20 November 2018

Vodacom's submission providing written comments on the Electronic Communications Amendment Bill as tabled in Parliament on 19 September 2018

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1. Introduction

Vodacom Pty Ltd ("**Vodacom**") wishes to thank Parliament for the opportunity to provide written comments on the Electronic Communications Amendment Bill as tabled in Parliament on 19 September 2018.

Vodacom is a committed investor and leading provider of communications services in South Africa and understands the centrality of communications to achieving the Government's National Development Plan for South Africans in terms of creating jobs, supporting growth of the economy and furthering healthcare and education. These opportunities will be realised through new and more widespread mobile and fixed communications technologies, if a supportive climate for investment and an appropriate regulatory framework is established.

Vodacom's comments are structured as follows:

Section 2: Executive Summary

Section 3: The new Chapter 3A - the WOAN

Section 4: Amendments to Chapter 5 – radio spectrum

Section 5: Amendments to Chapter 8 – open access

Section 6: Other changes

Section 7: Constitutionality of the Bill

There are five appendices to our submissions:

In **Appendix A**, we attach a report prepared by Frontier Economics.

In **Appendix B**, we attach a report prepared by Professor Martin Cave.

In **Appendix C**, we attach a technical report prepared by Northstream.

In **Appendix D**, we attach the submissions that we made on the draft Policy Direction.

In **Appendix E**, we set out the text of the Bill, with our proposed changes[1].

[1] Without prejudice to Vodacom's rights in respect of the Bill and without acknowledging that any amendments to the Act are required, Vodacom includes herewith as Appendix E, its proposed amendments to the Bill in an attempt to assist Parliament.

Glossary

2017 Bill	The Electronic Communications Amendment Bill, as published in Government Gazette number: 41261 of 17 November 2017
Act (or ECA)	The Electronic Communications Act, No. 36 of 2005
Authority (or ICASA)	The Independent Communications Authority of South Africa
Bill	The Electronic Communications Amendment Bill, as presented to Parliament on 19 September 2018
competitive WOAN	A WOAN that operates in a competitive environment with MNOs under the regulatory framework in the Act and that is assigned sufficient high demand spectrum to compete
Constitution	The Constitution of the Republic of South Africa, 1996
Department (or DTPS)	Department of Telecommunications and Postal Services
DG	Director General of the Department
dominant WOAN	A WOAN that is assigned all or substantially all of the unassigned high demand spectrum
HDS licensee	A radio frequency spectrum licensee that is assigned, or to be assigned, currently unassigned high demand spectrum, other than the WOAN
ICASA Act	The Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000)
IMT	An ITU standard for 4G radio technologies
ITA	Invitation to apply, a process followed by the Authority in assigning radio spectrum
ITU	International Telecommunications Union
LTE	Long Term Evolution, a 4G wireless broadband technology developed by the Third Generation Partnership Project (3GPP)
MNO	Mobile network operator
MVNO	Mobile virtual network operator
earlier Submissions	Our submissions to the Department, in relation to the 2017 Bill, in January 2018 and March 2018
Policy Direction	The proposed Policy and Policy Directions to the Authority on licensing of unassigned high demand spectrum, as published in the Government Gazette on 27 September 2018
submissions on the Policy Direction	Our submissions to the Department in relation to the draft Policy Direction dated 8 November 2018, attached as Appendix D

SMME	A small enterprise defined in section 1 of the National Small Enterprise Act, 1996 (Act No. 102 of 1996)
TVWS	Television white spaces
White Paper	The National Integrated ICT Policy White Paper of 3 October 2016
WOAN	Wireless or wholesale open access network

2. Executive Summary

2.1 Introduction

Vodacom supports the Government's objectives to increase broadband coverage, promote affordable broadband and innovation and transform the sector. But, in our view, these objectives can and should be achieved through promoting investment and network competition within the best practice regulatory framework in the current Act and not through the changes contemplated in the Bill.

The Policy Direction should be allowed to proceed

The Policy Direction is moving in the right direction. It envisages the establishment of the WOAN and the licensing of the unassigned high demand spectrum under the existing Act. We agree with much of what is broadly contemplated by the Policy Direction. Our assessment is that the majority of the goals set out in the White Paper can be achieved under the existing Act.

This will promote an investor-friendly environment, without detracting from the transformation and universal access objectives, and enable the timely and efficient roll-out of much needed broadband network and new technologies, for the benefit of consumers and the whole South African economy.

If the licensing of unassigned high demand spectrum proceeds under the existing Act and the Authority assigns the high demand spectrum to the WOAN and the other operators, then the aspects of the Bill related to these matters would become irrelevant and may be deleted or rendered consistent with the process achieved by the ITA contemplated in the Policy Direction.

In these submissions, however, we address the Bill generally without taking into account the fact that it may in several respects become irrelevant depending on the progress of the ITA contemplated in the proposed Policy Direction.

The Bill should not be rushed through Parliament

There is no pressing need for the Bill in our view and it should not be rushed through Parliament in its current form. The Government should pause and carefully consider the far-reaching (and we say significantly adverse) implications of the Bill for the sector and consumers. We recommend that the Policy Direction process, with the fine-tuning that we suggest in our submissions[2], continues as quickly as possible.

2.2 The WOAN

We accept a competitive WOAN, which should be capable of succeeding on its own merits, standing on its own two feet in the market and adapting to technological changes going forward.

We are concerned with provisions in the Bill that may unnecessarily preclude the involvement of substantial operators at a participation level. Vodacom wishes to have the opportunity to fully participate in the WOAN and contribute towards its success.

We accept there should be a capacity commitment from mobile operators that provides an anchor tenancy to support the WOAN's ability to raise finance. We also consider there should be a discounted price paid by the WOAN for spectrum or the ability to pay off the spectrum price over time, as well as no requirement, or an exemption, for the WOAN to comply with universal coverage obligations. In our view, these are the only incentives for the WOAN that are required.

[2] See Appendix D

Whether to grant incentives to the WOAN should be a matter for the Authority to determine, not the Minister. The Authority should conduct a cost-benefit analysis to ensure that incentives, taken together, do not unduly, unfairly or unreasonably benefit the WOAN so competition in the market is not distorted. Any such incentives should be time-limited.

2.3 Radio spectrum

The Bill includes radical changes to the existing Act in terms of erosion of independence of the Authority and the imposition of inappropriate conditions on the licensing of high demand spectrum. It also presumes a fundamental change to the way spectrum licences are renewed.

2.3.1 Erosion of the independence of the Authority

We are alarmed by the proposed erosion of the independence of the Authority under the Bill. This is particularly apparent in the area of radio spectrum, including in the assignment of high demand spectrum and the processes for assigning high demand spectrum under the Bill. The processes for assigning high demand spectrum should be undertaken by the Authority and not the Minister.

As Professor Martin Cave notes in his attached report[3]:

> "*The assignment of high value spectrum... is a highly technical matter which requires expertise which government departments may not possess. Access to such a valuable resource is often very contentious, and the assignment is often better done by a separated implementing body with specialised skills than (as in the Bill) by a Minister-led government department, which is inevitably subject to pressure from applicants and other interested parties.*"

These are operational matters, which require proper market analysis and independence from any political interference. There are also serious constitutional law issues at stake, as we discuss further below.

We also disagree with other abrogation's and erosions of the independence of the Authority, including the Minister taking over the Authority's roles in approval of universal service access and obligations and the Authority now being bound by the Minister's policy directives as opposed to taking policy directives into consideration. The Authority's role in administering Chapter 10 should also not be undermined by the changes in the Bill.

2.3.2 Spectrum licence conditions

The Bill requires that several licence conditions be included in the assignment of high demand spectrum.

The Bill includes a requirement to provide facilities leasing of networks and facilities in favour of the WOAN. In our view, the WOAN should be subject to the same facilities leasing rules as any other operator. There is already a competitive market for facilities leasing of mobile facilities and the existing regime under the Act enables the WOAN to acquire facilities leasing on non-discriminatory terms. This will enable the WOAN to quickly establish coverage in those areas where there are facilities and where it is reasonable to do so. The condition that requires facilities leasing of networks and facilities in favour of the WOAN should be removed from the Bill.

While we accept the spectrum licence conditions may include a minimum capacity commitment as an incentive for the WOAN, we don't accept that it makes sense that each HDS licensee is obliged to acquire 30% of the capacity of the WOAN. If each HDS licensee acquires 30% of the WOAN's capacity, this would mean that there will be little WOAN capacity available for MVNOs and smaller operators and

[3] Section 2, page 4, Appendix B

there could only be three, rather than four, HDS licensees. Vodacom proposes that the HDS licensees collectively commit to 30% capacity of the WOAN. The HDS licensees' licence conditions should specify that their commitment is to acquire capacity from the WOAN at fair, reasonable and non-discriminatory prices, which must be consistent with wholesale prices that are available in the market for comparable wholesale services.

We disagree with the spectrum licence condition that HDS licensees comply with the universal access and universal service obligations in rural and under-serviced areas *before* other areas. This would be highly inefficient and inconsistent with the Act's object of ensuring efficient use of the radio frequency spectrum, because licensees could not be allowed to use the high demand spectrum in areas where there is the highest capacity constraints. It would also reduce the value of the spectrum and the auction proceeds. We accept there should be universal access and universal service obligations in rural and under-serviced areas, but HDS licensees should be able to use the high demand spectrum in other areas as well. Licensees should be permitted to satisfy these obligations through sharing and roaming arrangements commercially negotiated with other operators or with the WOAN.

2.3.3 Wholesale open access and non-exclusive rights to spectrum

The Bill introduces the novel concept of wholesale open access and mandated non-exclusive rights to spectrum. Wholesale open access and non-exclusive spectrum rights will yield no efficiency gains or benefits for well-designed mobile networks.

On the contrary, any attempt to introduce multi-party sharing of a harmonised mobile band is likely to lead to unplanned network interference, even for a wholesale-only entity such as the WOAN. The changes in the Bill will risk serious undermining of investment incentives – as mobile operators invest in networks and spectrum jointly, in order to be able to offer mobile services. These proposed changes should be removed from the Bill.

2.3.4 Licence term and renewal rights

We are concerned with the operation of the provisions related to spectrum term and renewal. We propose that it be made clear that existing annual renewable spectrum licences should continue to subsist until the end of the licensee's individual licence and that multi-year spectrum licences, where the term extends beyond the term of the licensee's individual licence, should include an extension of the individual licence until the end of the spectrum licence term. This preserves the status quo in respect of existing annual renewable spectrum licences, allowing the new regulatory framework for spectrum renewal to be forward-looking.

2.4 Wholesale open access

The Bill includes a radical set of changes to impose wholesale open access on licensees. For mobile operators, the Bill includes an additional layer of intrusive and onerous provisions.

These changes are disproportionate, arbitrary and intrusive. We do not agree that virtually all licensees in a competitive market should have to provide open access to all their assets (networks, systems and facilities), whether or not it is reasonable to do so.

We do not agree that all mobile operators should provide open access at cost-oriented rates to potentially their entire mobile communications network, systems and services. This is practically the most intrusive intervention possible. It is unprecedented in any other competitive sector in South Africa, as far as we are aware, and is unheard off in any mobile telecommunications market around the world, where governments are aiming to incentivise investment to promote mobile broadband.

Vodacom considers that the Authority already has the tools available to it to achieve the Government's objectives and that it should use those tools instead of circumventing the balanced regulatory

framework in Chapters 8 and 10 by the changes in the Bill. Vodacom submits that it is essential to maintain the current provisions for facilities leasing under Chapter 8 and appropriate pro-competitive measures imposed after a proper market review under Chapter 10.

2.5 Current legislation is fit for purpose

In our view, the existing Act is fit for purpose and does not require radical change as proposed in the Bill. As we have seen from the Policy Direction in relation to the WOAN and the Priority Markets review process, the existing Act is able to successfully accommodate a broad range of Government policy objectives and regulatory processes. It compares favourably to international best practice in almost every aspect.

As well as the areas referred to above that should *not* be changed (facilities leasing, wholesale open access, exclusive spectrum rights, the Authority's independence, etc.), there are many other parts of the Bill where change is unnecessary and harmful. These include:

- Spectrum refarming provisions;
- Universal access and universal service provisions; and
- New objects provisions.

There are other areas of the Bill where we recognise there is the potential for some improvement, such as rapid deployment, international roaming and the end user and subscriber service charter, although we don't see these as being urgent in any sense and in each case have some flaws that would need to be resolved.

2.6 Constitutional issues with the Bill

The Bill entails several severe constitutional shortcomings. We address them in section 7 below. Fundamentally, the Bill entails a violation of the independence of the Authority entrenched in section 192 of the Constitution. It also entails several violations of basic requirements of the Rule of Law, that laws be clear and not vague, and that they not be arbitrary. The Bill also entails unjustifiable arbitrary deprivation of property.

2.7 Economic impact of the Bill

Vodacom asked Frontier Economics to provide an empirical analysis to quantify the economic impact of the Bill. They considered the direct consumer losses in the mobile sector, but also in the wider economy, as slower growth in the mobile industry as a result of the Bill will have indirect effects on GDP, employment and tax income in South Africa.

In its attached report, Frontier Economics considers that[4]:

> *"… if the 2018 Bill proposals are fully implemented, we would expect the mobile market in South Africa to move towards a market outcome constrained by increased regulatory uncertainty, lower and delayed investment, and much slower deployment of new mobile technologies. … [t]here is still a significant risk that network competition will be distorted through a preferential treatment of the WOAN, , at the expense of competition and ultimately SA consumers."*

They conclude that[5]:

[4] Section 3.2.2, Appendix A
[5] Section 3.3.1, Appendix A

- Mobile data prices would be up to 16% higher with the Bill, as a result of increased unit costs through slower migration to new technologies;

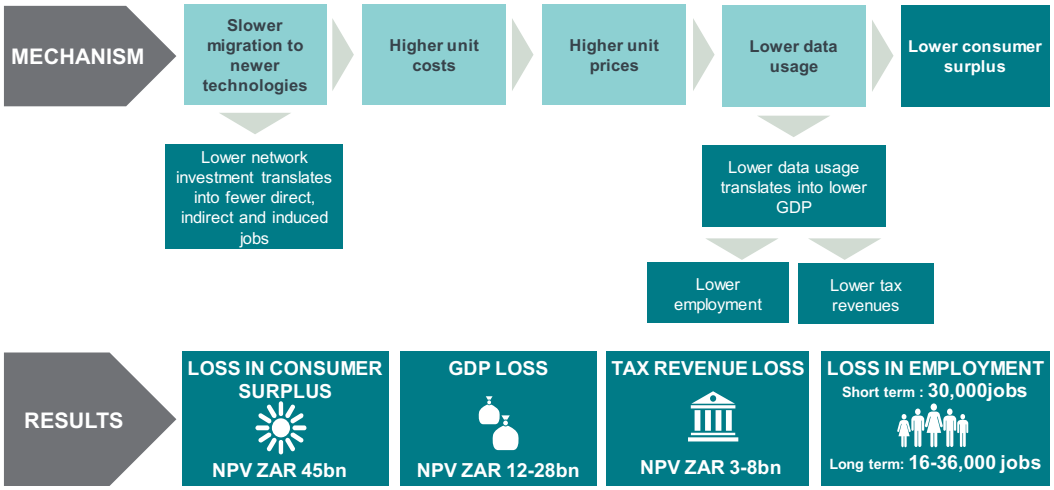
- As a result of these higher prices, usage of mobile data would be significantly lower under the Bill, with usage being between 6% and 16% lower than without the Bill over 2025-2030. This translates to the average consumer in South Africa consuming 415MB less data per month by 2030;

- These impacts could translate to a significant reduction in consumer benefits, with an estimated loss in consumer surplus from 2020 to 2040 of **ZAR 45bn** in NPV terms; and

- The loss in consumer surplus would still be significant even when considering potential benefits from the Bill, with the "net" loss in consumer surplus estimated at **ZAR 32bn**.

The slower deployment of next generation mobile technologies will also have a wider negative economic impact, because of the pivotal role broadband plays in supporting economic development and growth – as recognised by SA Connect. Frontier Economics estimated the following negative impacts under the Bill[6]: GDP would be lower by ZAR 12-28bn, tax by ZAR 3-8 bn, and c. 30,000 fewer jobs in the transitional period and 16,000 to 36,000 fewer jobs would be created in the longer term.

The following diagram summarises Frontier Economics' conclusions on the economic impact of the Bill:



Source: Frontier Economics

[6] Section 3.3.2, Appendix A

3. Chapter 3A

Part A Introduction

3.1 Introduction

The Bill introduces a new Chapter 3A dealing with the licensing of a WOAN.

The Bill was published prior to the Policy Direction, which envisages the establishment of the WOAN and the licensing of the unassigned high demand spectrum under the existing Act. Chapter 3A is at odds with the Policy Direction in two main respects:

- first, sequentially, the Policy Direction proceeds from the assumption that the licensing of the unassigned high demand spectrum will occur under the existing Act, without the changes in the Bill being required; and

- second, substantially, the Policy Direction is quite different to the provisions in Chapter 3A.

For the purposes of these submissions, we have assumed that Chapter 3A will apply to the establishment of the WOAN and the licensing of the unassigned high demand spectrum.

In our submissions on the Policy Direction, which we attach as Appendix D, we said that the CSIR Study envisaged the assignment of too much high demand spectrum to the WOAN and that the Policy Direction contemplated other WOAN incentives that are likely to distort competition and/or may be beyond the scope of the Act. We have made alternative proposals on the assignment of high demand spectrum to the WOAN and through the ITA.

If the process envisaged in the Policy Direction is finalised by the Department addressing the points that we raised, and the high demand spectrum is licensed under the existing Act, then we believe that the changes proposed in Chapter 3A will be largely irrelevant and so should either be deleted or rendered consistent with the Policy Direction.

In this section 3, we discuss our particular concerns regarding Chapter 3A in relation to:

- requirements for the applicant for a WOAN licence; and

- incentives that may be granted to the WOAN.

Part B Critique of the Bill

Our key critique of the Bill

Vodacom does not wish to be disqualified from participation in the WOAN or to be limited in joining a consortium with other operators. We are concerned that the Bill may unnecessarily preclude the involvement of substantial operators at a participation level and adversely affect the WOAN's chances of success.

Whether to grant incentives to the WOAN should be a matter for the Authority to determine, not the Minister. The Authority should ensure that incentives do not unduly, unfairly or unreasonably benefit the WOAN so competition in the market is not distorted. The Authority should also ensure that the WOAN will be in a position to stand on its own two feet in the market, and adapt to technological changes going forward. As such, any incentives should be time-limited.

3.2 Requirements for the applicant for a WOAN service licence

Section 19A sets out in detail the requirements for an applicant for the WOAN service licence, to be granted under that provision.

3.2.1 Market share requirements

Section 19A(1)(g) states that an applicant *"... may not have members in the consortium that either separately or collectively possess a market share of more than 50% in electronic communication services*".

At a high level, this requirement appears to be designed to limit the involvement of substantial operators, such as Vodacom, from being members of the consortium. This is quite different to the approach in the Policy Direction, as well as the White Paper, which envisaged that existing electronic communications network service licensees could participate in the WOAN[7]. We believe that paragraph (g) is unnecessary, especially when there is a limitation on control by a single entity under paragraph (e).

It is not clear what the logic is of a restriction on operators collectively having a high market share. After all, the resources and expertise of players in the industry would be invaluable in ensuring success for the WOAN. As long as control by a single entity is avoided, it makes little sense to restrict membership of the WOAN.

Vodacom wishes to have the opportunity to be a participant in the WOAN and wants to ensure its success. We do not wish to be disqualified from participation in the WOAN or to be limited in joining a consortium with other operators. We are concerned that the Bill may unnecessarily preclude the involvement of substantial operators at a participation level and adversely affect the WOAN's chances of success.

3.2.2 Controlled by a single entity

Paragraph (e) provides that the WOAN "... *may not be dominated or controlled by any single entity*". This was not a requirement in the Policy Direction.

Vodacom agrees with the principle that the WOAN should not be controlled by a single entity. We recommend removing the reference to "dominated". We assume the Government intends it to mean the same thing as control, but if so then this adds confusion by having two words meaning the same thing. It is also confusingly similar to "dominant", which is used elsewhere in the Act by reference to market power, which is not what is meant here.

3.2.3 Functional separation

If section 19A(2) is intended to mean that the WOAN will be a separate legal entity, then we agree. We have proposed language to make this clear.

If section 19A(2) means that there is a requirement for the functional separation of a shareholding operator to participate in the WOAN, then we do not agree. If the WOAN is a separate legal entity to any shareholding operator, then this creates an arm's length governance arrangement and a transparent interface point that may be observed by the Authority.

3.3 Incentives that may be granted to the WOAN

[7] White Paper, paragraph 9.1.6, page 79

Section 19A(7) requires the Authority to consider the terms and conditions (presumably of wholesale open access arrangements provided by the WOAN) and incentives.

As we stated in our submissions on the Policy Direction, while we believe that questions of incentives should properly be considered and consulted on by the Authority, it is important that the Authority must first consider *whether* to grant these incentives. Whether to grant incentives is a matter for the Authority to determine, not the Minister through policy directions.

The Authority should not be required to act "in accordance with" policies or policy directions issued by the Minister in section 19A(7). This is a significant, unnecessary and inappropriate change to the existing Act. As we note in section 7, it is in any event a major unconstitutional violation of the independence of the Authority to provide that policy directions should be binding on the Authority.

As we submitted in our comments on the Policy Direction, the Authority should determine the final incentive package for the WOAN, following a section 4B inquiry, with an appropriate cost-benefit analysis. In considering whether to grant incentives for the WOAN, and what incentives may be appropriate, the Authority should ensure that incentives do not unduly, unfairly or unreasonably benefit the WOAN so competition in the market is not distorted. The Authority should also ensure that the WOAN will be in a position to stand on its own two feet in the market, and adapt to technological changes going forward. As such, any incentives should be time-limited.

We also note that the amount of high demand spectrum to be assigned to the WOAN is relevant to the question of what incentives may be granted. If the WOAN receives an excessive amount of high demand spectrum, then any case for further incentives for the WOAN, such as preferential payment conditions, is substantially weakened.

3.3.1 Refraining from prescribing wholesale rates

In general, Vodacom opposes the determination of wholesale rates on the WOAN, or any other operator, except following a Chapter 8 or a Chapter 10 process. But if wholesale rates are determined under Chapter 8 or Chapter 10, there should be no refraining from applying these rates for the WOAN.

3.4 Other WOAN matters

Section 19A(3) and (4) sets out the basic requirements for the provision of wholesale open access by the WOAN. Paragraph (3) deals with providing wholesale open access to consortium members and paragraph (4) deals with providing wholesale open access to other persons.

Please see section 5.2 below on our discussion more generally of the changes to Chapter 8 to introduce wholesale open access.

Given that the WOAN will be subject to non-discrimination requirements, we don't believe there should be a separate provision dealing with wholesale open access provided by the WOAN to members. Section 19A(3) and (4) are confusing, in that it suggests that members may be treated differently to non-members, whereas the application of non-discrimination principles means they must be treated the same.

Part C Proposals

3.5 Amendments to the Bill

We set out our proposed changes to the Bill in greater detail in Appendix E. The changes include the following:

3.5.1 Requirements for the applicant for a WOAN service licence

Section 19A(1)(e) should be amended so that it reads "may not be controlled by any single entity".

Section 19A(1)(g), which precluded an operator or operators collectively with greater than 50% market share, should be deleted.

We propose a new paragraph (g) that makes it clear that the WOAN must be a wholesale-only entity.

3.5.2 Functional separation

Section 19A(2) requiring functional separation should be deleted and replaced with "The wireless open access network service licensee must be a separate legal entity from the members of the consortium", as discussed in section 3.2.3 above.

3.5.3 Wholesale open access agreements

Sections 19A(3) and (4) should be deleted. Access seekers can rely on facilities leasing under Chapter 8 or, where necessary, under Chapter 10.

3.5.4 Incentives

In section 19A(7)(b) it should be clear that the Authority determines whether to grant incentives subject to Chapter 10 and there should be a proviso added at the end of section 19A(7) saying "provided that any such incentives do not unduly, unfairly or unreasonably benefit the wireless open access network service licensee".

4. Amendments to Chapter 5

Part A Introduction

4.1 Introduction

The Bill makes several far-reaching changes to Chapter 5, dealing with radio spectrum.

The changes to Chapter 5 in the Bill give rise to a number of key issues:

- Assignment of high demand spectrum by the Minister;
- Spectrum licence conditions for high demand spectrum, including facilities leasing, capacity pre-commitments and universal access and universal services obligations;
- Wholesale open access and non-exclusive rights to spectrum; and
- Licence renewal rights.

In addition, Chapter 5 raises concerns regarding the constitutionally-protected independence of the Authority, as well as infringements of Vodacom's constitutionally-protected rights to property, which we address more fully in section 7 below.

As with Chapter 3A, if the process envisaged in the Policy Direction is finalised by the Department addressing the points that we raised, and the high demand spectrum is licensed under the existing Act, then we believe that the changes proposed in Chapter 5 will be largely irrelevant and so should either be deleted or rendered consistent with the Policy Direction.

Part B Critique of the Bill

Our key critique of the Bill

Assignment of high demand spectrum

Vodacom supports an independent regulatory authority and is opposed to the Minister's role in assignment of high demand spectrum and the processes for assigning high demand spectrum under the Bill. The processes for assigning high demand spectrum should be undertaken by the Authority and not the Minister.

Spectrum licence conditions

In terms of spectrum licence conditions, the WOAN should be subject to the same **facilities leasing** rules as any other operator. There is already a competitive market for facilities leasing of mobile facilities and the existing regime under the Act enables the WOAN to acquire facilities leasing on non-discriminatory terms. This would enable the WOAN to quickly establish coverage in those areas where there are facilities and where it is reasonable to do so.

While we accept the spectrum licence conditions may include a **minimum capacity commitment** as an incentive for the WOAN, we don't accept that it makes sense that each HDS licensee is obliged to acquire 30% of the national capacity of the WOAN. If each HDS licensee acquires 30% of the WOAN's capacity, this would mean that there will be little WOAN capacity available for MVNOs and smaller operators and there could only be three, rather than four, HDS licensees. Vodacom proposes that the HDS licensees collectively commit to 30% capacity of the WOAN. The HDS licensees' licence conditions should specify that their commitment is to acquire capacity from the WOAN at fair, reasonable and non-discriminatory prices, which must be consistent with wholesale prices that are available in the market for comparable wholesale services.

The spectrum licence condition that HDS licensees comply with the **universal access and universal service obligations** in rural and under-serviced areas *before* other areas would be highly inefficient. It would not be consistent with the Act's object of ensuring efficient use of the radio frequency spectrum, because licensees could not be allowed to use the high demand spectrum in areas where there is the highest capacity constraints. It would also reduce the value of the spectrum and the auction proceeds.

Wholesale open access and non-exclusive rights to spectrum

Wholesale open access and mandated non-exclusive rights to spectrum for well-designed mobile networks will yield no efficiency gains or benefits. On the contrary, any attempt to introduce multi-party sharing of a harmonised mobile band is likely to lead to unplanned network interference, even for a wholesale-only entity such as the WOAN.

Licence term and renewal rights

We are concerned with the operation of the provisions in the Bill related to spectrum term and renewal. We propose that it be made clear that existing annual renewable spectrum licences should continue to subsist until the end of the licensee's individual licence and that multi-year spectrum licences, where the term extends beyond the term of the licensee's individual licence, should include an extension of the individual licence until the end of the spectrum licence term. This preserves the status quo in respect of existing annual renewable spectrum licences, allowing the new regulatory framework for spectrum renewal to be forward-looking.

4.2 The Authority should be responsible for the assignment of high demand spectrum

Under section 31E in the Bill, the Minister will determine what constitutes high demand spectrum and which unassigned high demand spectrum must be reserved for assignment to the WOAN and so how much is available to other licensees. This is not possible under the current Act and the recently published Policy Direction accordingly correctly contemplates the Authority making this decision.

While Vodacom accepts the Government has a role in setting general spectrum policy direction, we do not support an outcome where the planning and allocation of spectrum is controlled by the Minister, and the Authority's role is limited to the administration and management of the assigned spectrum. The changes in the Bill that give the Minister authority over assignment decisions will undermine the Authority's independent role in controlling, planning, administering and managing the use and licensing of the radio frequency spectrum as contemplated under the Act (section 30(1)).[8] These are operational matters, which require proper market analysis and independence from any political interference.

As Professor Martin Cave notes in his attached report[9]:

> "*The assignment of high value spectrum… is a highly technical matter which requires expertise which government departments may not possess. Access to such a valuable resource is often very contentious, and the assignment is often better done by a separated implementing body with specialised skills than (as in the Bill) by a Minister-led government department, which is inevitably subject to pressure from applicants and other interested parties.*"

[8] The Authority's role under section 30(1) is limited under the changes in the Bill to "administers and manages the assignment, licensing, monitoring and enforcement" of spectrum use. The Authority will no longer have responsibilities for controlling or planning spectrum use.

[9] Section 2, page 4, Appendix B

4.3 Spectrum licence condition that the licensees provide wholesale open access to the WOAN is not required

Section 31E(4)(a) imposes a condition that "... *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*".

Our main concern is that leasing of electronic communications networks and facilities should not be mandated, through licence conditions, in favour of the WOAN. These services are available through commercial negotiations and, where necessary, appropriate remedies may be available for the WOAN through the Chapter 8 and Chapter 10 processes.

We have no issues with commercially negotiated wholesale roaming agreements. If the WOAN wishes to have national roaming or facilities leasing, then we expect there will be competition between the operators for the WOAN's business and that the outcome will be an acceptable commercially negotiated agreement[10].

The WOAN can lease the facilities of a licensee, to allow the WOAN to quickly begin providing wholesale services to its customers as soon as it is ready to do so, under the broad framework of the existing Chapter 8 of the Act. Chapter 8 provides that an ECNS licensee must, on request, lease electronic communication facilities to any other licensee in accordance with terms and conditions of an electronic communication facilities leasing agreement entered into between the parties, unless such request is unreasonable. The 2010 facilities leasing regulations (the **Leasing Regulations**) provide further details of the procedures and principles for these electronic communication facilities leasing agreements.

Any mandated leasing of electronic communications networks may only apply to operators with significant market power in markets which are proven to fail, following a proper review process under Chapter 10. It should not just be imposed on all HDS licensees as a licence condition.

We propose that paragraph (a) be removed entirely from the Bill, but if it is retained then the inconsistency between this paragraph (a) and the definition of wholesale open access in the Bill, that introduces vagueness, needs to be resolved. The definition of wholesale open access in the Bill requires a licensee to make available an "electronic communications network service" or "electronic communications facility". Whereas, paragraph (a) above requires wholesale open access to its "electronic communications networks" or "electronic communications facilities". So, the definition requires access to electronic communications *network services*, whereas paragraph (a) requires access to electronic communications *networks*. Both the terms are defined in the Act and cannot be used interchangeably, as they do not have the same meaning.

4.4 Spectrum licence commitment to acquire WOAN capacity requires adjustment

Paragraph (b) requires that "*the radio frequency spectrum licensee procures a minimum of 30% capacity or such high[er] capacity as determined by the Authority, in the wireless open access network service contemplated in section 19A, for a period determined by the Authority".*

4.4.1 Minimum capacity commitment

Vodacom disagrees that each HDS licensee must acquire 30% of the capacity of the WOAN. If each HDS licensee acquires 30% of the WOAN's capacity, this would mean that:

[10] Cell C and Telkom have both been able to secure successful and enduring mobile national roaming arrangements through commercial negotiations. Recently, Telkom switched from one national roaming provider (MTN) to another (Vodacom), providing further evidence that the wholesale market for national roaming is working effectively.

- there will be little WOAN capacity available for MVNOs and smaller operators; and

- there could only be three, rather than four, HDS licensees.

A key objective for the Government in establishing the WOAN is to provide a platform for MVNOs and smaller operators to indirectly acquire access to spectrum and to enjoy the benefits of scale and facilitate their access into the mobile retail market. If each HDS licensee acquires 30% of the WOAN's capacity, this would mean that there will be little WOAN capacity available for MVNOs and smaller operators. The purpose of the WOAN is to increase services-based competition and the inclusion of smaller players, not to provide additional capacity for the existing MNOs.

It also means that, if four HDS licensees are obliged to take-up 30% capacity each, it effectively amounts to a total capacity commitment of 120%, which is not logical. Our spectrum proposals in our submissions on the Policy Direction are that there should be four HDS licensees, which would potentially allow four established mobile operators and the WOAN to acquire high demand spectrum in equal blocks in the auction.

Vodacom proposes that the HDS licensees collectively commit to 30% capacity of the WOAN. The WOAN will approach the HDS licensees to purchase capacity and, if the capacity procured collectively equals or exceeds 30%, the above capacity commitment will be met. In the instance where the capacity procured by the HDS licensees does not equal 30%, they will be obliged to procure the remainder of the 30% capacity from the WOAN (in proportion to their relative market shares).

4.4.2 Meaning of capacity

The Authority should determine, as part of a section 4B inquiry, what is meant by capacity and the nature of the obligation to procure capacity.

If an HDS licensee is acquiring some percentage of the WOAN's capacity as a condition of its licence, that licensee's likely demand for that capacity would primarily be in urban areas and primarily at peak times. It is an important point that HDS licensees should not be required by the procurement commitment to take capacity from areas where there is no demand for that capacity.

Also, the capacity that must be procured by HDS licensees should relate to the WOAN's own capacity where it has its own operational network. The capacity shouldn't include, for example, capacity that the WOAN acquires from obtaining access to an electronic communications network service, e.g., roaming on another party's network. This would create a perverse outcome, where the WOAN acquires whole network services from an MNO, only to sell it back to that MNO as part of its capacity commitment.

4.4.3 Fair, reasonable and non-discriminatory pricing of capacity

In respect of the mandated minimum capacity commitment of the HDS licensees to the WOAN, the HDS licensees are captive buyers from the WOAN. As such, the WOAN faces no competition for selling this capacity and HDS licensees must purchase it from the WOAN as a result of their licence condition.

We believe that the HDS licensee's licence conditions should specify that their commitment is to acquire capacity at fair, reasonable and non-discriminatory prices, which must be consistent with wholesale prices that are available in the market for comparable wholesale services.

There is an established market among the MNOs for providing comparable wholesale services for MVNOs and national roaming and so the prices that the HDS licensees pay to the WOAN for capacity should be consistent with these wholesale prices.

4.5 Spectrum licence condition for universal service is inefficient

Paragraph (c) provides that "*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*".

This "outside-in" requirement will result in an inefficient use of radio frequency spectrum because it would deny an HDS licensee the right to immediate use of the high demand spectrum, especially the spectrum in the 2600MHz band which would likely be used for the deployment in the areas where there are capacity constraints, i.e., the urban and sub urban areas. As a result, it would be inconsistent with the objects of the Act that require the efficient use of radio spectrum.

Service quality in these capacity constrained areas will decrease because operators will be unable to efficiently address the capacity constraints and there will be delay in the deployment of the latest technology and investment where the need for it is most prevalent and economic impact the highest.

Operators in South Africa are starved of access to high demand spectrum, which is critical for the provision of high speed data services[11]. This has led to inefficient levels of densification of networks, which drives up the cost to communicate, and refarming of spectrum that could have been used to provide 2G and 3G services.

Licensees should be allowed to use spectrum in a technology and geographically-agnostic way. While we support the deployment of broadband services in rural and underserviced areas and licensees being obliged to deploy networks in these areas, this should be done in a way which does not compromise service delivery in urban and sub-urban areas.

4.6 Requirement for open access and non-exclusive assignment of high demand spectrum is unworkable

Under the new section 31E(2) in the Bill:

> "*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*"

These are novel concepts as applied to high demand spectrum. In its attached report, Frontier Economics states that[12]:

> *"The imposition of blanket measures mandating the non-exclusive use and control of spectrum for new licences (either as a result of open access obligations or non-exclusive spectrum assignment) is unprecedented in high demand spectrum bands. It would undermine materially the incentives of MNOs to acquire spectrum licences and undertake investments in LTE and next generation technologies…".*

4.6.1 Non-exclusive assignment of spectrum

There are a multitude of problems that arise with non-exclusive assignment of spectrum.

First, network operators can only invest with certainty to ensure high quality, efficient and high capacity networks, and a reliable customer service experience, if they are permitted to make full and exclusive use of assigned frequencies on every radio site installation and manage the interference between

[11] European operators are now operating four frequency layer 4G networks with approximately 2x60MHz total 4G deployment. By contrast, Vodacom has 2x38MHz and 1x5MHz in total (all technologies), a sizeable customer base, with many of these being 2G and 3G customers that need to continue to be supported.

[12] Section 2.1.1, Appendix A

neighbouring sites. This applies to network as well as to spectrum, because operators invest in network and spectrum jointly. If they cannot ensure a quality network and reliable customer service, because they do not have exclusive spectrum rights, then this will seriously undermine their incentives to invest.

Second, even if the non-exclusive use of spectrum provisions apply only to future spectrum awards, they would still have a material dampening impact on investment incentives 'today', in view of the long periods (15-20 years) over which mobile operators typically recover their investments.

Third, there are no global standards for non-exclusive spectrum assignment and no widespread adoption of the required technology. This means that assignment of spectrum, other than on an exclusive basis, will create insuperable technical problems for any licensee, including the WOAN.

Fourth, spectrum licensees have specific statutory and licence rights and responsibilities (quality of service, coverage, etc.) that may only be enjoyed or discharged if the licensee has control of the spectrum. If the spectrum licensee has to share its spectrum with others, then it risks losing that control over the spectrum. This means the spectrum licensee may be unable to enjoy the rights, and unable to discharge the responsibilities, associated with that spectrum.

Fifth, non-exclusive rights are inconsistent with many of the other aspects of the Bill and the Act. For example concepts of "spectrum trading" and "spectrum sharing", sought to be regulated by the Bill, are premised on exclusive rights to spectrum inhering in the licensee, and are entirely contradictory to a notion of "non-exclusive" spectrum.

Sixth, uncertainty over spectrum rights will flow through to the value of spectrum. The greater the uncertainty, or the greater the limitations that apply, the less the value of the spectrum to the licensee.

Mandated spectrum sharing for well-designed mobile networks will yield no efficiency gains or benefits. On the contrary, any attempt to introduce multi-party sharing of a harmonised mobile band is likely to lead to unplanned network interference, even for a wholesale-only entity such as the WOAN.

We submit that the concept of mandated non-exclusive rights to spectrum should be removed from the Bill and the principle of assigning spectrum on an exclusive basis should be retained, including on the renewal of spectrum licences.

As Frontier Economics puts it in the attached report[13]:

> *"Mobile networks are designed to be run efficiently where one operator is using one frequency band within a particular geographic area and can therefore manage inter-site interference. Whilst regulatory bodies in a number of jurisdictions (including the UK) are currently exploring ways of allowing a degree of spectrum sharing, as Professor Martin Cave puts it there is a "huge problem of technical and commercial co-ordination" associated with introducing it on a large scale."*

4.6.2 Wholesale open access to spectrum

Wholesale open access to spectrum has the same difficulties as non-exclusive rights to spectrum. In our view, principles of wholesale open access as applied to high demand spectrum are neither feasible nor coherent. While non-exclusive spectrum rights apply in some countries, in limited circumstances, wholesale open access to spectrum does not.

Wholesale open access implies that the spectrum licensee makes available spectrum on a wholesale basis, etc. The licensee retains the rights associated with the spectrum, and the responsibilities, but the access seeker may use that spectrum.

[13] Section 2.1.1, Appendix A

Wholesale open access might mean that an access seeker without spectrum can deploy its own network and use the spectrum of another licensee - something like an MVNO, but with its own active equipment and core network. We are not aware of any such arrangement anywhere in the world, nor are we aware of anyone asking for such a thing, particularly when more common commercial arrangements (such as an MVNO) are widely available.

Spectrum is neither "an electronic communications network service" nor "an electronic communications facility". Spectrum is a statutory right granted to a spectrum licensee; it is not a service and it is not a facility. By its very nature, it is not something that is capable of being provided "on a wholesale basis on general open access principles".

We submit that the concept of wholesale open access to spectrum should be removed from the Bill.

4.7 Powers of the Minister to dictate spectrum policy

Chapter 5 introduces a wide-ranging set of powers for the Minister in relation to the assignment of spectrum and spectrum planning. It is a general theme of these submissions that we disagree with the obliteration of the roles and responsibilities of the Authority when it comes to radio spectrum.

We have referred in section 4.2 to the need to preserve the Authority's independent role in the assignment of radio spectrum and that the separation of spheres of authority between the Minister and the Authority in the current Act should be preserved. The Minister should maintain his/her role and responsibilities to represent South Africa in international fora and to approve the national radio frequency plan developed by the Authority, but not go further. We discuss the constitutionality of this undermining of the Authority's independence in section 7 below.

4.7.1 Compliance with Ministerial policies or policy directions

Section 29A(c) states that the Minister will be responsible for "... *issuing policies and policy directions to radio frequency spectrum, subject to section 3*".

Under section 3(4), the Authority must consider any such policies and policy directions, but crucially the changes in the Bill to section 30(2)(a) require the Authority to "*comply with ... ministerial policies and policy directions as contemplated in section 3*".

This requirement to "comply with" Ministerial policies and policy directions represents a fundamental shift in the Minister's and the Authority's roles and responsibilities in the determination of radio spectrum matters.

These policies and policy directions now include spectrum regulations (which must be amended if the Minister requires) and spectrum fees under section 4(1A) (where previously only guidelines could be provided), spectrum trading and spectrum use rights under section 31B(4) and terms of spectrum renewal under section 31E(8).

Therefore, because of the changes to section 30(2)(a), the Authority must now comply with policy, not just consider it, and will be prevented from formulating its own independent judgement. The same applies to sections 4(1A), 31B(4) and 31E(8).

This completely obliterates the independent role of the Authority in matters of radio spectrum and we therefore oppose it.

4.7.2 Development of the national radio frequency plan

Under the new section 29A(d) in the Bill, "... *The Minister of Telecommunications and Postal Services is responsible for— ... the development of the national radio frequency plan* ..."

Under the current Act, the Authority is responsible for the development of the plan, with a right for the Minister to approve the Authority's plan under section 34(2). Under section 30(2), the Authority will be required simply to implement the National Radio Frequency Plan developed *and* approved by the Minister.

To preserve the independent role of the Authority and avoid interference with radio spectrum matters, the Authority should retain the role and responsibility to develop the national radio frequency plan.

4.8 Spectrum trading, sharing and re-farming

4.8.1 Spectrum trading

Vodacom agrees that spectrum trading should be subject to approval by the Authority, taking into account the impact on competition. This applies to the WOAN as much as to the other MNOs. Any spectrum trading by the WOAN should be scrutinised carefully by the Authority, either if the WOAN is selling or acquiring spectrum or if they are sharing spectrum.

Where the WOAN is selling spectrum, it should not be entitled to profit unduly or excessively, because it was assigned that spectrum on favourable terms.

4.8.2 Spectrum sharing

Vodacom also agrees that spectrum sharing should be subject to approval by the Authority in the case of high demand spectrum, including in respect of the WOAN.

We suggest the reference to spectrum trading in paragraph (b) be removed, as it may be read as suggesting that spectrum trading may not be allowed, whereas it is permitted with the approval of the Authority in section 31B.

4.8.3 Spectrum re-farming

Vodacom disagrees that spectrum refarming should be subject to approval in each case by the Authority.

While mobile operators seek to introduce the latest and most efficient mobile radio technologies such as 4G, they also have a responsibility to support a wide range of legacy customer devices, including 2G and 3G. The optimisation of the services that can be delivered to all users requires constant rebalancing of network capacity between all supported radio technologies, in line with the changing mix of handset types used by customers.

Consistent with the principle of technology neutral licensing, there are no restrictions on spectrum refarming in the current regulatory environment. It has become an almost daily necessity for mobile operators trying to manage network capacity requirements and becomes even more complex where there is a critical shortage of high demand spectrum. We therefore propose the deletion of section 31D.

4.9 Spectrum term and renewal

Section 31E presumes a major shift in the regulatory framework regarding the term and renewal of spectrum licences.

Many spectrum licences that were issued in the last five to ten years automatically renew each year and subsist until the expiry of the licensee's individual licence. In the case of these annual renewable spectrum licences, if the licensee fails to pay its spectrum fees or comply with its terms, then these

licences may terminate, but otherwise the Authority is obliged to renew the spectrum licence, which will continue to subsist, and may be used for so long as the licensee has an individual licence[14].

Section 31E takes another approach and contemplates that a spectrum licence may have a different term to a licensee's individual licence. So, a spectrum licence may expire within the term of an individual licence, or even after the term of an individual licence.

While multi-year spectrum licences are common in other countries, it has not been the norm in South Africa, at least in respect of those annual renewable spectrum licences issued to many of the MNOs. The individual licences are multi-year, but these spectrum licences have been annual, with an automatic renewal if licence fees are paid.

We have no particular issue with multi-year spectrum licences. They have the advantage of certainty of rights for that period. Where this model becomes problematic is where there is a multi-year spectrum licence where the term extends *beyond* the term of the licensee's individual licence.

We raised this issue in our submissions on the Policy Direction. We submitted that the new high demand spectrum licences should have a 20 year term and that the Authority should extend the term of the licensee's individual licence to align with that 20 year period.

The existing annual renewable spectrum licences, however, are not multi-year. So, when we consider the provisions of section 31E dealing with renewal, we are concerned over what those provisions mean in respect of annual renewable spectrum licences for high demand spectrum.

Our key submissions on section 31E, on issues related to the term and renewal of spectrum licences, are that:

- existing annual renewable spectrum licences should continue to subsist until the end of the licensee's individual licence; and

- multi-year spectrum licences, where the term extends beyond the term of the licensee's individual licence, should include an extension of the individual licence until the end of the spectrum licence term.

This preserves the status quo in respect of existing annual renewable spectrum licences, allowing the new regulatory framework to be forward-looking and apply to spectrum licences (expected to be multi-year spectrum licences) issued after the date of the amendment act implementing the Bill. This minimises disruption for existing licensees. It is also consistent with the premise of section 31E(7) that spectrum licences must be treated as multi-year licences.

4.9.1 Existing exclusive spectrum licences

Section 31E(6) provides that:

> "*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)*".

We have submitted in section 4.6 above that spectrum rights must be exclusive to the licensee. Therefore, we do not accept the premise of this provision that non-exclusive rights may apply following expiry and on renewal. We submit that section 31E(6) should therefore be deleted.

[14] See section 31(2)(b) of the Act and regulation 10 of the 2015 Spectrum Regulations

However, if this provision remains in the Bill, then we propose that it be amended to only apply to spectrum licences for high demand spectrum that have been issued after the date of the amendment act.

4.9.2 Renewal inquiry

Section 31E(7) provides that:

> "*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*"

Certainty of renewal

Mobile operators have long investment horizons, given the investment that is required to deploy and operate a mobile network. Clarity is required well before the expiry of the spectrum licence on whether and, if so, on what terms spectrum renewal would take place.

There needs to be a long lead-time for a renewal inquiry prior to the expiry of spectrum licences. 24 months is too late to launch an inquiry. We propose that the Authority begins its work five years before expiry and makes its final decision on renewal by three years prior to expiry.

If our submissions above are accepted, this means that the renewal inquiry:

- for annual renewable spectrum licences, should be dealt with as under the current Act, which aligns the term with the term of the individual licence; and

- for multi-year spectrum licences, would need to begin at least five years before expiry of the spectrum licence and be completed at least three years prior to that date.

We note that section 11, dealing with the renewal of individual licences, is not changed under the Bill. However, long term planning means that individual licensees need to understand the renewal terms well in advance of the expiry. The Authority should, in terms of section 11, make regulations prescribing the terms of the renewal of individual licences and this should be done sooner rather than later. As an individual licensee, we believe the Authority should conduct an inquiry with the aim to make these regulations, and we need to start consultations with the Authority at least five years, ideally longer, before expiry.

It should also be clear that the renewal decision must be made by the Authority, not the Minister. This means the reference to making recommendations to the Minister is inappropriate.

We also propose that paragraph (d) be deleted. The presence or otherwise of wholesale open access networks should not be an additional consideration, above the other factors in paragraphs (a) to (c).

We note that section 31E(7), with its minimum lead time of 24 months before expiry, is clearly necessarily premised on all spectrum licences being multi-year, and is entirely unworkable in the case of a spectrum licence that falls due for renewal every year, which is the case with practically all current spectrum licences.

4.9.3 Ministerial policy direction on renewal terms

Section 31E(8) provides that:

> *"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".*

It is a key theme of these submissions that we disagree with the obliteration of the Authority's independent role when it comes to spectrum and other matters. In this case, the Minister is preserving the right to require particular terms and conditions for renewed spectrum licences. We submit that this provision should be deleted.

4.10 Mandated universal access and universal service obligations on spectrum licensees

Under the new section 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 licensees, determined by the Authority*".

Under the existing Act, the Authority is not required to impose universal access and universal service obligations on licensees.

4.10.1 Existing spectrum licences

It is unreasonable and likely unlawful to impose universal service obligations, after the licence has been issued, on an existing spectrum licensee. A licensee agrees to become a spectrum licensee on the terms and conditions of that spectrum licence - not in the expectation of future new obligations being imposed.

In principle, it may be completely acceptable that "specific, attainable and measurable" obligations are included in the spectrum licence, but the spectrum licensee takes those obligations into account when it decides whether to acquire the licence.

If an operator with an existing spectrum licence may be subject to onerous new future obligations, this creates uncertainty which has a further chilling effect on new investment and the value of spectrum. Such obligations and amendments to licences should go through a comprehensive consultation and decision-making process.

4.10.2 New spectrum licences

It is different for new licensees, who can factor in universal service obligations that may be included in the licence at the time they acquire it. As noted in section 4.5 above, we have no principled objection to inclusion of universal service obligations in spectrum licence conditions for high demand spectrum that may be acquired by HDS licensees.

The provisions of section 31A(1) would work only in the context of new radio frequency spectrum licences where the universal service obligation is in the licence.

4.10.3 Relationship with section 8

Whereas section 8 provides that the Authority must prescribe standard terms and conditions for individual licences, which shall include universal access and universal service obligations, it is clear that this is intended to apply only to those operators that are designated licensees under regulations made by the Authority under section 8(4).

We discuss the changes made to section 8 in section 6.3 below.

4.10.4 Requirement for Ministerial approval

Under section 31A(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…".*

This provides too much control to the executive and undermines the Authority's independence. We propose that this provision be deleted.

4.11 Other changes to Chapter 5

4.11.1 Use it or lose it

Section 31(8) is amended in the Bill to allow the Authority to withdraw any spectrum license where the licensee "*… fails to use the assigned radio frequency spectrum for a period of two year[s], referred to as the 'use it or lose it' principle*".

The efficient use of all available mobile spectrum should be a primary policy objective. We prefer "use it or lease it" or "use it or trade it"[15] as an alternative to "use it or lose it". This places an obligation on a licensee, at the appropriate trigger point, to lease or trade the unused spectrum to other licensees, on a commercial basis. This allows the licensee that owns the "unused" spectrum to earn some revenue by leasing the spectrum. It is preferable to "losing it" because this does not allow any return, when that licensee may have invested significant amounts in acquiring the spectrum.

Vodacom doesn't believe SMMEs or new entrants, which would include the WOAN, should be exempted from this requirement under section 31(8A)(b).

Whether under "use it or lose it" or "use it or lease/trade it", there would need to be clarity on what constitutes the "use" of spectrum. For example, putting up one base station every year could mean an operator has used the spectrum. Vodacom suggests that, when the Authority issues a spectrum licence, it clarifies as part of the ITA process what constitutes "use" for the purposes of that spectrum. This should apply to new spectrum that is assigned, but not applied retrospectively, as that would create uncertainty for existing spectrum licensees.

4.11.2 Real-time spectrum database

Under the new section 34B(3):

> *"The Authority will be 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."*

The database referred to is contemplated by the new section 30(2)(g), which requires the Authority to:

[15] Subject to approval of the Authority, to ensure it does not distort competition

"...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"

The reference to "real-time" is not practical for mobile operator radio frequency spectrum updates.

Spectrum databases are beginning to be considered in some developed markets, primarily as a way to facilitate access by multiple users to spectrum that is highly underused – i.e. where there is a lot of white space. UHF TV broadcasting bands are the most common example[16]. TV broadcast networks typically use only one quarter of the total spectrum in any one locality. Other users with ad-hoc needs (such as programme makers and special events using wireless microphones) are able to use particular frequencies in particular locations at particular times, under the management of a spectrum database. In contrast, where spectrum is assigned to mobile networks (and particularly where it has been auctioned, and there is an opportunity cost to underuse), there is typically no spare capacity in areas of competing demand, and no practical purpose or benefit to introducing spectrum databases.

It is not clear how sharing of "sector specific" spectrum will be managed, i.e. real-time assignment, configuration and re-assignment of spectrum resources and interference management. For example, mobile networks have static network configurations for maintaining spectral efficiencies, reducing interference between neighbouring sites and cells, and have standardised and/or optimised site-specific parameters and features, which in several cases are linked specifically to an individual site and/or cell's frequency assignment.

We, therefore, do not consider it practical to dynamically assign and manage spectrum to other licensees on a real-time basis, given these dedicated network configurations.

Further, the re-configuration of cellular network parameters may require the base station, radio or traffic channel to be reset for new network parameters and/frequencies to take effect. This could take a few seconds to several minutes depending on the extent of the changes, which can be either at a traffic channel, cell, site, base station controller (BSC) or radio network controller (RNC) level. The re-configuration will also have a negative impact on existing customers utilising the network resources at that point in time, either though dropped calls or interrupted data services.

Consequently, apart from the fact that real-time database updating and auto-reconfiguration of cellular frequency assignments is currently not supported between mobile operators and other third-party networks, the resulting network outages and quality of service complexities in implementing such a solution would be detrimental to the end user experience.

4.11.3 Spectrum fees

In the new section 4(1A), *"...[a]ny regulations prescribed by the Authority on radio frequency spectrum fees must be in accordance with any policy or policy directions issued by the Minister..."*

The Minister ought to have a role in setting the policy objectives for spectrum fees, which should primarily be to ensure efficient assignment and use, and recovery of efficiently incurred spectrum administration costs. However, the Authority should have responsibility to set the specific charging mechanisms.

[16] We note that the Authority has produced draft regulations for the use of TVWS (Notice 283 of 2017). Among other things, these draft regulations contemplate establishing standard terms and conditions applicable to the operation of geo-location spectrum databases (GLSDs) in the frequency band 470 MHz to 694 MHz, which is obviously outside of the unassigned high demand spectrum bands. The draft regulations also include guidelines and specifications related to TVWS devices, authorisations, interference, operational parameters and so on.

4.11.4 Divergence from WRC decisions

Under the new section 34(6)(g), the national radio frequency plan, determined by the Minister if section 29A(d) remains in the Bill, shall:

> *"(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."*

This ability to diverge from WRC decisions could cause other unintended consequences of deviating from the positions taken by the SADC and the ATU, with challenges for cross border interference and ultimately the regional harmonisation of spectrum bands. These should be taken into account.

4.11.5 Catch-all powers of the Minister

Section 29A(h) states that the Minister will be responsible for "*...any other matter relevant to radio frequency spectrum that is necessary or expedient for the proper implementation or administration of this Act or related legislation*".

The Minister should not have a catch-all power to direct the implementation and administration of radio spectrum. This should be a matter solely for the Authority. This is even more so when, even taking into account the changes made to section 30(1) under the Bill, matters of implementation and administration are for the Authority and not the Minister.

4.11.6 Powers of sector-specific agencies

Under section 34B(1)(a) of the Bill, although sector-specific agencies must account to the Authority for the use of spectrum assigned to them, the agencies may also under paragraph (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*".

We don't agree that sector-specific agencies (the South African Maritime Safety Authority and the Civil Aviation Authority) should have this power of assignment and registration. This is another intrusion on the Authority's independent role, this time from another part of Government. These matters should be solely for the Authority.

Part C Proposals

4.12 Amendments to the Bill

We set out our proposed changes to the Bill in greater detail in Appendix E. The changes include the following:

4.12.1 Administration of radio frequency spectrum

Section 30 should be substantially reinstated so that it is the Authority, not the Minister, that controls, plans, administers and manages the use and licensing of spectrum.

4.12.2 High demand spectrum

Section 31E(1) should be amended so that the Authority makes determinations of what constitutes high demand spectrum and which unassigned high demand spectrum is assigned to the WOAN.

4.12.3 Spectrum licence conditions

We propose that section 31E(4) in its entirety should be deleted. We have set out our views above on each of the conditions. We propose that these matters be determined effectively by the Authority as part of its ITA process for the high demand spectrum.

4.12.4 Wholesale open access and non-exclusive spectrum rights

Section 31E(2)(a) and (b) should be deleted, so that the existing Act continues to apply without requiring wholesale open access or mandating non-exclusive spectrum rights.

4.12.5 Spectrum sharing

We have proposed deletion of reference to a specific geographical area in the definition of radio frequency spectrum sharing, as sharing may or may not be specific to a particular area.

4.12.6 Spectrum refarming

Section 31D(1) should be deleted. This means that spectrum licensees do not require the approval of the Authority for any refarming.

4.12.7 Spectrum term and renewal

New paragraphs should be added after section 31(2)(b) as follows:

> *"(c) All annual radio frequency spectrum licences that have been issued as at the commencement of the Electronic Communications Amendment Act shall remain valid for the period for which the relevant service licence contemplated in paragraph (b) above is valid, and shall not expire or fall due for renewal before such period expires, provided that the annual licence fees payable in respect of such radio frequency spectrum licences remain payable as prescribed, and provided that upon renewal the Authority shall specify an appropriate multi-year term for each such spectrum licence, which term shall not be less than fifteen years."*
>
> *"(d) Where the term of a multi-year spectrum licence extends beyond the term of the licensee's individual licence, then that individual licence shall be extended until the end of the term of the multi-year spectrum licence".*

Section 31E(6) should be deleted.

Sections 31E(7) and (8) should also be deleted in their entirety.

4.12.8 Mandated universal access and universal service obligations

Section 31A(1) should be deleted, so that universal access and universal service obligations are not imposed on existing licensees.

Section 31A(2) should be deleted, so that the Authority does not require the Minister's approval for universal access and universal service obligations imposed on spectrum licensees.

4.12.9 Use it or lose it

Section 31(8) and (8A) should be amended so that the "use it or lose it" principle also allows use it or lease/transfer at the end of the relevant period.

4.12.10 Real time spectrum database

Section 34B(3) should be amended by removing the references to “real time”.

4.12.11 Development of national radio frequency plan

Section 29A(e) should be amended by deleting reference to the Minister developing the national radio frequency plan. Section 34 should be amended so that the existing provision continues to apply, which requires the Authority to develop the national radio frequency plan.

4.12.12 Spectrum fees

Section 4(1A) should be deleted, so that the Authority remains entitled to set the radio frequency spectrum fees, having considered policy or policy directions issued by the Minister.

4.12.13 Divergence from WRC decisions

Section 34(6)(g) should be amended to require that the Authority takes into account potential for cross border interference and the regional harmonisation of spectrum bands.

4.12.14 Catch all powers of the minister

The catch-all powers of the Minister, set out in section 29A(h), should be deleted

4.12.15 Powers of sector-specific agencies

Section 34B should be deleted, as it is the Authority, not the sector-specific agencies, that should have the responsibility for the matters in this provision.

5. Amendments to Chapter 8

Part A Introduction

5.1 Introduction

The Bill makes several substantial changes to Chapter 8 of the Act. Chapter 8 currently includes an obligation to provide facilities leasing in a fair manner and in accordance with due process. These requirements have been replaced with an obligation to provide wholesale open access to a licensee's electronic communications network services (e.g. national roaming), and electronic communications facilities (e.g. sites and towers).

In this section, we discuss the changes to Chapter 8 in relation to:

- the **general wholesale open access requirements**, that apply to all operators; and
- the **deemed entity regime**, that applies to MNOs and potentially some other operators.

Vodacom sees the changes in the Bill to Chapter 8 as not enhancing the existing Chapters 8 and 10 in achieving the Government's objectives and instead will cause harm. We propose these changes be removed from the Bill.

Part B Critique of the Bill

Our key critique of the Bill

Our key concerns with the changes to Chapter 8 are that it introduces a new, irrational, intrusive and ambiguous regime that applies to licensees, whether or not they have market power, when a robust, best practice process is available for facilities leasing under Chapter 8 and under Chapter 10, to the extent there are market power problems.

5.2 General wholesale open access requirements

The new section 43(1) provides as follows:

> *"All electronic communications network service licensees … 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 the case of technical[ly] inability."*

5.2.1 Wholesale open access

Section 43(1) previously required a licensee to "lease" electronic communications facilities. Now the requirement under the Bill is that it must "provide wholesale open access".

Wholesale open access is defined in the Bill as:

> "*… 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)*".

Electronic communications network services is defined under the Act and "means a service whereby a person makes available an electronic communications network" and electronic communications network "means any system of electronic communications facilities (excluding subscriber equipment)". Accordingly, the definition of wholesale open access includes the lease etc of a service where a person makes available any system of electronic communications facilities.

While our primary critique of wholesale open access is that its scope is too broad and it is not subject to reasonableness, it is important to note in this context that a requirement to provide wholesale open access to electronic communications network services is an extremely broad requirement and, depending on the context, may cover virtually the entire mobile network, including complex systems deep within the core of the network.

The requirement under the new section 43(1A) to provide wholesale open access to potentially the entire communications network, systems and services of a mobile operator is practically the most intrusive intervention possible. Telecommunications is a highly dynamic sector which supports the economic growth of other sectors and that requires substantial investment. In this context, the changes make even less sense.

While some interventions of this nature could theoretically have been the outcome of a market review under Chapter 10, this would have required a process of defining a relevant market and testing whether the market is competitive and, if the market is found to be uncompetitive, analysing that licensee's market power and its potential to behave in an anticompetitive manner. That process is not required under the changes to Chapter 8, which are entirely arbitrarily imposed without any investigation into the dynamics of the market.

We are not aware of another country in the world that imposes a uniform set of interventions applicable to facilities, networks, systems and services of mobile operators. Assuming that intrusion in all these layers is justified, the level of intrusion will likely differ. Uniform intervention is entirely arbitrary.

5.2.2 General open access principles

The general open access principles are defined in the Bill as follows: *"... providing wholesale open access [to] on terms that are effective, transparent and non-discriminatory"*. Although these are the most general of the obligations imposed on licensees under the changes to Chapter 8, these are still highly invasive.

The terms "effective, transparent and non-discriminatory" are to be defined by the Authority in wholesale open access regulations, prescribed under section 44(c)(b) of the Bill. These definitions require the Authority to consider 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*".

When that definition of "effective access" is applied to the entirety of our mobile network, it causes us concern. Unbundling, as a regulatory concept, is a feature of fixed networks and ordinarily refers to unbundling of the local loop, which involves a disconnection of the loop from the access provider's equipment at the switch and reconnection to the access seeker's equipment. Although owned by the access provider, the access seeker has effective control over that loop.

There is no comparable piece of equipment in a mobile network. Mobile networks serve many customers, not just one as in the case of a single local loop. So, while an operator can unbundle a local loop, it cannot similarly unbundle any aspect of a mobile network that is dedicated to an individual customer.

"Transparency" obligations can be problematic when extending to all aspects of one's network, as it would entail revealing commercially sensitive or confidential information. How Vodacom has put

together its mobile network is highly confidential information. Revealing that information could give a competitor a significant unfair advantage. In those circumstances, as applied to all aspects of a network, transparency entails substantial legal and competitive implications and, potentially, exposure to liability when it relates to third party confidential information.

"Non-discrimination" is already a requirement of Chapter 8, which should be retained as it provides the necessary oversight related to facilities.

These general open access principles are a set of unjustified interventions which are not evidence-based. This is disconcerting to us. It applies to Vodacom, as a licensee, and to every other licensee in South Africa.

5.3 General wholesale open access requirements - no requirement for requests to be reasonable

Sections 43(1) and (4) of the Act currently require that facilities leasing requests be reasonable (technically and economically feasible). This requirement has been deleted in the Bill, although technical inability has been maintained as a qualifier to section 43(1).

It is important to appreciate the context of sections 43(1) and (4). These existing provisions require any operator to provide facilities leasing; these provisions are not confined to situations where an operator has significant market power in respect of the relevant facility. This means that the protections afforded by the reasonableness qualifications in sections 43(1) and (4) are entirely appropriate given the broad scope of the existing Chapter 8, where they may not be so suitable where the operator has significant market power.

5.3.1 Technical inability

In the Bill, technical inability now qualifies the wholesale open access obligations (amendment to section 43(1) of the Act). This has some cross-over with the previous element of reasonableness under Chapter 8, which was that a request is reasonable where, among other things, the lease of electronic communication facilities "is technically and economically feasible" (section 43(4)).

There is a gap between "technical feasibility" and "technical … ability". A request may be technically unfeasible (and so unreasonable under section 43(4)), although it was capable or possible of being achieved technically (and so must be done under section 43(1) if amended). That technically possible request may come at enormous cost and risk to the access provider, but because the request could be achieved technically, it must be carried out.

At the very least, the access provider should be fully compensated for that additional cost and risk of complying with the access seeker's technically possible request. This is the real problem that needs to be addressed.

That may be what is intended by section 43(5)(d) of the Bill, which provides that the Authority may "*in case of technical inability (other than environmental and technological inability), determine how to resolve technical inability that may include the apportionment of costs*".

If this provision is to remain in the Bill, it needs to be refocused. It should apply where a request is technically possible, but would require the access provider to incur additional costs or risks to comply with it. And it should be unequivocal that the access seeker bears that additional cost and risk as it will be the party that benefits. If there is a dispute over the amount to be paid by the access seeker, then the Authority should determine that dispute.

5.3.2 Economic infeasibility

By removing the reasonableness requirement, this effectively means that a request may be economically infeasible, but, so long as it is technically possible, it must be complied with.

As referred to above, the access provider should be fully compensated for the additional cost and risk of complying with the access seeker's technically possible request. However, we still consider that it is important that an access provider can refuse a request that is economically infeasible. Even if the access provider is fully compensated, there may be broader economic considerations that mean the access provider should be able to refuse the request.

As Frontier Economics notes in its attached report[17] "*When deciding whether to impose access obligations or adjudicating over requests for access, it is especially important that regulators take into account economic viability (in other words – the extent to which the benefits of providing access exceed its economic costs) in order to ensure efficient network investment and usage*".

5.3.3 Efficient use of networks and facilities

Sweeping away the reasonableness requirement also removes the ability of the Authority to consider the efficient use of networks and facilities. This means that a request from an access seeker could promote the inefficient use of electronic communications networks and facilities, but will still have to be complied with by licensees. We propose the efficient use qualifier be reinstated.

5.4 General wholesale open access requirements – regulation making power

Section 44(1) of the Bill provides that:

> *"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"*

Section 44(3) of the Bill sets out the matters which the wholesale open access regulations must include.

The Authority will be required to be much more prescriptive in the wholesale open access regulations. This includes "*the manner in which unbundled electronic communications facilities are to be made available*" (paragraph (q)) and the "*wholesale rates as contemplated in section 47*" (paragraph (h)).

The current Chapter 8 enables the Authority to respond, and tailor an appropriate response, to the particular access dispute before it. Under the changes to Chapter 8, the Authority will need to define all possible forms of access in the abstract and not in the context of any particular dispute that is referred to it. This power of the Authority to prescribe wholesale open access regulations undermines the due process requirements of Chapter 10 that apply before imposing remedies of this nature.

5.4.1 Interaction with Chapter 10

The changes to section 47(1), which relates to the regulation making powers of the Authority in relation to Chapter 8, are such that the Authority no longer needs to take into account the provisions of Chapter 10, as required under the current wording of section 47(1).

This was an important protection under the facilities leasing regime in Chapter 8. There is no warrant for excluding it and rendering the regulatory powers arbitrary and unconnected to market reviews in appropriate cases.

[17] Section 2.1.2, Appendix A

5.5 The deemed entity regime - introduction

In comparison to the settled and standard processes in the existing Act, the changes in the Bill introducing the deemed entity regime in Chapter 8 are inappropriate and inconsistent with international best practice.

The ethos in the National Development Plan was balanced, between incentivising sharing and encouraging investment[18]:

> *"Carefully applied open-access policies can incentivise sharing and common use of certain layers of the network, without discouraging private long-term investment"*

The wording of the Bill loses this balance. The deemed entity regime ignores the fact that open access at cost-oriented prices will discourage investment.

5.6 The deemed entity regime - vague and impractical definition of deemed entities

A new section 44(3A) has been added that instructs the Authority how to determine a deemed entity:

> "*(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 twenty-five percent of the total electronic communication infrastructure in such market, following which such electronic communications network service licensee is regarded as a deemed entity;*
>
> (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.*"

Open access principles, once properly defined and confined to appropriate facilities, may only be applied to operators with significant market power in markets which have been proved to fail, following a proper review process. The definition in section 44(3A) goes beyond operators with proven significant market power.

The infrastructure thresholds in the deemed entity definition are inconsistent with international best practice and competition law principles. In its report attached to our earlier Submissions, Frontier Economics explained the process for a best practice approach to imposing *ex ante* regulatory obligations, following approaches commonly accepted in the EC and middle-income countries that are comparable to South Africa[19]. The deemed entity regime is contrary to these best practice approaches.

[18] National Development Plan, page 172

[19] Annex A, Frontier Economics report, Part 2 of earlier Submissions in January 2018

5.6.1 Significant market power and control of infrastructure

The first half of section 44(3A)(a) is concerned with recognised competition law principles. It requires the Authority, having conducted a market definition exercise, to determine whether any ECNS licensee has significant market power in an "infrastructure market".

The term "infrastructure", which is used widely throughout the Bill, is undefined. Because of its significance as a term, we suggest that it either be defined or, wherever it is used, it is replaced with established defined terms in the Act.

It is not clear what an "infrastructure market" is. The intention may be to refer to a wholesale market for facility access. Market definition requires a consideration of supply and demand side substitutes and there may, or may not, in fact be such a thing as an infrastructure market. The Authority will be in the improbable position of creating a market for the purposes of this definition, where it may have concluded that this market does not exist. This is irrational.

There is no requirement for the Authority to follow accepted competition law principles in determining whether a licensee has significant market power under section 44(3A). And there is no requirement that there be ineffective competition in the market before imposing pro-competitive measures.

If this section is to be retained, Vodacom proposes that the Authority expressly be required to comply with section 67(4) and (5) of the Act in determining whether there is effective competition in those relevant markets and market segments and whether a licensee has significant market power for the purposes of section 44(3A) and expressly consider whether there is effective competition in those relevant markets as required by section 67(4)(b).

Under the second half of paragraph (a), the Authority must determine an ECNS licensee to be a deemed entity if it has greater than 25% infrastructure in the market. This is a wholly arbitrary requirement, not in any way related to an assessment of true market power in any "infrastructure market".

Frontier Economics discusses this in the attached report[20]:

> *"Even if there were evidence to suggest that some form of access regulation was necessary, there is no clear basis for the 'spectrum holding' and/or '25% market-share' criteria used to define a deemed entity. Again, in order to limit the potential harm from imposing burdensome ex-ante regulation unnecessarily, it is important that any remedies are carefully targeted at relevant concerns identified by detailed market analysis".*

The definition refers to having 25% of "the total electronic communication infrastructure" in an infrastructure market and we referred above to the fact than an infrastructure market may not exist. If the Authority can conceptualise an "infrastructure market", then the next step is trying to measure what 25% of the total electronic communication infrastructure would be.

This requires a definition of what infrastructure is relevant (a very difficult if not totally impracticable thing to do) and collecting data about who possesses what infrastructure that fits within that definition. Then a licensee, who controls that amount of infrastructure, will be a deemed entity, even if control of that infrastructure confers no market power.

5.6.2 Control of essential facilities and spectrum

Under the new section 44(3A)(b), the Authority must determine an ECNS licensee to be a deemed entity if it has control of an essential facility or IMT spectrum. Whereas essential facilities, in the current

[20] Section 2.1.2, Appendix A

Act, bear some relation to competition law principles, these new qualifiers in relation to IMT spectrum are completely arbitrary and unmoored in any recognised competition law principles.

Control of essential facilities

With the changes to the definition of essential facility in the Bill, this term is getting closer to the test that may be applied under competition law.

The focus is on the substitutability of the facility services. In our view, under the current market structure, it is very unlikely that any MNO's mobile network can be an essential facility. It doesn't meet the threshold of "exclusively or predominantly provided by a single or limited number of licensees and cannot feasibly (whether economically, environmentally or technically) be substituted or duplicated in order to provide a service in terms of this Act". This is confirmed by the fact that there are a number of MNOs and independent mobile facility service providers, which are providing a nationwide service. They are clearly substitutable.

Control of IMT spectrum

Under the proposed definition, however, an operator does not need to control essential facilities in order to be a deemed entity. It will be sufficient for the operator to control IMT spectrum. All MNOs are therefore deemed entities.

This is unprincipled and irrational. Mobile markets are generally competitive, and unless an operator or operators control disproportionately large amounts of spectrum and these are shown to lead to a dominant position in a relevant wholesale or retail market, there should not be a question of ownership of spectrum being synonymous with the control of an essential facility.

The prevailing market practice around the world is to make spectrum available to operators for exclusive use to enable them to compete in the market efficiently. Sometimes there are spectrum caps, or other competition law controls, to prevent anti-competitive acquisition of spectrum. There are legitimate concerns about monopolisation of LTE spectrum, as we discussed in our earlier Submissions. Monopolisation of LTE spectrum is avoided if the WOAN is assigned a sufficient share of the unassigned LTE spectrum and other operators are assigned an equivalent share of high demand spectrum.

This demonstrates the fragile underpinning of the definition of deemed entity in the Bill. Because of control of one asset type (IMT spectrum), an MNO is subject to intrusive cost-oriented access, notwithstanding that there are other MNOs with almost the same spectrum, about to be joined in the market by the WOAN, making nonsense of the concept of an "essential facility" as understood in its source – competition law principles.

We consider the deemed entity regime to be unprincipled, irrational and unjustifiably intrusive. It also risks undermining the WOAN, the flagship policy initiative of the Government.

5.7 The deemed entity regime - criteria unrelated to a market

Under section 44(3A)(a), a deemed entity needs to have significant market power in an infrastructure market determined by the Authority or have greater than 25% infrastructure in that market. This, however, makes that licensee a deemed entity, not only for that market, but for all markets.

A similar issue arises with control of essential facilities and spectrum. A deemed entity may control such facilities or spectrum, but the open access requirements in the amended Chapter 8 will apply to it in unrelated markets. For example, a mobile operator may have some spectrum, but be required to comply with the deemed entity regime in relation to any fixed network that it may have.

The market in which the open access obligations apply may be perfectly competitive, yet the obligations in Chapter 8 will apply.

As a consequence, this is irrational, unprincipled and arbitrary. Even if, contrary to what is submitted above, it were considered that deemed entities were appropriate, no active infrastructure sharing obligations or cost-oriented pricing should ever apply in markets where the reason for being a deemed entity (in some other market) does not apply to a particular licensee.

Frontier Economics noted in their attached paper[21]:

> *"By extending the scope of access obligations to potentially cover communication providers' entire networks without first identifying the relevant bottlenecks that would justify such a wide-ranging intervention, the Bill diverges from regulatory best practice. In reality, the fact that mobile operators in markets around the world compete at all levels of the supply chain and that network access regulation is not widely observed internationally, indicates that genuine bottlenecks (that would justify such an intervention) are rare in mobile networks".*

5.8 The deemed entity regime - imposition of blanket remedies

The new section 43(1B) sets out the obligations that apply to deemed entities, as follows:

> *"(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 open access principles on its electronic communications network:*
>
> *(a) Active infrastructure sharing;*
>
> *(b) Wholesale rates prescribed by the Authority in terms of section 47;*
>
> *(c) specific network and population coverage targets."*

5.8.1 Active infrastructure sharing

The description of "active infrastructure sharing" in the 2017 Bill has been deleted in the Bill. That included national roaming, radio access network sharing and enabling MVNO access. The Authority may decide to define active infrastructure sharing as requiring those forms of access in any case, given the generality of the term.

It is not clear, however, that the "technical inability" qualifier in the amended Chapter 8 is intended to apply to active infrastructure sharing under section 43(1B).

It is highly unusual for regulators internationally to mandate national roaming, MVNO access or other forms of active sharing in the mobile sector. When regulators do mandate these services, they are remedies to identified market failures in specific wholesale markets, after careful market reviews, not methods of general open access that arise through some arbitrary asset ownership.

[21] Section 2.1.2, Appendix A

5.8.2 Cost-oriented pricing

Under the changes to Chapter 8, "*the Authority must prescribe wholesale rates applicable to deemed entities that must be cost-oriented*" (section 47(1)).

Cost-oriented pricing remains an extreme remedy, which has only been applied in extreme cases, after appropriate review of the relevant market failure, in the most significant monopoly situations.

The imposition of such an extreme remedy should require a Chapter 10 process of defining a relevant market and testing whether the market is competitive and, if the market is found to be uncompetitive, analysing that licensee's market power and its potential to behave in an anticompetitive manner. Imposing cost-oriented pricing entirely arbitrarily without any investigation into the dynamics of the market is unprecedented, inconsistent with international best practice and will create a chilling effect on the investment incentives of those operators and adversely impact on competition in the market.

Because operators need to continue to invest large amounts in next generation networks, they need to know what the risks are. For example, if their prices are to be regulated on such an arbitrary basis, how will this impact of the risk of achieving a reasonable return on their investment? If weight is not given to these risks (including the risk of not achieving a reasonable return) in the calculation of cost-oriented pricing, this will create a chilling effect on the investment incentives of those operators and adversely impact on competition in the market.

Frontier Economics has assessed the impact of imposing cost-oriented pricing as contemplated by the Bill. They say[22]:

> *"Imposing cost-oriented access on deemed entities creates a "last-mover" advantage with respect to investments – in particular, investments in new technologies which may carry significant risks. In other words, operators may find it preferable to wait for one of their rivals to invest and then rent access from them, rather than undertake investments themselves. This is because renting access would allow operators to enjoy the benefits of any investments made by the host network, whilst avoiding all of the risks. At the same time, as noted above, mandated access would diminish the upside from investment, by undermining the ability of the investing network to differentiate their services.*
>
> *As such, imposing cost-oriented access obligations on effectively most of the mobile industry would lead to inferior outcomes in which investment is significantly delayed or potentially never happens due to a combination of the two effects described above."*

5.8.3 General pricing principles

There are overarching, general pricing principles that must be applied by the Authority in sections 47(2) and (3), including that a price must "serve[s] to promote efficiency and sustainable competition, and

[22] Section 2.1.2, Appendix A

maximise consumer benefits", "may also take account of prices available in comparable competitive markets", must be "fair and reasonable" and "non-discriminatory".

While these general pricing principles are far less intrusive than "cost-oriented" pricing, it is a key theme of these submissions that wholesale open access, and so application of these general pricing principles, should only be mandated following an appropriate Chapter 10 process.

If section 47 is to remain in the Bill, then we propose that sections 47(2) and (3) also apply where prices are set at cost-oriented rates under section 47(1).

5.8.4 Network and population coverage targets

Under the Bill, a deemed entity is required to comply with "specific network and population coverage targets".

This is confusing as section 31A addresses universal access and universal service obligations. It is unclear whether "specific network and population coverage targets" is meant to be the same thing as universal access and universal service obligations. It is important that this be clarified. For example, does this mean that the specific network and population coverage targets are not required to be "attainable and measurable" in the same way that they are for universal access and universal service obligations?

The deemed entity regime creates a distinct category of operators that are subject to a more intrusive set of wholesale access obligations than other operators. Conceptually, requiring coverage targets as well appears misplaced in this context, particularly where there is a more general universal access and universal service obligation regime elsewhere in the Bill. Chapter 8 is the wrong place to deal with this issue.

5.8.5 Proportionality and response to changing market conditions

Under Chapter 10, the Authority may modify pro-competitive conditions to ensure proportionality or revoke conditions if the market changes (section 67(8)). There is no such ability for the Authority in respect of open access under Chapter 8.

By implication, this means that, even where open access is no longer proportional or if market conditions changed rendering the obligation inappropriate, the Authority has no power to modify the terms that apply to the deemed entity. Yet, in the more stringent Chapter 10, where powerful pro-competitive terms may be applied to parties with significant market power, the Authority does have this ability. This is an arbitrary and irrational distinction.

5.8.6 Requirement for accounting separation

Under the changes to Chapter 8 (the new section 43(1A)), all ECNS licensees that are vertically-integrated operators, as determined by the Authority, must undertake accounting separation, as well as complying with the general open access requirements. Under Chapter 10 of the existing Act, accounting separation may have been imposed as a pro-competitive measure, but only where the licensee had significant market power.

The Bill now states that "*only entities that are deemed entities … may be determined to be vertically integrated entities*" (section 44(3)(d)). This is another onerous intervention imposed on licensees that may be deemed entities not by reason of market power, but because they own spectrum or other infrastructure.

Accounting separation should not be routinely applied to licensees that have not been found to have significant market power. The burden and cost of complying with accounting separation requirements

can be considerable, the benefits normally few and as such it is rarely a proportionate measure. In our view, the existing powers under Chapter 10 are more than adequate in these circumstances.

5.9 Impact of these changes

5.9.1 Deemed entity regime

The effect on competition of interventions based on the arbitrary and intuitively low appearing thresholds in the deemed entity regime is likely to be disruptive and damaging, which will outweigh any perceived pro-competitive outcomes.

Licensees will be dis-incentivised from new investment and innovation (especially next generation technologies with considerable risks) when they may be forced to provide cost-oriented access to facilities and network services to their competitors at regulated rates, purely because they made that investment, not because they possessed any market power.

As Frontier Economics puts it in the attached paper[23]:

> *"... cost-oriented access obligations are a particularly intrusive form of regulation that can undermine the incentives of operators to invest. As such, they are typically regarded as a "last resort" measure for regulating markets with significant, non-transitory barriers to effective competition. Below we set out that:*
>
> - *Imposing such wide ranging obligations on all operators is unprecedented and will significantly undermine investment incentives;*
> - *Regulating prices is a highly complex task and carries significant risks;*
> - *The imposition of wholesale access obligations is rarely observed in mobile markets;*
> - *Extending the scope of access obligations to cover network services as well as facilities is unjustified;*
> - *Requiring access wherever technically possible, regardless of whether it is reasonable goes against regulatory best practice; and*
> - *By disregarding the economic viability of access request, the Bill risks encouraging inefficient network investment and usage".*

Operators that commercially invest in facilities that support sharing, a common current occurrence, will be disincentivised to invest by the risk of the application of cost-oriented pricing. The commercial business case for developing "shareable" facilities will be adversely affected, which will deter investment.

As South Africa seems to be the first country in the world to introduce such a regime, its implementation will increase the uncertainty of investing in the sector, and will therefore increase the cost of capital, which would be reflected in a higher cost-oriented price.

There will be a "last-mover advantage", as licensees that find themselves deemed entities, or might become a deemed entity, would prefer to acquire access from others at cost-oriented prices rather than take the risk of investing themselves. This creates a stalemate, because no licensee will wish to invest first as a result.

[23] Section 2.1.2, Appendix A

Local and foreign direct investment will be directed to industries that do not have this sort of onerous and capricious regulation.

Similar concerns arise with the general requirement to provide wholesale open access based on general open access principles. The ambiguity and uncertainty in the Bill in relation to what is required and on what basis will have a chilling effect on investment.

Part C Proposals

5.10 The Government's objectives can be achieved through the existing tools in the Act

The existing tools under the Act enable balanced process for the Authority to respond to any market failure. This process should not be by-passed by the changes to Chapter 8 in the Bill.

In this Part C, we demonstrate why these tools are appropriate for addressing market failure .

5.10.1 Essential qualities of the existing tools

The Chapter 10 process in the Act (section 67(4)) involves the Authority, following an inquiry, prescribing regulations and imposing appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition and any licensee has significant market power in that market or market segment. It involves a sequential and rigorous process of market assessment, market definition, identification of whether there is effective competition, and whether any licensee has significant market power, with each stage needing to be satisfied before moving to the next stage. This allows for a robust, accurate and evidence-based process and outcome in which operators, and the Government, should have confidence.

Then, if market failure and market power problems are identified, the process allows the Authority to tailor a proportionate remedy to best address the harm.

As Frontier Economics puts it in its report attached to our earlier Submissions:

> *"In terms of the cost-based access and roaming obligations, the importance of conducting market reviews prior to imposing ex-ante remedies such as these is well-established and is a key principle of international best-practice. This is because regulatory interventions can give rise to market distortions which could lead to worse outcomes for consumers. Before implementing any regulatory measures/remedies, it is therefore important to conduct a detailed market investigation to first identify any market failures and potential regulatory measures/remedies, and then assess the likely impact of such measures/remedies. The Priority Markets review should help to facilitate this process by identifying the markets that are susceptible to ex-ante regulation".*[24]

It should be possible to complete the process required by Chapter 10 within a reasonable timeframe without compromising the integrity and rigour of the process. International precedents indicate that it is possible to complete such a process within approximately 12 to 18 months.

In August 2018, the Authority published its "Findings document on priority markets inquiry in the electronic communications sector". This includes a list of markets that should be prioritised for a market review under Chapter 10. On 16 November 2018, the Authority issued a notice of intention to conduct an inquiry into mobile broadband services. The Authority should be allowed to conduct an inquiry in terms of its powers under Chapter 10. Vodacom's view is that this would be the appropriate route to follow, rather than the deemed entity regime or the general open access principles, especially in keeping trend with best international practice, as considered further below.

[24] Page 6, Frontier Economics report, Part 2, Vodacom's earlier Submissions

5.10.2 Consistency with international and regional best practice

The Chapter 10 process for determining whether to introduce *ex ante* regulation, through pro-competitive measures, is consistent with international best practice, including in comparable upper-middle income countries around the world.

We asked Frontier Economics to contrast the Chapter 10 process with other models used internationally[25]. They compared Chapter 10 with the *ex-ante* regulatory frameworks in five other jurisdictions spanning high income and middle-income regions as well as other African countries. These included the EU (high income), Malaysia and Singapore (middle income) and Kenya and Nigeria.

In their report attached to our earlier Submissions, Frontier Economics found that:

> *"Within each of these countries, the steps that NRAs are required to follow when imposing ex ante regulations in any market or sub-market are broadly in line with the process set out in chapter 10. In particular the key steps are:*
>
> - *To define the relevant economic market – at a geographic, product, temporal or functional level*
> - *To set out the methodology used to determine the effectiveness of competition in these markets (and others if needed)*
> - *To undertake the market analysis using the methodology set out as above, and to identify undertakings that have significant market power*
> - *To impose ex-ante measures in the relevant markets, and monitor their implementation"*

Frontier Economics included a table in their report, showing the comparison in more detail.

South Africa is not a regulatory outlier with an unworkable process for *ex ante* regulation. Quite the contrary. Our industry and regulatory environment are perfectly consistent with that of other countries, including most countries that we would consider to be comparable. And South Africa is not a unique market in global terms, that can afford to risk an untested and untried arbitrary and irrational short-cut process to address common international policy goals.

5.10.3 The existing tools may be applied by a reasonably resourced and capable regulator

International best practice comparisons reveal that the Chapter 10 process may be applied by a reasonably resourced and capable regulator.

The Authority can execute optimally on its requirements under Chapter 10 if it is fully resourced and any stumbling blocks are removed. In the past, the Authority has stated that it has not been able to effectively execute on its mandate or achieve its strategic objectives due to financial and human resource constraints[26]. The nature of the work required to be carried out by the Authority can be complex and requires appropriate resourcing to improve its competency if it is to succeed on its mandate.

5.10.4 Application of the existing tools

We have two recent examples of application of the existing tools by the Authority.

[25] Annex A, Frontier Economics report, Part 2, Vodacom's earlier Submissions

[26] ICASA 2015/2016 Annual Report, page 7; ICASA 2014/2015 Annual Report, page 17; ICASA 2013/2014 Annual Report, page 19

The Authority is part way through the priority markets review, which we refer to above. This is a significant inquiry to assess which markets or market segments are susceptible to *ex ante* regulation under Chapter 10.

The Authority's work on the eventual market review should continue in accordance with the principles of regulatory certainty and due process. The Bill as drafted will in effect suspend and derail these processes, and is certainly directly in tension with them, creating uncertainty for market participants while they await the outcome of these processes. The Authority should be allowed to see the priority markets study through to finalisation under the current provisions of the law.

The other recent example of application of the existing tools by the Authority is the mobile termination rate pro-competitive measures that were determined following the Chapter 10 process. The Authority has demonstrated that it can successfully implement the provisions of Chapter 10 through regulation of call termination services over the last seven years, using the current tools it has at its disposal.

5.11 Amendments to the Bill

We set out our proposed changes to the Bill in greater detail in Appendix E. The changes include the removal of all changes to Chapter 8.

6. Other changes

Part A Introduction

6.1 Introduction

In this section 6, we discuss a number of miscellaneous material changes to the Act introduced by the Bill that are not otherwise captured in the above sections. The objects clause of the legislation is proposed to be amended with the addition of new and unprincipled objectives. These are vitally important, as they will dictate how decision-makers engaging with the legislation interpret it and exercise their powers and duties. These must be firmly rooted in the interests of consumers, the industry and the sector as a whole, rather than introducing new and confusing policy objectives.

In this section, we also discuss provisions in the Bill which enable the Authority to impose obligations on operators that require potentially significant expenditure or significant risks, as well as changes that envisage regulation of international roaming services and changes that erode the independent role of the Authority when it comes to these matters.

Part B Critique of the Bill

6.2 Inappropriate new objects of the Act

The objectives in section 2 of the Act will be significantly undermined by the changes made under the Bill.

The existing objects in the Act include:

- to encourage investment, including strategic infrastructure investment, and innovation in the communications sector (section 2(d));
- ensure the efficient use of the radio frequency spectrum (section 2(e));
- promote competition within the ICT sector (section 2(f)); and
- promote an environment of open, fair and non-discriminatory access to electronic communications networks and electronic communications services (section 2(g)).

These objects present a fair and balanced approach to the development of a competitive telecommunications market in South Africa. They remain relevant and important and should not be amended with the inclusion of the arbitrary and inappropriate new objects contemplated by the Bill.

6.2.1 Access to spectrum

The changes to section 2 introduce a new objective to:

> "*(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*".

The principle of spectrum being granted on an exclusive basis to a small number of operators is the norm in almost every country in the world for spectrum in the high demand bands. Exclusivity has been required to avoid interference and for the other technical reasons described in section 4.6.1 above and spectrum is awarded to several operators because each requires control to provide, without any interference, services over their networks efficiently.

The licensing of spectrum on an exclusive basis has directly facilitated the development of mobile networks in strong competition with each other and the provision of voice and data services enjoyed, at an impressive comparative efficiency level, by the vast majority of the people of South Africa.

The application of this new objective underlies the deeming of all MNOs to be subject to onerous wholesale access obligations, even where their spectrum is substitutable for spectrum held by other operators and where they have no market power and operate in competitive markets, as discussed in section 5.6. Furthermore, the whole foundation of the deemed entity regime as it applies to MNOs is flawed. This objective is the premise for that flawed regime and is inappropriate in a regulatory framework that respects the legal property rights of licensees.

6.2.2 Promotion of services-based competition and avoidance of duplication

The changes also introduce a new objective to:

> "*(cB) promote serviced-based competition and avoid concentration and duplication of electronic communications infrastructure in urban areas*".

The objective in paragraph (cB) deals with two ideas. First is that services-based competition should be promoted and second is that duplication of infrastructure in urban areas should be avoided.

This strongly suggests the Government has lost confidence in facilities-based competition, where most countries in the world are doing everything they can to increase facilities-based competition. This type of competition is not something to stop, it is something that should be actively encouraged where it is efficient to do so, as that competition drives investment, as we have explained in this submission and in our earlier Submissions. In fact, facilities-based competition leads to greater services-based competition, as competing facilities providers drive wholesale and retail competition, whereas a pure focus on services-based competition results in homogenous products at similar prices, with little differentiation among service providers.

While the WOAN is intended to promote services-based competition, it is also a facilities-based competitor to the existing operators. This puts the main feature of the Bill arbitrarily at odds with one of its main objectives.

6.2.3 Open access environment

The changes introduce a new objective to:

> "*(cC) promote an environment of open access to electronic communications networks on terms that are effective, transparent and non-discriminatory*".

Wholesale open access, conceptually, is a principle that should apply to specific concrete and defined pro-competitive measures, found appropriate in markets found to have failed after rigorous reviews of the competitive dynamics of such markets. As such, if it is to be imposed on a licensee, then there should be rigorous analysis to support it under a Chapter 10 process.

South Africa should not accept a general environment of mandated open access, operating at the level of an object of the Bill, that may be applied regardless of the impact on licensees that may be subject to it. The outcome would be a reduction in desperately required investment and an adverse effect on welfare enhancing capabilities of the efficiently operating ICT sector.

6.2.4 Market dominance and control

The changes introduce a further new objective to:

"*(cD) redress market dominance and control*".

It is unclear what "control" means in this context and what it is intended to add to the reference to market dominance. Also, redressing dominance without engaging in the market review processes that should define the contours and extent of dominance is not rational. We propose that this object be replaced with "redress cases of market failure".

6.3 Universal access and universal service obligations on individual licensees

The existing Act includes a sensible framework for the implementation of universal service and access policy. The Minister may make policies on these matters (section 3(1)) after consultation with the Authority and the Authority may prescribe standard terms and conditions for universal access and universal service obligations for individual and class licences (section 8(2)(g)),

Section 8(4) now requires that the Authority must, not may, include universal access and universal service obligations in individual licences.

Further, section 8(3) now requires that the Authority must, not may, make regulations for designating licensees to whom these obligations apply and, with the new section 8(4A), the Authority must review the regulations every five years.

Vodacom does not support this section 8(3), as it will have a negative impact on certainty and investment. Nor do we support section 8(4), as universal service regulations should be at the discretion of the Authority. These changes to section 8 should be deleted.

6.4 New Chapter 7A: international roaming

Chapter 7A envisages the regulation of international roaming services. While these regulations contemplate SADC roaming regulations (section 42A(1)), they may extend to other countries where reciprocal terms and conditions are imposed in that other country by the local NRA (section 42A(2)).

Section 42A(2)(a) provides that:

> *"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."*

This is defined in paragraph (b) as requiring similar tariffs.

While we support the general concept of reciprocity of wholesale inbound roaming prices, it needs to be acknowledged that there can be material differences in the wholesale cost of roaming in different countries. In these circumstances, care is needed in applying reciprocal terms and conditions.

Where there are material differences in wholesale costs, say between South Africa and Country X, the risk is that imposing reciprocal terms and conditions may place a South African service provider in a loss-making position due to higher wholesale costs, even though those reciprocal terms and conditions may not have that effect for a Country X service provider due to lower wholesale costs applying in that country. It may also create a distortionary effect on competition in the local market.

We therefore propose that the principle of reciprocal wholesale roaming charges be subject to conditions of full cost recovery by the service provider in South Africa and that such charges do not distort competition in the South Africa market[27]. This is likely to require the Authority to undertake a cost-modelling exercise and a market review before setting or agreeing reciprocal charges.

[27] As provided for in the guiding principles contained in the SADC Roaming Policy of 26 June 2015.

We don't see any reason for reciprocity and any other form of regulation to extend to retail roaming charges. Competition in the mobile market is more than sufficient to ensure good outcomes for consumers.

To the extent that Chapter 7A deals with consumer protection issues, these are adequately addressed generically in Chapter 12 of the existing Act.

6.5 Rapid deployment

Vodacom generally supports the changes to Chapter 4 regarding the promotion and encouragement of rapid deployment of electronic communications networks and electronic communications facilities. However, the changes to Chapter 4 go far beyond promoting and encouraging rapid deployment.

Our main concerns relate to the obligations that may be imposed on licensees that are onerous and that may perversely hinder the rapid deployment of networks.

6.5.1 Rapid deployment powers are potentially onerous

The Authority is required to make regulations setting out obligations on licensees for the rapid deployment of networks and facilities (section 20C(1)(b)) and terms and conditions for rapid deployment of networks and facilities (section 8(6)).

These requirements are very similar to the new power for the Authority to impose universal access and universal service obligations on licensees under section 31A. In both cases, an operator may be required to deploy network where it had not planned to deploy, or require it to do so more quickly than it would have intended. There may be no, or a marginal, business case for deployment. This may significantly increase the risk to the licensee of making these new investments.

This power of the Authority to force a licensee to incur major expenditure, or take on significant risk, to deploy new network is an extraordinary imposition on that licensee's freedom to operate its business as it sees fit, within the scope of the law.

And this power is arbitrarily limitless; the Authority may determine that a licensee is going to rapidly deploy network and facilities in a particular area, regardless of the feasibility of that requirement, regardless of whether it is even attainable and regardless of the damage it will cause to that licensee. We propose that section 20C(1)(b) be removed.

6.5.2 Requirements to share may slow down deployment

We are also concerned that rapid deployment obligations may be used, conversely, to compel a licensee to slow down deployment of its network, where sharing may be an option, but it would be quicker, easier and potentially cheaper for the licensee to deploy its own network. It would be perverse, in the interests of rapid deployment, if a licensee were not able to move rapidly to meet end user demand because it is forced to share with another licensee.

In this regard, a licensee should not be required to seek out alternatives to new deployment (section 20D(5)(g)) if it does not consider it to be in its best interests to do so. We propose the obligation simply be to consider alternative options.

The same comment also applies to such measures as single trenching under section 20F.

6.5.3 A rapid deployment database is not practical

A rapid deployment database as envisaged by the new section 20B(3)(b) of the Bill is unlikely to be practical. Despite being highly motivated to do so, existing operators struggle in practice to build and maintain accurate configuration databases of our active and passive assets.

Accordingly, while a rapid deployment database is a worthy objective, it is not a practical option and is unlikely to meet its objectives.

We also believe that the process in updating and maintaining an accurate centralised database for operators will result in delays in their rolling out new network. This would be counterproductive and will override any benefits that a centralised approval model will have in addressing duplication.

6.5.4 The Authority should perform the functions of the Coordinating Centre

The creation of the Rapid Deployment National Coordinating Centre as a separate entity would lead to the creation of a further unnecessary or wasteful SOC and will introduce debate between the regulators/entities and result in unnecessary delays. We propose that its role be undertaken by the Authority.

6.5.5 Collection of information on planned deployments may harm competition

The Bill includes a new section 20C, which provides as follows:

> "*(3) The Authority must ensure that electronic communications network service licensees—*
>
> *(a) provide information on existing and planned electronic communications networks and facilities, … for inclusion into the geographic information system database …;*
>
> *(b) provide information on existing and planned electronic communications networks and facilities to the Authority…*"

Vodacom's concern with this provision is that the inclusion of this information in the database is likely to be harmful to licensees as sensitive commercial information regarding their planned roll outs and location of fibre customers would be revealed. Even if this information is anonymised in the database, this disclosure requirement is likely to have anti-competitive effects.

Instead, the database should be updated when new deployments have been made. There should be no requirement to notify of upcoming deployments, due to their commercial sensitivity.

6.5.6 Access to high sites

The new provisions dealing with mandated access to high sites (section 20E) suffer from some of the same problems as the wholesale open access obligations under Chapter 8. A request for access to a high site may be technically feasible, but economically unreasonable and inefficient.

Unlike under section 43(5)(d), there is no ability for the Authority to apportion costs in these situations where it is economically damaging to provide access to the high site.

Fundamentally, we disagree that a licensee with a high site may be required to provide access to that site, where that may come at enormous cost and risk to the licensee, but because the request could be achieved technically, it must be carried out. In our view, high sites should be treated no differently to any other sort of facility where access may be sought under Chapter 8. Accordingly, section 20E should be deleted.

6.5.7 Access to adequately served networks

The points that we make above in relation to access to high sites would also apply to a network that is "adequately served" under section 20H. An access seeker should rely on its rights under Chapter 8. A separate regime for adequately served networks is neither necessary nor appropriate.

Further, there should be no limitation on a licensee's deploying a network or facility in "adequately served" premises if it considers it is in its best interests to do so (section 20H(3)). Accordingly, section 20H should be deleted.

6.6 Technical standards

We acknowledge the minor change to section 36(2)(e) where standards for the performance and operation of any equipment or electronic communication facility, including radio apparatus, shall "*ensur[e] universal design requirements to make provision for persons with disabilities*."

We are uncertain how such a standard would apply to radios and antennas, and other electronic communications facilities. We recommend that paragraph (e) be amended to provide further clarity on this issue.

6.7 Quality of service requirements

The Authority can make quality of service regulations every two years, including broadband download and upload speeds (section 69A). This is an open-ended power for the Authority to require an operator to invest large amounts to increase speed, even when the prospect of a return on that investment is low.

Throughout these submissions, we have highlighted the onerous provisions in the Bill which enable the Authority to impose obligations on operators, which will require potentially significant expenditure or significant risks to meet.

These include:

- new obligations to provide universal access and universal service under the new section 31A (see section 4.10); and

- powers of the Authority to impose terms and conditions on licensees for the rapid deployment of networks and facilities (see section 6.5)

This ability for the Authority to set broadband upload and download speeds, at least every three years, is another objectionable example of an onerous power. We propose that the quality of service indicators set by regulations under section 69A be targets, rather than standards.

6.8 Additional terms subject to Chapter 10

Under the previous section 8(3), the Authority could prescribe additional terms and conditions applied to any individual licence or class licence, but this was "subject to the provisions of Chapter 10". This proviso has been deleted in the Bill.

The proviso provided an important protection for licensees, and a guarantee of a rational process, as licensees knew that Chapter 10 applied only to parties with significant market power and, as such, the obligations that may have been imposed under section 8(3) would not apply to them if they did not have that market power. The reference to Chapter 10 provided the assurance that the impact of additional terms on competition in the market will be considered, before imposing such additions.

Now, regardless of whether a licensee has market power, the amended section 8(3) entitles the Authority to change the terms and conditions of their licences. This is a very open-ended power to grant to the Authority. The reference to Chapter 10 should be reinstated.

6.9 Ownership and control of individual licences

The Authority was previously required to conduct an inquiry, including a market study, before it made regulations for the ownership and control of individual licences under section 13(3). Now, with the changes made to section 13(5), that is no longer necessary.

This was a valuable and important step for the Authority to take, to make a rational process more likely, before it issued these ownership and control regulations. A market review may readily demonstrate that there is no need to limit the ownership and control of certain individual licences.

It is unclear why this step in the process should be removed. We propose that it be reinstated.

6.10 End user and subscriber service charter

Vodacom generally supports the changes proposed to section 69, but we are concerned about extending the code of conduct to include wholesale matters and also amendments to section 69(5) in relation to end user and subscriber service charters.

Subsection (1A) extends the code of conduct protections beyond retail end users to include "users of wholesale services". Users of wholesale services are retail service providers. They are normally significant business entities that have no need of consumer protection-style codes of conduct. These protections should be confined to retail end users. We note further that wholesale users who buy services from Vodacom ordinarily negotiate independent contracts where bespoke terms are agreed. Such users have sufficient negotiating power and insight and therefore do not require the protection of a code of conduct.

The amendments to subsection (5) include a requirement that licensees provide "accurate, understandable and comparable information" to end users on their plans. Although this sounds acceptable in principle, in practice it is likely to be difficult to comply with, especially in relation to comparability.

Licensees have a multitude of plans in the market, trying to appeal to particular customer segments. In a competitive market such as South Africa, retail plans are changing constantly, with licensees trying to provide value for consumers in the best way possible.

The only way this obligation could work is if the Authority identified a set of standard customer parameters and asked licensees to provide information on the prices and product features that met those parameters. This is similar to the way benchmarking is done by organisations such as the OECD.

Our suggestion is that the Authority consider these matters in regulations.

We also propose that every three years is too frequent for the Authority to review the regulations for minimum standards for code of conduct and end-user and subscriber service charters (changes to subsection (3)), which will create unwarranted uncertainty for the industry. We propose instead that it be reviewed at least every five years.

6.11 Historically disadvantaged groups

We propose that the changes to section 9(2)(b) be removed from the Bill. This is because the Authority is required to implement empowerment in terms of the BBBEE Act, and not in terms of the narrow

concept of HDI/HDG ownership. In terms of section 10(1)(a) of the BBBEE Act, the Authority has an obligation to apply the ICT Sector Code when determining the qualification criteria for the award of licences under the Act.

Part C Proposals

6.12 Amendments to the Bill

We set out our proposed changes to the Bill in greater detail in Appendix E. The changes include the following:

6.12.1 New objects of the Act

We propose the deletion of the new objects in paragraphs (cA), (cB) and (cC) that relate to "skewed access" to spectrum, promotion of services-based competition (preferring it over facilities-based competition) and a presumed open access environment.

We have suggested more appropriate wording for the long title of the Bill.

Paragraph (cD) should be deleted and replaced with "redress cases of market failure" renumbered as paragraph (cA).

6.12.2 Universal access in individual licences

Sections 8(3) and (4) should be deleted, due to their adverse impact on certainty and the independence of the Authority.

6.12.3 International roaming

Section 42A(2)(b) be amended to make it clear that references to "tariffs" are to wholesale roaming tariffs and to add at the end ", provided that the wholesale tariffs allow full cost recovery by the service provider in South Africa and that the tariffs do not distort competition in the market".

6.12.4 Rapid deployment

We propose a range of amendments to Chapter 4 in the Bill so that the Authority's role is to promote and encourage sharing of infrastructure, rather than requiring it, and removing their ability to force deployment of new network. Operators should be required to consider alternative options.

Obligations on operators to provide information should apply to deployed networks and not to planned networks.

6.12.5 Quality of service

Amendments are required to section 69A so that the Authority sets targets for operators in regulations, rather than setting standards.

7. The Constitutionality of the Bill

The discussion in the preceding sections of our submissions will have already illustrated that there are a number of respects in which the Bill falls short of the requirements of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"). In this section, Vodacom specifically deals with the important proposition that the Bill is subject to constitutional challenge.

This is considered under three headings:

- violations of the rule of law and the doctrine of legality;
- violations of the constitutionality guaranteed independence of the Authority; and
- violations of Vodacom's property rights.

7.1 Violations of The Rule of Law and the Doctrine of Legality

7.1.1 The Centrality of the Rule of Law in South Africa's Constitutional Order

The rule of law is a foundational principle in our constitutional democracy,[28] and is entrenched in section 1(c) of the Constitution. The rule of law has many facets: central amongst these is the principle that a State must be governed by law, and not by Ministerial (or other government official) fiat.

In the context of legislation, the Constitutional Court, in the decision on *Fedsure Life Assurance*, has explained how the rule of law means that legislation must be clear and certain, and that it must operate prospectively and not extinguish existing rights:

> "*Generally, legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed'.*
> *As Innes CJ reasoned in Curtis:*
>
> > *'The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation.'* "[29]

In another important decision in *Veldman*, the Constitutional Court explained that the doctrine of legality meant that the exercise of public power could not be arbitrary:

> "*It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive*

[28] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) ("Fedsure Life Assurance") at paras 57-59.
[29] *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* 2007 (3) SA 210 (CC) at paras 26-27 (footnotes omitted.

and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."[30]

Hence, all law, including the Bill once enacted, must comply with the requirements of the rule of law in order to pass constitutional muster. If not, once enacted by Parliament,[31] it can be declared unconstitutional by a Court,[32] which means it then has no legal effect.

In the preceding sections of our submissions, we have canvassed a number of instances where the Bill is unconstitutional because it violates the rule of law. In this section, we elaborate on this proposition. The main violations in this regard inhere in the following:

- the Bill is irrational and arbitrary in a number of respects; and
- the Bill is materially vague in a number of respects.

7.1.2 The Bill is Irrational and Arbitrary

The principle of legality means that law that is arbitrary is unconstitutional.[33]

In the discussion above, and in the report by Frontier Economics, respects in which the Bill is arbitrary irrational and vague, and contrary to its purposes and contradictory, are canvassed in some detail. These are not all repeated here. Suffice to emphasise the following:

- The goals of achieving the rapid unlocking of high demand spectrum, its efficient exploitation, and equitable and efficient access by the public to its benefits will be severely undermined, rather than furthered, by removing the current efficient exploitation of spectrum by operators, and making the total networks of all licensees subject to wholesale open access.
- The basic methodology of the Bill is irrational: its main feature is the creation of a Wholesale Open Access Network, the WOAN, to operate as the vehicle through which wholesale open access is to be provided. But this is undermined entirely by the fact that all other licensees are also rendered "wholesale open access networks", by being subject to the obligation to provide wholesale open access to the whole of their networks, yet are required to monetise the WOAN by *each* taking up 30% of its capacity. The creation of a new wholesale infrastructure player to provide wholesale open access is entirely unnecessary if all the industry players will be obliged to provide such access.
- The notion of "open access" to spectrum is fundamentally incoherent.
- Making spectrum itself liable to "wholesale open access" (and "non-exclusivity") drains spectrum of its value for the licensee; yet eligibility for being assigned high demand spectrum is made conditional on taking up 30% of the WOAN's capacity, something there would be no incentive nor ability to do with such precarious high demand spectrum rights.

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[30] *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa an Others* 2000 (2) SA 674 (CC) ("*Pharmaceutical Manufacturers*") at para 85 (emphasis added).

[31] The Bill cannot be challenged in Court unless and until it is enacted as an Act of Parliament by the Legislature. Section 79 of the Constitution affords the President the opportunity to refer a Bill (before it is enacted) to the Constitutional Court if he has concerns about the constitutionality of the Bill in certain circumstances.

[32] In order to do this, a party (such as Vodacom) would bring an application to the High Court of South Africa to have the Bill (once it is enacted into law as an Act of Parliament) declared unconstitutional. If the High Court makes such an order, the declaration of constitutional invalidity must then be confirmed by the Constitutional Court in terms of section 167(5) of the Constitution.

[33] *Pharmaceutical Manufacturers*.

- The Bill decrees that spectrum assignment is to be "non-exclusive" and even no longer "individual" – suggesting that no licensee assigned spectrum would have any rights to such spectrum not enjoyed by all other players (to the same spectrum). This contradicts the very premise of a licensing regime, and is entirely incompatible with concepts such as spectrum trading and spectrum sharing that the Bill also ostensible entrenches, all of which are premised on meaningful ownership rights in the licensed spectrum.

- The concept of "non-exclusive" spectrum is used interchangeably with spectrum that is susceptible to "wholesale open access", where these concepts are logically at odds – the former implying no special rights to the spectrum at issue on the part of the licensee and the latter necessarily implying special rights akin to ownership coupled with an obligation to provide access to others. This renders the whole spectrum regime hopelessly incoherent and vague.

- Placing the decision how much high demand spectrum is to be allocated to the WOAN entirely in the hands of the executive, without being preceded by a market inquiry, is manifestly arbitrary, as only a rigorous market inquiry could yield a rational assessment of the likely effects, both on the WOAN and on the market generally, of allocating a certain share of high demand spectrum to a WOAN.

- The deemed entity regime is entirely arbitrary and the thresholds imposed for supposed market power irrational and without any foundation; the fact that open access obligations extend into all aspects of the network and potentially all markets, even those in which the licensee cannot conceivably be a deemed entity, exacerbates the irrationality.

- The uniquely extensive sharing obligations that extend to all aspects of the network and are bereft of any reasonableness thresholds rigidly lock extremely inefficient and counterproductive arrangements into the legislation, leading to absurd results, especially as accepted competition principles are thrown overboard and substituted by arbitrary and rigid determinations not based on any market impact analysis for each individual case as would be required for rationality.

- The criteria for the membership of the WOAN are based on a legislative construct, namely the market in "electronic communications services", an aggregate percentage "market share" of which determines eligibility, when no such concept or market is known to exist.

- An overriding purpose of the Bill is ostensibly to favour services based competition over infrastructure-based competition, yet the main contribution of the Bill is to introduce an infrastructure competitor in the WOAN.

- The open-ended and potentially limitless extent of the deployment obligations imposed on licensees is arbitrary and irrational.

All of these are examples of how the Bill is arbitrary, irrational and vague, and therefore in conflict with the Rule of Law.

7.2 Violating the independence of the regulator

The Bill requires the Minister to take over a number of functions of ICASA. These include:

- the development and approval of the National Radio Frequency Plan;

- the approval of Universal Service Access and Obligations; and

- a requirement that the Authority must now act in accordance with the Minister's policy directives, which must be contrasted with the current position which requires the Authority to take into consideration policy directives when making decisions, but insists on its independence in relation to its decision making, and which even specifically precludes policy directions that intrude on individual licencing decisions.

Furthermore:

- the Bill gives the Minister the role of deciding what spectrum constitutes high demand spectrum;

- the Bill gives the Minister the power to decide how much high demand spectrum is to be assigned to the WOAN and how much left to other operators;

- the Bill limits the Authority's power to determine the terms for the award of spectrum to the market participants, by imposing a rule that for a potential bidder to acquire high demand spectrum it must first commit to buying 30% of the capacity of the WOAN; and

- the Bill transfers from the Authority to the Minister some of the Authority's key responsibilities, including:

    - the development of the radio frequency plan;

    - issuing policies and policy directions relating to spectrum; and

    - ensuring equitable distribution of radio frequency spectrum resources.

These provisions individually and collectively undermine the constitutionally-entrenched independence of the Authority. The independence of ICASA is fundamental to effective decision-making and regulation of the electronic communications sector. The exercise of executive discretion weakens the Authority's functional independence.

If the Bill is adopted in its present form, ICASA's role will be largely limited to the administration of the radio frequency spectrum. Planning and control of the spectrum will reside with the Minister. A consideration of section 34 of the Act (dealing with the national radio frequency plan) is illustrative of how the powers currently given to the Authority, will be taken over by the Minister. Section 34 of the Act presently provides:

"*(1) The Minister, in the exercise of his or her functions, represents the Republic in international fora, including the ITU, in respect of—*
(a) the international allocation of radio frequency spectrum;
(b) the international coordination of radio frequency spectrum usage; and
(c) the co-ordination and approval of any regional radio frequency spectrum plans applicable to the Republic, in accordance with international treaties and multinational and bilateral agreements entered into by the Republic.
(2) The Minister must approve 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.
(3) The Authority must assign radio frequencies consistent with the national radio frequency plan for the use of radio frequency spectrum by licence holders and other services that may be provided pursuant to a licence exemption.
(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.

(5) The national radio frequency plan must be updated and amended when necessary in order to keep the plan current. When updating and amending this plan due regard must be given to the current and future usage of the radio frequency spectrum.

(6) The national radio frequency plan must—

(a) designate the radio frequency bands to be used for particular types of services;

(b) ensure that the radio frequency spectrum is utilised and managed in an orderly, efficient and effective manner;

(c) aim at reducing congestion in the use of the radio frequency spectrum;

(d) aim at protecting radio frequency spectrum licensees from harmful interference;

(e) provide for flexibility and the rapid and efficient introduction of new technologies;

(f) aim at providing opportunities for the introduction of the widest range of services and the maximum number of users thereof as is practically feasible.

(7) In preparing the national radio frequency plan as contemplated in subsection (4), the Authority 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;

(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—

(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 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.

(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.

(16) The Authority may, 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, except where such migration involves governmental entities or organisations, in which case the Authority-
(a) must refer the matter to the Minister; and
(b) may migrate the users after consultation with the Minister.

Hence, under the current section 34 of the Act, ICASA has extensive powers to develop and prepare the national radio frequency plan, as well as to implement it.

Under the Bill, this section will be amended significantly to empower the Minister to take over most of these powers without ICASA's involvement. Specifically, under the Bill:

- sub-section (1) will be deleted, as will sub-sections (4), (8) to (15);
- the Minister is no longer required to "*approve*" the NRFP, but now has the function to "*develop*" it as described in sub-section (2) and (5);
- the Minister must take over the functions in sub-section (7); and
- the Minister is required only to "*consult*" ICASA.

The role and function of ICASA in the development of the NRFP are therefore handed over to the Minister, and the only role of ICASA is to "*consult*" with the Minister.

Moreover, since subsection (4) of the principal Act has been deleted there is no certainty as to when the NRFP has to be prepared or appropriate modifications made to any existing radio frequency plan.

Section 192 of the Constitution provides as follows:

"*National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.*"

The importance of independence of the broadcasting regulator finds expression in international instruments, such as the African Charter on Broadcasting (2001), which states, at paragraph 2:

"*All formal powers in the areas of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society, and is not controlled by any particular political party.*"

There are three statues that give effect to the imperative in section 192 of the Constitution for an independent regulating Authority: the Broadcasting Act 4 of 1999 ("**the Broadcasting Act**"), the ECA and the ICASA Act. As the Constitutional Court has explained in *Electronic Media Network Limited and Others v e.tv (Pty) Ltd and Others*,[34] these Acts "*give institutional embodiment to a vivid constitutional notion – a commitment to regulating broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.*"

The Constitutional Court has found that the ECA and ICASA Act are inextricably linked in fulfilment of the value of section 192:[35]

[34] 2017 (9) BCLR 1108 (CC) at para 101.
[35] Paras 102 and 103.

"*[Parliament] locked the two statutes together. The ECA doesn't stand alone on a statutory island, isolated from the ICASA Act and from section 192. The two statutes lie entwined in a friendly, mutually inter-locking constitutional embrace, their provisions and purposes closely interlinked.*

They must be. Both owe their origin to section 192. And both seek, rightly, to fulfil its values."

The extract demonstrates an important recognition by the Constitutional Court that the reach of section 192 is not confined to the traditional conception of "*broadcasting*" in isolation from electronic communications. After all, the constitutional section expressly sets out a purpose – making the electronic media of the spread of ideas in South Africa subject to independent regulation, not beholden to Governmental control, and this purpose must be read to determine the scope of the protection, and to keep pace with technological and social developments. This is in line with the orthodox theory of constitutional interpretation in our law, to interpret the Constitution as a "*living document*". This is specifically recognised in the context of section 192 in *Electronic Media Network*:[36]

"[Section 192] remains alive, an operative part of a living Constitution".

Both the ECA and the Broadcasting Act (as did the Broadcasting Act 153 of 1993, which was in place when section 192 was enacted), define broadcasting broadly enough to encompass any unidirectional electronic communication to the public by means of any electronic communications, which would include mobile technology. This would include an internet-based news service. With increasing convergence, the barriers between broadcasting and telecommunications have broken down such that there is no longer a coherent line between them for the purposes of protecting the value enshrined in section 192, which is precisely why the statutes were linked together in the way celebrated by the Constitutional Court.

For these reasons, Vodacom's primary submission is that section 192 expressly and directly entrenches the independence of ICASA, and any legislation which seeks to undermine that independence would likely fall foul of this constitutional protection.

Even if the term "broadcasting" in section 192 were to be read as confined to the narrower traditional conception – contrary to this primary submission – and be read to exclude electronic communications generally, the degree to which the Bill confers the power to control spectrum and the use of spectrum on the Ministry entails an infringement of section 192. Spectrum is critical for (traditional) broadcasters to operate, and the degree of control over spectrum allocation conferred on the Ministry in the Bill amounts to an ability effectively to license broadcasters through controlling their spectrum – an ability ultimately to control the free spread of ideas independent of governmental dictates through broadcasting.

The right in section 192, to an independent regulator, is not qualified or subject to any limitation.[37] Any conduct of legislation which amounts to a limitation of section 192 of the Constitution, through an infringement of the independence of ICASA, would therefore be unconstitutional, and would not be capable of being justified.

It may be observed that the radical subversion of the independence of ICASA also contradicts provisions in the ICASA Act that entrench ICASA's independence (not only in the sphere of

[36] Para 100.

[37] Rights in the Bill of Rights, for instance, are subject to section 36 of the Constitution, which permits a limitation of fundamental rights to the extent that the limitation is reasonable and justifiable in an open and democratic society. This is not so for a violation of section 192.

"*broadcasting*").[38] These contradictions add to the irrationality of the amendments, as they do not fit within the current legislative framework with a companion Act.[39]

7.3 Infringements of Vodacom's Property Rights

7.3.1 Constitutional Protection Against the Arbitrary Deprivation of Property

Section 25(1) of the Constitution provides a range of protections against a person's (including a juristic person's) property rights. It reads:

> "*25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*

In the *First National Bank* decision,[40] the Constitutional Court set out the structure of analysis for direct application of the property clause in the form of a set of questions, as follows:

- Does the law or conduct complained of affect "property" as understood by section 25?
- Has there been a deprivation of the property by the law or conduct?
- If there has, is the deprivation consistent with the provisions of section 25(1)?
- If not, is the deprivation justified under section 36 of their Constitution?
- If it is, does it amount to an expropriation in accordance with section 25(2)?
- If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)?
- If not, is the expropriation justified under section 36?

7.3.2 Interference with Vodacom's Rights to Spectrum as an Arbitrary Deprivation

The Bill appears to envisage wholesale open access applied to spectrum itself. Current exclusive rights to licensed spectrum constitute constitutionally protected "property" for purposes of protection under the property clause of the Constitution, consistent with the assessment of the content of the concept of property by the Constitutional Court.[41]

The Bill envisages the following interference with existing valuable spectrum rights –

- the express removal of the expectation of renewal of the licence conferring current exclusive spectrum rights in line with international best practice and invariable historical practice, as long as its conditions remain fulfilled and the relevant fees are paid, coupled with

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[38] See The objects of the ICASA Act in section 2, sections 3(3) and (4), and the provisions in sections 4(3)(e) and 4(4)(f) that confer exclusive jurisdiction on ICASA in respect of licensing.

[39] This is analogous to the situation in *Pharmaceutical Manufacturers* where the President (at that time, Nelson Mandela) brought into operation the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998, and in so doing repealed all the existing supporting regulations. This was done under the mistaken understanding that a new set of supporting regulations had been set up to replace the repealed ones. The result was that, in the absence of Schedules and regulations, the entire regulatory structure relating to medicines and the control of medicines had been rendered unworkable by the promulgation of the 1998 Act. The Constitutional Court found that the act of bringing into operation the 1998 Act in these circumstances was irrational, not rationally related to the purpose for which the power had been given, and violated the rule of law.

[40] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) ("***First National Bank***") at para 46 (emphasis added).

[41] In *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape & Others* 2015 (6) SA 125 (CC) ("***Shoprite Checkers***") at paras 37-70, the Court held that a commercial trading licence which allows for the selling of wine in a grocery store constituted "property" as defined in section 25 of the Constitution.

- the loss of exclusive rights in and to the spectrum and the obligation to share the spectrum on an undefined "open access" basis once the licence is renewed.

This constitutes "*substantial interference*" with the existing use and enjoyment of spectrum sufficient to amount to "*deprivation*" of property in line with the tests for this term accepted by the Constitutional Court.[42]

For such deprivation to be constitutional, it must not be "*arbitrary*", lest it violate section 25(1) of the Constitution.[43]

The test for arbitrariness depends on the importance of the property deprived. When it comes to spectrum, the degree of deprivation is significant, and the nature of the property at issue lies at the core of the functioning of the whole ICT sector, which is fundamental to the realisation of open democracy, a foundational constitutional value. Accordingly, the property lies close to the heart of constitutional values, which means that, for the deprivation to be "non-arbitrary", it must occur with "sufficient reason" such that there is a proportional relationship between the objects and the means chosen – the means chosen must not disproportionally interfere with the property to achieve the objects sought to be achieved.[44]

In the instant case, the arbitrariness test is failed. Even if the test were one of mere rationality, the test for arbitrariness applicable when the property at issue is less closely related to constitutional values, the rationality test is failed in important respects. Examples of the respects in which the Bill is arbitrary are set out in section 7.1.2 above, and are not repeated here. But because the Bill entails a deprivation of property in circumstances where this lies close to the heart of constitutional values, the requirements to pass muster for arbitrariness are stricter – i.e. less irrationality is required to strike down the law than when considered merely from the viewpoint of legality. The required proportionality between means and ends – objective and means chosen – is entirely absent.

For these reasons, the interference with Vodacom's spectrum rights amounts to an arbitrary deprivation of property, which violates Vodacom's property rights which are protected under section 25(1) of the Constitution. Moreover, this violation is not justifiable under section 36 of the Constitution – principally because the Bill will not satisfy the requirement that it is the least restrictive means to achieve its purpose.[45] For these reasons, the Bill, if enacted, would be susceptible to being declared unconstitutional as amounting to an arbitrary deprivation of property rights.

7.3.3 Interference with Vodacom's Network as an Arbitrary Deprivation

Section 43(1) of the Bill provides as follows:

> "*(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*

[42] See in particular *FNB* (above) at para 57, *Mkontwana v Nelson Mandela Metropolitan Municipality & Another* 2005 (1) SA 530 (CC) at paras 32 and 45, and *Shoprite Checkers* (above) at paras 73-76.
[43] The deprivation must also be in terms of a "*law of general application*", but we accept that the Bill, if enacted, would constitute a law of general application.
[44] See in particular *Shoprite Checkers* (above) at para 21.
[45] Section 36 of the Constitution, contains a general limitations clause which allows any limitation of a right in the Bill of Rights (which would include section 25), to be justified if the limitation is considered "*reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors*".

into between the parties, in accordance with the general open access principles, except in the case of technical inability.

(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 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."

Hence, under the Bill, licensees will be obliged to make the whole of their networks available on a wholesale basis, and those that are "*deemed entities*" to do so on the basis of "*wholesale rates*" which will be cost-oriented and prescribed by ICASA.

Given the radical invasion of erstwhile property rights over the range of an operator's network this entails, especially on the basis that access for "deemed entities" is to be "*cost-oriented*", the degree of interference is sufficient to amount to deprivation of property.

Such deprivation is arbitrary for the following main reasons:

- The fact that there is no rational assessment of the levels of competition in the relevant markets where networks are to be shared and that all licensees are to share their networks is entirely arbitrary.

- The determination of deemed entity status is based entirely on an arbitrary (and low) market share threshold, and the mere possession of assigned spectrum, and is oblivious to whether a particular licensee possesses significant market power or not, which is an irrational means of capturing market power as a reality, the effects of which would be to undermine, rather than to further, access, efficient exploitation and competition, the objects sought to be achieved.

- Making the obligations apply even if the request is unreasonable is irrational.

- Extending the obligations beyond even the markets in relation to which the operator is a deemed entity makes no sense at all and exacerbates the arbitrariness in the deprivation.

For these reasons, therefore the requirement of wholesale open access to all of a licensee's network, with a deemed entity also being obliged to provide this at regulated cost-oriented rates, would amount to an arbitrary deprivation of Vodacom's property rights in its facilities.