



**Submission to the Independent Communications Authority of South Africa
Bitstream and shared / full loop access regulations
Government Gazette No. 36705**

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INTRODUCTION

1. Neotel thanks the Independent Communications Authority of South Africa (“ICASA”) for the opportunity to comment on the Bitstream and Shared / Full loop access regulation (“the LLU Regulation”), which was published in the Government Gazette No. 36705, Notice 768 of 2013.
2. The policy proposes to provide the regulations governing Local Loop Unbundling which is of significant economic and social importance to South Africa.
3. Neotel’s submission is structured as follows: we first comment briefly on the legislative framework governing the publication of the Local Loop Unbundling. We then comment on the regulations as drafted.
4. This is followed by a detailed set of proposals for the regulations.

LEGISLATIVE FRAMEWORK

5. Neotel notes that the Authority published the Local Loop Unbundling (“LLU”) regulations in terms of section 38 and 4 of the Electronic Communications Act 36 of 2005 (“the ECA”) and section 3(j) of the ICASA Act 13 of 2000 (“the Icasa Act”).
6. In Neotel’s view, the Authority is permitted in terms of the existing legislative framework (in terms of both the ECA and the Icasa Act) to develop, publish and implement the Local Loop Unbundling regulations.
7. LLU is a specialised form of facilities leasing and the Authority is entitled to regulate it as such, particularly in accordance with Chapter 8 of the ECA.
8. In fact, section 4 of the ECA entitles the Authority “to make regulations with regard to any matter which in terms of the ECA or related legislation must or may be prescribed, governed or determined by regulation. In particular, section 4(1) empowers the Authority to make regulations with regard to, *inter alia*, any technical matter necessary or expedient for the regulation of the services identified in Chapter 3 of the ECA and any matter of procedure or form which may be necessary or expedient to prescribe for the purposes of the ECA or the related legislation.
9. Further, section 4(3)(j) of the Icasa Act entitles the Authority to make regulations on any matter consistent with the objects of the Act and the underlying statutes or that are incidental or necessary for the performance of the functions of the Authority.
10. There appears to be legal uncertainty on whether the Authority has the necessary statutory powers to regulate “bitstream access” as this does not constitute a “lease” of “facilities” for legal purposes, but rather a sale of capacity (electronic communications services).
11. It does appear that the Authority may not prescribe LLU regulatory models that do not constitute a “lease” of facilities.
12. The significance of this is that LLU can take a number of forms, not all of which amount to a “lease” of facilities.

13. Of the four models discussed in the Authority's earlier Discussion Document, only line sharing, full LLU and sub-LLU can be considered to constitute a lease in the legal sense.
14. Therefore, the Authority appears to lack the power to regulate bitstream access although there is nothing in law to prevent Telkom from voluntarily providing bitstream access to seekers.
15. It is clear from the existing legislative framework that the Authority is entitled to regulate LLU in the form of line sharing, full LLU and sub-LLU.
16. While it remains unclear on whether the Authority can regulate bit-stream access, and Neotel urges the Authority to take senior counsel view on this matter, Neotel respectfully submits that the Authority should focus on the three forms of LLU and deal with the regulation of bitstream access and wireless local loops at the appropriate time and under different interventions.
17. Finally, Neotel respectfully also requests the Authority to seek legal opinion on the issues highlighted above to avoid the process being vulnerable to judicial review. Neotel further wishes to stress to the Authority that any attempt to base any LLU regulations on the policy decision should be avoided as this may render the process vulnerable to review. The current legislative framework alone is sufficient to enable the Authority to regulate Local Loop Unbundling.

COMMENTS ON DRAFT REGULATIONS

18. Neotel strongly supports the Authority's publication of the LLU Regulations.
19. Nonetheless, the proposed regulations duplicate a number of the provisions of the facilities leasing regulations. The facilities leasing regulations apply to the lease of local loops, and therefore there is no need to repeat the provisions of the facilities leasing regulations in the local loop unbundling regulations.
20. The regulations do not precisely define the access technology that is the target of the local loop unbundling regulations. The access technology considered under Local Loop Unbundling refers to the copper last mile facilities owned by Telkom SOC Ltd, as envisaged in the Local Loop Unbundling Committee's ("LLUC")¹ report which the Minister's Policy Decision on Local Loop Unbundling refers to². Specifically, the LLUC stated that:³

¹ See "Local Loop Unbundling, A way forward for South Africa", The Local Loop Unbundling Committee, 23 May 2007.

² See Government Gazette No. 30308, where the late Minister in her decision says that: "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..."

³ See "Local Loop Unbundling, A way forward for South Africa", The Local Loop Unbundling Committee, 23 May 2007, p. 2.

“Unbundling the local loop is the process of allowing both the incumbent operator and the new entrants to have open access to use the copper-pair of the local loop infrastructure, which are the fixed line telephone connections from the telephone exchange to the customers’ premises”.

21. Should the Authority seek to provide access to other technologies, such as wireless local loops, these should be considered under different interventions, including regulations on Mobile Virtual Network Operators.
22. Neotel’s approach is to largely adopt the rules developed over time by Ofcom, the independent regulator and competition authority for the UK communications industries, including the Undertakings made by BT Group PLC (“BT”) to Ofcom.⁴ These rules have been developed over a period of almost 15 years, which South Africa may benefit from. Of course, the Ofcom rules need to be adapted to suit South Africa.
23. In the proposed regulations below, Neotel has adapted the Ofcom rules to suit South Africa’s environment, legislation and regulatory framework.
24. Neotel suggests that the Authority considers, for the Reference Facilities Leasing Agreement proposed in the Annexure, that relevant components of a similar agreement from BT are used.⁵ Similarly, Neotel proposes that the Authority encourages the creation of an organisation similar to NICC to develop technical standards including the Access Network Frequency Plan proposed in the regulations below.⁶
25. Neotel’s proposed regulations are set out in the Annexure below.

ANNEXURE: PROPOSED REGULATIONS

1. Scope

1.1 These Regulations shall be binding on Telkom in the Republic.

1.2 Nothing in these Regulations shall supersede or replace the regulations set out in the Electronic Communications Facilities Leasing Regulations as published in Government Gazette no. 33252.

2. Definitions

2.1 In these regulations:

⁴ Available at: <http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/bt/consolidated.pdf>, last accessed on 26 August 2013.

⁵ Available at: <https://www.openreach.co.uk/orpg/home/products/llu/contracts/contracts.do>, last accessed on 28 August 2013.

⁶ See http://www.niccstandards.org.uk/files/current/nd1602_2005_08.pdf?type=pdf

“ACPF” or “Advanced Capacity Planning Forecast” means the Licensee’s forecast for its Distant Location order requirements for a rolling period of twelve calendar months commencing on the first day of each Quarter.

“Access Network” means the Electronic Communications Network which runs from a Local Access Node to a network termination point on an End-User’s premise which supports the provision of copper-based access services to End Users.

“Access Network Frequency Plan” means a plan intended to prevent or minimise interference arising from the use of any equipment or apparatus connected or intended to be connected directly or indirectly to Metallic Path Facilities or Shared Metallic Path Facilities and which is published and approved by an Industry Body to be appointed by ICASA in accordance with clause 3.13 of these Regulations.

"Approved Status" means, in relation to any person, either that;

- (i) that person appears on a list of approved contractors which Telkom maintains for the purposes of ensuring that only suitable third party individuals are employed to carry out work at its Exchanges on its behalf (a "Telkom Contractor"); or
- (ii) that person has satisfied all of the criteria (but no others) which Telkom requires to be satisfied by Telkom Contractors from time to time.

“Associated Services” means those products and services supplied from time to time ancillary to the provision of Metallic Path Facility and Shared Metallic Path Facility, including:

- a) Colocation space;
- b) Co-mingling space (variable exchange space footprints and rack space units);
- c) Distant Location;
- d) power (AC & DC);
- e) ventilation and cooling;
- f) Internal Tie Cabling;
- g) External Tie Cabling (for Distant Location); and
- h) cable link for Metallic Path Facility and Shared Metallic Path Facility (installation of third party backhaul).

“Carrier Price List” means the price list having that name which contains charges for certain products and services provided by Telkom to Licensees and certain products and services provided by Licensees to Telkom, as such price list is amended from time to time, and which shall be published at <https://secureapp.telkom.co.za/wholesale-web/> within four months of these Regulations taking effect.

“Co-location” means an arrangement under which a Licensee’s equipment is located at an Exchange which may be either a Licensee Equipment Room or Co-mingling;

“Co-location Hostel” means Co-location whereby the Licensee Equipment Room is constructed in accordance with the specification and description of a co-location hostel published from time to time by Telkom;

“Co-mingling” means Colocation whereby the Licensee’s Equipment is installed at an Exchange in an area which may also house Telkom equipment and/or third party Licensee equipment un-partitioned from the Licensee’s equipment and from each other;

“Commercial Information” means information of a commercially confidential nature relating to products and services to which Equivalency of Inputs applies:-

- a) product development,
- b) pricing,
- c) marketing strategy and intelligence,
- d) product launch dates,
- e) cost,
- f) projected sales volumes, or
- g) network coverage and capabilities, excluding any such information as agreed by ICASA from time to time.

“Customer Confidential Information” means any information, in whatever form, which, in the case of written or electronic information, is clearly designated by the Licensee as commercially confidential and which, in the case of information disclosed orally, is identified at the time of disclosure as such or is by its nature commercially confidential, but excluding any information which:

- a) enters the public domain otherwise than by reason of a breach of confidentiality;
- b) is previously known to Telkom at the time of its receipt;
- c) is independently generated or discovered at any time by Telkom; or
- d) is subsequently received from a third party without any restriction on disclosure.

“Distant location” is an arrangement under which the equipment of the Licensee intended to be connected to the Metallic Path Facility or Shared Metallic Path Facility in the Telkom Electronic Communications Network is located outside an Exchange and a link is made using a tie cable between the Exchange and the Licensee’s Electronic Communications Network.

“Downstream Divisions” means Telkom divisions which are predominantly concerned with providing End-Users with downstream products and services and for the avoidance of doubt excludes Telkom Wholesale.

“ECA” means the Electronic Communications Act, no. 36 of 2005.

“Electronic Communications Facilities Leasing Agreement” has the same meaning in Part III of the Electronic Communications Facilities Leasing Regulations as published in Government Gazette no. 33252.

“End-User” has the same meaning as in the ECA.

“Equivalence of inputs” or “EOI” means that Telkom provides, in respect of a particular product or service, the same product or service to all Licensees (including Telkom) on the same timescales, terms and conditions (including price and service levels) by means of the same systems and processes, and includes the provision to all Licensees (including Telkom) of the same Commercial Information about such products, services, systems and processes. In particular, it includes the use by Telkom of such systems and processes in the same way as other Licensees and with the same degree of reliability and performance as experienced by other Licensees.

In this context “the same” means exactly the same subject only to:

- a) trivial differences;
- b) such other differences as may be agreed by ICASA in writing;
- c) differences relating to the following:
 - i. credit vetting procedures;
 - ii. payment procedures;
 - iii. matters of national and crime-related security, physical security, security required to protect the operational integrity of the network and such other security requirements as agreed between Telkom and ICASA from time to time;
 - iv. provisions relating to the termination of a contract; and
 - v. contractual provisions relating to requirements for a safe working environment;
or
- d) such other differences as are specified elsewhere in these Regulations.

"Escorted Access" means the direct physical supervision by a person nominated for that purpose by Telkom of another person having entered an Exchange.

“Estimated Space Availability Details” means details of estimated space availability within the Exchanges annually notified (by being placed on a password protected Telkom website) in accordance with section 3.22 to those Licensees who have signed an appropriate confidentiality agreement with Telkom.

“Estimated Delivery Date” means the date provided by Telkom to the Licensee as being the date on which Telkom anticipates completion of External Tie Cable jointing, labelling and testing work which shall be always subject to:

- a) Any extensions of time equivalent to the period or periods during which construction or testing is delayed as a result of failure by the Operator to carry out its obligation; and
- b) Extensions of time equivalent to the period or periods during which there is a Dispute relating to the provision of Distant Location facilities and which directly and necessarily affects the continuation of such provision; and

- c) Extensions of time equivalent to any period of time that the provision of Distant Location facilities is prevented by reason of statute or regulation or other binding legal rule or decision from commencing (except where such statute regulation rule or decision only applies due to an act or omission by Telkom and the circumstances in a) and b) do not apply);

“Exchange” means a Telkom building, structure or cabinet containing a Local Access Node.

“External Tie Cable” means a link by means of a Metallic Path Circuit that connects an Internal Tie Cable (accessing a Metallic Path Facility) to a Handover Distribution Frame, provided by Telkom or the Licensee, at Licensee provided premises.

“Facilities Leasing” has the same meaning as in Chapter 8 of the ECA.

“FTTC” means a network structure for access at End-Users’ premises at a fixed location In which optical fibres connect a node in an Exchange to a Local Access Node contained in a street cabinet, and copper wires connect the End-Users’ premises to the Local Access Node contained in the Telkom street cabinet.

“FTTC Passive Inputs” means:

- a) access to the copper wires that connect the End-User premises to a Local Access Node contained in the Telkom FTTC street cabinet;
- b) the provision to a Licensee of a FTTC street cabinet (which for the avoidance of doubt could include a cabinet facility attached to or otherwise integrated with a Telkom FTTC street cabinet), cooling, ventilation and power therein where practicable, and copper tie-cables, where required; and
- c) the various associated components of the Physical Layer of Telkom’s Access Network connecting the Local Access Node in the FTTC street cabinet and the End-Users premises to the extent that these components are only to be used in connection with the provision of services that are run over the entirety of FTTC.

“Handover Distribution Frame” means ironwork, in form of a Telkom provided frame, or a Licensee provided frame for the connection of:

- a) an Internal Tie Cable within a Specified Floor Area; or
- b) an External Tie Cable within premises provided by the Licensee.

“ICASA” means the Independent Communications Authority of South Africa as established by the Independent Communications Authority of South Africa Act, no. 13 of 2000.

“Internal Tie Cable” means a link by means of a Metallic Path Circuit contained within an MDF Site that connects a Metallic Path Facility to a Handover Distribution Frame in a Specified Floor Area or to an External Tie Cable by way of a joint in the Telkom building cable chamber at the MDF Site.

“Licensee” means an Electronic Communications Network Services licensee, duly licensed in terms of Chapter 3 of the Electronic Communications Act, no. 36 of 2005.

“Licensee Equipment Room” means the room (which for the avoidance of doubt includes a Co-location Hostel) within an Exchange in which the Licensee has a Specified Floor Area.

“Local Access Node” means a node in an Electronic Communications Network which supports the provision of services to End-Users. For the avoidance of doubt, such nodes include the following, namely a main distribution frame, an optical distribution frame, a digital local exchange, a digital subscriber line access multiplexer, a remote concentrator unit and an MSAN.

“MDF Site” means a Telkom site at which one or more Main Distribution Frames is located.

“Measured Products” means Metallic Path Facility, Shared Metallic Path Facility, Sub-Loop Unbundling and FTTC Inputs.

“Metallic Path Facility” means a circuit comprising a pair of twisted metal wires between an End-User’s premises and a main distribution frame that employs electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy to convey Signals when connected to an Electronic Communications Network.

“Migration process” means a process by which:

- a) a Licensee transfers from using one product or service to another product or service;
- b) an End-User transfers from using one product or service to another product or service;
- c) an End-User transfers from using a product or service supplied by a Licensee to the same product or service supplied by another Licensee.
- d) any combination of a), b) or c) above;
- e) any combination of a), b), or c) above which involves more than one End-User and/or two or more Licensees and the transfer takes place within a single process; or
- f) any combination of a), b) or c) above which involves the synchronised transfer of multiple services or products.

“MSAN” means a Multi-Service Access Node, being a Local Access Node in Telkom’s NGN which is capable of supporting the provision of multiple services to End-Users whether over fibre or copper.

“Network Layer” means the network layer of the International Standards Organisation seven layer model for communications protocols.

“NGN” means Next Generation Network, a packet-based Electronic Communications Network which is able to provide Electronic Communications Services and to make use of multiple broadband and quality of service-enabled transport technologies, and in which service-related functions are independent of the underlying transport-related technologies.

“Physical Layer” means the duct, fibre, copper and other non-electronic assets in an Electronic Communications Network.

“Proactive Review” means the Telkom Wholesale process set out in section 3.20.

“Quarter” means a period of three calendar months commencing on a date notified by Telkom to the Licensee from time to time.

"Relevant Purpose" means any purpose connected with the exercise of any rights or the performance of any obligations under any Electronic Communications Facilities Leasing Agreement or any other agreement between Telkom and a Licensee for the supply of any products and/or services in section 3.1;

"Republic" has the same meaning as in the ECA.

"RFS date" means the Ready For Service date from which an Equivalence of Inputs product or service is available for use by other Licensees for the new End-Users, and is also available for use by Telkom (and is in use by Telkom) to handle all product or service events for New End-Users (being new after the RFS date). The RFS date is also the date of the start of migration of the relevant installed base of End-Users. In this definition "New End-User" means either:

- a) an End-User who has not previously been directly supplied by Telkom for any Telkom product or service; or
- b) an End-User with no current service from Telkom but who is returning to Telkom;

and excludes for the avoidance of doubt:

- i. an existing Telkom End-User who is moving premises, and
- ii. an existing Telkom End-User purchasing a new service.

"Shared Metallic Path Facility" means access to the non-voiceband frequencies of the Metallic Path Facility.

"SLA" means Service Level Agreement.

"Specification" means any of the specifications listed below:

Ref.	Specification title	As amended from time to time by:
1	Access Network Frequency Plan	ICASA or the multilateral industry group described in paragraph 3.13
2	Internal Tie Cable specification	Telkom
3	External Tie Cable specification	Telkom
4	End to end process manual specifications as set out in 3.13.2	ICASA or the multilateral industry group described in paragraph 3.13

"Specified Floor Area" is a floor area or areas within an Exchange occupied by a Licensee where that Licensee's equipment is installed.

"Start Date" means the first Working Day after the end of the week in respect of which a Weekly Order Form has been agreed to be submitted or, where a counter-offer has been made by Telkom, the Start Date specified by Telkom in the counter-offer and accepted by the Licensee.

"Sub-loop Unbundling" means access to the part of a Metallic Path Facility or the part of a Shared Metallic Path Facility from an End -User premises to an intermediate point prior to the main distribution frame.

“System Alteration” means a change to the Telkom System, not including a change to an interface, which may materially affect the Facilities or service(s) provided by Telkom to a Licensee by means of the Metallic Path Facility.

“Telkom” means Telkom SA SOC Limited incorporated in terms of the company laws of the Republic of South Africa under registration number 1991/005476/06.

“Telkom System” means the Electronic Communications Network provided by Telkom for connection to the Licensee Electronic Communications Network pursuant to these Regulations.

“Telkom Wholesale” means the division within the Telkom organisation that currently has that designation and which predominantly manages upstream products and services, designed for use by other Licensees, as inputs to their own products, and includes any successors to that division.

“Weekly Order Form” means the form issued by Telkom and used by the Licensee to submit its orders for Distant Location in respect of a week agreed by Telkom and the Licensee as being the week for submission of orders in accordance with a committed weekly ordering pattern.

“Working Day” means any day which is not a Saturday, Sunday or an official Public Holiday recognized as such in the Republic.

2.2 Words or expressions shall have the meaning assigned to them in these Regulations and otherwise any word or expression shall have the same meaning as it has in the ECA.

2.3 References to sections shall mean sections of these Regulations, unless otherwise stated.

2.4 In these Regulations, “product” means product and/or service as appropriate, unless the context otherwise requires.

3. Provision of equivalent products and services

Duty to supply certain products and services

3.1 Telkom shall supply to all Licensees within four (4) months of the publication of these Regulations the following products and services and where relevant their handover products:

- a) Metallic Path Facility;
- b) Shared Metallic Path Facility;
- c) Sub-loop Unbundling;
- d) FTTC Inputs; and
- e) Associated Services.

3.2 Telkom shall prepare a reference Electronic Communications Facilities Leasing Agreement (which meets the requirements of these Regulations) and offer it to all

Licensees to give effect to these Regulations within four (4) months of the publication of these Regulations.

- 3.3 Telkom shall publish details of any proposed change to the Electronic Communications Facilities Leasing Agreement established terms of section 3.2 not less than 10 Working Days before such proposed change it to come into effect. Telkom shall give not less than 28 days' prior written notice of changes to the terms of the Electronic Communications Facilities Leasing Agreement in 3.2 with regard to the introduction of new services which may be provided for under that Electronic Communications Facilities Leasing Agreement, and 90 days' prior written notice of any changes to the terms for existing products and services provided under that Electronic Communications Facilities Leasing Agreement.
- 3.4 Telkom shall publish a Carrier Price List for the products and services set out in 3.1 within four (4) months of the publication of these Regulations.
- 3.5 Telkom may revise the charges set out in the Carrier Price List at any time provided that Telkom shall give Licensees using any of the products and services set out in 3.1 not less than 90 days' prior written notice. For the avoidance of doubt, if Telkom launches a new service under these Regulations, it shall give not less than 28 days' prior written notice. Such timescales may not be modified unless agreed with ICASA.

Equivalence of Inputs for certain products and services

3.6 Telkom shall apply Equivalence of Inputs to the following products:

- a) Metallic Path Facility;
- b) Shared Metallic Path Facility;
- c) FTTC Passive Inputs; and
- d) Associated Services.

3.7 Nothing in this section 3 shall require Telkom when providing Electronic Communications Services either to itself or to other Licensees to use Metallic Path Facility as an input to that product.

3.8 Telkom shall ensure that by 1 March 2014 at least 80% of Telkom's relevant installed End-User base shall be migrated so that the products that this base purchases, that consume the Measured Products, do so on an EOI basis from Telkom Wholesale;

3.9 Telkom shall ensure that by 1 March 2015 at least 90% of Telkom's relevant installed End-User base shall be migrated so that the products that this base purchases, that consume the Measured Products, do so on an EOI basis from Telkom Wholesale;

3.10 Telkom shall ensure that by 1 March 2016 at least 95% of Telkom's relevant installed End-User base shall be migrated so that the products that this base purchases, that consume the Measured Products, do so on an EOI basis from Telkom Wholesale;

3.11 Commencing on 1 March 2014 Telkom shall make available to other Licensees a stand-alone address matching service (on the basis that the data made available under that service can only be used by Licensees for address matching purposes directly related to the order and/or repair of the products concerned) with the objective of

reducing address matching failures, until such service is no longer reasonably required by virtue of the availability of an alternative Equivalence of Inputs service.

3.12 Commencing on 1 March 2014 Telkom will provide access to the engineering appointment books and systems used by Telkom to enable Licensees to provide their End-User customers with services.

Technical standards, specifications and processes

3.13 ICASA or a multilateral industry group endorsed by ICASA shall prepare:

3.13.1 An Access Network Frequency Plan; and

3.13.2 An end to end process manual to give effect to these regulations, including but not limited to:

- a) The detailed manner in which the products and services in 3.1 will be offered;
- b) Advanced Capacity Planning Forecast forms, processes and procedures and procedures;
- c) Timeframes for activities and penalties for not meeting those timeframes, including Start Dates and Estimated Delivery Dates;
- d) Weekly Order Forms; and
- e) Advanced Point of Presence Form ("APO Request Form").

3.13.3 Other technical standards, specifications and processes where necessary to give effect to these Regulations.

3.14 Telkom shall within two months of the publication of these regulations prepare the technical standards and specifications for :

3.14.1 Internal Tie Cables;

3.14.2 External Tie Cables; and

3.14.3 Co-location Hostels.

3.15 Insofar as a multilateral industry group is established to give effect to clause 3.13, and this industry group is endorsed by ICASA, Telkom shall participate in that group.

Customer confidential information

3.16 Telkom shall restrict disclosure of Customer Confidential Information relating to a Licensee to those persons who have a reasonable need to know.

3.17 Customer Confidential Information shall not be disclosed to Telkom employees working for the Downstream Divisions except:

3.17.1 with the relevant customer's consent; or

3.17.2 to the minimum extent that disclosure to Telkom employees working for the

Downstream Divisions is necessary to operationally enable Telkom Wholesale to deliver products provided by Telkom Wholesale under section 3 of these Regulations.

- 3.18 For the avoidance of doubt, Telkom shall ensure that Customer Confidential Information is not used to give commercial advantage to Telkom's Downstream Divisions and in this respect, no employees who have direct dealings with BT Customers or who deal directly with the detailed planning of retail sales programmes or strategies shall have access to Customer Confidential Information. Customer Confidential Information shall be used solely for the purposes for which it was disclosed.
- 3.19 Telkom shall ensure that any aggregated information (not being Customer Confidential Information) which is compiled from Customer Confidential Information supplied to Telkom by Licensees relating to the provision of products and services set out in section 3.1 shall not be provided to Telkom's Downstream Divisions unless such aggregated information is generally made available to the Licensees by ICASA or by Telkom.

Exchange access, space, power and location of equipment

3.20 In relation to Exchange space and power:

- 3.20.1 Within two months of these Regulations taking effect Telkom shall consult with industry with regard to the scope of the Colocation and Co-mingling products within the definition of Associated Services to allow for flexible use of space specifically to enable Licensees to house in that space equipment connected to the Telkom System and used in connection with the products and/or services in section 3.1. Following industry consultation, Telkom will develop for the products and/or services in section 3.1 Co-location and Co-mingling products within the definition of Associated Services.
- 3.20.2 Telkom shall develop and launch a space-only-allocation product on an Equivalence of Inputs basis which will enable Licensees to pre-book space allocated to them in and used in connection with the products and/or services in section 3.1 for an appropriate charge. The maximum duration of the space-only-allocation product is 18 months, after which time the space will be released if the Licensee has not placed a firm build order for space for use in connection with products and/or services in section 3.1.
- 3.20.3 Telkom shall develop and publish guidelines detailing the approach it will adopt for the space and power allocation process for use in connection with products and/or services in section 3.1. The approach for allocating space and power will be on an Equivalence of Inputs basis, subject to this being on a "first come first served" basis. The guidelines will include a description of the space and power allocation process for use in connection with products and/or services in section 3.1, and the role of Telkom.
- 3.20.4 The guidelines will also set out the process for reviewing space availability for use in connection with products and/or services in section 3.1 on a proactive basis where space is in short supply with a view to verifying the space records and identifying options to free up space (the "Proactive Review"). Space allocated to be used for Telkom's NGN within the next 18 months will be included in considering Exchange sites where space is in short supply.
- 3.20.5 Telkom shall carry out the Proactive Review. The Proactive Review will focus on a list of Exchanges agreed between ICASA and Telkom, from time to time, as the most

probable locations for space demand. This list of Exchanges will be published in accordance with the space and power allocation guidelines.

3.20.6 Licensees whose space requirements for use in connection with products and/or services in section 3.1 have not been met under the space allocation process may raise concerns with ICASA about the outcome of the Proactive Review, including where the Proactive Review occurs pursuant to section 3.20.8.

3.20.7 ICASA will periodically monitor the Proactive Review process and in particular review those Exchanges where space is constrained. ICASA's initial review will also include 20 (twenty) randomly selected Exchanges where space records indicate that there is sufficient space. Subsequent periodic reviews will be based on a random sample of Exchange sites. ICASA also has the right, if necessary, to audit the operation of the Proactive Review process.

3.20.8 Where Telkom identifies a conflict for Exchange space between Telkom's NGN and other Licensees' requirements for space, and the Telkom NGN date as published in the NGN plan of record is more than 18 months away, the Telkom NGN space allocation will be released provided the space is needed to meet a Licensee's earlier Exchange space requirement firm build order.

3.20.9 Other divisions of Telkom will not be required to use the Equivalence of Inputs space-only-allocation product for space allocated in connection with the initial deployment of NGN as documented in the NGN plan of record. All other allocations for Exchange space by Telkom will be required to use the Equivalence of Inputs space-only-allocation product.

3.21 In relation to access to Exchanges:

3.21.1 Subject to sub-paragraphs 3.21.2 and 3.21.3, Telkom shall not impose a requirement for any Licensee to buy or use Escorted Access or any equivalent service when that Licensee requests entry for a Relevant Purpose for itself or for any third party to any Exchange owned or controlled by Telkom.

3.21.2 Telkom may require a Licensee to buy or use Escorted Access only where it can demonstrate that:

- i. any person in respect of whom a Licensee has requested that Telkom grants entry to an Exchange does not have Approved Status; or
- ii. where entry is requested to an Exchange or any part of an Exchange, Telkom only allows individuals who are not employees of Telkom to enter such premises under physical supervision;

provided that, in relation to each Exchange at which Telkom requires Escorted Access, Telkom shall promptly supply Escorted Access to any Licensee requesting access for a Relevant Purpose.

3.21.3 Telkom may only refuse entry for a Relevant Purpose to any Exchange or any part of any Exchange in accordance with criteria agreed between Telkom and ICASA.

3.21.4 Unless Telkom agrees otherwise with the Licensee, a Licensee may not be required to pay for any form of surveillance or supervision of any person having entered any Exchange unless that surveillance or supervision is Escorted Access required by

Telkom in accordance with sub-paragraph 3.21.2.

3.21.5 Telkom shall ensure that the Reference Electronic Communications Facilities Leasing Agreement contains all terms and conditions necessary or desirable to give full effect to this paragraph 3.21.

3.22 In relation to Exchange planning and information:

3.22.1 The Estimated Space Availability Details shall be provided by Telkom by the November 1 preceding the next Telkom financial year for which the Telkom corporate property strategy applies.

3.22.2 Telkom shall invite Licensees to submit by 1 January preceding the next Telkom financial year for which the Telkom corporate property strategy applies, written observations (including demand forecasts for space) to Telkom concerning the Estimated Space Availability Details. Telkom may require these written observations to be submitted in a standard format provided by Telkom.

3.22.3 Telkom will consider reasonable observations provided under section 3.22.2 as part of the Telkom corporate property strategy, when planning future use of Exchanges, provided that the effect of the observations would not materially affect Telkom's right to carry out its bona fide business requirements or its right to reduce its bona fide costs of managing and maintaining the Exchanges.

3.22.4 Within four months of these Undertakings taking effect, Telkom will provide (by placing the list on a password protected Telkom website) to ICASA and to those Licensees who have signed an appropriate confidentiality agreement with Telkom a list of Exchanges that it intends to vacate in accordance with its property strategy. Telkom will inform any Licensee requesting to occupy a Vacation Exchange before the Licensee deploys its equipment at the site that it is a Vacation Exchange and the proposed date of vacation. Subject to Telkom complying with its obligations under this section 3.22.4, the Licensee will vacate that site on or before the proposed vacation date and will not be entitled to any compensation from Telkom, except where existing contractual terms apply. Telkom will have the right to amend that list from time to time as appropriate, and must do so at least every six months, during the period of these Regulations, if there have been any changes, and such amended list shall be provided in the same manner as the original list to ICASA and to those Licensees who have signed an appropriate confidentiality agreement with Telkom.

Telkom Product and Service Roadmap

3.23 Telkom shall in respect of the products in section 3.1:

3.23.1 publish on or before 30 November 2013:

- i. an 18 month roadmap which will establish the timing and content of the product and service developments and enhancements to existing products (the "Roadmap"); and
- ii. a document specifying the change control process (the "Change Control Process") that applies to the Roadmap;

3.23.2 update and republish both the Roadmap and Change Control Process, following discussion with its customers, at least every six months thereafter.

FTTC Passive Inputs

3.24 Within two months of the publication of these Regulations, Telkom shall conduct a consultation with industry in order to assess the demand for and Licensees' views on the design of FTTC Passive Inputs. The consultation process will address the needs of Licensees wishing to invest at the time of Telkom's upgrade programme as well as the reasonably foreseeable needs of those considering investing at some future time.

3.25 Telkom shall:

3.25.1 ensure that it meets reasonable demand for FTTC Passive Inputs from Licensees wishing to locate their FTTC equipment in a Licensee's FTTC street cabinet facility (i) attached to or otherwise integrated with the Telkom FTTC Cabinet; or, if it is not technically or economically feasible for Telkom to do so, (ii) in the vicinity of the Telkom FTTC street cabinet, whether at the same time as Telkom installs its Telkom FTTC street cabinet or at some future time, where practicable and recognising that all reasonable security measures need to be adhered to.

3.25.2 in designing the capabilities around its FTTC street cabinet deployment (the "Street Cabinet Solution"), adopt design principles relating to the provision of power and optical fibre availability that will enable other Licensees to locate their own equipment at or in the vicinity of Telkom's FTTC street cabinets in the most cost-efficient manner possible, all where practicable.

3.25.3 taking into consideration the findings of the consultation Licensees (as set out in section 3.24), review and modify its design principles for the Street Cabinet Solution, where practicable, to facilitate meeting reasonable future demand for FTTC Passive Inputs cost effectively.

3.25.4 in designing its systems for Telkom products and/or services offered by its Downstream Divisions, where practicable, adopt design principles that make it possible in future to enable the delivery of FTTC Passive Inputs on the basis provided in section 3.26.

3.26 Telkom shall:

3.26.1 in providing any FTTC Passive Inputs, use the same components, processes and systems it uses itself for the products and/or services offered by its Downstream Divisions where reasonably practicable and on the most cost-efficient basis.

3.26.2 where it cannot provide FTTC Passive Inputs in accordance with sub-paragraph 3.26.1, provide FTTC Passive Inputs as far as possible to the same specifications with the same functionality and performance as the inputs it uses itself for the products and/or services offered by its Downstream Divisions.

ICASA shall monitor the provision of the FTTC Passive Inputs pursuant to this section in accordance with appropriate metrics to be agreed by Telkom and ICASA.

4. System alterations

4.1 If Telkom wishes to make a System Alteration, it shall give Licensees using products and/or services in section 3.1 reasonable notice, which shall not be less than 7 months' written notice, prior to the date of the anticipated System Alteration. The notice shall

specify the technical details of the System Alteration and the date of the anticipated System Alteration. Following such notification Telkom shall supply to the Licensee such information as the Licensee may reasonably request including, to the extent reasonably practicable, the potential impact on the service provided by the Licensee to End Users.

4.2 If necessary, Telkom and ICASA or the multilateral industry group as set out in section 3.13, shall amend the Specifications prior to a System Alteration.

5. Broadband dialtone

5.1 Telkom shall ensure that no Licensee, to which it supplies Metallic Path Facility or Shared Metallic Path Facility, suffers a material competitive disadvantage to its products based on such Metallic Path Facility or Shared Metallic Path Facility solely as a result of Telkom's software-controlled migration between products made possible by its NGN.

6. Information requests and Co-operation

6.1 Where, following consultation with Telkom on the draft of such a request, ICASA makes a proportionate request in writing for information reasonably necessary for ICASA to monitor compliance with these Regulations, Telkom shall provide such information to ICASA within a reasonable period, being not less than fifteen working days, and which is reasonable having regard to the seriousness and urgency of the matter, of the request being received.

7. Directions

7.1 Where ICASA:

7.1.1 has given Telkom a notification that it has reasonable grounds for believing that Telkom has contravened any of these Regulations, which specifies the Regulation or Regulations concerned and setting out its reasons and enclosed a draft of a direction which may specify or describe steps to be taken by Telkom for the purpose of securing compliance with the Regulation or Regulations concerned; and

7.1.2 has allowed Telkom a reasonable period, being a period of at least one month, to make representations to ICASA following receipt of such notification; and

7.1.3 having considered any representations Telkom has made, is satisfied that Telkom is in contravention of one or more of these Regulations and has given Telkom a direction with reasons which may specify or describe steps to be taken by Telkom for the purpose of securing compliance with the Regulation or Regulations is referred to in that section and which includes an address at which Telkom may give notice under i or ii below, Telkom may within two weeks of receipt of the direction, or such longer period as may be agreed with ICASA in any particular case, give notice to ICASA that it either:-

- i. accepts the direction; or
- ii. following a decision to that effect of the Telkom Board, declines to accept the direction, in which case, for the avoidance of doubt the direction shall be of no effect.

In the event that Telkom fails to give a notice to ICASA within the period specified above, it shall be deemed to have accepted the direction.

7.2 Where under section 7.1 Telkom accepts a direction it shall comply with the same. For the avoidance of doubt, if Telkom fails to comply with a direction it has accepted, a Licensee may use the dispute resolution mechanism set out in Section 46 of the ECA.

CONCLUSION

26. As alluded to above, Neotel strongly supports the Authority's publication of the LLU Regulations.
27. Local Loop Unbundling regulations require, *inter alia*, tight definitions and processes hence benchmark regulations would assist the Authority and the industry in this regard. Neotel submits that the Authority should consider adopting rules developed by Ofcom. However, the Authority must ensure that these rules are adapted to suit the South African environment, legislation and regulatory framework.
28. While there might be legal uncertainty regarding whether the Authority can regulate bitstream access, Neotel respectfully submits that the Authority should seek legal advice to avoid the process being vulnerable to judicial review.
29. Neotel remains at the Authority's disposal to provide any clarity that may be required in relation to this submission.