SUBMISSION ON ICASA'S FRAMEWORK FOR INTRODUCING LOCAL LOOP UNBUNDLING - DISCUSSION PAPER FOR PUBLIC COMMENT

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1 INTRODUCTION

Telkom SA Limited ("**Telkom**") welcomes the opportunity to provide comments on ICASA's Framework for introducing Local Loop Unbundling ("**LLU**") - Discussion paper for public comment ("**the Discussion** paper) published by the Independent Communication Authority of South Africa ("**the Authority**").

Telkom has noted that the proposed unbundling of the local loop has received much media attention and various stakeholders have provided views and comments on the possible benefits and implications of LLU. In this regard, Telkom believes that the proposed implementation of LLU will not only have a material impact on Telkom's business and the industry, but on the South African economy as well. Furthermore, Telkom believes that it is ideally placed to provide comments on this important topic and trusts that the Authority will view Telkom's comments as part of a process that needs further debate and discourse. Telkom would also welcome an opportunity to make oral representations at any public hearing that maybe held in this regard.

Telkom's submission is divided into the following broad sections:

- Executive summary
- Myth Busters
- General comments
- Comments on the Authority's media statements
- Detailed comments on Discussion paper (Annexure A)
- Summary and conclusions

Outline of Telkom Submission

1. Introduction
2. Executive summary
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6. Comments on ICASA's media statements
7. Detailed comments on Discussion paper (Annexure A)
8. Summary and conclusions

EXECUTIVE SUMMARY

The Executive summary will provide the Authority with a high-level overview of Telkom's main contentions which is expanded at the end of the submission:

- Telkom believes that LLU is an outdated regulatory remedy developed in the late 1990s and specifically for developed countries where high levels of fixed-line teledensity were prevalent
- Telkom believes that the principle of open access, including access to the local loop and the equivalent thereof in the broadcasting environment, should be equitable, proportionately applied to all licensees in the communications industry, including network providing mobile cellular services.
- Specific South African conditions make Telkom more vulnerable than global peers to introduction of LLU, i.e. the concentration of revenues in few profitable exchanges.
- International practice has shown that LLU is complex and costly to implement.
- Telkom is of the considered view that developing countries face challenges that are dissimilar to developed countries. It is not clear how LLU will promote South Africa's developmental agenda and indeed it is Telkom's view that the implementation of LLU would be a departure from such policy.
- The Authority ought to conduct a Regulatory Impact Assessment before imposing LLU obligations, or any regulation and clearly illustrate how LLU will promote public interest.
- Telkom is of the view that any costs incurred by Telkom in order to facilitate the introduction of LLU should be funded by Access Seekers. Furthermore, Telkom believes that a fundamental principle to the implementation for LLU is full cost recovery including the recovery of the Access Line Deficit (ALD).
- LLU will not support Government's objectives of universal broadband access, particularly in the rural areas, and job creation. In the SA context with low fixed penetration rates, LLU would have an adverse impact on jobs & investments in the roll-out of network infrastructure. It is Telkom's view that

LLU will benefit a small segment of the South African population while furthering the digital divide between the 'haves' and 'have-nots'.

- The Authority's reliance on the Ministerial Policy decision of 2007 as an enabling policy framework is misplaced and incorrect in law. In addition, Telkom is of the considered view that the Authority's reliance on its facilities leasing regulations is flawed in law and open to legal challenges.
- Telkom is of the view that having regard to the Authority's Discussion paper, LLU would be legally, technically and financially be infeasible.
- Lastly, Telkom strongly cautions against the Authority proceeding with a LLU framework as there has not been sufficient discourse on this topic and the Authority has not considered the implications and possible unintended consequences of LLU. In this regard, Telkom believes that the Authority should not proceed prior to having considered the Government's policy objectives, conducted a Regulatory Impact Assessment and having addressed Telkom's ALD.

MYTH BUSTERS

Telkom believes that a number of perceptions and myths exist which are related and critical to the proposed implementation of LLU.

Myth 1: Telkom's access network has been paid with taxpayers' money

It is a common misconception that Telkom's access network has been funded by government with taxpayers money. This gives rise to the notion that since the public at large has funded Telkom's network, it would be fair to allow all operators to have access to this network. This notion however is misplaced. The value of the net assets on Telkom's balance sheet when the company was corporatised in October 1991 was –R1,5bn. This negative value reflects the liabilities Telkom inherited from the Government, which offset the value of the assets received. The value of the buildings, network infrastructure and equipment that Telkom received from the State was R12,8bn but the total value of liabilities came to R14,3bn.

Furthermore, during the period 1991 – 2010 Telkom had invested more than R65bn in its network while it only receiving R4.4bn from Government as its primary shareholder during this period. In the light of these facts, it is far-fetched to claim that taxpayers paid for Telkom's network and competitors should therefore have access to this network by introducing LLU.

Myth 2: Telkom's copper network has already been paid-off

In addition to Myth 1, there is a perception that Telkom's copper network has already been paid-off and hence it should be made available to competitors. It should be noted that Telkom continuously re-invests in its network and the cost (e.g. copper prices, labour costs) of installing and maintaining the network elements have dramatically increased in recent years. In this regard, Telkom is

forced by copper theft, vandalism, accidental breakage and environmental conditions to replace elements of its existing access network. To a large extend, these conditions are peculiar to South Africa and few operators (especially in developed countries) had to deal with this issue at the same scale that Telkom does. When viewed against the fact that copper cables are generally depreciated over 20 to 40 years, depending on the type of cable used, it is clear that a major part of the capital investment in the copper network is still to be paid off.

Furthermore, during the last few years Telkom has experienced, on average in any given year, in excess of 12,500 incidents of copper theft and breakage. For example, in 2009/2010 Telkom's Operational expenditure on theft and breakage incidents was R527m. Furthermore, Telkom has spent over R17bn over the last 5 years on building, replacing and modernising its network. In addition, it should be noted that the access network cost components are not limited to the procurement cost and installation of the physical lines, but also the ongoing maintenance of the access network, i.e. fixing of faults. For example, in 2009 Telkom had to repair 1.5 million faults in the access network.

Myth 3: LLU will increase network roll-out and Broadband penetration in under-serviced areas

It is another myth that LLU in South Africa will be to the benefit of society at large and will indeed increase broadband penetration and provide poorer communities located in non-urban and rural areas with affordable broadband access. It is evident that the purpose of LLU is to unbundle the local loop, that is, existing local loops. Where there are no local loops, there will be no unbundling of the local loop and hence that segment of society will not enjoy the benefits of LLU (as perceived and advocated by proponents of LLU). It should be noted that the majority of South Africans still do not have access to fixed-line communications infrastructure, i.e. the local loop and that this problem will not be solved by LLU. It is therefore important to note that LLU may have the unintended consequence of

delaying the rollout of access lines to underserviced and rural areas (where there is no local loop) as such investments would also be subjected to LLU and the recovery of the investment (and associated risk) would be foregone. LLU, when implemented in an inappropriate context, therefore has the potential to increase the digital divide between the 'haves' and 'have-nots'.

For example, fixed-line teledensity was at 87% in the UK when LLU was introduced. As most UK citizens already had access to communications infrastructure it was thought that LLU would bring other benefits (more competition and lower prices) to these citizens. It was therefore a conscious decision by the regulator that it would look after the interest of society at large (87%) while accepting that LLU would not benefit a small segment of society (13%). Telkom believes that the proposed implementation of LLU in South Africa in contrast would only benefit a small segment of society who already have access to fixed-line infrastructure (8%) and ignore society at large (92%). This approach is not consistent with the developmental agenda and the objective of the South African Government to roll-out infrastructure in underdeveloped areas.

Myth 4: The implementation of LLU is simple and can be done quickly

It is common knowledge that LLU has been introduced in many countries with varying degrees of success. It is however unfortunate that many stakeholders have only considered the final destination (LLU implementation) without considering the journey including the process, time, effort and resources it has taken individual operators, industry and regulators in getting to the final destination. It is regrettable that some stakeholders have created the perception that LLU is neither complex nor costly and that South Africa should not consider the unintended consequences but simply transplant LLU practices from other jurisdictions. It should be noted that internationally operators have been given sufficient lead time prior to the introduction of LLU to address the various aspects of the business required for LLU implementation including, product development,

establishing processes, up-skilling staff, systems development, information and database preparation and network equipment installation. Each one of these business areas has its own eco-system of challenges and requirements.

Myth 5: LLU will create jobs (and / or retain jobs) in South Africa

Telkom is of the view that it is a fallacy to believe that LLU would either create or even retail jobs in South Africa. There is no empirical evidence to support this notion that LLU would create jobs in South Africa. Firstly, it should be noted that Telkom compared to international and local peers may be considered to have a workforce which is higher than the norm. For example, Telkom employs over 23,000 people while MTN and Vodacom's local operations only employs about 6,500 and 5,000 people respectively. Telkom has already communicated to the Authority that the cost of implementing LLU and the nett revenues foregone to competitors would substantially decrease Telkom's operating profits. This may leave Telkom with no alternative but to review its workforce size.

GENERAL COMMENTS

Relevance of LLU

Telkom believes that it is critical as part of the discourse on the proposed implementation of LLU, to consider the relevance of LLU, with specific reference to the South African experience and policy orientation. Telkom is of the view that the Authority must consider the relevance of LLU by specifically considering what the intended rationale and objectives for LLU are. Furthermore, the Authority should heed lessons learned from developing countries in dealing with LLU and in particular how BRICs have dealt with the issue of LLU. The Authority should also consider the peculiarities that may be present in the South African communications market such as the continued existence of an Access Line Deficit ("**ALD**"), tariffs that have not been fully rebalanced and Telkom's unique situation when compared with its peers where LLU have been introduced. In addition, the Authority cannot consider the introduction of LLU and its relevance without considering the implications this would have on job creation (or job retention) and investments in the industry. Telkom submits that the Authority can only answer the question of the relevance and importance of LLU for South Africa after it has completed undertaken a comprehensive Regulatory Impact Assessment (RIA). Indeed, a RIA should indicate whether LLU is the most appropriate regulatory tool considering the stated objectives.

Rationale and regulatory objectives for LLU (Why LLU?)

Telkom has noted that the Authority has not explicitly stated the objectives and rational for implementing LLU. Telkom submits that unless the Authority has clearly stated the intended purpose of LLU as a regulatory remedy, it is neither appropriate nor realistic to expect operators to provide comment unless the Authority has been transparent on what market failure or competitive distortion LLU is meant to address or alleviate. In this regard, it is not evident whether the

Authority's intention for introducing LLU is meant to address the so-called 'inefficient use' of Telkom's network as claimed by the Authority, whether LLU is intended to drive down broadband prices, increase broadband penetration, uptake and usage, create additional jobs, extend networks to underserved areas or simply to increase competition in the industry.

Telkom believes that unless the Authority adheres to the five principles for good regulation (BRTF, 2005) namely transparency, accountability, proportionality, consistency and targeting, it is not clear how LLU will promote public interest and benefit the society at large. Indeed, the European Commission (EC) recognised that poorly conceived and ill-considered regulation can prove to be excessive and go beyond what is strictly necessary. The EC (2006) furthermore acknowledges that "*some regulation can be overly prescriptive, unjustifiably expensive or counterproductive."* This could therefore result in a decrease in public interest and society welfare.

Telkom submits that the Authority should not consider Telkom's questioning of "why LLU?" as frivolous and of no relevance to the LLU debate. Furthermore, Telkom is also of the view that the Authority can equally not circumvent answering this question by considering the implementation of LLU as a policy direction from government and thereby exonerate itself from considering the costs and benefits associated with LLU, the implications and requirements of LLU, the possible beneficiaries of LLU and the unintended consequences of LLU. It is indeed incumbent upon the Authority to illustrate that it is acting in the public interest. In summary, Telkom submits that the framework for implementing LLU can only be discussed once the Authority has been transparent on the objectives and rationale for considering LLU.

International experience / BRICs

Telkom is acutely aware that LLU has been implemented in a number of international jurisdictions and at some point in time was even considered regulatory best practice. However, Telkom questions the relevance of LLU for South Africa and strongly cautions against simply transplanting regulation to South Africa. One only has to have regard to the time when LLU was first introduced as a regulatory remedy to come to the conclusion that it may no longer be the most appropriate and relevant tool. LLU was first introduced in the late 1990s in Hong Kong, United States and Canada and subsequently in the UK, France and South Korea in the early 2000s and consequently became an European Union requirement since 2001. If the Authority believes that LLU is international best practice, Telkom would like to point out that two of the jurisdictions that were first to have implemented LLU (i.e. Hong Kong and USA) have subsequently either withdrawn or roll-backed LLU obligations in favour of an explicitly stated policy of facilities-based competition intended to promote network modernisation and to promote future investments in fibre networks and other technologies.

Telkom would also like to point out that internationally LLU has not been viewed as an appropriate regulatory tool for developing countries. Although there have not been many reports on the appropriateness of LLU for developing economies and South Africa in particular, two international leading communications experts who have intimate knowledge of the South African communications landscape have questioned the transplant of LLU implementation for South Africa. A paper published by Cogna Consulting cautioned that developing countries like South Africa should carefully consider whether LLU is relevant in the modern telecommunications landscape before it invest in the considerable expense and effort into an LLU regime. It indeed concluded that LLU is a poor option for South Africa. Another paper published by Ewan Sutherland in conjunction with LINK Centre, concluded that in Africa, LLU may not be the answer or not a very significant answer.

Although proponents of LLU will be quick to point out that there have been developing countries (especially in Eastern Europe) where LLU have been introduced, they fail to consider that these are exceptions to the rule and in most cases the implementation of LLU in these countries have been preceded by proper Market Reviews and subsequent declaration of SMP status to operators. Further, Telkom is of the view that the Authority should heed lessons learned from developing countries in dealing with LLU and in particular how BRICs have dealt with the issue of LLU.

Telkom acknowledges that South Africa must look at its own needs, challenges and experiences with regards to the local communications industry and the role of communications in socio economic development and job creation. However, it may be useful to consider how other BRICs countries have addressed similar challenges and whether SA can learn and benefit from them.

How has BRICS dealt with LLU?

	Obligation Imposed on Incumbent Fixed Operator	
	Country	**LLU**
B	Brazil*	No
R	Russia	No
I	India	No
C	China	No
S	South Africa	Why?

**Despite LLU being mandated, LLU has not been implemented*

It is clear from the above table that LLU has not been introduced in developing countries that are indeed very comparable to South Africa. Considering the importance that BRICs are playing in the world economy and the fact that South

Africa has recently joined the BRICs group, it seems that any implementation of LLU in South Africa may be counterproductive and disjointed.

International experience / Eastern Europe

On many occasions proponents of LLU have cited the implementation of LLU in developing countries with reference to Eastern Europe. These countries are often listed as evidence that some developing countries have indeed considered the costs/benefits in implementing LLU and the consequent implementation of LLU is evidence that the benefits outweighed the costs and that it is indeed proper for developing countries to implement LLU.

It should be noted that regulators in Western European countries had been mandated, through their European Union membership to implement national measures aimed at ensuring that the local loop would have been unbundled in 2002. Due to their non-membership and late ascension to European Union membership, the vast majority of Eastern European countries undertook LLU as part of the liberalisation and sector reform ascension requirements. As a result, the implementation of LLU has largely been staggered and uncoordinated throughout Eastern Europe. Furthermore, it should also be noted that the implementation of LLU in these countries have been preceded by proper Market Reviews and subsequent declaration of SMP status to operators before the obligation of LLU was imposed on such operators.

ALD & rebalancing

As indicated earlier, it is Telkom's view that the Authority should consider the peculiarities that may be present in the South African communications market such as the existence of an ALD and the fact that tariffs that have not been fully rebalanced. Almost all jurisdictions where LLU was introduced first embarked on

a process of addressing the ALD and then only introduced LLU. It is Telkom's view that LLU can only be implemented from both a commercial and regulatory perspective provided that full tariff re-balancing as been achieved, i.e. retail prices reflect underlying costs. The pricing of the unbundled LL is crucial for demand of LLU: if the price is set too low (below costs) then the incumbent cross-subsidises the competing OLOs, if the price is set too high, it could reduce the demand for LLU.

Therefore, it is important for the success of LLU that the incumbents' retail prices are set at a level that is higher than its wholesale price.

The ALD can be described as the shortfall between the cost of providing basic access to the fixed network (including maintenance costs) and the revenue received from line rental and installation charges. Where ALD exists, the retail price of the access line would be below the cost (possible wholesale price) of the line.

Historically, Telkom provided access to the fixed network at prices below cost and cross-subsidised the shortfall with revenues from mainly national long-distance and international call traffic. Telkom's access charges (line rentals) were not set at the appropriate level sufficient to recover the underlying cost because of socio-political and universal service objectives (because line rental is a barrier to entry) and price control restrictions that existed.

The introduction of the EC Act has increased the number of competitors to some 550+ potential competitors while VoIP services are placing increasing pressure on Telkom's ability to generate revenues (due to decrease in volumes and price pressures) from national long-distance and international calls. The introduction of number portability and carrier pre-selection will further limit Telkom's ability to cross-subsidise the recovery of the ALD with voice call charges. As a result Telkom is facing reduced overall profitability which will limit Telkom's ability to continue to invest in the local access network. The introduction of LLU will therefore further exacerbate the situation.

In addition to the reduction of Telkom's overall profitability, the consequences of not addressing the ALD can be summarised as:

- distortion of market dynamics which would undermine the implementation of LLU;
- the restriction of Telkom to effectively compete in 'competitive' market segments;
- the future undersupply of access services since costs are not fully recovered;
- distortion of markets including market entry (as a result of cross-subsidisation);
- cherry picking by new entrants providing access services only in profitable areas;
- reduction of investment in the access network and minimal development and expansion of the access network to non-profitable areas;
- non-replacement of stolen or damaged access infrastructure; and
- possible perception of margin squeeze by Telkom on access services which could be construed as being anti-competitive.

In summary, Telkom submits that:

- it's retail prices for line rental are below costs and that an ALD exists
- Telkom has been submitted Regulatory Financial Statements (RFS) to the Authority which would confirm the existence of ALD

- that it would not make sense to implement LLU prior to addressing the ALD as a wholesale cost-based price of unbundled local loops would be below the Retail price for an exchange line

Impact on Telkom (financial & competitive position)

Telkom is concerned that there may be a general perception that incumbent operators in other jurisdictions mostly maintained their competitive positions and dominance after the introduction of LLU and hence Telkom would not be materially adversely affected. Telkom believes that any such generalisation is irresponsible and does not consider Telkom's unique situation when compared with its peers where LLU have been implemented. Furthermore, historically the market conditions at the time of the introduction of LLU (late 1990s and early 2000s) are substantially different as the fixed-line market was still in a growth phase while internationally now fixed-line markets are now generally considered to be declining markets.

In addition, Telkom's competitive position is different to its peers where LLU was introduced and this makes Telkom more vulnerable than its peers at the time when LLU was implemented. Telkom believes that it would be irresponsible for the Authority to ignore these realities and must therefore consider how the proposed implementation of LLU would impact on Telkom's ability to both comply with universal and social licence obligations including the ALD while also having to compete with OLOs who do not have similar universal service obligations.

LLU, Job Creation & investments

Telkom is of the view that the Authority cannot consider the proposed implementation of LLU and its relevance for South Africa without considering the

potential implications on job creation (and job retention) and future investments in the industry.

Telkom believes that regulation must promote public interest. Furthermore, Telkom is of the view that the Authority should pay particular attention and be guided by President Zuma's State of Nation Address of 2011 (SONA 2011):

> *"We have declared 2011 a year of job creation through meaningful economic transformation and inclusive growth . . . We urge every sector and every business entity, regardless of size, to focus on job creation. Every contribution counts in this national effort. The programmes of State Owned Enterprises and development finance institutions should also be more strongly aligned to the job creation agenda"*

It should be noted that Telkom is the single biggest employer in the ICT sector with 23,247 full-time employees (2011). Some of Telkom's biggest competitors namely MTN (6,500 employees) and Vodacom (5,000 employees) who would be beneficiaries of LLU do not contribute nearly as much as Telkom to job creation and Telkom submits that the Authority cannot ignore these considerations and be indifferent to the implications of LLU on job creation and retention.

In addition, Telkom submits that the implementation of LLU has significant implications for continued and future investments in the access network. The implementation of LLU would undoubtedly serve as a significant disincentive in discouraging any further investment in the access network where the Authority would mandate Telkom to make available its network to competitors while these competitors have not taken any investment risks.

Regulatory Impact Assessments

Telkom submits that the Authority can only answer the question of the relevance and importance of LLU for South Africa after it has completed a proper Regulatory Impact Assessment (RIA). Indeed, a RIA should indicate whether LLU is the most appropriate regulatory tool considering the stated objectives.

The OECD (2007) defines RIA as "*a systematic decision tool used to examine and measure the likely benefits, costs and effects of new or existing regulation."*

According to Harrison (2009):
"The idea of an RIA is to make regulation more efficient and effective by having its designers justify the reasons for implementing a new regulation, consider the costs and benefits of different options at an early stage and take a community-wide perspective of their effects, to ensure that the benefits to society (broadly conceived) of a regulation are greater than the costs (also broadly conceived) and to encourage the design and adoption of the regulation with the greatest net benefit."

Telkom believes that the Authority's implementation of RIAs would be consistent with the principles of 'good governance' and create regulatory certainty. RIAs should therefore logically embed the principles of:

- Proportionality
- Targeting
- Consistency
- Accountability and
- Transparency

The OECD (2004) identified some common characteristics of RIAs which should include:

- Statement of problem
- Definition of alternative remedies

- Determination of the effects of each alternative, including potential unintended consequences
- Estimation of benefits and costs of each alternative
- Assessment of other economic impacts
- Identification of winners and losers
- Communication with the interested public
- A clear choice of the preferred alternative
- Provision of a plan for *ex post* analysis or regulatory outcomes

Complexities around LLU

Legal framework for LLU

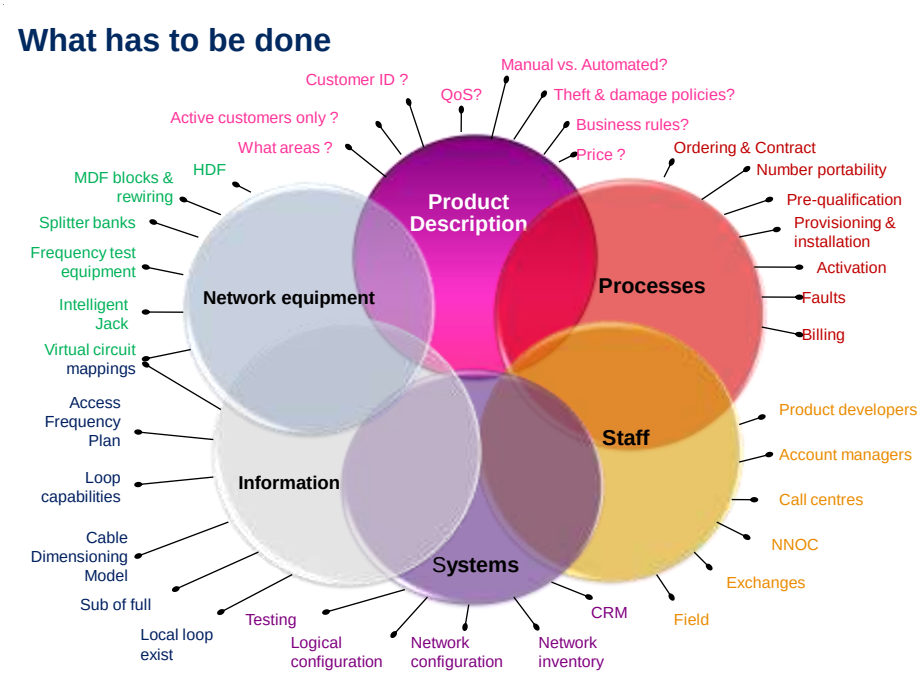
It is Telkom's considered view that given the complexities of an LLU process and its inherent intrusiveness any regulatory intervention must be guided by the contours of the explicit powers conferred upon the Authority to give comprehensive treatment to the matter. Telkom is of the view that the current legislative framework had clearly not been introduced with Parliament having contemplated the unbundling of the local loop. In this regard, there is an absence of clear, precise and unambiguous provisions in the primary legislation which explicitly gives treatment to the unbundling of the local loop. It is hence Telkom's view that the reliance on a Policy Decision (2007 Ministerial Policy Decision on LLU) as a means of substituting the absence of primary legislation is erroneous and imprudent.

Telkom will elaborate on the legal complexities relating to the proposed implementation of LLU in a separate section.

Technical and Financial complexities LLU

It is Telkom's view that the Authority systemically trivializes the technical work entailed and underestimates the difficulties in implementing LLU. It should be noted that the introduction of LLU would require many business processes and systems to be reviewed including, product development, establishing processes, up-skilling staff, systems development, information and database preparation and network equipment installation. Each one of these business areas has its own eco-system of challenges.

The following diagram provides a more detailed analysis of the eco-system around LLU implementation.



It should be noted that there is no ‘soft switch’ for LLU and it is not a ‘plug-in-and play’ service. Typically, there are numerous issues that must be resolved and processes that must be put in place so as to make LLU happen. Among others, these include:

- network elements to which access is offered,
- information concerning the location of physical access sites,
- information concerning availability of local loops in specific parts of the access network,
- technical conditions relating to access and use of local loops,

- technical characteristics of the twisted metallic pair in the local loop,
- ordering and provisioning procedures,
- service level agreements,
- usage restrictions,
- co-location information on the notified operator's relevant sites
- co-location options at the sites
- equipment characteristics: restrictions, if any, on equipment that can be co-located
- security issues – measures put in place by notified operators to ensure the security of their locations
- access conditions for staff of competitive operators
- safety standards
- rules for the collocation of space where collocation space is limited
- conditions for beneficiaries to inspect locations at which physical collocation is available, or sites where collocation has been refused on grounds of lack of capacity
- conditions for access to the notified operator's operational support systems (OSS), information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing
- electronic ordering systems
- lead time for responding to requests for services or facilities;
- service level agreements;

- fault resolution;
- escalation procedures
- standard contract terms
- pricing or pricing formula for each feature, function and facility listed above
- pricing or pricing formula for line sharing
- monthly rental fee for the LLU
- co-location costs
- miscellaneous costs
- non-reversibility of access provided to local loops

In summary, LLU capabilities do not inherently exist in Telkom and would require time to develop while the NGN architecture invalidates several of the assumptions with respect to physical unbundling. Telkom would once again like to highlight that unless the Authority allows for full cost recovery by Telkom and addresses the ALD, it would be financially infeasible to implement LLU.

LEGAL CONSIDERATIONS AND CONCERNS

The following section will provide Telkom's comments on important legal considerations which are critical to the Authority's LLU process.

Telkom's comments will mainly focus on the following broad themes which Telkom considers critical to the Authority's Discussion paper:

- The Authority's purported initiation of a section 4B inquiry;
- The Authority's purported reliance on a Policy Decision to initiate the LLU process'
- The Authority's interpretation of Chapter 8 of the Act;
- Obligations set-out in section 43(1) of the Act; and
- Parliamentary delegation of law-making powers to administrative bodies

The Authority's purported initiation of a section 4B inquiry

Telkom has noted that the Authority has made the following statements on the cover page of the Discussion paper:

> *"1. The Independent Communications Authority of South Africa (herein after referred to as "the Authority") hereby gives notice of its intention to embark on a section 4B inquiry process on local loop unbundling in terms of the Independent Communications Authority of South Africa Act, Act 13 of 2000 ("the ICASA Act").*
> *2. The purpose of this discussion paper is to outline the Authority's initial views on the process to be followed to unbundle the "local loop"."*

In this regard, Telkom has understood the context within which the Authority has solicited written representations regarding the Discussion paper to be in terms of an inquiry being undertaken pursuant to section 4B of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) ("**the ICASA Act"**). Further, the Authority has stated at paragraph 2.2.4.1 that its reliance on section 4B of the ICASA Act is confined to subsection (1)(a) which reads as follows:

> *"The Authority may conduct an inquiry into any matter with regard to—*
> *(a) The achievement of the object of this Act or the underlying statutes."*

Further, section 4C of the ICASA sets-out in meticulous detail the manner in which the Authority is enjoined in law to conduct inquiries pursuant to section 4B of the ICASA Act. It is important to note that once the Authority elects to initiate and conduct an inquiry pursuant to section 4B of the ICASA Act, the Authority *must* conduct such an inquiry in terms of section 4C of the ICASA Act. Here, the Authority possesses no discretion as to whether or not it wishes to conduct such an inquiry in terms of other alternative procedures which are not consistent with section 4C of the ICASA Act.

In particular, section 4C(1) of the ICASA Act reads as follows:

> *"(1) Subject to this Act, a councillor presiding at an inquiry conducted in terms of section 4B must determine the procedure at such inquiry."*

It is implicit in section 4C(1) of the ICASA Act that the procedure for the conduct of a section 4B inquiry must be determined *prior* to the initiation of such an inquiry. In other words, the procedure, which of course must be consistent and be premised on the provisions of section 4C of the ICASA Act, ought to be set-out in sufficient detail *prior* to the initiation of a section 4B inquiry. It is Telkom's

view that the reason for this requirement is obvious: all interested parties wishing to participate in the section 4B inquiry must be availed withadequate and sufficiently clear notice regarding the precise scope and ambit of the inquiry. Furthermore, since sections 4C(2), (3), (4) and (5) of the ICASA Act confer certain rights to interested parties wishing to participate in such an inquiry, it would be incumbent for the Authority to set-out the applicable procedure relating to the manner in which the conduct of the inquiry serves to either curtain or expand those rights conferred. This is the implication of the requirement set-out in section 4C(1) of the ICASA Act which requires the Authority to determine the applicable procedure pursuant to which the inquiry is to be conducted *prior* to the commencement of the inquiry.

Telkom is of the opinion that it is not the contemplation of section 4C of the ICASA Act that the Authority may elect to undertake a section 4B inquiry in a manner that is inconsistent and at odds with the provisions of section 4C of the ICASA Act. Nor would it be in the reasonable contemplation of the operation of section 4C of the ICASA Act that the Authority may, after having commenced with a section 4B inquiry without having firstly set-out the applicable procedure, elect to proceed with such an inquiry without having regard to the provisions of section 4C of the ICASA Act.

Yet, this is precisely the conduct that the Authority has engaged in relation to its interactions with Telkom. Here, Telkom submits that the Authority has erred in not having regard to the requirements clearly set-out in section 4C of the ICASA Act and this in of itself presents a substantial risk that the outcomes of such an inquiry may be subject to administrative judicial review.

In this regard, notwithstanding that on 22 June 2011 the Authority conducted a media briefing broadly setting out the underlying rationale for initiating an inquiry, although both the media statement and media release do not in any manner or form allude to the initiation of a section 4B inquiry, and that the Authority alluded

to both one-on-one engagements and the closing date for the submission of written representations, Telkom is of the considered view that this is plainly inadequate to comply with the requirements of section 4C(1) of the ICASA Act.

Furthermore, the purport and demeanour of both the media statements and media release may hardly be described as being concerned with determining the procedure for undertaking the section 4B inquiry as required by section 4C(1) of the ICASA Act. In addition, the Authority's statements to Telkom (one-on-one engagement convened on 30 August 2011) that the Authority intends conducting public hearings subsequent to its receipt of written representations is clearly inconsistent with the requirements of section 4C(1) of the Act. Indeed, the Authority's statement amounted to the first instance upon which Telkom had learned of the Authority's intentions in this regard. Certainly, the Authority had not previously expressed an intention to convene public hearings as part of a section 4B inquiry either in its media release and media statements or at any other juncture *prior* to the purported commencement and initiation of the section 4B inquiry. The compliance with section 4C(1) of the ICASA Act cannot be regarded as having been fulfilled by the Authority simply by communicating vague information relating to the manner in which the public consultative process was anticipated to unfold. In this regard, Telkom is of the considered view that the Authority has not adequately discharged its statutory obligation set-out in section 4C(1) of the ICASA Act.

The Authority's purported reliance on Policy Decision to initiate the LLU process

The Authority has proceeded on undertaking and initiating the public consultative process regarding LLU purely on the basis of the Ministerial Policies and Policy Directions *gazetted* by the Honourable Minister on 17 September 2007 under Government Gazette No. 30308 of 17 September 2007 ("**the Ministerial Policy**

Decision"). This is clearly discernable from several references made by the Authority in the Discussion paper.

Here, at paragraph 2.2.2 the Authority states the following:

> *"**Policy directive from the Minister of Communications***
>
> *The Minister of Communications has, in terms of section 3(2) of the ECA, discretionary powers to issue to ICASA policy directions consistent with the objects of the ECA and of the related Legislation in relation to-*
>
> *(a) The undertaking of an inquiry in terms of section 4B of the ICASA Act on any matter within ICASA's jurisdiction and the submission of reports to the Minister in respect of such matter;*
>
> *(b) The determination of priorities for the development of electronic communication networks and electronic communications services or any other service contemplated in Chapter 3; and*
>
> *(c) The consideration of any matter within ICASA's jurisdiction reasonably placed before it by the Minister for urgent consideration."*
>
> *Through these powers, the then Minister of Communications, the late Honourable Dr Ivy Matsepe-Cassaburi, issued a policy direction to ICASA to implement local loop unbundling based on the findings of the Local loop Unbundling Committee. The policy direction is repeated below for reference:*
>
> > *'**I HAVE ALSO TAKEN THE POLICY DECISION** that, given the complexity of local loop unbundling process on the one hand and the urgency for South Africa to enable all operators appropriately licensed to have access to the local loop on the other hand, the unbundling process in South Africa should be urgently implemented and completed by 2011. In addition, the Authority should urgently*

and as appropriate, take advantage of the report of the Local Loop unbundling committee and its recommendations on the proposed unbundling models."

The current Minister, the Honourable Radhakrishna Padayachie, re-affirmed the policy direction to implement local loop unbundling in November 2010."

It is Telkom's considered view that the Authority's statement above is erroneous in law and deeply flawed as the basis upon which the Authority has conceived the existence of *both* procedural powers and substantive powers to initiate and undertake an administrative process which would culminate in the unbundling of the local loop. In this regard, first, the Authority has erroneously referenced the Ministerial Policy Decision as amounting to a Policy Direction which had been issued and made by the Minister pursuant to section 3(2) of the Act.

The Authority's misconstruction of the law is evident: at paragraphs 2.2.2.1 and 2.2.2.3 the Authority refers to the existence of a Policy Direction while at paragraph 2.2.2.2 the Authority proceeds to make a *verbatim* extraction of the relevant text of the Policy Decision made by the Minister on 17 September 2007. It would appear that the Authority has pre-supposed that there exists no substantive difference between, on the one hand the derivation of a Policy Decision, and on the other hand a Policy Direction by the Minister. Yet, this distinction is plain and obvious upon a cursory perusal of the Act, and in particular section 3 thereof.

In this regard, section 3(1) of the Act, which relates to the conception and derivation of Policy Decisions by the Minister reads as follows:

"Ministerial Policies and Policy directions

(1) The Minister may make policies on matter of national policy applicable to the ICT sector, consistent with the objects of this Act and of the related legislation in relation to—

(a) the radio frequency spectrum;

(b) universal service and access policy;

(c) the Republic's obligations and undertakings under bilateral, multilateral or international treaties and conventions, including technical standards and frequency matters;

(d) the application of new technologies pertaining to electronic communications services, broadcasting services and electronic communications network services;

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

(f) the promotion of universal service and electronic communications services in under-serviced areas;

(g) mechanisms to promote the participation of SMME's in the ICT sector;

(h) the control, direction and role of state-owned enterprises subject to the Broadcasting Act and the Companies Act, 1973 (Act No. 61 of 1973); and

(i) any other policy which may be necessary for the application of this Act or the related legislation."

Further, section 3(2) of the Act reads as follows:

> *"(2) The Minister may subject to subsections (3) and (5), issue to the Authority policy directions consistent with the objects of this Act and of the related legislation in relation to—*
>
> *(a) the undertaking of an inquiry in terms of section 4B of the ICASA Act on any matter within the Authority's jurisdiction and the submission of reports to the Minister in respect of such matter;*
>
> *(b) the determination of priorities for the development of electronic communications networks and electronic communications services or nay other service contemplated in Chapter 3;*
>
> *(c) the consideration of any matter within the Authority's jurisdiction reasonably placed before it by the Minister for urgent consideration."*

We shall, for present purposes not concern ourselves with the exceptions set-out in subsections (3) and (5) of section 3 for they are immaterial for our consideration. The substantive purport of *both* sections 3(1) and section 3(2) of the Act are evidently different in their focus, ambit and purpose. The failure to acknowledge this substantial and significant distinction amounts to a manifest error in law, particularly where the Authority seeks to place substantial reliance upon this error in law in conceiving the existence of powers which have clearly not been conferred upon it by Parliament. Further, in conflating the focus, ambit and purpose of section 3(2) with that of section 3(1) of the Act, not only did the Authority make a substantial and fundamental error in law in not sustaining this distinction, the Authority also erroneously presumed the derivation of its substantive powers from the incorrect source of law.

Not only has Parliament sought to sustain this clearly discernable distinction between Policy Decisions and Policy Directions, the Courts have had the opportunity to affirm the existence of this distinction and further expound upon the significance of the distinction. In this regard, Davis AJ in *Altech Autopage Cellular (Pty) Ltd v ICASA NO* sought to determine the precise nature of Policy Directions and whether or not the issuance of these by the Minister amounted to the exercise of administrative action susceptible to administrative judicial review under PAJA or the exercise of executive authority which falls within the exceptions of the definition of an administrative action under PAJA. Bearing in mind the Authority's obligation when exercising its powers and performing its duties to *consider* policies made by the Minister in terms of section 3(1) of the Act and policy direction issued by the Minister in terms of section 3(2) of the Act, Davis AJ stated the following in relation to the general demeanour of policy directions:

> *"One can also readily appreciate that the issues listed under (c) of the sought to be impugned paragraph of the Ministerial directions referring to socio-economic issues (but excluding the requirement to show "good cause") may constitute "broad" or "general" considerations of a policy nature."* [para 5.5]
>
> …
>
> *When considering what the directions then in fact entail, it is clear that the directions overstep the line of pure policy or direction of a general nature…"* [5.9]

At paragraph 5.9, Davis AJ further described Policy Directions as being of a "*concrete*" nature. This is of course distinct from Policy Decisions which may be described as statements of a general nature and being reflective of broad utopian socio-economic and political aspirations. Critically, the real distinction which exists between Policy Directions and Policy Decisions lies in the language and purport of such texts. In particular, whereas Policy Decisions are general in their

very nature, Policy Directions are directory and peremptory in relation to the precise manner in which the aspirations of the Policy Direction are to be attained. This is clearly discerned from the Ministerial Policy Decisions and Policy Direction of 17 September 2007.

There, the Minister had *gazetted* eight (8) Policy Directions and three (3) Policy Decisions. In relation to paragraph 1 entitled *International Terrestrial and Submarine Cable*, which gave treatment to the establishment of Thusong Post Offices, the Minister made a Policy Decision in that regard. With regards to paragraph 2 entitled *Robust, Reliable and Affordable International Connectivity*, the Minister *instructed* and *directed* the Authority to exercise the substantive powers conferred by Parliament in prescribing regulations envisaged in section 43(8)(b) of the Act. Furthermore, paragraphs 3, 4, 5, 6 and 7 equally amounted to Policy Directions reflective of the use of clear and unambiguous language which was directory in nature and unequivocal. Most importantly, the Policy Directions gave *guidance* to the Authority in relation to *both* manner in which the direction was to be given effect to *and* the source of the conferred power to which the Authority must rely upon in giving effect to the direction.

In other words, the directions make the following clear:

- The language is directory and peremptory regarding the purpose of the direction; and

- The Policy Direction clearly *guides* the Authority to the substantive powers which the Authority is required to invoke in order to give effect thereto.

In summary, it is Telkom's considered view that the Authority's reliance on a Policy Decision in order to derive procedural and substantive powers so as to initiate and undertake an administrative process which would culminate in the

unbundling of the local loop is flawed in law, amounts to a fundamental error in law and presents a substantial risk that this process may be subjected to review.

The Authority's interpretation of Chapter 8 of the Act

Having opined above that the Authority has erred in law in deriving its point of departure in purporting to initiate the unbundling of the local loop process, we turn to consider the substantive and procedural powers which the Authority has further purported to rely upon as the legal basis for purporting to unbundle the local loop.

Here, the Authority states at paragraph 3.2.2.9 of the Discussion Document that:

> *"Based on the obligation to lease electronic communications facilities, providing access to the local loop is already mandatory based on the obligation imposed under Section 43(1)."*

However, at paragraph 3.2.2.16, the Authority makes the following contrary statement:

> *"Although the current regulations do not explicitly prescribe the manner in which such unbundling should take place, the right for an ECNS licensee to request access to unbundled facilities is enshrined through the definition of electronic communications facilities in the ECA and the requirement under Regulation 10(3) of the regulations."*

The internal inconsistencies and extreme contradictions in the Authority's reasoning are plainly apparent: on the one hand, the Authority opinions that the current legislative framework is sufficiently adequate to give effect to the unbundling of the local loop, yet on the other hand, the Authority unequivocally states that the very same legislative framework is not sufficiently explicit in giving

effect to same. These inherently antagonistic positions proclaimed by the Authority with remarkable simultaneity reveals the Authority's attempts at inferring that the current legislative framework had been envisaged by Parliament as contemplating the undertaking of the unbundling of the local loop. Telkom submits that this amounts to a strained construction of the true intent of Chapter 8 of the Act.

As will become more apparent below, Parliament had not envisaged delegating subordinate legislative-making powers to the Authority for purposes of giving effect to the unbundling of the local loop process. Furthermore, the delegation necessary for giving effect to the unbundling of the local loop is neither explicit or implicit in the formulation of the Act. We turn to demonstrate this strained and untenable interpretation which the Authority has sought to sustain in its endeavours to undertake the unbundling of the local loop.

Obligations set-out in section 43(1) of the Act

At the outset, the Authority has fundamentally misconstrued both the *ambit* and *scope* of the obligation imposed by Parliament on licensees as set-out in section 43(1) of the Act. For convenience, we restate the relevant provision here:

> *"Subject to section 44(5) and (6), an electronic communications network service licensee must, on request, lease electronic communications facilities 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 an electronic communications facilities leasing agreement entered into between the parties, unless such request is unreasonable."* (own emphasis)

Here, the obligation is clear: first, it pertains to all licensees in possession of a licence granted and issued by the Authority pursuant to the Act. Second, the

scope of the obligation pertains to *leasing*. Leasing ought to be understood as is generally used in common parlance: it is the creation by the owner of the tangible or intangible property of subordinate or secondary quasi-proprietary rights in the tangible or intangible property for the beneficial usage or attribution to a third party. In the ordinary course of commercial transacting, the terms and conditions of a leasing arrangement are usually arrived at through bi-lateral or multi-lateral negotiations. However, in the instance of section 43(1) of the Act, these negotiations are to be constrained by the provisions of the regulations contemplated to be prescribed by the Authority in terms of section 44(1) of the Act. It suffices at this juncture to emphasise that the *scope* of the obligation is one of leasing.

This, of course, is entirely different to an obligation to *unbundle*. Although the Authority has inferred from section 44(3)(m) of the Act that the regulations contemplated in section 44(1) of the Act impose an obligation to unbundle electronic communications facilities subject to the mandatory leasing requirements of section 43(1) of the Act, this interpretation is contextual to section 44 of the Act and not of general application. In other words, section 44(3)(m) of the Act must be interpreted within the context of the intention behind section 44 of the Act. This intention is clear: Parliament had delegated to the Authority the powers to derive regulations pursuant to section 44(1) of the Act, and in particular section 44(3)(m) of the Act so as to ensure that those electronic communications facilities defined as such in section 1 of the Act ought to be capable of being leased or made available in an unbundled or disaggregated manner. This was to ensure that unreasonable tying or bundling of electronic communications facilities which were to be leased by an electronic communications facilities seeker did not occur and result in some detriment. Furthermore, this intention is clearly consistent with the provisions in section 8 of the Competition Act which concern themselves with the anti-competitive bundling or tying. Whereas the Competition Act would amount to an *ex post* enforcement instrument for this type of market behaviour, equally, section 44(3)(m) of the Act

would amount to the *ex ante* enforcement instrument for the same market behaviour.

The Authority's interpretation, of course, further presupposes that the facilities that are to be leased and that are to be made available by the electronic communications facilities provider are aptly defined as such in section 1 of the Act. In other words, in order for section 44(3)(m) of the Act to find operation, it is a pre-requisite that the electronic communications facilities to which the obligation to unbundle or disaggregate in the manner contemplated in section 44(3)(m) of the Act are properly ascribed as electronic communications facilities in terms of the definition set-out in section 1 of the Act. Where this is not the case, then the requirements and purport of section 44(3)(m) of the Act plainly do not apply.

Therefore, and contrary to the Authority's interpretation, section 44(3)(m) of the Act plainly does not create a general obligation to unbundle electronic communications facilities in the same manner that the unbundling of the local loop is understood to occur. However, even if the Authority's contention was to be accepted as being cogent, the operation of section 44(3)(m) of the Act would be curtailed to those facilities defined as electronic communications facilities in terms of section 1 of the Act. As stated above, the local loop is clearly not defined as such. Indeed, the Authority, realising that the Act has not contemplated giving treatment to the unbundling of the local loop and has not set-out a definition of same anywhere in the Act, proceeds to invent such a definition in the Discussion paper at paragraph 3.1.1.

In this regard, the Authority defines the local loop in the following manner:

> *"…a physical circuit connecting the electronic communications network termination point at the subscriber's premises to the main distribution frame or equivalent facility in an electronic communication network and/or*

means the physical twisted metallic pair circuit connecting the electronic communications network point at the subscriber's premises to a connection point at the edge of the provider's network or a specified intermediate network."

As stated above, this definition is one which has been conjured by the Authority not as contemplated by the Act, but rather from creative expediency in attempting to give effect to an administrative process that had never been contemplated by Parliament to arise.

Third, the *ambit* of the obligation, or that to which the obligation pertains to, is clearly that which is defined or ascribed as amounting to an "electronic communications facility". In other words, the *scope* of the obligation attaching to electronic communications network service licensees is that which pertains to leasing that which is ascribed as amounting to an electronic communications facility.

The ascription of what amounts to electronic communications facilities is to be found in section 1 of the Act. In this regard, this provision reads as follows:

*"**"electronic communications facility"** includes but not limited to any—*

(a) wire;

(b) cable;

(c) antenna;

(d) mast;

(e) satellite transponder;

(f) circuit;

(g) cable landing station;

(h) international gateway;

(i) earth station; and

(j) radio apparatus or other thing,

which can be used for, or in connection with electronic communications, including where applicable-

(i) collocation space;

(ii) monitoring equipment;

(iii) space on or within poles, ducts, cable trays, manholes, hand holds and conduits; and

(iv) associated support systems, sub-systems and services, ancillary to such electronic communications facilities or otherwise necessary for controlling connectivity of the various electronic communications facilities for proper functionality, control, integration and utilisation of such electronic communications facilities."

In seeking to pursue the Authority's logic regarding the ascription of the unbundled local loop as amounting to an electronic communication facility which is mandated to be leased pursuant to section 43(1) of the Act, unsurprisingly, Telkom encounters the plain reality that the Authority's deduction is deeply misplaced on three fronts. First, the ascription of the local loop as an electronic communications facility within the meaning of section 1 of the Act amounts to pure legal fiction: section 1 of the Act does not explicitly seek to ascribe the local loop as an electronic communications facility. Second, even if by some extrapolation the Authority is correct in its reasoning, there clearly is a difference between the local loop in its integrated form, and the local loop in an unbundled form. So, where the Authority, at paragraph 3.2.2.9 of its Discussion paper states that the local loop is already subject to mandatory leasing in terms of section 43(1) of the Act, the Authority presumes that the local loop is already in an unbundled form and that a definition of an unbundled local loop already exists in section 1 of the Act. This, of course, is plainly not the case and the Authority's strained interpretation of Chapter 8 of the Act read in conjunction with section 1 of the Act becomes rather obvious and equally unpalatable and unsustainable.

Furthermore, It is Telkom's view that the fact that the Authority is seeking stakeholder input (paragraph 5.2 of the Discussion paper) as to whether the Authority's proposed approach to LLU through the implementation of the facilities leasing regulations is reasonable, feasible and acceptable is indicative that ICASA itself is uncertain as to whether LLU can in fact be implemented by means of the facilities leasing regulations. It is also not clear to Telkom why the Authority would subject the implementation of LLU by means of the facilities leasing regulations to 'reasonable', 'feasible' and 'acceptable' tests if there is indeed a basis in law for its implementation. Either the law explicitly provides for the implementation of LLU or it doesn't. Telkom finds it also peculiar that the Authority would rely on subordinate legislation (crafted by ICASA itself) as the legal basis for the obligation (and the Authority's powers) to unbundle the local loop.

Lastly, and perhaps most importantly, the Authority's undue conflation of, on the one hand an obligation to lease, and on the other hand an obligation to unbundle is plainly demonstrated in the cursory explanation given by the Authority of the meaning of local loop unbundling. Whereas the Marwala Committee Report explores at some length the technical intricacies involved in giving effect to the unbundling of the local loop, at paragraph 3.1.2 of the Discussion paper, the Authority merely stated that local loop unbundling amounts to the following:

> *"Local loop unbundling is the process whereby a licensee is obliged to provide access to the local loop at a wholesale price so that other licensees may access end-users."*

This amounts to the definitive technical description of the unbundling process provided by the Authority with regards to articulating the existence of some obligation imposed on licensees to unbundle the local loop. Again, in the

absence of Parliament having delegated to the Authority both the procedural and substantive powers setting-out the manner in which an unbundling of the local loop process is to the undertaken, the Authority has instead derived a legal invention and professed a rather thin definition of an unbundling of the local loop process.

Indeed, the Authority has merely provided a descriptive appreciation of the ultimate result of an unbundling of the local loop process, and not an elaboration (which ought to be derived from the Act) of the technical and operational practicalities involved in undertaking the unbundling of the local loop. Tellingly, the Authority admits as much when conceding to the absence of *any* legislative framework in the Act which sets-out both the *procedural* and *substantive powers* of giving effect to the local loop unbundling process. Here, the Authority states that:

> *"…in reality, in the absence of detailed regulatory rules regarding how such access [to the local loop] must be provided, licensees may not easily be able to exercise their rights to obtain access to the local loop."*

This concession is revealing on three accounts: first, it serves as an admission that the Authority's strained interpretation of the purport of Chapter 8 of the Act amounts to a desperate exercise littered with a plethora of legal inventions and derived definitional concepts unsupported by the text or underlying purport of the Act. Second, it is an admission that the Authority has attempted to overreach into Parliament's legislative conscious when it delegated subordinate legislative-making powers to the Authority. These powers were never intended or contemplated to provide for the "detailed regulatory rules" which the Authority tellingly admits to their non-existence. All in all, the Authority's endeavours as reflected in the Discussion paper may then be characterised as a desperate exercise attempting to give effect to that which the law had never contemplated nor thought to be desirous in the first place.

Lastly, the Authority's concession perhaps reveals much more than is readily discernable. It reveals the limitations of the Authority's ability to exercise subordinate legislation-making powers which have been delegated to it by Parliament. We turn to consider this within the context of discussing Parliament's constitutional delegation function to administrative bodies (such as the Authority) and the explicit and implicit limitation of this delegation.

Parliamentary delegation of law-making powers to administrative bodies

It is trite that Parliament derives its legislative authority from section 43 of the Constitution. In this regard, section 43 of the Constitution reads as follows:

> *"In the Republic, the legislative authority –*
>
> *(a) of the national sphere of government is vested in Parliament, as set out in s44;*
>
> *(b) …*
>
> *(c) ..."*

Inherent in the contours and operation of section 43 of the Constitution is the ability conferred to Parliament to *delegate* the practical discharge of its legislative authority. This delegation, though, may only be conferred in law and ideally by an Act of Parliament. This delegation function has been confirmed by the Constitutional Court in *Executive Council of the Western Cape and others v President of the Republic of South Africa and others* 1995 (4) SA 877 (CC)[1] wherein the court stated the following:

> *"Although Parliament has a wide power to delegate legislative authority to the Executive, there are limits to that power."*[2]

[1] See in particular the discussion by Chaskalson P paras [51] to [63]

[2] *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) para [25]

The essence of the delegation function as explained by the Constitutional Court is that it is a function that must necessarily be fettered or constrained by Parliament. The necessity to constrain unfettered exercise of delegated legislative-making powers is obvious: administrative bodies may not exercise delegated legislative-making powers in a manner which undermines the constitutional supremacy of Parliament as the legislative authority. So, when delegating this competency, by implication Parliament must *guide* the administrative body with regards to the *manner*, *purpose* and *scope* of exercising its delegated legislative-making powers. We refer to this function as the *guidance* principle.

The *guidance* principle has been recognised within South African law as an important cornerstone of the rule of law. In this regard, Hoexter JA in *Arenstein v Durban Corporation* 1952 (1) SA 279 (A) stated at 296H-297A that:

> *"In the result the Municipal Council has delegated to the mayor the power to do by arbitrary executive act what it ought to do itself by legislative act. The effect of the by-law may be described mutatis mutandis, in the words of Feetham JP in the case of Natal Organic Industries (Pty) Ltd v Union Government 1935 NPD 701 at p 715:*
>
> > *'Really the effect of the regulation is to make the Commissioner the legislator on the particular point with which the regulation seeks to deal, and such a delegation of authority is not a good delegation.'*
>
> *In my opinion the delegation to the mayor in the by-law under consideration is invalid."*

Further, within the context of a constitutional democracy, the Constitutional Court has developed adequate jurisprudence in articulating the contours of the *guidance* principle. In *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC),

the Constitutional Court had considered the instance where Parliament had conferred an administrative discretion on the exercise of delegated powers without having provided sufficient *guidance* on the exercise of this discretion. At paragraph 55 of its decision, the court stated that the delegation was constitutionally impermissible since "no attempt has been made by the legislature to give guidance to decision-makers in relation to their power."[3]

Further, in *Janse van Rensburg NO v Minster of Trade and Industry* 2001 (1) SA 29 (CC) para [25], Goldstone J held:

> *"[A]s this Court has already held (in the context of a limitation analysis), the constitutional obligation on the Legislature to promote, protect and fulfill the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised. The absence of such guidance [renders] the procedure provided in s8(5)(a) [of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988] unfair and a violation of the protection afforded by s33(1) [of the Constitution]."* (own emphasis)

The *guidance* principle was further emphasised by the Constitutional Court in a subsequent decision in *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC). At paragraph 34 of its decision, the court stated that:

> *"…the delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power*

[3] In paragraph [48] O'Regan J observed: "In a constitutional democracy such as ours the responsibility to protect constitutional rights in practice is imposed both on the Legislature and on the Executive and its officials. The Legislature must take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary powers it confers."

> *so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. These constraints will generally appear from the provisions of the empowering statute as well as the policies and objectives of the empowering statute."*[4] (own emphasis)

Of course, *Affordable Medicine Trust* pre-supposes that Parliament had conferred some powers which entailed the exercise of discretionary powers through delegation. However, the *ratio* of the decision remains equally applicable even where this delegation does not exist.

All in all, the Constitutional Court jurisprudence reflects a consistent affirmation of the *guidance* principle as it applies to the exercise of discretionary powers delegated to administrative bodies or other functionaries by Parliament. In this regard, courts will set-aside any administrative action which results in an administrative body purporting to exercise powers which it has either no authority to exercise (due to the scope of the delegation) or which it exercises without due regard to the *guidance* principle. Further, it is the function of Parliament as the constitutional legislative authority to provide such guidance when delegating legislative-making powers to administrative bodies. Where such guidance is absent or where Parliament has not explicitly delegated powers to be exercised in accordance with such guidance, administrative bodies may not on their own accord attempt to purposively fill this *lacuna* through some imaginative construction of the law.

Telkom finds application of the *guidance* principle in the manner in which the Authority has purported to initiate and undertake the unbundling of the local loop process. As emphasised above, the Act is silent on the conferment of either

[4] Para [34]

substantive or procedural powers to undertake the unbundling of the local loop. The Authority has made this concession and Telkom has sought to extensively demonstrate the inadequacy of the Authority's reasoning in its attempt to deviate from its tellingly revealing concession.

COMMENTS ON ICASA'S MEDIA STATEMENTS

Telkom is perturbed that the Authority's media release which accompanied the publication of the Authority's Discussion paper has contained substantial unfounded and, with due respect, even misleading statements.

Among others, the Authority is on record stating that:

- Because Telkom's network is underutilised, LLU will increase Broadband penetration
- Jobs in the industry will be secured
- LLU represents a revenue generation opportunity, including for Telkom - new revenue of over R1bn will be shared by operators
- Revenue can be used to fund network expansion

The Authority has however to date not:

- explained what the policy objectives of LLU are
- highlighted what the costs would be for implementing LLU
- done any regulatory impact assessments
- provided any empirical evidence or data for its claims
- indicated how LLU will benefit underserviced areas or poor customers

Telkom sincerely regrets to state that it believes that these statements are unfounded and unsubstantiated. Furthermore, it is of great concern that the Authority has made these statements even though Telkom has shared its own analysis of the impact and which indicates the contrary. Telkom accepts that the Authority is indeed entitled to its own views and opinions. However, it is incumbent on the Authority as the regulator not to act irresponsible or make statements that are unfounded and violates the principle of transparency and accountability.

DETAILED COMMENTS ON DISCUSSION PAPER

Telkom has provided detailed comments on the Authority's Discussion paper as Annexure A to this submission. Please note that Telkom's detailed comments on the Authority's LLU Discussion paper should not be read in isolation to the main body of Telkom's LLU submission which focuses on general issues and the conceptual framework underpinning any discussion on LLU. In this regard, Telkom believes that a detailed discussion on the practicalities of LLU implementation is inappropriate considering the fact that the Authority has not addressed issues of the relevance and need for LLU. However, in the interest of contributing to the process Telkom has provided comments on the Authority's Discussion paper.

SUMMARY AND CONCLUSIONS

The following section will provide the Authority with Telkom's high-level conclusions and critical themes which the Authority should consider prior to continuing the process of developing a LLU framework:

- Telkom believes that LLU is an outdated regulatory remedy developed in the late 1990s and specifically for developed countries where high levels of fixed-line teledensity were prevalent. New developments in alternative access technologies, market changes and customer preferences have made LLU outdated and inappropriate for developing countries, specifically for South Africa

- The Authority's approach to LLU should be technology neutral. Broadband is not limited to ADSL and not to fixed line or copper-based services only. Any discussion on LLU should enshrine the principle of net neutrality. Telkom believes that the principle of open access, including access to the local loop

and the equivalent thereof in the broadcasting environment, should be equitable, proportionately applied to all licensees in the communications industry, including network providing mobile cellular services.

- Specific South African conditions make Telkom more vulnerable than global peers to introduction of LLU, i.e. the concentration of revenues in few profitable exchanges. The Authority need to consider Telkom's competitive position and ability to compete as well as legacy licence and social obligations.

- International practice has shown that LLU is complex and costly to implement. Telkom's own studies have confirmed this. Telkom believes that the Authority's Discussion paper has oversimplified the introduction of LLU. Quite to the contrary, the Authority has underplayed the substantive resources that would be required by all stakeholders (including the Authority) to oversee the implementation of LLU. Furthermore, the Authority has not acknowledged that from all possible regulatory remedies or tools, LLU is by far the most complex and costly to implement.

- Although LLU has been mandated in Brazil, it has not been implemented in any of the BRIC countries. Telkom believes that the Authority should consider lessons learned from BRIC countries and not simply transplant regulation from developed countries. Telkom is of the considered view that developing countries face challenges that are dissimilar to developed countries. It is not clear how LLU will promote South Africa's developmental agenda and indeed it is Telkom's view that the implementation of LLU would be a departure from such policy. Although Telkom notes that some regulators in developing countries in Eastern Europe have indeed implemented LLU, one should have regard to the context within which such LLU obligations were imposed. It was through their European Union membership and as part of the liberalisation and sector reform ascension requirements that these regulators were actually

compelled to implement national measures aimed at ensuring that the local loop would have been unbundled in 2002.

- The Authority ought to conduct a Regulatory Impact Assessment before imposing LLU obligations, or any regulation, as promised in the Authority's latest annual report. Telkom believes that the costs associated with LLU will exceed the possible benefits that could be derived from LLU. Furthermore, the Authority has not clearly stated how LLU will promote public interest. In addition, it is disconcerting that the Authority is considering a far more costly and complex regulatory obligation when the success from the earlier implementation of CPS and NP has not been considered. The Authority has not demonstrated how its LLU framework is proportionate, reasonable and fair.

- Telkom is of the view that any costs incurred by Telkom in order to facilitate the introduction of LLU should be funded by Access Seekers. Telkom is of the view that since Access Seekers would be the beneficiaries of LLU, it is only fair that they should fund any implementation costs associated with LLU. Telkom believes that it is unfair and unreasonable to expect the Access Provider to cross-subsidise Access Seekers, i.e. Access provider must incur costs to facilitate introduction of LLU. Furthermore, Telkom believes that a fundamental principle to the implementation for LLU is full cost recovery including the recovery of the Access Line Deficit (ALD).

- LLU will not support Government's objectives of universal broadband access, particularly in the rural areas, and job creation. In the SA context with low fixed penetration rates, LLU would have an adverse impact on jobs & investments in the roll-out of network infrastructure. It is Telkom's view that LLU will benefit a small segment of the South African population while furthering the digital divide between the 'haves' and 'have-nots'.

- The Authority's reliance on the Ministerial Policy decision of 2007 as an enabling policy framework is misplaced and incorrect in law. In addition, Telkom is of the considered view that the Authority's reliance on its facilities leasing regulations is flawed in law and open to legal challenges. Telkom believes that the Authority's reliance on these regulations is unreasonable, infeasible and not acceptable.

- Telkom is of the view that having regard to the Authority's Discussion paper, LLU would be legally, technically and financially be infeasible. Firstly, there is no legal basis for the Authority to impose LLU. Secondly, both full and sub-loop unbundling are *prime facie* technically and financially infeasible. Further, LLU capabilities do not inherently exist in Telkom and would require time to develop while the NGN architecture invalidates several of the assumptions with respect to physical unbundling. Telkom would once again like to highlight that unless the Authority allows for full cost recovery by Telkom and addresses the ALD, it would be financially infeasible to implement LLU.

- As previously communicated to the Authority, Telkom would strongly caution against the Authority proceeding with a LLU framework as there has not been sufficient discourse on this topic and the Authority has not considered the implications and possible unintended consequences of LLU. In this regard, Telkom believes that the Authority should not proceed prior to having considered the Government's policy objectives, conducted a Regulatory Impact Assessment and having addressed Telkom's ALD.

END