadcasting **[in the Authority's preparation and modification of the radio frequency spectrum plan]**; **[and]**
(e) give due regard to the radio frequency spectrum allocated to security services**[.]**;
(f) (i) perform monitoring and evaluation of radio frequency spectrum use and conduct periodic radio frequency spectrum audits based on the information contemplated in paragraph (i);
(ii) make available monitoring and evaluation and audit reports to the Minister; and
(iii) publish the audit results on the Authority's website;

(g) maintain a high quality and appropriately accessible real-time database of radio frequency spectrum assignments and any other information determined by the Authority, excluding assignments to security services, that includes real-time updates from sector-specific agency databases as contemplated in section 34B;
(h) advise the Minister on areas for future research, development and planning; and
(i) ensure that radio frequency spectrum licensees submit an annual report on its spectrum usage to the Authority and Minister that includes information on achievement of spectrum license obligations, as applicable, and such information as determined by the Authority, in consultation with the Minister.
(j) publish guidelines on the information contemplated in paragraph (i), including a procedure to allow licensees to submit a supplementary annual report to address concerns which the Authority may identify.
(3) The Authority must, in performing its functions in terms of subsection (1), ensure that in the use of the radio frequency spectrum harmful interference to authorised or licensed users of the radio frequency spectrum is eliminated or reduced to the extent reasonably possible.
(4) The Authority must investigate and resolve all instances of harmful interference to licensed services that are reported to it."

Telkom Commentary

Control and administration of radio frequency spectrum

Telkom supports reassigning spectrum "control and planning" from ICASA to the Minister of the DTPS, in which case ICASA is then responsible for managing or administrating spectrum use. Telkom addressed this matter extensively in Part A of its submission.

Telkom is of the view that the introduction of the term "assignment planning" in section 30(2)(d), specifically in the context of analogue to digital conversion and digital television broadcasting migration, is not clear and must be defined and suitably addressed. Whereas "assignment" refers to the licensing of spectrum, which is an accepted function of the Authority, the concept "assignment planning" is not clear as it is not a standard term used within the industry.

Further, the conversion of analogue to digital television is a specific matter, which is being addressed (although long overdue) and need not to be reflected in legislation. If the intent of this section is to refer to ICASA's existing function of developing radio frequency spectrum assignment plans, that supports the licensing of spectrum, it is superfluous as it is within their mandate and could be deleted.

While the intention for the cross-referencing of sections 30(2)(f) to be read with section 30(2)(i) is supported, the former provision may be improved to ensure there is no ambiguity between the various functions such as "monitoring and evaluation" and "audits".

15.3. **SECTION 31: RADIO FREQUENCY SPECTRUM LICENCE**

15.3.1. Deletion of subsection 31(2A) in the Principal Act

15.3.2. Substitution for subsection 31(3) of the following subsection:

"(3) The Authority may, taking into account the objects of the Act, prescribe procedures and criteria for radio frequency spectrum licences contemplated in section 31E(4) and the amendment, renewal, suspension, cancellation and withdrawal of radio frequency spectrum licences."

15.3.3. Deletion in subsection 31(4) of the word "or" at the end of paragraph (d), insertion of that word at the end of paragraph (e) and addition of the following paragraph:

"(f) if the Authority has approved an application for spectrum sharing, spectrum trading or spectrum refarming."

Telkom Commentary

Telkom submits that it is not ideal that ICASA amends a spectrum licence of a firm that seeks to refarm its spectrum as it could stall the deployment of new faster technologies, including LTE. It also implies that all existing spectrum licences must be amended to capture the technology currently deployed in each frequency band, noting also that licensees use the same frequency bands for different technologies. In many cases, a frequency band is also used for multiple technologies such as 3G and 4G or 2G and 3G. Implementing such decision will be problematic and may result in unfair competition if the bands are used for different technologies. Telkom submits that spectrum refarming should not be subjected to approval by the Authority, if needed, a notification process will suffice. Please also refer to Telkom's submission in Part A where the issue of refarming has been addressed extensively.

Telkom Proposed Amended Wording

"(f) if the Authority has approved an application for spectrum sharing or spectrum trading."

15.3.4. Substitution for subsection (7) of the following subsection:

"(7) The Authority may, on its own initiative, take appropriate action to ensure compliance with the provisions of this Chapter and must develop and implement an effective monitoring and enforcement system, including adjudication of spectrum disputes."

15.3.5. Substitution for subsection 31(8) of the following subsection:

"(8) Subject to subsection (9), the Authority may withdraw any radio frequency spectrum licence or assigned radio frequency spectrum when the licensee fails to comply with section 31A(6), to utilise the assigned radio frequency

spectrum in accordance with the licence conditions applicable to such licence or fails to use the assigned radio frequency spectrum for a period of two years, referred to as the 'use it or lose it' principle."

Telkom Commentary

Telkom supports the amendment of section 31(8) of the Amendment Bill in terms of applying a period of two years to the "use-it-or-lose-it" principle. The Authority may withdraw a spectrum license when the licensee fails to comply with the imposed USOs. Although Telkom agrees with this principle, Telkom is concerned that imposing similar obligations to all licensees will be detrimental to smaller operators. Please refer to Telkom's submission in Part A regarding this matter.

15.3.6. Insertion after subsection 31(8) of the following subsection:

"(8A)(a) The 'use it or lose it' principle contemplated in subsection (8) does not apply to passive science services due to the nature of their operations which do not transmit signals frequently."
(b) The Minister may, upon recommendation by the Authority, and upon good cause shown, exempt SMMEs and new entrants from the 'use it or lose it' principle contemplated in subsection (8) for a period defined by notice in the *Gazette*."

Telkom Commentary

Telkom's position is that the use-it-or-lose-it principle must apply to all spectrum licensees, including the passive science services. Although Telkom agrees that passive science services does not involve the transmission of signals it still involves the use of a receiver to receive natural emissions from earth, sea, etc. The same applies to radio astronomy, which uses a radio receiver to receive radio waves of cosmic origin. The frequency assignment is therefore applicable to allow the use of the necessary receivers to receive such natural emissions or to perform astronomy observations. If these specific passive services are not being used, the frequency spectrum licence should also be withdrawn. If a frequency band is therefore assigned to a science institution for passive services, such assignment is used only when the necessary receivers are deployed. If no receivers are deployed, then the spectrum is not used and the use-it-or-lose-it principle must apply. In any event, the use of the word "frequently" is not appropriate or relevant and not defined). Whether a transmission occurs regularly or in-frequently should not be the criteria to apply the principle of use-it-or-loose-it. For example, IoT (Internet of Things) devices could transmit a single burst signal once a month for a few milli-seconds; the spectrum is nevertheless

use specifically for that application even if such transmission/reception is used in-frequently.

Telkom Proposed Amended Wording

Telkom recommends that section 31(8A)(a) be deleted. If the Minister however wishes to retain the reference to passive services, Telkom recommends the wording be changed as follows:
"(a) The 'use it or lose it' principle contemplated in subsection (8) [~~does not~~] equally applies to passive [~~science~~] services [~~due to the nature of~~] due to the fact that [~~frequently~~], it involves the reception of emissions."

15.3.7. Insertion for subsection 31(9) of the following subsection:

"(9) Before the Authority withdraws a radio frequency spectrum licence or assigned radio frequency spectrum in terms of subsection (8), it must give the licensee prior written notice of at least 30 days and the licensee must have 7 (seven) business days in which to respond, in writing, to the notice (unless otherwise extended by the Authority) demonstrating its compliance with section 31A(6) or that it is utilising the radio frequency spectrum in compliance with this Act and the licence conditions."

15.3.8. Addition of the following subsection:

"(11) The Authority must develop an automated licensing system for radio frequency spectrum that is not high demand radio frequency spectrum that may be linked to the real-time database contemplated in section 30(2)(g)."

15.4. Insertion of section 31A in the Principal Act:

"Universal access and universal service obligations of radio frequency spectrum licences
31A. (1) In addition to any universal access and universal service obligations contemplated in section 8(2)(g), the Authority must impose universal access and universal service obligations on existing and new radio frequency spectrum licencees, determined by the Authority.
(2) The Authority must obtain the Minister's approval on the nature and form of all universal access and universal service obligations before they are imposed on any radio frequency spectrum licensees, as well as the approval of the Minister of Communications, if such radio frequency spectrum licensees are broadcasting service licensees, to ensure that the obligations are co-ordinated, relevant and aligned with national policy objectives and priorities.
(3) Radio frequency spectrum licensees that were assigned radio frequency spectrum in similar radio frequency spectrum bands must have similar universal access and universal service obligations.
(4) Radio frequency spectrum licensees must report annually to the Authority on their compliance with their universal access and universal service obligations, which report

the Authority must make publicly available.
(5) Universal access and universal service obligations must be specific, attainable and measurable and compliance must be evaluated by the Authority on an annual basis.
(6) The Authority may withdraw any radio frequency spectrum licence or assigned radio frequency spectrum when the licensee fails to comply with its universal access and universal service obligations."

Telkom Commentary

The issue of universal access and universal service obligations on spectrum licences have been addressed extensively in Part A of Telkom's submission.

Telkom contends that its current USOs must be considered when formulating new obligations. Imposition of additional obligations on Telkom will be onerous as we have already incurred extensive USO obligations.

Telkom proposes that USOs should be linked to market share of licensees; imposing equal obligations to all licensees (even for the same spectrum) will further entrench the dominance of those with SMP. Market studies are therefore required. ICASA must conduct a market review before imposing any new USO obligations to ensure that the identified USO obligations address the concerns identified in the market review.

The Authority must also consult licensees in all cases where new USOs are formulated.

The newly proposed section 31A(6) of the EC Amendment Bill is concerning in that, if further inequitable USOs are imposed on Telkom where it already carries an unequal burden, Telkom should not suffer from the possible withdrawal of a spectrum licence for failure to comply with USOs.

Telkom Proposed Amended Wording

"31A. (1) [~~In addition to any universal access and universal service obligations contemplated in section 8,~~] The Authority may [~~must~~] impose universal access and universal service obligations on [~~existing and~~] new radio frequency spectrum [~~licencees~~] licensees following a market review.
(2) The Authority must within three months of completion of the market review obtain the Minister's approval on the nature and form of all universal access and universal service obligations [before they are imposed] to be imposed on any radio frequency spectrum licensee~~s~~ to ensure that the obligations are coordinated, relevant and aligned with national policy objectives and priorities.
(3) Radio frequency spectrum licensees assigned radio frequency spectrum in similar radio frequency spectrum bands must have similar universal access and universal service obligations, subject to subsection (5).
(4) Radio frequency spectrum licensees must [~~report annually~~] within three months of the end of the preceding year submit annual reports to the Authority on their compliance with their universal access and universal service obligations that the

Authority must make publicly available, after consultation with the radio frequency spectrum licensees.
(5) Universal access and universal service obligations [should] imposed shall be based on the outcome of a market review, which shall take into account market share of licensees, and must be specific, attainable and measurable and compliance should be evaluated by the Authority on an annual basis, as a condition of renewal of the radio frequency spectrum licence."

15.5. Insertion of section 31B in the Principal Act

"**Radio frequency spectrum trading**
31B. (1) Radio frequency spectrum licensees may trade licenced spectrum, subject to approval from the Authority.
(2) The Authority must prescribe spectrum trading regulations, within 12 months of the commencement of this section, that include—
(a) the spectrum trading application and notification processes; and
(b) the criteria and conditions for spectrum trading.
(3) The criteria and conditions contemplated in subsection (2)(b) must include the following:
(a) Competition may not be distorted by any spectrum trade or by the accumulation and hoarding of spectrum rights of use;
(b) licence obligations will be passed on to the new user of the radio frequency spectrum;
(c) the current radio frequency spectrum licensee must have used the radio frequency spectrum in the year prior to the spectrum trade to ensure that the trade is not used to subvert the 'use it or lose it' principle;
(d) the current and new radio frequency spectrum licensee must comply with all the relevant legislation; and
(e) submission to the Authority of the particulars of the spectrum trade transaction, including the legal, technical and financial terms and conditions to ensure that the spectrum trade does not undermine policy objectives.
(4) The Minister may issue policy directions to the Authority on spectrum trading and spectrum use rights in order to fulfil specific national objectives.

Telkom Commentary

Telkom recommends the involvement of the Competition Commission in transactions involving HDS. See Telkom's comments on spectrum trading in Part A of Telkom's submission. The wording of sub-section 31B(2)(a) refers to "trading application and notification processes". The reference to "notification process" is not relevant to spectrum trading (as in the case of spectrum sharing addressed in section 31B). This provisions must therefore be amended. Telkom is of the view that spectrum trading involves an application but not notification. Telkom also recommends the deletion of section 31B(3)(d) as compliance with legislation is common course.

Telkom Proposed Amended Wording

Telkom proposes the amendment of section 31B(2)(a) as follows:

"(a) the spectrum trading application [~~and notification~~] processes~~; and~~"

Telkom proposes the deletion of section 31B(3)(d) as follows:

[~~"(d) the current and new radio frequency spectrum licensee must comply with all the relevant legislation; and~~"]

15.6. Insertion of section 31C in the Principal Act

"**Radio frequency spectrum sharing**
31C. (1) Radio frequency spectrum licensees may share licenced spectrum, subject to—
(a) approval from the Authority, in the case of high demand spectrum; and
(b) notification to the Authority, in the case of non-high demand spectrum.
(2) The Authority may not approve spectrum sharing of high demand spectrum if it will—
(a) have a negative impact on competition;
(b) amount to spectrum trading; or
(c) compromise emergency services and other services that meet public interest goals.
(3) The Authority must prescribe spectrum sharing regulations within 12 months of the commencement of this section that include—
(a) the spectrum sharing application and notification processes; and
(b) the criteria and conditions for spectrum sharing, including for sharing of sector-specific spectrum assigned to sector-specific agencies contemplated in section 34B."

Telkom Commentary

Telkom supports the dual approach of approval and notification for spectrum sharing as proposed in the EC Amendment Bill. See also Telkom's proposals regarding the definition of spectrum sharing.

15.7. Insertion of section 31D in the Principal Act

"**Radio frequency spectrum refarming**
31D. (1) Radio frequency spectrum licensees may refarm licenced spectrum, subject to approval from the Authority.
(2) The Authority may not approve spectrum refarming if it will have a negative impact on competition.
(3) Universal access and universal service obligations must be imposed on radio frequency spectrum licensees if other assigned spectrum in similar bands to the refarmed spectrum, carry universal access and universal service obligations, as contemplated in section 31A.

(4) Spectrum fees must be imposed on radio frequency spectrum licensees for refarmed spectrum commensurate with other assigned spectrum in similar bands.
(5) The Authority must prescribe spectrum refarming regulations within 12 months of the commencement of this section that include—
(a) the spectrum refarming application process; and
(b) the criteria and conditions for spectrum refarming.

Telkom Commentary

The issue of spectrum refarming has been addressed extensively in part A of Telkom's submission. See also Telkom's comments regarding the definition of refarming as provided above.

In summary Telkom proposes that the provisions pertaining to spectrum refarming be deleted from the EC Amendment Bill. Licensees should not have to seek the permission of ICASA to refarm spectrum to encourage innovation and development of faster more efficient technologies.

The current spectrum licensing regime is based on the internationally accepted model of technology neutrality. Spectrum licences are currently assigned on a technology neutral basis, which gives licensees broad rights in terms of using radio equipment in the assigned spectrum.

The proposed introduction of section 31D could have a negative impact on the market and operator's ability to introduce new technologies. The use of the word "technology" is more appropriate as refarming occurs on the technical level as indicated in Part A of our submission. However, the use of the word "technology" has its own implications and must be further considered. For example, 3GPP standards for mobile networks are upgraded as "releases"; changing from, for example, release 13 to release 14, may or may not be considered a technology change. Also, "upgrading" from, for example 3G to 4G may be done by implementing only some features of a release. The word "technology", if used, may therefore have to be defined in the context of refarming. One possible way of addressing this is for the Authority to define this in the regulations to be developed as per section 31B of the EC Amendment Bill.

Telkom Proposed Amended Wording

Pursuant to Telkom's concerns in respect of spectrum refarming, Telkom proposes that section 31D be deleted from the Amendment Bill. If section 31D retained, Telkom recommends that the proposed approval process be amended to a notification process, which will allow the Authority to check for possible negative competition effects.

15.8. Insertion of section 31E in the Principal Act

"**High demand spectrum**

31E. (1) The Minister must, within six months of the commencement of the Electronic Communications Amendment Act, …, and thereafter as required, determine, by notice in the *Gazette*, after consultation with the Authority—

(a) what constitutes high demand spectrum; and

(b) which unassigned high demand spectrum must be reserved for assignment to the wireless open access network service licensee.

(2) The assignment of high demand spectrum—

(a) is subject to the principles of wholesale open access as contemplated in Chapter 8; and

(b) must be done on a non-exclusive basis,

subject to the provisions of the national radio frequency plan.

(3) The Authority must assign the spectrum contemplated in subsection (1)(b) to the wireless open access network service licensee in accordance with section 19A.

(4) The Authority must issue radio frequency spectrum licences for unassigned high demand spectrum not reserved for assignment to the wireless open access network service licensee, as contemplated in subsection (3), on condition that—

(a) the radio frequency spectrum licensee provides immediate wholesale open access to its electronic communications networks or electronic communications facilities in urban areas, to the wireless open access network service licensee;

(b) the radio frequency spectrum licensee procures a minimum of 30% capacity or such higher capacity as determined by the Authority, in the wireless open access network service contemplated in section 19A, for a period determined by the Authority; and

(c) universal access and universal service obligations contemplated in section 31A are imposed on the radio frequency spectrum licensee, and such obligations are complied with in rural and under-serviced areas before the assigned spectrum may be used by the licensee in other areas.

(5) The provisions of subsection (4)(a) and (b) only apply to unassigned high demand spectrum that is identified for International Mobile Telecommunications, not reserved for assignment to the wireless open access network service licensee.

(6) Radio frequency spectrum licences that include exclusively or individually assigned high demand spectrum on the date contemplated in subsection (1), may not be renewed on the same terms and conditions at the end of the licence term, to ensure compliance with section 31E(2).

(7) The Authority must, within 24 months before the expiry of radio frequency spectrum licences contemplated in subsection (6), conduct an inquiry, as contemplated in section 4B of the ICASA Act, and make recommendations to the Minister, at least six months before the expiry of the radio frequency spectrum licences contemplated in subsection (6), on the terms and conditions that may apply to such radio frequency spectrum licences, as a condition for the renewal thereof, taking into account—

(a) policy;

(b) market developments;

(c) the promotion of competition; and

(d) the extent of availability of wholesale open access networks.

(8) Notwithstanding the provisions of section 3(3), the Minister must issue a policy direction to the Authority in terms of section 3(2) on the terms and conditions that must apply to such radio frequency spectrum licences, as a condition for the renewal thereof, at least three months before the expiry of such radio frequency spectrum

licences."

Telkom Commentary

Telkom's comments made in relation to section 19A (licensing of the WOAN) and the definition of HDS should also be noted when assessing Telkom comments pertaining to section 31E. Also, HDS has been addressed extensively in Part A of Telkom's submission, including the impact on competition, obligations associated with HDS, identification of a deemed entity, etc.

Whereas the Minister must consult with the Authority when determining high demand spectrum (HDS) according to section 31E(1), there is no indication that the Minister will consult with industry, as interested parties. Considering the huge effect that the declaration of spectrum as "high demand spectrum" will have on licensees specifically and industry in general, both ICASA and the Minister must consult industry before declaring spectrum as HDS. Declaring existing used spectrum as HDS will have far-reaching consequences for licensees. Since HDS may be subjected to a higher spectrum fee structure, wholesale open access obligations (as the licensee will be considered a deemed entity), competitive award processes may apply, etc., it is imperative that the categorisation thereof as HDS is performed with utmost certainty and through thorough consultation. See also Telkom's comments on imposing obligations retrospectively on spectrum licenses.

Section 31E(2)(b) states that HDS must be assigned on a "non-exclusive" basis. The intention of this provision is not clear and needs further elaboration. In the context of spectrum management, spectrum is assigned either on shared basis or exclusively. Spectrum sharing could mean the following:

- the spectrum is shared between licensees deploying the same services, for example, fixed links;
- the spectrum is shared between different services, for example, a mobile network and satellite services.

On the other hand, non-exclusive use could also mean, in the context of the ICT Policy, that the mobile networks provided using HDS must be made available on an open access basis. The addition of the phrase "subject to the provisions of the national radio frequency plan" could indicate that the non-exclusive use refers to sharing between licensees using different services (e.g. mobile sharing with satellite). This is however not clear and must be clarified to ensure that there is no doubt as to the interpretation of this provision.

The words "exclusively or individually assigned high demand spectrum" is also used in section 31E(6). The use in this context is understood to mean that the spectrum is not shared with another licensee providing mobile services.

Telkom is of the view that, where mobile networks are deployed, the spectrum cannot be shared between licensees in the same area due to harmful interference that will be caused between networks. Exclusive assignment of HDS for mobile

networks is therefore essential. Considering that the Authority makes assignments on a shared basis between different services per the NRFP as standard spectrum management practice, and since sub-section (a) deals with the principle of wholesale open access, Telkom recommends that sub-section (b) be deleted. Alternatively, this sub-provision must be clarified noting the above considerations.

In terms of section 31E(4)(a), a licensee must provide wholesale open access to its electronic communications networks or electronic communications facilities in urban areas to the wireless open access network service licensee. The term "urban" has not been defined and will lead to disputes if not defined. Telkom recommends that the term "urban" be defined by the Authority following public consultation.

Telkom is concerned that the implementation of section 31E(4)(b) is problematic and unclear.

- The term "capacity" must be defined to avoid doubt.

- It is not clear why a "minimum of 30% capacity" was prescribed; there is no scientific basis for this specific amount. Telkom recommends that the minimum capacity should be determined by ICASA as part of their market study when assessing the amount of spectrum required for a viable WOAN.

- If a licensee procures minimum 30% capacity in the WOAN, when acquiring additional HDS, it implies that three licensees will acquire 90% of the capacity of the WOAN. The WOAN will therefore have almost no capacity left for new players such as MVNOs. It is also not clear how more than three licensees will be accommodated as this equals to 120% capacity, which is not possible.

- Two critical factors are undetermined, which must be clarified before licensees acquire HDS and commit to buy capacity in the WOAN, namely the period and price. In terms of section 31E(4)(b), the period must be determined by the Authority; this must however be done before a licensee acquires the spectrum and commits to procure the stipulated capacity as this acquisition must be factored into the business case. The price is also a huge concern, as this will be unregulated for a period per section 19A(7)(b)(ii). The WOAN may therefore charge excessive rates and this may endure for a long time.

- It is also not clear how the procurement of 30% capacity will be implemented when additional HDS is licensed during a second of subsequent rounds of spectrum assignment. For example, if 5G spectrum is assigned to the market following the approval of mmWave bands at WRC-19 and if the currently unassigned HDS have been assigned as per section 31E), will licensees then have to again procure 30% capacity in the WOAN? Will such obligation relate only to the new spectrum obtained by the WOAN or all capacity provided through the WOAN using all its assigned

spectrum? Will licensees still have the obligation to procure capacity in the WOAN even if the WOAN does not receive additional spectrum during a specific round of assignment?

Regarding imposing obligations on the spectrum licensee as stipulated in section 31E(4)(c), please refer to Telkom's comments in Part A of this submission dealing with obligations. Specifically, Telkom is of the view that asymmetric obligations must be applied based on market share and scale and that the rural-first criteria is more onerous for smaller players to achieve due to their lack of scale and networks in rural areas.

Further, ambiguity exists in attempting to apply section 31E(4)(c) read with section 31E(4)(a). Whereas the licensee must provide immediate wholesale open access to its electronic communications networks or electronic communications facilities in urban areas, the licensee must first deploy services in the rural areas. It seems therefore that the intention is to provide access to its existing electronic communications networks or electronic communications facilities in urban areas, when acquiring new HDS. This point needs to be clarified.

According to section 31E(7), ICASA must conduct an inquiry within 24 months before expiry of the exclusively or individually assigned HDS and make recommendations to the Minister at least six months before the expiry of these radio frequency spectrum licences. Whereas Telkom agrees with the intent of this provision, it must be considered that not all spectrum declared as HDS will necessary expiry on the same date. Since any frequency band may potentially be declared as HDS, which could expire on any date, and since it is not known when the EC Amendment Act will commence, it may not be possible to adhere to the proposed time lines in all cases. This provision must be amended accordingly to consider such eventuality.

Also, since HDS licences may potentially expiry at different dates, the authority may potentially be involved in an inquiry on an ongoing basis to cater for various expiry dates. Criteria such as market developments, competition and availability of wholesale open access are constantly evolving and a consideration of these factors in ongoing inquiries may be problematic due to the evolving nature of these factors. This must also be considered in drafting this section.

In terms of section 31E(8), the Minister will issue a policy direction to ICASA regarding the new terms and conditions that must apply to a radio frequency spectrum licence, at least three months prior to the expiry of the licence. It is not clear what will happen when said policy direction is issued after the prescribed three-month period. This eventuality should be catered for in this provision.

15.9. **SECTION 34: RADIO FREQUENCY PLAN**

15.9.1. Deletion of subsection 34(1) in the Principal Act

15.9.2. Substitution for subsection 34(2) of the following subsection:

"(2) The Minister must **[approve]** develop the national radio frequency plan **[developed by the Authority]**, which must set out the specific frequency bands designated for use by particular types of services, taking into account the radio frequency spectrum bands allocated to the security services."

Telkom Commentary

Telkom supports the proposed changes to section 34(2) of the ECA by relocating the development and approval of the national radio frequency plan (NRFP) from the Authority to the Minister. As indicated above in Telkom's comments on section 30 of the ECA, this function is an extension of the ITU WRC process in determining which services are allocated in a specific frequency band and is a national policy matter. See also Telkom's comments on this matter contained in Part A of Telkom's submission. Noting that the definition of "radio frequency plan" includes the development of a frequency migration plan, need to be considered. This is addressed further below.

15.9.3. Deletion of subsection 34(4) in the Principal Act

[(4) The Authority must, within 12 months of the coming into force of this Act, prepare the national radio frequency plan or make appropriate modification to any existing radio frequency plan to bring it into conformity with this Act.]

Telkom Commentary

Telkom supports the Minister drafting the frequency band plan as indicated above. Deletion of 34(4) is supported as it is historical; updating the NRFP is catered for.

15.9.4. Addition in subsection 34(6) of the following paragraph:

"*(g)* determine the service allocation to be made in the national table of frequency allocations in cases where there are competing services in a particular radio frequency spectrum band, and where the decisions of an ITU World Radiocommunication Conference create divergent interests nationally."

15.9.5. Substitution for subsection (7) of the following subsection:

"(7) In preparing the national radio frequency plan **[as contemplated in subsection (4)]**, the **[Authority]** Minister must—
(a) take into account the ITU's international spectrum allocations for radio frequency spectrum use, in so far as ITU allocations have been adopted or

agreed upon by the Republic, and give due regard to the reports of experts in the field of spectrum or radio frequency planning and to internationally accepted methods for preparing such plans;
(aA) consult the Authority;
(b) take into account existing uses of the radio frequency spectrum and any radio frequency band plans in existence or in the course of preparation; and
(c) **[consult with the Minister to]** take into account—
(i) **[incorporate]** the radio frequency spectrum allocated **[by the Minister]** for the exclusive use of the security services **[into the national radio frequency plan]**;
(ii) **[take account of]** the government's current and planned uses of the radio frequency spectrum, including but not limited to, civil aviation, aeronautical services, public protection and disaster relief services and scientific research; **[and]**
(iii) **[co-ordinate a plan for]** migration of existing users, as applicable, to make available radio frequency spectrum to satisfy the requirements of subsection (2) and the objects of this Act and of the related legislation**[.]**;
(iv) the priority of access, availability and protection from harmful interference of frequencies for safety-of-life services; and
(v) the allocation and preservation of specific bands for broadcasting."

Telkom Commentary

Telkom supports the Minister to develop the National Radio Frequency Plan. Per section 34(7)(c)(iii), the minister must consider "the migration of existing users", *inter alia*, when preparing the national radio frequency plan. Noting also the introduction of sub-section 34(7A), the national radio frequency plan will include, where necessary the requirement to migrate systems or uses. On the other hand, in terms of section 34(16), the Authority will migrate users in accordance with the national radio frequency plan and any "migration plans developed by the Authority". ICASA must therefore continue to develop a frequency migration plan, which will align with the proposed migrations as contemplated in the national radio frequency plan. Telkom recommends that the definition of "radio frequency plan" be amended to clarify the roles of the Minister of the DTPS and the Authority as it relates to frequency migration.

15.9.6. Insertion after subsection (7) of the following subsection:

"(7A) If the national radio frequency plan includes migration of existing users, the time period for migration may not exceed five years, unless otherwise specified by the Minister and the plan must indicate whether any licensee or another party is responsible for the migration costs.";

Telkom Commentary

See also Telkom's comments above regarding the role of the Minister of the DTPS and ICASA regarding migration. The reference to "plan" in section 34(7A) is not clear as it may refer to the national radio frequency plan or the migration plan to be developed by the Authority. Considering the details of the proposal i.e. the period to migrate and the party responsible for the migration costs, Telkom recommends that such information be contained in the migration plan to be developed by the Authority.

15.9.7. Deletion of sections 34(8) – (15) in the Principal Act

[(8) The Authority must give notice of its intention to prepare a national radio frequency plan in the Gazette and in such notice invite interested parties to submit their written representations to the Authority within such period as may be specified in such notice.
(9) The Authority may, after the period referred to in subsection (8) has passed, hold a hearing in respect of the proposed national radio frequency plan.
(10) After the hearing, if any, and after due consideration of any written representations received in response to the notice mentioned in subsection (8) or tendered at the hearing, the Authority must forward the national radio frequency plan to the Minister for approval.
(11) The Minister must, within 30 days of receipt of the national radio frequency plan, either approve the plan, at which time the plan must become effective, or notify the Authority that further consultation is required.
(12) Upon approval of the national radio frequency plan by the Minister, the Authority must publish the plan in the Gazette.
(13) Any radio frequency plan approved in terms of this section and all the comments, representations and other documents received in response to the notice contemplated in subsection (8) or tendered at the hearing must be –
(a) kept at the offices of the Authority; and
(b) open for public inspection by interested persons during the normal office hours of the Authority.
(14) The Authority must, at the request of any person and on payment of such fee as may be prescribed, furnish him or her with a copy of the radio frequency plan.
(15) The provisions of subsections (6) to (14) apply, with the necessary changes, in relation to any amendment made by the Authority to the radio frequency plan.]

Telkom Commentary

In terms of the EC Amendment Bill, public consultation in developing or amending the NRFP is addressed through the new section 34(8A), which

references the processes in section 3(5) with the necessary changes. In this regard, section 3(5) requires the Minister, when issuing a policy or policy direction, to obtain the views of interested persons by publishing the text of such policy or policy direction by notice in the *Gazette*.

Therefore, if section 3(5) applies to the development or amendment of the NRFP, with the necessary changes, an assumption must necessarily be made that the NRFP will be published in terms of section 3(1) of the ECA as a policy document. If this is the case, Telkom supports the deletion of sections 34(8) – (15) and the insertion of section 34(8A), which provides for sufficient public participation processes. See further comments under section 34(8A) immediately below.

15.9.8. Insertion after subsection 34(8) of the following subsection:

"(8A) The provisions of section 3(5) apply, with the necessary changes, to the development or amendment of the national radio frequency plan."

Telkom Commentary

Telkom supports the addition of section 34(8A); this will allow for public consultation on the publication of the NRFP or amendments thereto if the intention is that the NRFP will henceforth be published as a policy.

Alternatively, if the NRFP will not be published as a policy in terms of section 3(1) of the ECA, then Telkom recommends that the wording of section 34(8A) is clarified to determine that the *processes for publication* contemplated in section 3(5) will apply with the necessary changes to the development or amendment of the NRFP.

15.9.9. Substitution for subsection (16) of the following subsection:

"(16) The Authority **[may]** must, where the national radio frequency plan identifies radio frequency spectrum that is occupied and requires the migration of the users of such radio frequency spectrum to other radio frequency bands, migrate the users to such other radio frequency bands in accordance with the national radio frequency plan, and any migration plans developed by the Authority, except where such migration involves governmental entities or organisations, in which case the Authority must—
(a) **[must]** refer the matter to the Minister; and
(b) **[may]** migrate the users **[after]** in consultation with the Minister."

Telkom Commentary

The migration plan is part of the definition of the "radio frequency plan". As such, with the Minister developing the NRFP, a distinction must be made to the "frequency migration plan", which is developed by the Authority. It may

be required that the definition of “radio frequency plan” be amended to separate the development of the table of frequency allocations from the development of the migration plan, while noting that the table of frequency allocations will contain elements of frequency migration. See also Telkom’s comments to section 34(7) made above regarding this matter.

15.9.10. Insertion of the following sections in the Principal Act after section 34:

“**National Radio Frequency Spectrum Planning Committee**
34A. (1) The Minister must co-ordinate radio frequency spectrum across government and sector-specific agencies contemplated in section 34B.
(2) *(a)* The Minister must establish a National Radio Frequency Spectrum Planning Committee that includes representation from relevant Government stakeholders.
(b) Members of the National Radio Frequency Spectrum Planning Committee must possess suitable qualifications, skills and experience in radio frequency spectrum management and planning.
(c) The purpose of the National Radio Frequency Spectrum Planning Committee is to ensure fairness and equitable distribution of radio frequency spectrum.
(3) The Department of Telecommunications and Postal Services must co-ordinate the work of the National Radio Frequency Spectrum Planning Committee.

Telkom Commentary

In principle Telkom agrees with section 34A; however, it must be ensured that the “distribution of radio frequency spectrum” as stipulated in sub-section (b) relates only to spectrum used for government services (civil aviation, maritime, science, etc.) and should not include commercial spectrum, especially where government institutions require the use of such “commercial” spectrum. It is not clear what will happen where spectrum is used for both commercial and government application and who will consider the interest of commercial use during the discussions within the National Radio Frequency Spectrum Planning Committee.

Telkom recommends that it be made clear that the National Radio Frequency Spectrum Planning Committee deals only with spectrum used exclusively for government purposes. Where spectrum can also be used for commercial purposes, industry must also be consulted, to the extent that industry may be affected.

Sector-specific agencies
34B. (1) The sector-specific agencies must—

(a) account to the Authority as determined by the Authority for the use of radio frequency spectrum assigned to such sector-specific agencies;
(b) assign the radio frequency spectrum contemplated in paragraph *(a)* and register users of radio frequency spectrum in such sector in accordance with regulations prescribed by the Authority;
(c) ensure availability and maintenance of quality information related to radio frequency spectrum assignments and usage; and
(d) maintain a database of radio frequency spectrum users in their respective sectors and ensure that such database enables real-time updating of the corresponding database of the Authority.
(2) The Minister, the Authority and the sector-specific agencies must enter into a Memorandum of Understanding on matters relevant to the radio frequency spectrum contemplated in this section.
(3) The Authority is required to develop a database with real-time updates, including that such database enables real-time updating by the corresponding databases of sector-specific agencies."

15.10. **SECTION 36: TECHNICAL STANDARDS FOR EQUIPMENT AND ELECTRONIC COMMUNICATIONS FACILITIES**

15.10.1. Deletion in subsection 36(2) of the word "and" at the end of paragraph *(c)*, insertion of that word at the end of paragraph *(d)* and addition of the following paragraph

"*(e)* ensuring universal design requirements to make provision for persons with disabilities."

16. **CHAPTER 7A: INTERNATIONAL ROAMING**

16.1. Insertion of the following chapter in the Principal Act after Chapter 7:

"CHAPTER 7A

INTERNATIONAL ROAMING

International roaming regulations

42A. (1) The Authority must prescribe international roaming regulations, including SADC roaming regulations.

(2) *(a)* The regulations contemplated in subsection (1) must be conditional on reciprocal terms and conditions being imposed on electronic communications service providers of another country by such country or its National Regulatory Authority.
(b) Reciprocal terms and conditions contemplated in subparagraph *(a)* means that the electronic communications service provider of another country must offer similar tariffs as those offered by the South African electronic communications service provider.
(3) *(a)* (i) When prescribing international roaming regulations the Authority must take into consideration any policy direction that may be issued by the Minister responsible

for Telecommunications and Postal Services;
(ii) When prescribing SADC roaming regulations, the Authority must take note of SADC Roaming decisions and must take into consideration any policy direction that may be issued by the Minister responsible for Telecommunications and Postal Services.
(b) The regulations may include rate regulation for the provision of roaming services, including without limitation price controls on wholesale and retail rates, as determined by the Authority.
(4) The Authority may—
(a) obtain any information required for international roaming regulation from electronic communications service licensees;
(b) share the information obtained in terms of paragraph *(a)* with relevant national regulatory authorities of other countries; and *(c)* for purposes of SADC roaming regulations, share the information obtained in terms of paragraph *(a)* with the Communications Regulators' Association of Southern Africa.
(5) The Authority may engage national regulatory authorities of any other country in order to—
(a) promote international roaming between the respective countries;
(b) ensure reciprocity of the roaming terms and conditions applicable to electronic communications service providers of the respective countries, as contemplated in subsection (2); or
(c) enter into a bi-lateral agreement to give effect to international roaming and reciprocity, as contemplated in this section, despite any other provision in the underlying legislation."

Telkom Commentary

Section 42A(1) of the Amendment Bill:
Given that the ECA is only applicable in the Republic it is only applicable to the Republic. The regulatory authority will therefore only be able to regulate wholesale arrangements in the Republic It must be acknowledged that coordinated action is required for multi-jurisdictional arrangements. Telkom would welcome SADC ministers entering into an arrangement whereby they would enable NRAs to co-operate through agreements with other NRAs in the SADC region. The ECA and regulations (as determined by the NRA) would then align with any approved SADC Roaming Policies.

Telkom is of the view that regulation of international roaming regulation would benefit smaller operators that do not have multi-jurisdictional reach as they do does not enjoy the same volumes as the bigger mobile operators. Any regulation of international roaming rates where local rates are based on the cost base of the large mobile operators' volumes would pose a commercial risk for smaller operators who do not have the buying power or international presence of the larger entities. Wholesale and Retail prices for International roaming services should not be less than the underlying costs of the specific operator.

Telkom proposes a cost-oriented approach to pricing and that prices are transparent, fair and reasonable – as per section 47 of the Amendment Bill.

Prices charged and other obligations imposed on electronic communications service licensees should not distort competition between electronic communications service providers within the SADC region.

International roaming regulations must be aligned with the SADC decisions on international roaming. Currently, the regulations appear to be independent of the SADC decisions. Telkom therefore welcomes the inclusion of the need for closer cooperation and reciprocity between countries to facilitate competitive prices in international roaming.

Section 42A(2) of the Amendment Bill:
Telkom is concerned about the effect of "similar tariffs" under a reciprocal regime. Reciprocal has at its core a 50:50 relationship. Attempting to pin down a "similar tariff" for international roaming is a challenge and may distort the trade relationships between SADC countries as there is a difference in monetary economic conditions such as exchange rates, taxes, etc. which currently have an impact on roaming tariffs. These factors need to be considered when roaming tariffs are determined.

Operators may have their own operating strategies when it comes to choosing between operators for wholesale roaming services e.g. visiting operators may opt for the network offering lower wholesale rates, rather than the one with more inbound traffic volumes. It could also happen that larger operators have agreements with each other which is based on high-volume deals where lower rates are paid to each other. In this way, they keep the traffic on their networks. This type of reciprocal agreement will not benefit smaller single country operators unless a mechanism is implemented to monitor such rates in a transparent manner.

Telkom supports an agreement with other operators that is based on reciprocal tariffs and reciprocal terms and conditions. As a small operator, Telkom does not support a regime where rates are based on traffic volume discounts.

Section 42A(3) of the Amendment Bill:
Please refer to paragraph one of 42A(1). When prescribing International Roaming regulations approved SADC policies also need to be considered which addresses the framework of the implementation of the SADC roaming initiative.

All stakeholders, including operators, should be engaged in a market review process that should be aimed at harmonizing the regulation of roaming services within the SADC region. This should also include the review process that includes cost modelling to determine wholesale and retail ceiling rates for roaming.

Section 42A(3)(b) proposes that regulations may include rate regulation, including without limitation of price controls on the wholesale and retail rates as determined by the NRAs. Telkom proposes regulating at the wholesale level will be more effective as opposed to at the retail level.

Section 42A(4) of the Amendment Bill:

Telkom is concerned about the protection of international roaming information exchanged between ICASA and other country national regulators. Telkom holds a similar concern for the exchange of SADC roaming information being exchanged between ICASA and SADC country NRAs.
To protect confidentiality, non-disclosure agreements must be in place on a SADC Ministerial level, as well as between operators and other entities e.g. NRAs, CRASA consultants, etc. before information is shared between any parties.

Section 42A(5) of the Amendment Bill:
Please refer to Telkom's concerns in section 42A(4) in respect of the sharing of information.

17. **CHAPTER 8: ELECTRONIC COMMUNICATIONS FACILITIES LEASING**

Substitution of the following heading for the heading to Chapter 8 of the principal Act:

"[ELECTRONIC COMMUNICATIONS FACILITIES LEASING] <u>WHOLESALE OPEN ACCESS</u>"

17.1. **SECTION 43: OBLIGATIONS TO LEASE ELECTRONIC COMMUNICATIONS FACILITIES**

17.1.1. Substitution of the following heading for the heading of section 43 of the principal Act

"**Obligation to [lease electronic communications facilities] <u>provide wholesale open access</u>**"

<u>Telkom Commentary</u>

Telkom's concern is that term "wholesale open access" should refer to operators making available to other licensed entities, based on economically sound principles, the use of the fixed and/or mobile last-mile (access) infrastructure of such operators.

The requirement to offer wholesale open access to electronic communications facilities in the fixed line market may have unintended consequences and disincentivise other operators from rolling out fibre investments as they will essentially be forced to offer wholesale open access to such facilities. It is trite that the fixed line market has become competitive in the last 10 years.

Accordingly, Telkom submits that wholesale open access should refer to network operators which would facilitate service based competition and should not extend to electronic communications facilities.

17.1.2. Substitution for subsection 43(1) of the following subsection:

"(1) All electronic communications network service licensees, except electronic communications network service licensees that provide broadcasting signal distribution or multi-channel distribution services, must provide wholesale open access, upon request, to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of a wholesale open access agreement entered into between the parties, in accordance with the general open access principles, except in case of technically inability."

Telkom Commentary

Telkom supports the substitution of section 43(1) particularly the inclusion of the words "except in case of technically inability". However, as mentioned with reference to the heading of section 43 above, Telkom is concerned with the proposed definition of "wholesale open access" and the inclusion of the wording "electronic communications facility". 'Wholesale open access' should only be applied in the mobile market and exclude the fixed line market as there is already sufficient competition in this market since 2008 which a number of new entrants continuing to enter this market which is illustrative of the fact that there are no insurmountable barriers to entry in that market.

17.1.3. Insertion of the following subsections after subsection 43(1):

"(1A) An electronic communications network service licensee that is determined a vertically integrated operator by the Authority in the wholesale open access regulations must, in addition to the requirement in subsection (1), do accounting separation.
(1B) An electronic communications network service licensee that is determined a deemed entity by the Authority in the wholesale open access regulations must, in addition to the requirement in subsection (1), comply with the following wholesale open access principles on its electronic communications network:
(a) Active infrastructure sharing;
(b) wholesale rates as prescribed by the Authority in terms of section 47; and
(c) specific network and population coverage targets."

Telkom Commentary

Imposing additional obligations on an entity that is considered a "deemed entity" should be limited to those managed network operators with significant market power rather than including all those with access to High Demand Spectrum.

There is sufficient competition in the fixed market (fibre) with several new entrants since 2008, thus negating the need for cost based pricing/regulation in that market.

17.1.4. Deletion of sections 43(2), (3) and (4) in the Principal Act:

[(2) Where the reasonableness of any request to lease electronic communications facilities is disputed, the party requesting to lease such electronic communications facilities may notify the Authority in accordance with the regulations prescribed in terms of section 44.
(3) The Authority must, within 14 days of receiving the request, or such longer period as is reasonably necessary in the circumstances, determine the reasonableness of the request.
(4) For purposes of subsection (1), a request is reasonable where the Authority determines that the requested lease of electronic communications facilities –
(a) is technically and economically feasible; and
(b) will promote the efficient use of electronic communication networks and services.]

Telkom Commentary

Telkom is concerned that the deletion of subsections 43(2), (3) and (4) in the Principal Act removes the reasonability test, which should be adapted in the open access context.

Although technical inability is specifically contemplated in section 43, there are limitations to the scenarios in which it can be applied and therefore economic feasibility and efficient use of electronic communications networks become crucial to evaluate the terms and conditions at which wholesale open access based on general open access principles can be practiced.

Telkom Proposed Amended Wording

Telkom recommends that the nuances in subsections 43(2), (3) and (4) of the Principal Act relating to ICASA's determination on whether sharing requests are economically and technically feasible be retained.

17.1.5. Substitution for subsections 43(5), (6) and (7) of the following subsections, respectively:

"(5) In the case of unwillingness or technical inability of an electronic communications network service licensee to negotiate or agree on the terms and conditions of **[an electronic communications facilities leasing agreement]** a wholesale open access agreement, either party may notify the Authority in writing and the Authority may—
(a) impose terms and conditions consistent with this Chapter;

(b) propose terms and conditions consistent with this Chapter which, subject to negotiations among the parties, **[must]** may be agreed to by the parties within such period as the Authority may specify; **[or]**
(c) if no agreement is reached as contemplated in paragraph (b), refer the dispute to the Complaints and Compliance Committee for resolution on an expedited basis in accordance with the procedures prescribed in terms of section 46**[.]**; or
(d) in case of technical inability (other than environmental and technological inability), determine how to resolve technical inability that may include the apportionment of costs;
(6) For the purposes of subsection (5), unless otherwise agreed in writing by the parties, a party is considered unwilling to negotiate or unable to agree if a **[facilities leasing agreement]** wholesale open access agreement is not concluded within the time frames prescribed.
(7) The **[lease of electronic communications facilities]** wholesale open access provided by an electronic communications network service licensee in terms of subsection (1) must, unless otherwise requested by the **[leasing]** requesting party, be non-discriminatory as among comparable types of **[electronic communications facilities]** wholesale open access being **[leased]** provided and not be of a lower technical standard and quality than the technical standard and quality provided by such electronic communications network service licensee to itself or to an affiliate or in any other way discriminatory compared to the **[the comparable network services]** wholesale open access provided by such licensees to itself or an affiliate."

Telkom Commentary

Telkom is concerned that the insertion of section 43(5)(d) of the Amendment Bill limits the full array of argument for or against "technical inability" which may have significant consequences and reduces the complexity of technical inability to a simple commercial agreement.

17.1.6. Insertion of the following subsection after subsection 43(7):

"(7A) Subject to section 4D of the ICASA Act, licensees must provide to the Authority any information specified by the Authority in order that the Authority may carry out its duties in terms of this Chapter."

Telkom Commentary

The purpose for the information sought must only be directly related to ICASA carrying out its duties in terms of this Chapter. Telkom emphasises that the Authority, being a creature of statute, may only exercise its powers as far as this empowering section allows. In other words, information sought by the Authority must be directly linked to the carrying out of its duties. If the information provided by licensees in terms of this

section exceeds the empowering provision, then the call for such information is unlawful and reviewable.

17.1.7. Deletion of section 43(8), (8A) and (9) in the Principal Act

[(8) The Authority must prescribe a list of essential facilities including but not limited to –
(a) electronic communications facilities, including without limitation local loops, sub-loops and associated electronic communications facilities for accessing subscribers and provisioning services;
(b) electronic communications facilities connected to international electronic communications facilities such as submarine cables and satellite earth stations; and
(c) any other such facilities, required to be leased by an electronic communications network service licensee in terms of subsection (1).
(8A)
(a) Requests for leasing of essential facilities are deemed to promote efficient use of electronic communication networks and services.
(b) All electronic communications network services licensees receiving requests contemplated in paragraph (a) are required to agree on non-discriminatory terms and conditions of a facilities leasing agreement for those essential facilities within 20 days of receiving the request.
(c) If the electronic communications network licensee can prove that the request is not technically or economically feasible within the 20 day period the electronic communications network services licensee may refuse the request.
(d) If no agreement regarding the non-discriminatory terms and conditions contemplated in paragraph (b) can be reached, the Authority must impose terms and conditions consistent with this Chapter within 20 days of receiving notification of the failure to reach an agreement.
(9) The Authority must review the list of electronic communications facilities at least once every 36 (thirty six) months and, where the Authority finds market conditions warrant it, make modifications to such list after undertaking an inquiry in accordance with section 4B of the ICASA Act.]

Telkom Commentary

Telkom supports the deletion of section 43(8), (8A) and (9), and the removal of references to “essential facilities”. However, Telkom’s concerns in respect of “electronic communications facility”, which effectively appear to reintroduce this concept in the definition of “wholesale open access” is discussed in terms of section 44 below. The term ‘essential facility’ along with section 43(8), (8A) and (9) become irrelevant as all facilities are subject to unbundling i.e. to be made available under wholesale open access on

general open access principles.

17.2. **SECTION 44: WHOLESALE OPEN ACCESS REGULATIONS**

17.2.1. Substitution of the following heading for the heading to section 44 of the Principal Act:

"[Electronic communications facilities leasing] <u>Wholesale open access regulations</u>"

17.2.2. Substitution for subsection 44(1) of the following subsection:

<u>"(1) The Authority must prescribe wholesale open access regulations to facilitate wholesale open access to electronic communications networks and facilities within 18 months of the coming into operation of the Electronic Communications Amendment Act, …"</u>

17.2.3. Deletion of subsection 44(2) in the Principal Act

17.2.4. Substitution for subsection 44(3) of the following subsection:

<u>"(3) Matters which the wholesale open access regulations must address, include, but are not limited to—
(a) wholesale open access agreement principles, including—
(i) reference offers containing model terms and conditions for the different wholesale open access categories contemplated in section 43;
(ii) the timeframe and procedures for—
(aa) the negotiation of wholesale open access agreements;
(bb) the conclusion of wholesale open access agreements; and
(cc) the technical implementation of the wholesale open access agreements;
(b) the definitions of the general open access principle terms, 'effectiveness', 'transparency' and 'non-discrimination', considering that 'effective access' refers to access to a high quality service, unbundled to a sufficient degree, that is easily obtained in reasonable locations using standardised interfaces;
(c) the implementation and enforcement of wholesale open access principles;
(d) a list of vertically integrated entities, including the criteria used to determine vertically integrated entities: Provided that only entities that are deemed entities as contemplated in paragraph (e), may be determined to be vertically integrated entities;
(e) accounting separation procedures for vertically integrated entities;
(f) determination of deemed entities;
(g) the quality, performance and level of service to be provided, including time to repair or restore, performance, latency and availability;
(h) wholesale rates, as contemplated in section 47;</u>

(i) the sharing of technical information including obligations imposed in respect of the disclosure of current and future electronic communications network planning activities;
(j) contractual dispute resolution procedures;
(k) billing and settlement procedures;
(l) a list of essential facilities;
(m) services associated with wholesale open access, such as support systems, collocation, fault reporting, supervision, functionality, unbundling, and co-operation in the event of faults;
(n) access and security arrangements;
(o) the framework for determining technical inability, as contemplated in section 43(1);
(p) the requirement that an electronic communications network service licensee negotiate and enter into a wholesale open access agreement with an applicant for an individual licence;
(q) the manner in which unbundled electronic communications facilities are to be made available;
(r) any controls necessary to reduce competition concerns; and
(s) any other matter necessary for the effective regulation of wholesale open access in accordance with this Act.";

Telkom Commentary

Telkom recommends wholesale open access applies from OSI Model layer 3 and above. Access to infrastructure below level 3 will lead to access to sensitive passive elements of network infrastructure and will cause significant concerns regarding security issues. This may further expose operators' critical infrastructure to possible damage and unreasonably force operators to make the infrastructure available to competitors, even if it is not economically and technically feasible, pursuant to the amended clause 43. Telkom is already providing open access to layer 3 infrastructure, which is more than sufficient to address the issue of open access to broadband infrastructure.

Telkom is concerned that ISO Model layer 2 or layer 3 are potentially implicated in the definition of "wholesale open access" in that the definition in itself references "electronic communications facility". In this regard, Telkom reiterates that in terms of the ECA, "electronic communications facility" includes, but is not limited to any –

> "*(a) wire, including wiring in multi-tenant buildings; (b) cable (including undersea and land-based fibre optic cables); (c) antenna; (d) mast; (e) satellite transponder; (f) circuit; (g) cable landing station; (h) international gateway; (i) earth station; (j) radio apparatus; (k) exchange buildings; (l) data centres; and (m) carrier neutral hotels, or other thing, which can be used for, or in connection with, electronic communications, including, where applicable- (i) collocation space; (ii) monitoring equipment; (iii) space on or within poles, ducts, cable trays, manholes, hand holds and conduits; and (iv) associated support systems, sub-systems and*

services, ancillary to such electronic communications facilities or otherwise necessary for controlling connectivity of the various electronic communications facilities for proper functionality, control, integration and utilisation of such electronic communications facilities".

Section 44(3)g: with regard to *the quality, performance and level of service to be provided, including time to repair or restore, performance, latency and availability,* these criteria vary per product and is agreed upon between the service provider and customer in the relevant service level agreement. Telkom is of the view that it will be a complex and cumbersome task for the Authority to dictate parameters for every electronic communication network service offered. Telkom proposes that the section be reworded to explain that the Authority will prescribe minimum acceptable levels for the indicated performance criteria.

In terms of section 44(3)(b), if the definition of "effective access" is to be accepted, it will need to be further defined in that the words employed in the proposed definition are in themselves open to further interpretation and uncertainty.

In this regard, "effective access" is defined to mean, the access to "*high quality*" service, unbundled to a "*sufficient degree*" that is easily obtained in "*reasonable*" locations using standardised interfaces. Those words which intend to give meaning to "effective access" are in themselves open to interpretation and hence the definition of "effective access" is vague.

Telkom instead recommends that the general open access principle terms are subjected to a common law, more generally applied, definition within the wider auspices South Africa's constitutional and common-law dispensation for "effectiveness", "transparency" and "non-discrimination".

17.2.5. Insertion of the following subsection after subsection 44(3):

"(3A) For purposes of the determination of deemed entities, as contemplated in subsection (3), the Authority must—
(a) following the definition of markets, as contemplated in section 67(3A), determine in respect of infrastructure markets, which electronic communications network service licensee, if any, has significant market power in such market or has an electronic communications network that constitutes more than 25% of the total electronic communication infrastructure in such market, following which such electronic communications network service licensee is regarded as a deemed entity; or
(b) determine which electronic communications network service licensee, if any, controls an essential facility or a scarce resource, such as radio frequency spectrum that is identified for International Mobile Telecommunications, following which such electronic communications network service licensee is regarded as a deemed entity."

17.2.6. Substitution for subsection (4) of the following subsection:

"(4) Where the regulations require negotiations with an applicant in terms of subsection (3)*(l)*, a reference in this Chapter to a licensee seeking to **[lease]** access electronic communications networks or facilities must be considered to include such applicant."

17.2.7. Deletion of subsection 44(5), (6) and (7) in the Principal Act

17.3. **SECTION 45: FILING OF WHOLESALE OPEN ACCESS AGREEMENTS**

17.3.1. Substitution of the following section for section 45 of the Principal Act:

"**Filing of [electronic communications facilities leasing] wholesale open access agreements**
45. (1) **[An electronic communications facilities leasing]** A wholesale open access agreement must be in writing and must be submitted to the Authority.
(2) **[Electronic communications facilities leasing]** Wholesale open access agreements are effective and enforceable upon being filed with the Authority in the prescribed manner, unless an order of a court of competent jurisdiction is granted against such agreement or the Authority provides the parties with written notice of non-compliance in terms of subsection (6).
(3) …
(4) The Authority must, at the request of any person and on payment of such fee as may be prescribed, furnish that person with a copy of any **[electronic communications facilities leasing]** wholesale open access agreement.
(5) The Authority must review **[electronic communications facilities leasing]** wholesale open access agreements submitted in terms of subsection (1) to determine whether such agreements are consistent with the regulations prescribed.
(6) Where the Authority determines that any term or condition of **[an electronic communications facilities leasing]** a wholesale open access agreement is not consistent with the regulations, the Authority must, in writing—
(a) notify the parties of the non-complying terms and conditions; and
(b) direct the parties to agree on new terms and conditions consistent with the regulations.
(7) The parties must, upon reaching agreement and amending the non-complying terms and conditions of the **[electronic communications facilities leasing]** wholesale open access agreement, submit the amended agreement to the Authority for consideration and review.
(8) The provisions of subsections (5) and (6) apply, with the necessary changes, to such consideration and review of the amended agreement by the Authority."

Telkom Commentary

Telkom recommends that the ICASA must make its decision to approve or reject wholesale open access agreements within 20 business days of submitting same by the parties concerned. Provision must be made to allow the parties to claim the agreement or parts thereof as confidential.

17.4. **SECTION 46: NOTIFICATION OF WHOLESALE OPEN ACCESS AGREEMENT DISPUTES**

17.4.1. Substitution of the following section for section 46 of the principal Act:

"**46.** (1) A party to a dispute arising out of **[an electronic communications facilities leasing]** a wholesale open access agreement may notify the Authority, in writing, of the dispute and such dispute must be resolved, on an expedited basis, by the Complaints and Compliance Committee in accordance with the regulations prescribed by the Authority.
(2) A party who notifies the Authority of a dispute in terms of subsection (1) may, at any time, withdraw the notice in writing.
(3) A decision by the Complaints and Compliance Committee concerning any dispute or a decision concerning a dispute contemplated in section 43(5)*(c)* is, in all respects, effective and binding on the parties to the **[electronic communications facilities leasing]** wholesale open access agreement, unless an order of a court of competent jurisdiction is granted against the decision."

Telkom Commentary

Telkom recommends that the Complaints and Compliance Committee must resolve the disputes expeditiously not more than 30 business days after they are submitted.

17.5. **SECTION 47: OPEN ACCESS PRICING PRINCIPLES**

17.5.1. Substitution of the following section for section 47 of the principal Act:

"**[Facilities leasing] Wholesale open access pricing principles**
47. (1) The Authority **[may]** must prescribe **[regulations establishing a framework for the establishment and implementation of]** wholesale rates applicable to **[specified types of electronic communication facilities and associated services taking into account the provisions of Chapter 10]** deemed entities that must be cost-oriented.
(2) The Authority—
(a) must ensure that any cost recovery mechanism or pricing methodology that is mandated, serves to promote efficiency and sustainable competition, and maximise consumer benefits; and
(b) may also take account of prices available in comparable competitive markets.
(3) The Authority must ensure that any cost recovery mechanism or pricing methodology is—
(a) fair and reasonable; and
(b) non-discriminatory, unless there are pro-competitive or efficiency

justifications that exist and the cost recovery mechanism or pricing methodology does not prevent or distort competition.
(4) The regulations must be reviewed at least every three years."

Telkom Commentary

Telkom recommends that regulations contemplated in section 47(4) were reviewed every two years, instead of every three years as proposed. In Telkom's view, it is more beneficial to conduct more frequent reviews to ensure that current cost considerations and trends are being adequately considered when wholesale rates are prescribed.

18. **CHAPTER 10: COMPETITION MATTERS**

18.1. **SECTION 67: COMPETITION MATTERS**

18.1.1. Insertion of the following subsections after subsection 67(3):

"(3A) (a) The Authority must, within 12 months of the coming into operation of the Electronic Communications Amendment Act …, define all the relevant markets and market segments relevant to the broadcasting, and electronic communications sectors, by notice in the *Gazette*.
(b)The notice contemplated in paragraph (a) must set out a schedule in terms of which the Authority will conduct market reviews of the defined markets and market segments, prioritising those markets with the most significant impact on consumer pricing, quality of service and access by users to a choice of services and markets relevant to policy directions, issued by the Minister responsible for Telecommunications and Postal Services.
(3B) The Authority must, thereafter, at least every three years, review and update the market definitions and schedule in terms of which the Authority will conduct market reviews, by notice in the *Gazette*.
(3C) The Authority must give notice of its intention to define or review and update all the relevant markets and market segments in the Gazette and, in such notice, invite interested parties to submit their written representations to the Authority within such period as may be specified in such notice."

Telkom Commentary

Telkom submits that for purposes of certainty and to avoid any delays, the definition of all the relevant markets and market segments must take place within 12 months.

18.1.2. Substitution for subsection 67(4) of the following subsection:

"(4) The Authority must, when conducting a market review, prescribe regulations that must—

(a) determine whether there is effective competition in such market or market segment;
(b) determine which, if any, licensees have significant market power in such market or market segment where there is ineffective competition;
(c) impose appropriate pro-competitive license conditions on those licensees having significant market power to remedy the market failure;
(d) set out a schedule in terms of which the Authority will undertake periodic review of the market or market segment, taking into account subsection (8) and the determination in respect of the effectiveness of competition and application of pro-competitive measures in such market or market segment; and
(e) provide for monitoring and investigation of anti-competitive behaviour in the market or market segment."

Telkom Commentary

The period in terms of which the ICASA will undertake periodic review of the market or market segment must be set out clearly.

18.1.3. Substitution for subsection 67(4B) of the following subsection:

"(4B) Subject to section 4D of the ICASA Act, licensees or any other person must provide to the Authority any information specified by the Authority in order that the Authority may carry out its duties in terms of this section."

18.1.4. Insertion of the following subsection after subsection 67(4B):

"(4C) A market review under this Chapter shall not take longer than 12 months."

Telkom Commentary

Telkom welcomes the short period in which market reviews will be completed.

18.1.5. Substitution in subsection 67(7) for paragraph *(a)* of the following paragraph:

"*(a)* obligations in respect of interconnection and **[facilities leasing]** wholesale open access, in addition to those provided for in Chapters 7 and 8 and any regulations made in terms thereof;"

Telkom Commentary

As previously indicated, granting wholesale access to fixed would not be ideal as there is sufficient competition in that market. Wholesale access must only extend to mobile and only apply to those operators with significant

market power.

18.1.6. Substitution for subsection 67(8) of the following subsection:

"(8) Review of pro-competitive conditions:
(a) Where the Authority undertakes a review of the pro-competitive conditions imposed upon one or more licensees under this subsection, the Authority must**[—**
(i) review the market determinations made on the basis of earlier analysis; and
(ii)] decide whether to modify the pro-competitive conditions set by reference to **[a market determination]** the previous market review**[;]**.
(b) Where, on the basis of a review under this subsection, the Authority determines that a licensee to whom any pro-competitive conditions apply, is no longer a licensee possessing significant market power in that market or market segment, the Authority must revoke the applicable pro-competitive conditions applied to that licensee by reference to the previous market **[determination based on earlier analysis]** review**[;]**."

Telkom Commentary

Telkom submits that the pro-competitive conditions imposed upon one or more licensees under this subsection must only be removed after a market review pursuant to a public hearing. The power to remove the pro-competitive conditions must be exercised with caution.

18.1.7. Addition of the following subsection:

"(13) The Authority must perform the market definition and market review proceedings under this Chapter, after consultation with the Competition Commission.".

Telkom Commentary

Telkom recommends that the terms of the consultation between the Competition Commission and ICASA must be set out in the Memorandum of Agreement. This agreement must be concluded within three months of the coming into operation of the Amended Act. This agreement must allow for among others – • second of each other's economists to each other's investigation teams on a case by case basis when there is a matter in which both have jurisdiction; • mechanisms to streamline and expedite matters; • co-operation on market studies/reviews; • set out the boundaries regarding the respective mandates of the two to ensure that each body is given a mandate that is best suited to it.

18.1.8. Insertion of the following section in the Principal Act after section 67:

"**Concurrent jurisdiction agreement between Authority and Competition Commission**

67A. (1) The Authority must enter into a concurrent jurisdiction agreement with the Competition Commission in terms of section 4(3A) of the ICASA Act and such agreement must be published in the *Gazette*.

(2) The concurrent jurisdiction agreement contemplated in subsection (1) must be concluded within three months of the coming into effect of the Act.

(3) the concurrent jurisdiction agreement contemplated in subsection (1) must address all issues pursuant to the co-operation between the Authority and the Competition Commission, including—

(a) mechanisms to facilitate consultation between the Authority and the Competition Commission;

(b) the sharing of information between the two institutions; and

(c) the management of complaints, mergers, market reviews, market definitions and other relevant matters conducted by the institutions."

Telkom Commentary

Telkom welcomes the inclusion of section 67A. However, Telkom submits that the memorandum of agreement (the concurrent jurisdiction agreement) must be concluded within three months of the coming into operation of the Amendment Act. This agreement must also provide for clear timelines to resolve those matters that fall within their concurrent jurisdiction. This agreement must be published in a Government Gazette for public comment. Among several measures that can be considered would be the secondment of each other's investigative teams to each other's office when there is a matter that falls within their concurrent jurisdiction and set out the boundaries regarding the respective mandates of the two to ensure that each body is given a mandate that is best suited to it. While the use of each other's staff is already contemplated in clause 3.3 of the MOU, it does not appear to have resulted in regulatory certainty. It may be ideal to allow one regulator to take a leading role on a matter to expedite same without usurping each other's powers. Key learnings must be drawn from the United Kingdom and must be considered in evaluating a solution to cut the red tape and avoid delays. The issue has been traversed at great length in paragraph 3.7 above and will not be repeated hereunder to avoid prolixity. . The United Kingdom model which has led to a promulgation of legislation to govern this relationship may be a future model for South Africa to consider including allowing the Competition Commission to take over matters from ICASA to avoid duplication of processes and delays if is appropriate to do

so for the purpose of promoting competition, within any market or markets in South Africa for the benefit of consumers. However, if such a power were to be conferred on the Competition Commission, such a power must be exercised with great circumspection. Please refer to commentary under section 67(13) above.

19. CHAPTER 12: CONSUMER ISSUES

19.1. SECTION 69: CODE OF CONDUCT, END-USER AND SUBSCRIBER SERVICE CHARTER

19.1.1. Substitution of the following section for section 69 of the principal Act:

"**Code of conduct, end-user and subscriber service charter**

69. (1) The Authority must **[, as soon as reasonably possible after the coming into force of this Act,]** prescribe regulations, that must be reviewed at least every three years, setting out a code of conduct on consumer protection for licensees, subject to this Act and persons exempted from holding a licence in terms of section 6, to the extent such persons provide a service to the public.

(1A) The code of conduct contemplated in subsection (1) must include, without limitation, provision for the protection of different types of end-users and subscribers including persons and institutions as well as users of wholesale services.

(2) The Authority may develop different codes of conduct applicable to different types of services. All electronic communications network services licence and electronic communications service licensees must comply with the Code of Conduct for such services as prescribed.

(3) The Authority must[, **as soon as reasonably possible after the coming into force of this Act,]** prescribe regulations, that must be reviewed at least every three years, setting out the minimum standards for **[and]** end-user and subscriber service charters.

(4) The Authority may develop different minimum standards for **[and]** end-user and subscriber service charters for different types of services.

(5) The matters which an end-user and subscriber service charter **[may]** must address, include, but are not limited to—

(a) the provision of accurate, understandable and comparable information to end-users and subscribers regarding services, rates, and performance procedures;

(aA) standards of service that end-users and subscribers may expect;

(b) provisioning and fault repair services;

(c) the protection of private end-user and subscriber information;

(d) end-user and subscriber charging, billing, collection and credit practices;

(e) complaint procedures and the remedies that are available to address the matters at issue; and

(f) any other matter of concern to end-users and subscribers.

(6) Where an end-user or subscriber is not satisfied after utilising the complaint procedures set out in the regulations, his or her complaint may be

submitted to the Authority in accordance with the provisions of section 17C of the ICASA Act.
(7) The Authority must enter into a concurrent jurisdiction agreement with the National Consumer Commission in terms of section 4(3A) of the ICASA Act, to ensure co-ordination of consumer protection within the ICT sector."

Telkom Commentary

There is a risk that the regulations on quality will preclude operators from being able to differentiate between their customers and lead to inequitable outcomes. While section 69(4) appears to empower the Authority to "develop different minimum standards for **[and]** end-user and subscriber service charters for different types of services", Telkom is concerned that the preceding section 69(3) does not provide certainty on the meaning of "setting out the minimum standards for **[and]** end-user and subscriber charters" as opposed to minimum performance standards for licensees on different types of services.

The End User Subscriber Quality Regulations/Charter is sufficient to deal with any concerns relating to services standards.

ICASA should remain the primary authority in overlapping matters while National Consumer Commission ("**NCC**") should provide non-binding recommendations on specific issues falling within the NCC jurisdiction (ICASA should take leading role with the role of NCC being limited making recommendations).

Section 69(1A) introduces consumer protection of "institutions as well as users of wholesale services". Telkom is concerned that there is no apparent reasoning for the introduction of consumer protection of institutions and users of wholesale services.

Telkom Proposed Amendment Wording

*"(3) The Authority must **[, as soon as reasonably possible after the coming into force of this Act,]** prescribe regulations, that must be reviewed and updated at least every two years, setting out the minimum standards for **[and]** end-user and subscriber charters that include minimum performance standards for licensees on different types of services."*

19.1.2. Insertion of the following section in the principal Act after section 69:

"**Quality of service**
69A. (1) The Authority must make regulations prescribing quality of service standards for each category of licence, which must be reviewed at least every three years.
(2) The standards contemplated in subsection (1) must include matters relating to—

(a) broadband download and upload speeds and latency, together with waiting time for installation and fault clearance;
(b) the defined level of technical quality such as call quality and success rates;
(c) timeframes for service installations;
(d) requirements to ensure reliability and robustness of services;
(e) the required level of customer service, including the handling and resolution of complaints and disputes;
(f) minimum requirements to meet the needs of persons with disabilities; and
(g) standards to ensure quality of emergency services.
(3) Subject to subsection (2), the Authority must, in preparing quality of service standards, take account of guidelines issued by the ITU, as well as best practice in other jurisdictions.
(4) The Authority must promote public awareness of the quality of service standards.
(5) Licensees must publish information for end-users and subscribers on the quality of their services which information must also be supplied to the Authority.
(6) The Authority may prescribe the quality of service parameters to be measured, and the content, form and manner of information to be published by licensees.
(7) The Authority must monitor and evaluate the national broadband policy targets in SA Connect and compliance with broadband quality of service standards on an ongoing basis, and make recommendations to the Minister responsible for Telecommunications and Postal Services every two years regarding the review of the national broadband policy targets, as necessary."

Telkom Commentary

Please refer to Telkom's concerns under section 69 and the definition of "**broadband**" above.

20. **CHAPTER 13: GENERAL**

20.1. **SECTION 74: OFFENCES AND PENALTIES**

20.1.1. Addition of the following subsection:

"(6) A person who fails to comply with a notice issued under section 67(4B) is guilty of an offence and liable, upon conviction, to a fine not exceeding R5 000 000."

Telkom Commentary

The powers in terms of section 74(6) must be exercised with the utmost caution. Notices issued under section 67(4B) must clearly indicate that failure to comply with such notices may result in that party being guilty of an offence and liable, upon conviction, to a fine not exceeding R5,000,000."

20.1.2. Insertion of the following section in the principal Act after section 79B:

"**Market performance report**
79C. (1) The Authority must annually publish a market performance report in respect of the broadcasting, electronic transactions, postal and electronic communications sectors, which report must—
(a) include assessment of affordability of services, accessibility to services, quality of service, impact on users of market trends, expected market trends and compliance by licensees with conditions and obligations set;
(b) consider the effects of convergence, including monitoring of the extent and impact of horizontal and vertical integration and bundling of services; and
(c) consider the impact of policy and legislation.
(2) Subject to section 4D of the ICASA Act, licensees must provide to the Authority any information specified by the Authority in order that the Authority may carry out its duties in terms of this section.
(3) The Authority must submit the market performance report to the Minister and Parliament within 30 days of publication."

Telkom Commentary

Telkom submits that the information to be sought by ICASA in terms of section 79C(2) must be for the sole purpose of publishing the market performance report. Provision must be made by ICASA to treat the confidential information of licensees with the utmost care to avoid it being disclosed to other licensees.

21. CHAPTER 14: UNIVERSAL SERVICE AND ACCESS AGENCY OF SOUTH AFRICA

21.1. SECTION 82: FUNCTIONS OF AGENCY

21.1.1. Substitution in subsection 82(3)*(a)* for the words preceding subparagraph (i) of the following words:

"The Agency must from time to time, with due regard to circumstances and attitudes prevailing in the Republic, including the needs of persons with disability and broadband, and after obtaining public participation to the greatest degree practicable, make recommendations to enable the Minister to determine what constitutes—"

21.2. SECTION 88: APPLICATION OF MONEY IN UNIVERSAL SERVICE AND ACCESS FUND

21.2.1. Addition of the following subsection:

"(4A) In exercising the powers contemplated in subsection (4), the Agency must consider the needs of persons with disabilities in assessing the access

gap and setting universal service and access definitions and targets."

22. **CHAPTER 15: TRANSITIONAL PROVISIONS**

22.1. **SECTION 94: CONFLICTS**

22.1.1. Addition of the following subsections:

"(2) In the event of any conflict between the provisions of this Act and any regulations made in terms of this Act prior to the commencement of the Electronic Communications Amendment Act,…., the provisions of this Act prevail.
(3) Any regulations made in terms of this Act prior to the commencement of the Electronic Communications Amendment Act… that are inconsistent with any provision of this Act, must be reviewed by the Authority within a period of 24 months from the date of commencement of the Electronic Communications Amendment Act…"

Telkom Commentary

Telkom supports the insertion of transitional provisions to address any conflicting regulation of the ECA. Telkom urges that the DTPS must be mindful to provide consistent and effective clarity in respect of any conflict of laws in terms of section 94(3).

22.2. **SECTION 95: EXISTING REGULATIONS**

22.2.1. Addition of the following subsection:

"(3) Any regulations made in terms of this Act prior to the commencement of the Electronic Communications Amendment Act, …., remain in force until they are amended or repealed in terms of this Act."

Telkom Commentary

Telkom supports the insertion of transitional provisions in the Amendment Bill. Telkom reiterates that the current Radio Frequency Spectrum Regulations, 2015 and various Radio Frequency Spectrum Assignment Plans prescribed for IMT frequency bands. Consequently, Telkom urges the DTPS to be mindful of any potential vacuums created regarding certain regulations that are currently in force, or where no regulations have been prescribed.

23. **SCHEDULE TO THE PRINCIPAL ACT**

Amendment of the ICASA Act in terms of the Schedule to the Principal Act

23.1. Insertion after the definition of "Broadcasting Act" of the following definition:

"B-BBEE ICT Sector Code" means the Broad-Based Black Economic Empowerment Information, Communications and Technology Sector Code, a sector code on broad-based black economic empowerment, issued in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and

23.2. Deletion of the definition of "policy directions"

23.3. Substitution for subsection 4(3)(c) of the following subsection:

"(c) must **[control, plan,]** administer and manage the **[use]** assignment **[and]**, licensing monitoring and enforcement of the radio frequency spectrum use in accordance with bilateral agreements or international treaties entered into by the Republic"; and

23.4. Substitution for subsection 4(3)(k) of the following subsection:

"(k) **[may]** must make regulations **[on empowerment requirements]** to apply the B-BBEE ICT Sector Code to existing and new licences or exemptions, including spectrum assignment to promote broad-based black economic empowerment within 12 months of the promulgation of the Electronic Communications Amendment Act, 201….".

Telkom Commentary

Telkom's concerns in respect of the provisions relating to B-BBEE are dealt with under section 9(2)(b) above.

23.5. Substitution for subsection 4(3A) of the following subsection:

"(3A) The Authority, in exercising its powers and performing its duties—
(a) must consider policy made, and policy directions issued, by the Minister in terms of this Act, the underlying statutes and any other applicable law; **[and]**
(aA) must act in accordance with any policy or policy directions issued by—
(i) the Minister responsible for Communications or the Minister responsible for Telecommunications and Postal Services in terms of sections 3(1)*(e)* or 3(2)*(d)* of the Electronic Communications Act; or
(ii) the Minister responsible for Telecommunications and Postal Services in terms of sections 19A(3) or 30(2)*(a)* of the Electronic Communications Act; and
(b) may conclude a concurrent jurisdiction agreement with any relevant authority or institution and must, at least once every three years, where necessary, review and revise the agreement by agreement with the authority or institution in question, subject to sections 67A and 69(7) of the Electronic Communications Act."

END OF SUBMISSION