
**NEOTEL'S SUBMISSION
PUBLIC INQUIRY INTO THE STATE OF COMPETITION IN THE ICT SECTOR**

EXECUTIVE SUMMARY

Neotel welcomes the opportunity to share its views with the Authority on the public inquiry into the state of competition in the ICT sector. Neotel further believes that there is scope for extending the understanding of the issues identified as the Authority's process unfolds.

As previously stated, Neotel is committed to reducing the cost to communicate in South Africa and to drive innovation in the sector. However, Neotel believes that in order for new entrants as well as smaller operators such as Neotel to grow in an effectively concentrated market, the Authority must ensure that the regulatory framework is conducive to achieve the desired competitive outcomes.

Neotel has concerns with some of the statements upon which the inquiry appears to be based. The cost to communicate in South Africa has fallen, in some cases quite dramatically, over the past few years – for everyone, from businesses to consumers, and across voice and data. Therefore, it is respectfully submitted that the Authority should, in addition to this inquiry, also focus on the various regulatory and policy bottlenecks that have an impact on competition in the sector.

Amongst the issues that require the Authority's urgent attention in this regard, are market access (e.g., number portability and rapid deployment of electronic communications facilities), opening up the fixed-line network (this being one of the regulator's role to regulate for competitive outcomes in order to ensure that services are priced competitively and that services are reliable in the fixed line sector), and a thorough reconsideration of the universal service and access regime.

As fibre access is being rolled out to reach customers in South Africa, the role of the Authority should be primarily to create an enabling environment for competitive players to deploy fibre. In many respects, it is somewhat premature to simply move to a general principle of open access when one of the most critical issues in deployment of infrastructure is making it financially viable for players to deploy fibre.

Unlike fibre, high demand spectrum is a finite and limited resource. Hence, the most critical issue for the Authority is to ensure that the spectrum is both available and used with maximum efficiency. This requires that spectrum be assigned timeously and fairly to players that require it to continue to compete efficiently.

With regards to the impact of net neutrality and disruptive technologies on the competitive landscape, Neotel respectfully submits that while net neutrality is an issue that should be of concern to the Authority, it is not an issue that currently has any significant impact within South Africa. The history of telecommunications is a history of disruptive technologies, and the players that are best able to exploit new technologies succeed. Briefly, this is the essence of competition, and the ability to deploy new technologies should generally not be restricted, unless they infringe in some way on the legal rights of existing providers.

Market consolidation in the industry should not be viewed as a negative, but rather a sign of a maturing market, also indicative of the realities of constraints for access to capital and a reflection of global and local markets. It is not *per se* a bad sign or to be viewed with concern. There are of course socio-economic benefits that can be derived from consolidation. The key requirements for competition that benefits end users are a level playing field, with pro-competitive regulation as needed. To this end, Neotel respectfully submits that any merger transaction should be treated on its own merits taking into the principles of competition law and policy. Unless a proper and thorough competitive assessment is conducted, it cannot be assumed that any form of consolidation in any sector of the economy will be detrimental to competition.

SECTION 1 - INTRODUCTION

1. The Independent Communications Authority of South Africa (“the Authority” or “ICASA”) seeks to conduct a public inquiry into the state of competition in the sector. This process is envisaged to take between 6 - 8 months to finalise. The Authority has requested stakeholders in the information and communications technology (“ICT”) sector to make submissions on a number of issues. The issues include, *inter alia*, the following:

- The current state of competition in the entire ICT sector;
- Challenges to creating a level playing field across platforms;
- The impact of convergence, net neutrality and disruptive technologies on the competitive landscape;
- The role of fixed (fibre) and wireless (high demand spectrum) in enabling competition; and
- The tension between consolidation and plurality in the sector.

2. Neotel welcomes the inquiry by the Authority and appreciates the opportunity to make a submission. It is extremely important that the ICT sector is competitive in all respects and at all levels of the value chain. Neotel supports efforts to enhance competition in the ICT sector and will co-operate fully with the inquiry.

3. Neotel’s submissions is structured as follows:

- Section 1 - Introduces the issues and sets out the structure of the Submission.
- Section 2 - provides general comments.

In sum, this section outlines and discusses some of the current regulatory issues that Neotel believes should be prioritised in order to enhance competition in the telecommunications market. This includes, *inter alia*, market access (e.g., number portability and rapid deployment of electronic communications facilities), opening up the fixed-line network (this being one of the regulator’s role to regulate for competitive outcomes in order to ensure that services are priced competitively and that services are reliable in the fixed line sector), universal service and access regime, and the application-to-person SMS services.

- Section 3 - Neotel’s responses to some of the specific questions the Authority poses in the inquiry.
- Section 4 - conclusion.

4. Neotel hopes that its submissions are helpful to the Authority in its inquiry in the state of competition in the ICT sector and we would welcome the opportunity to make oral submissions, if required.

SECTION 2 - GENERAL COMMENTS

5. As alluded to above, the Authority seeks to conduct a general inquiry into the state of competition in the ICT sector. The Authority envisages the inquiry process to take no less than 6 months to complete.
6. While Neotel understands that the Authority does not require specifics nor answers at this stage, Neotel considers it necessary - in order to address the Authority's request for stakeholders to address the state of competition in the ICT sector - to identify some regulatory bottlenecks that it believes, continue to stifle competition in the sector.
7. As stated above, while Neotel as a smaller player is supportive of any process that will facilitate a level playing field, Neotel does not agree with the basis of some of the statements upon which the inquiry appears to be based. The cost to communicate in South Africa has fallen, in some cases quite dramatically, over the past few years – for everyone, from businesses to consumers, and across voice and data. While one can argue that there is insufficient competition in some areas, and that South Africa has fallen behind other countries in PPP terms, the approach as a whole appears at times muddled.
8. Further, our respectful view is that as much as the inquiry should focus on the state of competition in the sector, from the supply side, demand side issues should also be examined, and critically, a dispassionate examination should be undertaken of the legal, regulatory and policy bottlenecks that still exist in the ecosystem. By this, we mean the absence of specific regulations or the undue delays that have occurred in the past and in some cases, still occur for the implementation of certain regulations that are required and which would facilitate competitive dynamics in the sector. This is more fully explained in the ensuing section.
9. This statement and submission should however, in no way be considered as critical of, nor an attack on the Authority. It is simply stated in order to ensure that issues that make the industry more competitive are addressed without any further delay.
10. Further, Neotel's approach should in no way be construed as a suggestion that 'market inquiries' are not relevant or essential at all. 'Market inquiries' are particularly helpful as they enable regulators to examine whether there are features of the market which lessen, prevent or distort competition. They also assist regulators to establish the factual basis for making recommendations to the relevant stakeholders on the state of competition in the sector and also the recommended course of action.
11. Neotel therefore believes that the specifics outlined below may assist the Authority's Inquiry Team to identify some of the key competition bottlenecks that need to be addressed through the inquiry.

12. These are competition issues that the Authority is conversant with currently and in terms of which several substantial submissions supported by in-depth research, have been submitted to aid the Authority in this regard. Some of the competition issues which requires ICASA's immediate attention include, *inter alia*, the following:

- Local Loop Unbundling;
- Lowering cost to communicate: Toll-Free Implementation Framework;
- Number portability;
- Rapid Deployment of Electronic Communications Infrastructure;
- Application-to-Person ("A2P") SMS Services; and
- A review of the Universal Service and Access framework.

13. Of course, there are huge benefits to be derived from a public inquiry in any sector. A public market inquiry would at least open up the sector to scrutiny and guide the Authority as to the action that is required from them, whether this be recommendations to the Competition Commission for prosecution of certain conduct in terms of the Competition Act, regulatory interventions or consumer protection. The impact of this kind of inquiry together with some of the competition issues affecting the ICT sector has been succinctly summed up by the former Chairperson of the Competition Tribunal of South Africa, as follows:

"We saw Telkom granted an exclusive monopoly in exchange for an extension of access – we saw them take full advantage of their monopoly and, predictably, fail to improve penetration; we have seen the failed introduction of number portability; we have now seen the changes in the regulatory environment that will allow self provision of network infrastructure, but, while this represents progress of a sort, I have no doubt that its benefits will be limited to a few large players and that the impact on entry barriers will be extremely limited...telecommunications is ripe for such a study [public market inquiry]"¹

14. While Neotel acknowledges recent positive changes at the Authority with respect to processes and outcomes, decision-making still appears to be slow at times, which can have a significant impact on business processes. It is unclear if a process of this nature could in fact, be completed within 6 months, or that the interventions required could be implemented speedily, or in fact, would differ from various

¹ See David Lewis' talk for Neotel/Mail and Guardian Breakfast on 15 July 2009, available at <http://www.comptrib.co.za/speeches>, last accessed on 19 June 2014.

processes already underway at the Authority, which if completed, would have a positive impact on the state of competition in the sector. Thus, Neotel submits a number of issues that we believe, if addressed, would facilitate the very outcomes this inquiry seeks to achieve.

15. Neotel also submits that the Authority should consider engaging or involving the Competition Commission in undertaking a holistic inquiry into the state of competition in the ICT sector. The Authority could explore possibilities within the legal framework to set up a task team comprising staff from the Competition Commission and ICASA in undertaking such an inquiry.
16. In conclusion, Neotel believes that there are certain fundamental issues that the Authority must address. We in turn provide further details on these specific issues, which will be followed by Neotel's views on specific questions raised by the Authority.

Local loop unbundling (LLU)

17. LLU has been under the Authority's consideration for an excessive period of time. This is despite the fact that the unbundling of the copper local loop has been the government's policy since 2007, as a result of the Local Loop Unbundling Committee's report², and the then Minister of Communications' policy direction that "...the unbundling process in South Africa should be urgently implemented and completed by 2011".³
18. Research shows that the incumbent fixed-line operator is by far the largest provider of fixed line services in South Africa. Its share of supply of fixed line services accounts for around 50%⁴ and for approximately 80% of the supply of fixed line voice services which account for the large majority of all fixed line services.
19. The Competition Tribunal's finding of the fixed-line operator's dominant market share of more than 45% in the fixed line services market together with a finding of abuse of dominance by the incumbent fixed line operator is a clear sign that this is in itself a market failure that needs to be addressed through a number of open access regulatory mechanisms including LLU. The absence of regulatory mechanisms in the

² The Local Loop Unbundling Committee, 23 May 2007, "Local loop unbundling: A way forward for South Africa", Available at: <http://www.info.gov.za/view/DownloadFileAction?id=72535>, last accessed on 13 September 2011.

³ See Section 8 of Government Gazette no. 30308, notice no. 876, published on 17 September 2007.

⁴ See BMI report, 2014Q1. See also Competition Tribunal decision in *Competition Commission vs. Telkom SA Ltd.*, case no. 11/CR/Feb04, wherein the Tribunal found the incumbent fixed-line operator dominant with a market share of more than 45% in respect of markets for fixed line services..

form of LLU, for example, continue to stifle competition in the sector. Operators are required to rely on their own network in order to compete with the incumbent fixed-line operator. Without the promulgation of the LLU regulations, new entrants and existing operators would still have to put significant investments to build their own networks where they could possibly use the dormant network of the incumbent fixed line operator.

20. Neotel reiterates its views that the introduction of local loop unbundling in South Africa will help stimulate growth in the telecommunications market. Once this is implemented, it will also help stimulate economic growth of the country. It is further recommended that South Africa should adopt similar regulatory interventions as adopted in Europe and elsewhere in the world where wholesale regulatory mechanisms have been precisely, the main route through which fixed line entry has been achieved. This will facilitate competition in markets for fixed line broadband.
21. The implementation of LLU will undoubtedly improve competition in the telecommunications sector. There are enormous benefits that could emanate from the promulgation of LLU regulations. The key benefits include:
- (a) An increase in innovation around broadband services provided using copper local loops.
 - (b) Encourages new facilities based entry, by providing new entrants with the ability to learn about customers, build their brands, and gain credibility with investors and lenders, so as to build competitive infrastructure.
 - (c) Reduced pricing for broadband services by introducing competition for the provision of services to consumers and Small and Medium Enterprises (“SMEs”).
 - (d) Increased broadband penetration among consumers and greater access to media rich services, including Internet Video.
 - (e) Increased broadband penetration among SMEs, which facilitates job creation, and provides SME employees with broadband internet access. LLU will support SME development by expanding access to and reducing the cost of high capacity broadband internet.
 - (f) Increases in investment and employment. Local loop unbundling will mean that operators like Neotel will need to roll out infrastructure to the incumbent fixed line operator’s exchanges to provide backhaul services, which requires substantial investments and which will create significant numbers of jobs. More than 2,500 jobs will likely be created through Neotel alone building out infrastructure.⁵

⁵ Neotel has previously conducted substantial research on the pros and cons of the implementation of LLU in South Africa. We refer the Authority to Neotel’s previous submissions on the topic.

22. This year marks seven years' anniversary since the then Minister of Communications announced that local loop must be unbundled. Neotel therefore urges the Authority to ensure that there are no further delays concerning the implementation of LLU. Further, Neotel reiterates its views that LLU should be implemented in respect of copper last mile facilities rather than in respect of wireless or fibre facilities. There are several wireless providers, and the rollout of fibre networks has only recently begun. It is also unclear what is meant by wireless LLU. In the case of mobile wireless networks, there is no obvious facility that can be unbundled. It is likely that expanding the focus of the LLU process beyond the copper last mile will substantially delay the unbundling of copper local loop.
23. To this end, Neotel urges the Authority – albeit not an antitrust regulator – to move towards the direction of “protecting competition and not competitors”.

Toll-Free Implementation Framework

24. Neotel believes that there should be no further delay to the Toll Free Implementation Framework beyond the mandatory two year deadline, i.e., on or before October 2014. A further delay in implementing this framework will perpetuate the unwarranted cost to consumers which contradicts Government's strategic objective to lower the cost to communicate.
25. The existing toll-free status quo, is onerous on consumers for the reasons cited below, and this service is not free of charge as mandated by the Numbering Plan Regulations 2012, Government Gazette 35737.
- (a) For customers making on-net calls to an on-net toll free number, calls are free. The toll free service provider pays the operator for the calls.
 - (b) For customers making an off-net call to a toll free number on another operator's network, the customer pays the originating provider for the cost of carrying the call. The toll free number service provider pays the terminating operator the normal charge of an on-net call.
 - (c) Neotel has raised this matter in the Industry Numbering Forum and will continuously engage to expedite the implementation of a toll free framework to the benefit of the consumers.
26. It is accordingly submitted that the Authority should move swiftly and implement the Toll Free Implementation Framework by no later than October 2014.

Number Portability

27. Neotel acknowledges that number portability regulations and the related functional system specification have been of great assistance in bringing about competition amongst electronic communications operators in South Africa. Accordingly, Neotel commends the Authority in this regard. We therefore limit our submissions on the impact of the existing regulatory number portability framework on two issues, namely, non-geographic and geographic number porting.

(a) Non-geographic number porting

28. Both mobile and geographic number portability are enabled in South Africa. However, there remains challenges to porting certain number ranges, for example, 080x and 086x. The narrow interpretation of number portability regulations is that ALL other non-geographic numbers are not allowed to be ported. However, the Authority has previously announced that number ranges such as the 081x number range to be mobile numbers which inadvertently allow porting of other non-geographic numbers. In the existing Number Plan regulations, the 081x number range has been designated for future and not necessarily for mobile services.

29. Business customers often request numbers which have some link to their company names or an “easy-to-remember” number, for example, 0860 NEOTEL (0860 636 835). For these reasons, customers are often reluctant to switch operators as they place some marketing value on these numbers. Several customers have indicated that they would like to switch their services to Neotel, for example. This is an issue that does not only affect Neotel but other operators particularly new and smaller entrants in the electronic communications market. The effect of this is that new and smaller operators such as Neotel have and are continuously losing considerable business due to the fact that non-geographic number porting is not allowed by the current regulatory framework. Because of this lacuna in the existing regulatory framework, consumers are not able to benefit from competition that Number Portability regulations are designed to bring to the market. Therefore, consumers’ choice of a preferred service provider is unduly hampered. This is not ideal for the growth of the sector and the economy in general. The introduction of a regulatory framework that enables porting of non-geographic numbers will help bring prices down, and this will greatly benefit consumers.

30. Neotel respectfully urges the Authority to introduce the process that would enable porting of ALL non-geographic numbers to further bolster competition in the electronic communications market.

31. We in turn consider the implications of the existing regulatory geographic number portability framework on the current state of competition in the ICT sector.

(b) Geographic number porting

32. Similarly, Neotel has on numerous occasions raised issues with the Authority on the impact of the existing regulatory geographic number porting framework on the state of competition in the sector. As fully explained below, the existing framework pertaining to the boundaries of “exchange code areas” is very restrictive in nature.
33. Individual ECNS licensees provide geographic services and coverage throughout South Africa. For an operator who provides geographic numbering services, the geographic coverage area is made up of numerous “exchange code areas”. In a traditional network there are no overlaps between the adjacent exchange code areas.
34. The regulatory instruments provide that the termination point of a geographic number must remain within the “boundaries of an exchange code area of a block operator”. The consequences of this is if a block of 10 000 numbers are allocated, a block operator by default determines the exchange boundaries. The numbers allocated in these number blocks can therefore not be used outside the geographic boundaries of that “exchange code area”. This has ramifications to consumers because a subscriber who wishes to relocate to a destination outside the “exchange area code” cannot retain its number. As a result, the customer has to change numbers which adds to substantial cost and management. Further, the customer has to republish its numbers which has associated costs related to advertising. This in itself does not encourage competition and neither does it benefit consumers.
35. By way of an example, Neotel’s network does not make use of the “exchange code area” concept and its associated approach. A Neotel subscriber can be relocated anywhere within an “ONN” code area while retaining its number. The advantage is that Neotel subscribers – whether directly assigned or ported-in – could retain their number while with Neotel. Therefore, there is no need for customers to inform their clientele or family and friends about number changes. This has a significant and direct cost advantage to customers as it enables them to immediately save costs.
36. As alluded to above, the existing regulatory instruments require that the termination point of a subscriber must remain within the boundaries of the “exchange code area”. This in essence means that ported-in subscribers are denied the privilege a Neotel network can offer for using the number outside the boundaries of the “exchange code area”.

37. It is accordingly submitted that the aforementioned practice or restriction clearly results in unfair competition by denying ported-in subscribers benefits which are inherent on our network and thus leads to discrimination of subscribers. This also results in subscribers being reluctant to port to Neotel or any other similar network as they are informed that they will lose their existing numbers if relocated to a different so-called “exchange code area” or even further, porting back to the original operator is not possible.
38. It is plainly clear that the aforementioned practice severely restricts an operator’s ability to compete in the market. Further, it discourages and prevents consumers from porting their geographic numbers outside the “exchange code area”. Therefore, this is not consonant with the spirit, purport and objects of the Electronic Communications Act and the Competition Act. Most importantly, it does not promote the interests of consumers with regard to the price, quality and the variety of electronic communications services.⁶ Similarly, such practice does not promote and maintain competition precisely because it fails to provide consumers with competitive prices and product choices.⁷
39. In summary, the existing number portability regulatory framework does not encourage switching between operators which may serve to inhibit competition. Further, the current number portability regulatory framework appears to favour the incumbent operators to the detriment of new and smaller operators.
40. Accordingly, Neotel submits that the Authority should urgently revise these restrictive geographic number portability regulations and allow porting to take place within the same “ONN” geographic code area boundary. Any delay by the Authority to implement the required changes will undoubtedly continue to stifle competition in the fixed line services market. More so, it will continue to limit consumers’ ability to utilise a service provider of their choice when they opt to utilise alternative affordable services and which may possibly be cheaper.

Rapid Deployment of Electronic Communications Infrastructure

41. The Government and the Authority have both expressed concern about the cost of telecommunication services and the negative impact which this may have on the cost of doing business in South Africa. This was most recently stated in the notice published by ICASA in the Government Gazette of 4 June 2013 in which it noted that *“The Authority has, since 2006, been focussing on reducing the high cost to communicate in South Africa”* and *“some stakeholders in the South African electronic communications*

⁶ See section 2(n) of the ECA.

⁷ See section 2(c) of the Competition Act 89 of 1998.

industry and consumers at large have raised concerns in different fora regarding the high cost to communicate in South Africa”.

42. One of the most effective means of ensuring reduced costs (and prices) is through facilitating competition. This is in line with the objects of the ECA which include the promotion of competition within the ICT sector, the promotion of an environment of open, fair and non-discriminatory access to electronic communication networks and services and the promotion of the interests of consumers with regard to the price, quality and the variety of electronic communications services. Of course, these provisions are also consonant with the provisions of the Competition Act which seeks to maximise competition in order to benefit consumers.
43. One of the significant features of the regime introduced by the ECA is that it seeks to facilitate competition between providers of electronic communications networks and services through permitting the providers to install the necessary facilities on any land (including privately owned land).
44. Smaller operators such as Neotel currently face resistance in the roll-out of telecommunications infrastructure throughout the country. This undoubtedly has an impact on competition as it becomes impossible to penetrate certain areas for the provision of services in those areas. This is despite the fact that the current legislation entitles operators to access any land – be it private or public – for the rapid deployment of telecommunications services in South Africa.
45. The limitation thereof is partly due to the absence of ‘rapid deployment regulations’ which the Ministry of Communications is required to develop in consultation with its counterparts in Co-operative Governance and Traditional Affairs, Environmental Affairs, Rural Development and Land Reform, the Authority and other relevant institutions.⁸
46. These guidelines or regulations must provide procedures and processes for:
 - (a) Obtaining any necessary permit, authorisation, approval or other governmental authority including the criteria necessary to qualify for such permit, authorisation, approval or other governmental authority; and
 - (b) Resolving disputes that may arise between an ECNS licensee and any landowner, in order to satisfy the public interest in the rapid rollout of electronic communications networks and electronic communications facilities.

⁸ See section 21(1) and (2) of the Electronic Communications Act 36 of 2005 (prior to the 2014 amendment).

47. In 2012, the industry drafted proposed guidelines for consideration by the Authority and relevant ministries. The draft guidelines could also help insofar as it pertains to the development of rapid deployment policy. To date, there has been no progress in this regard.

48. The absence of these regulations/guidelines have led to litigation.⁹ For example, in the matter between *Mobile Telephone Networks (Pty Ltd and SMI Trading CC)*¹⁰ the Supreme Court of Appeal clearly emphasised the need for these regulations and opined as follows:

*“Section 69 required the Independent Communications Authority of South Africa, the regulator of the telecommunications industry, to prescribe regulations inter alia for the procedure to be followed and consultations to be held between an operator and any affected person or authority. **No regulations were, however, made just as no ‘procedures and processes’ were prescribed in terms of s 21(2)(b) of the ECA for ‘resolving disputes that may arise between an electronic communications licensee and any landowner’.**”¹¹ (Our emphasis)*

49. Neotel welcomes the recent amendments in the ECA¹² in terms of which the Authority is required to prescribe ‘rapid deployment regulations’ as opposed to ‘rapid deployment guidelines’. However, the current legislative framework requires the Ministry of Communications in consultation with other ministries, the Authority and other relevant institutions to develop a policy and policy directions for the rapid deployment and provisioning of electronic communications facilities following which the Authority must prescribe ‘rapid deployment regulations’. The aforesaid policy and policy directions must be made within 12 months of the coming into operation of the Electronic Communications Amendment Act 2014, i.e., on or before 20 May 2015.

50. Of particular concern is that the amendment does not prescribe the deadline for the Authority to prescribe the envisaged rapid deployment regulations. It further remains questionable whether the Authority should wait for the Ministry of Communications and its counterparts to develop a policy and policy directions thereof. Any delay in giving effect to the ECA amendments will continue to pose significant constraints to smaller players in the sector.

⁹ See *MTN vs SMI* (below); *The Msunduzi Municipality vs Dark Fibre Africa (RF) (Pty) Ltd* case no. 2763/2014 (KZD) and *City of Tshwane Metropolitan Municipality vs Link Africa (Pty) Ltd and Others* case no. 6859/2014 (GNP).

¹⁰ Case No. [2012] ZASCA 138.

¹¹ See par. 10 of the *MTN vs SMI* judgment.

¹² See section 21 of the Electronic Communications Amendment Act 1 of 2014, which came into operation on 21 May 2014.

51. The critical question is how can new and smaller operators contribute to the Government's broadband roll-out target and *South Africa Connect* in light of these and other obstacles. The removal of these barriers will certainly help reduce the digital divide, make economic opportunities more accessible and generate new business opportunities.
52. Accordingly, Neotel urges the Authority to fast-track the development and promulgation of the rapid deployment regulations without any further delay. This will of course benefit consumers at large while ensuring that other smaller and new operators are able to roll-out their telecommunications infrastructure without any hindrance. This could certainly help address government's vision in terms of broadband roll-out.
53. It is Neotel's view that the increasing competition in the telecommunications sector is beneficial to consumers and will result in decreasing (and more affordable) prices for consumers. However, this is only possible if all operators have equal opportunity in accessing both private and public land for purposes of deploying electronic communications facilities.
54. Neotel believes that the promulgation of the rapid deployment regulations will certainly help stimulate competition in the deployment of the electronic communications facilities and thereby stimulate growth in the sector. Neotel further believes that the policy and policy directions combined with regulations would streamline processes to obtain way-leaves (i.e., municipal way-leaves) and permissions (such as water-user licence) and thereby facilitate the rapid deployment (and possibly, sharing) of electronic communications infrastructure.

Application-to-Person ("A2P") SMS Services

55. South Africa has recently witnessed a shift from the termination of A2P SMS's on a sender-keeps all basis. It is argued by some industry players that the current practice of permitting SMS traffic to terminate onto each other's networks on a sender-keeps all basis is no longer commercially practical or sustainable. While this may be true in an industry which constantly changes due to the advent of technological advances, it remains questionable whether the current practice (i.e., the high termination rate imposed) is economically sound from a regulatory perspective.
56. This has led to some players - particularly new and smaller operators - signing (arguably under duress) separate SMS interconnection agreement separate from the main interconnection agreement. The newly

established SMS interconnection regime replaces the sender-keeps-all model with an SMS termination rate for A2P.

57. The Authority only commenced activity in this issue in December 2013. This followed a flurry of commercial SMS interconnection agreements that were filed with the Authority. At the time the Authority indicated to the industry that “the introduction of a termination rate represents a significant change from the pricing principle of sender-keeps-all that the mobile operators introduced under the old Telecommunications Act of 1996. The Authority made it clear that it was concerned about the impact the introduction of a termination rate may have on the value chain associated with the provision of short message services. The Authority was further concerned with the impact such a change in the pricing principle may have on the provision of services which currently exist, the future sustainability of those companies currently providing SMS services combined with the potential implications for employment security in the event that such a change in the pricing principle were to take place. Consequently, the Authority announced that it would put a moratorium on the approval of any new SMS services interconnection agreements pending an industry workshop to discuss the impact of the shift in the pricing principle. An industry workshop was held on 24 January 2014.

58. Neotel welcomes the Authority’s involvement in this matter. However, there remains a regulatory *lacuna* in respect of the regulation of commercial SMS termination. This places competitive constraints on new and smaller players in the industry. Arguably, introducing an extortionately high termination rate for SMS appears to be a mechanism to keep pricing high for retail users and business users alike. In the long run, this is likely to erode the value of SMS services further. This will undoubtedly have a negative impact on fixed and fixed-mobile services and value added services because fixed and fixed-mobile handsets tend to be more price-sensitive.

59. Neotel firmly believes that in the long run, a low, regulated SMS termination rate is better for the industry than the current “*wild west*” approach in the market. An economical sound regulatory approach is required to bulk SMS termination in South Africa. Therefore, it is important that the Authority conducts a proper study on the regulation of A2P SMS termination in South Africa. In order to ensure that there is effective competition in the SMS termination market, Neotel urges the Authority to introduce a wholesale termination rate for A2P SMS services. This may require that the Authority conduct a review similar to the one currently undertaken by the Authority with regards to Wholesale Call Termination.

Universal Service and Access Framework

60. Neotel respectfully urges the Authority to re-consider its approach to universal service and access and the existing framework in this regard through the inquiry. The “old guard” approach to managing Universal Service Obligations (“USOs”) was designed and implemented in a monopoly market. In this regard, the current thinking on allocating USO’s on a per operator basis in this manner, harks to a different regulatory epoch in which a few operators were given the privilege of having a licence in a concentrated market and for that privilege, paid a licence entry fee and took on service obligations. This was so, as in a concentrated market, without competition, the underserved will never be an addressable market and required policy directed at creating access in such areas. The policy goal remains as relevant as ever, but the thinking and mode of trying to give effect to universal service ideals in the same manner, is not, nor cannot be relevant.
61. Moreover, the universal service and access regulatory framework as it is currently appears to be skewed and in itself, creates unintended outcomes for competition in the sector. For example, the Authority does not appear to consider the market position of licensees when allocating licence obligations. Arguably, regulators cannot impose same or equal universal service and access obligations to new and smaller operators as that imposed on the incumbent operators or licensees with significant market power. This somewhat distorts competition as new and smaller operators, with capex constraints, will continuously fail to meet those obligations. It is clear that new and smaller licensees cannot compete equally with their incumbents and any unjustifiable obligations further constrain their ability to meet certain obligations.
62. As such, Neotel proposes an entire overhaul to the thinking, away from the mode of regulating in monopoly/duopoly/concentrated markets. Moreover, despite the market changes, even previously, the sector has never had a successful result of universal service delivery on the current model.
63. Neotel proposes that in the post ECA environment, the “Contribution regime” should be applicable, as it is in many parts of the world. By this, operators should (and do) contribute to a Fund and the Fund is administered by an agency (as is the case in South Africa) or a policy desk within government and projects are funded for roll-out on a bidder basis for under-served areas. The capex comes from the fund and all operators contribute on an equitable basis, relative to their size and turnover.
64. This model would allow a rational market response and a rational allocation of resources to fund infrastructure projects. South Africa has the model in place, but has not utilized it.
65. The predictive, arguably premature response that under-serviced areas will still remain under-served if specific roll-out obligations are not assigned, is neither economically rational nor proven as the model has never been tested, yet has had great success in many other countries. It is also a model in line with an increasingly liberalized (and ultimately de-regulating) framework. Neotel firmly believes that the funds

currently within the USAF should be released for “bid-basis” projects in designated areas and for needy beneficiaries and the project management of the build should be in concert with USAASA. The roll-out plan for the country should be conceptualized by USAASA and multiple projects in which operators tender for the project should be the basis of the model – based on the very funds accrued through the application of the Universal Service and Access “contribution” required by all licensees on an equitable basis.

SECTION 3 - SPECIFIC QUESTIONS POSED BY THE AUTHORITY IN THE INQUIRY

66. Neotel believes that the specific submissions made above help provide answers to some of the key questions posed by the inquiry. Below is a summary of Neotel’s position with regard to local loop infrastructure.

- **The modernisation of local loop infrastructure:** The local loop network has indeed been slow to modernise. Access to the fixed local loop is of vital importance to the industry as it will promote competition in the fixed line services market. As clearly set out above, there are huge benefits that could be derived from unbundling the fixed local loop. Accordingly, Neotel urges the Authority to have regard to the previous submissions Neotel made to the Authority which highlights the studies and research that shows how LLU has benefited other countries. Further, Neotel reiterates its views that LLU should be implemented in respect of copper last mile facilities rather than in respect of wireless or fibre facilities. There are several wireless providers, and the rollout of fibre networks has only recently begun. It is also unclear what is meant by wireless LLU. In the case of mobile wireless networks, there is no obvious facility that can be unbundled. It is likely that expanding the focus of the LLU process beyond the copper last mile will substantially delay the unbundling of copper local loop.

67. Neotel makes submissions below on some of the specific issues that Neotel believes must be addressed through the envisaged inquiry.

- The impact of convergence, net neutrality and disruptive technologies on the competitive landscape;
- The role of fixed (fibre) and wireless (high demand spectrum) in enabling competition; and
- The tension between consolidation and plurality in the sector.

The cost to communicate, competition and consolidation

The impact of consolidation on competition in the ICT sector

68. The Authority appears to be concerned about the impact of consolidation on the state of competition in the ICT sector. In particular, the Authority states that its concern is on the implications of the unprecedented market consolidation on competition, cost to communicate and the digital divide. It appears that the Authority's concern stems from the public announcement by MTN and Vodacom (both companies allegedly in control of about 80% of the market) that they are planning to acquire or otherwise undertake some form of joint venture with other ECS/ECNS licensees.
69. As Neotel is one of the parties in a proposed acquisition, subject to regulatory and competition authority approval, we will not make any specific comment on the proposed transaction at this stage. However, we attempt to respond generally on this matter.
70. There has been several mergers and acquisitions in the ICT sector in South Africa as well as in other jurisdictions. In South Africa, there has been a number of consolidations between 2005 and 2009. For example, mergers and acquisitions include transactions such *Vodacom/Cointel*¹³, *MTN/Cell Place*¹⁴, *Telkom/BCX*¹⁵, *MTN/Verizon SA*¹⁶, *Vodacom/Stortech*¹⁷, *Vodacom/Gateway*, *MTN/iTalk*¹⁸, *Vodafone/Vodacom*¹⁹, to name a few. However, from 2009 onwards, there has not been significant mergers and acquisitions activity in the ICT sector. Internationally, for example in Europe, there has been a number of mergers and acquisitions between companies such as *Hutchison 3G Austria/Orange Austria*²⁰, *T-Mobile/Orange*²¹, *France Telecom/Mid Europa Partners/One*²², *T-Mobile Austria/Tele.ring*²³, and many others.

¹³ Case no. 52/LM/Jun05.

¹⁴ Case no. 83/LM/Sep05.

¹⁵ Case no. 51/LM/Jun06.

¹⁶ Case no. 81/LM/Jul08.

¹⁷ Case no. 113/LM/Oct08.

¹⁸ Case no. 107/LM/Oct08.

¹⁹ Case no. 135/LM/Dec08.

²⁰ Case no. COMP/M.6497.

²¹ Case no. COMP/M.5650.

²² Case no. COMP/M.4809.

²³ Case no. COMP/M.3916.

71. Only one (i.e., *Telkom/BCX*) out of the 8 merger transactions mentioned above was prohibited in South Africa, after a thorough competitive assessment was conducted.
72. It is also evident that there has been a number of mergers and acquisitions in other foreign and international jurisdictions in the ICT sector. South Africa is not an exception in this regard. We have recently observed some ICT companies announcing that they intend to merge or enter into strategic commercial relationship with each other. This is normal in any sector of the economy. As the Authority is aware, there are several reasons why consolidation occurs across all sectors of our economy.
73. Consolidation is not a bad thing *per se*. In fact, consolidation was both inevitable and necessary following the *Altech* court ruling²⁴ in 2008 that created many hundreds of arguably, unsustainable small players. The key requirements for competition that benefits end users are a level playing field, with pro-competitive regulation as needed, and a reasonable balance of market shares between the players, which can often only be achieved through some level of consolidation of smaller players.
74. The number of competitors necessary for a vibrant, competitive market, which drives efficiency and lowers the cost to communicate, varies across the sector. In some of the high investment, infrastructure-based markets, such as mobile, it has been shown globally that three to four competitors is optimal, and a larger number is unsustainable. In other markets, such as the provision of internet services over wholesale broadband access, many smaller competitors can co-exist and all succeed, since the minimum investments and required returns are lower.
75. It is ill-advised to assume in the absence of a competitive assessment of a particular transaction, that consolidation in the ICT sector (or any other sector) will result in the decrease of competition in the fixed-line and/or mobile market. There are of course other socio-economic benefits that are derived from consolidation. As such, regulators will have to conduct proper assessment of the likely impact of competition resulting from any proposed merger transaction. To this end, Neotel respectfully submits that any case should be treated on its own merits.
76. At this juncture, Neotel will not deal any further with the specifics of the publicly announced merger transactions. Accordingly, it is advisable to deal with any competition concerns that may arise from the envisaged mergers and acquisitions at the appropriate time and forum.

²⁴ *Altech Autopage Cellular (Pty) Ltd v The Chairperson of the Independent Communications Authority of South Africa and Others* Case 20002/08 (TPD).

The cost to communicate

77. The Authority appears to be concerned about the impact of consolidation on the cost to communicate. There are several factors that have an impact on the cost to communicate. For example, regulatory barriers can lead to high cost to communicate. Arguably, not all mergers lead to an increase in prices. Therefore, it is equally important that the Authority pay particular attention to the regulatory flaws discussed in the section dealing with general comments (above). For example, in the case of A2P SMS termination (discussed above), the lack of wholesale price regulation is likely to confer significant pricing power on dominant firms active in the A2P SMS termination market.
78. It is also suggested that the Authority must conduct a comprehensive market study (including costing studies) to assess, *inter alia*, the extent of barriers to entry and general competition dynamics at various levels of the broadband value chain. This will assist the Authority to make recommendations that may serve to improve the state of competition in the ICT sector.

The impact of net neutrality and disruptive technologies on the competitive landscape

79. While net neutrality is an issue that should be of concern to the Authority, it is not an issue which currently has any significant impact within South Africa. The conflicting pressures from content providers and service providers on the Internet that is being felt in North America and in Europe, in particular, are not being felt in South Africa. In general, South African service providers generally adopt an approach that is supportive of net neutrality, and there are no sizeable content providers (other than the obvious global players such as Google) in the market, and hence there are not currently attempts to limit end users' access to some content in favour of other content.
80. The stance taken by regulators elsewhere has been to strike a reasonable balance between users paying for what they use, including better access to some content (such as unshaped broadband), while not limiting the ability of any content provider to reach any user within these constraints. To argue that all users should get the same service, regardless of the cost to implement, is not logical or economically sound. However, service providers should also not be able to restrict access to some content in favour of other content, i.e., all content should be treated equally.
81. The history of telecommunications is a history of disruptive technologies, and the players that are best able to exploit new technologies succeed. This is the essence of competition, and the ability to deploy new technologies should generally not be restricted, unless they infringe in some way on the legal rights of existing providers. For example, the ability to deliver Voice over IP, while extremely disruptive to the

traditional voice industry, is not something that telcos should be protected from. As with other technologies, the effect of Voice over IP has been to create a more competitive voice market, including driving incumbent telcos to be more efficient.

The role of fixed (fibre) and wireless (high demand spectrum) in enabling competition

82. As fibre access is being rolled out to reach customers in South Africa, the role of the Authority should be *inter alia*, to create an enabling environment for competitive players to deploy fibre. It is not necessarily appropriate to talk of a general principle of open access when, as stated above, the most critical issue is making it financially viable for players to deploy fibre. Already there are multiple wholesale and retail access fibre providers in the larger metros, and these should be encouraged to compete in their respective markets. Only in a situation where a player has been able to create a monopoly (such as exclusive rights within an estate), or has significant market power in a particular access market (such as an incumbent nationally) is any access regulation necessary.

83. Unlike fibre, high demand spectrum is a finite and limited resource. Hence, the most critical issues for the Authority is to ensure that the spectrum is both available and used with maximum efficiency. This requires that spectrum be assigned timeously and fairly to players that require it to continue to compete effectively. As noted, there is a practical limit to the number of players in a mobile market to ensure effective competition, and hence it is to this small number of players that such high-demand spectrum should be assigned. The Authority should also ensure that any player that is assigned such spectrum has the resources to make efficient use of it considering future growth requirements.

CONCLUSION

Neotel hopes that its submissions are helpful to the Authority in its inquiry into the state of competition in the ICT sector. Neotel believes that there is scope for extending the understanding of the issues identified as the Authority's process unfolds. Neotel accordingly reserves the right to supplement this submission should it become necessary. Lastly, Neotel would welcome the opportunity to make oral submissions, if required. Neotel looks forward to a positive discussion with the Authority and remains at the disposal of the Authority to clarify any issues in relation to this submission.