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The Acting Deputy-Director-General
ICT Policy and Strategy Development
Department of Telecommunications and Postal Services
iParioli Office Park
1166 Park Street,
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0001

Attention: **Ms. M Masemola**

By email: ecabill@dtps.gov.za

31 January 2018

Dear Ms Masemola,

Invitation to provide written comment on Electronic Communications Amendment Bill

1. We refer to the above Electronic Communications Amendment Bill published by the Department of Telecommunications and Postal Services ("**DTPS**") in Government Gazette No. 41261 on 17 November 2017 and the extension to the closing date for submissions, published thereafter in Government Gazette No. 41312 on 08 December 2017.

2. We note that while the draft Bill is still a departmental document, it articulates a refreshed vision for the sector, a fundamental restructure of the market and a radical change to the institutional arrangements responsible for regulation, *inter alia,* and it therefore has the potential to have far-reaching consequences.

3. Our submission is intended to highlight the potential for various unintended consequences that may emerge, in an effort to ensure that the Department avoids those to the greatest extent possible in the draft Bill that will eventually be sent to Parliament.

4. We wish to confirm our support for several aspects of the draft Bill that are long overdue and entirely necessary to create efficiency in regulation and to enhance competition and consumer welfare.

5. Mindful of the early stages of this consultation, our preliminary comments in regard to the draft Bill are therefore attached.

6. We note that a clear process for the further stakeholder consultation has yet been articulated. We submit that such consultation is necessary (or at least will be of significant utility) in order to finalise a draft Bill that has broad support. We wish to express our availability to participate in any further written or oral submissions on the draft Bill as well as any iteration that may follow. We also intend, where necessary to supplement this submission in future and participate in public hearings and any further form of consultation that may be held. We would appreciate being allocated a presentation time slot at the appropriate juncture.

We request that you kindly acknowledge receipt of this submission.

Yours sincerely

LIQUID TELECOMMUNICATIONS SOUTH AFRICA PROPRIETARY LIMITED

Per: Mike Silber
General Counsel

Submission to the Department of Telecommunications and Postal Services

by

Liquid Telecom

on

the Electronic Communications Amendment Bill published in Government Gazette No 41261 on 17 November 2017

INTRODUCTION

1 Liquid Telecommunication South Africa ("**Liquid Telecom**") thanks Department of Telecommunications and Postal Services ("**the Department** / **DTPS**") for the opportunity to comment on the Electronic Communications Amendment Bill ("**the draft Bill / the ECA Amendment**").

2 Specifically, we thank the Department for the concession of an extension to the closing date for submissions of 18 December 2017, which extension was published in Government Gazette No. 41312 on 08 December 2017, extending the 30-day consultation period for comment to 31 January 2017.

3 This draft Bill proposes a radical revision of the Information and Communication Technology ("**ICT**") sector and appears to be part of a "package" of legislation that will be required to do so. While we appreciate the short extension to the closing date for submissions that was granted, considering the radical revision contemplated, this draft Bill undoubtedly requires a significant period of consultation to ensure a substantively meaningful contribution. In particular, the need to understand the various elements in this legislative "package" and how they will interact.

4 We address this issue further in our submissions but wish to re-iterate upfront the importance of substantive and meaningful consultation that is required to ensure that the arguably overdue amendments required in the sector are finally made, but also capable of implementation in a manner that will address the unintended outcomes of two decades of policy reforms that have still not resulted in the objectives of the Electronic Communications Act (26 of 2005) ("**ECA**") being realised.

5 Our submission will follow the following format:

5.1 An overview of Liquid Telecom;

5.2 **General comments** in respect of the draft Bill and the sector;

5.3 **Specific comments** to specific provisions of the draft Bill.

About Liquid Telecom

6 Liquid Telecom is the leading independent data, voice and IP provider in eastern, central and southern Africa.

7 For those less familiar with our operations who may read this submission, our business is to supply fibre optic, satellite and international carrier services to Africa's largest mobile network operators, Internet Service Providers ("**ISP's**") and businesses of all sizes. Liquid Telecom also provides payment solutions to financial institutions and retailers, as well as data storage and communication solutions to businesses across Africa.

8 In February 2017, Liquid Telecom group together with Royal Bafokeng Holdings acquired the erstwhile Neotel Proprietary Limited. Neotel was re-branded as Liquid Telecom South Africa in June 2017.

9 Formerly the "second network operator" in South Africa, with a focus on small business, consumer, enterprise and wholesale services over the last 8 years, the acquisition of Neotel established the merged entity as a formidable pan-African telecommunications service provider, with an impressive fibre network footprint across the region and a comprehensive product portfolio. Liquid Telecom has an established record in both infrastructure and service provision in South Africa and in Africa. As a relatively new entrant, we understand well, the complexities and dynamics of a sector requiring investment, infrastructure, wholesale services and consumer centrality as necessary requirements for enabling competition and optimal consumer choice and pricing. These elements still lack currently and one of our main concerns is that this draft Bill will (unintendedly) preserve that status quo.

10 Liquid Telecom is also the sister company of Econet Media Limited, which trades under the brand name "Kwese'". Econet Media/Kwese' is a recent entrant into the African pay television services market in various African countries and itself, has experienced in South Africa, the impact of a skewed market structure and its deleterious impact on competition and lower prices. On the basis of our joint and

nascent histories, Liquid Telecom supports the explicitly articulated objectives underlying the draft amendment:

"(cA) redress the skewed access by a few to economic and scarce resources such as radio frequency spectrum, to address the barriers to market entry;

(cB) promote serviced-based competition and avoid concentration and duplication of electronic communications infrastructure in urban areas;

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

(cD) redress market dominance and control.; R & D, innovative services and market entry by SMME's.

11 If the intent underlying the objectives stated above is to be meaningfully realised, many aspects of the draft Bill will require amendment or reconfiguration both at the conceptual level and within the technical drafting proposed. Below, in our general comments, we set out the conceptual orientation of the draft Bill that concerns us, underpinned by the important question of "what is the mischief the DTPS seeks to remedy by these proposals?". Understanding the problems and their individual and collective genesis is critical to fixing those aspects of the SA ICT sector that require remedy.

PART A: GENERAL COMMENTS

12 Our general comments are divided into two aspects:

12.1 The **structural concerns** that permeate the bill, namely the approaches to:

12.1.1 Wholesale services and open access;

12.1.2 Spectrum management, and;

12.1.3 Independent regulation.

12.2 The **conceptual concerns** that permeate the bill, namely the:

12.2.1 Drafting new legislation to provide for matters that are currently enabled by the ECA, but not implemented;

12.2.2 The risk of excessive reliance on inter-governmental co-operation;

12.2.3 The amount of re-regulation required;

12.2.4 The lack of institutional capacity.

We address these concerns collectively, below.

Structural Concerns

13 This concern is central to the formulation of any amendment to the current regime. Several decades of policy and legislative reform in the SA ICT sector has yielded many positive outcomes and many unintended consequences. These are well documented by academic and sector commentators.[1] These arguments essentially examine the policy reform process in South Africa against the objectives stated in legislation, for example, in one case, affordable access to services and accelerated development to meet the needs of a modern economy. Gillwald, has shown how laudable policy objectives lacking effective implementation have impacted negatively on affordable access and has inhibited market innovation. At the root of this result lies market structure, which over the period until 2005 and the ECA, saw reform designed entirely for the benefit of a the vertically integrated incumbent operator, which induced "inherently anti-competitive imperatives, which in turn demanded a resource-intensive regulatory response". The critique further noted that concomitantly, the regulator often did not have the statutory powers, nor the capacity, to circumscribe the behaviour of the incumbent so that it does not impact negatively on new entrants. As such, the so-called benefits sought by the policy (a highly debated and consulted on policy mind you) did not materialise.

14 The structural concern that arises in the context of the draft Bill is that the proposals for a single wholesale open access network ("**WOAN**"), mimics this pre-2005 policy environment, albeit the proposal does not seek to enable vertical integration. While laudable in its genesis, in itself and if ineffectively regulated (which based on past trends is a concern) will also frustrate the materialisation of the objectives listed above. The draft Bill proposes far-reaching changes to the structure of the sector:

14.1 it proposes a single wholesale provider for spectrum access;

14.2 it proposes radical revisions to the arrangements responsible for regulating the sector (which again on historical grounds will likely result in delays and severe regulatory implementation lag);

[1] Gillwald, A (2005) Good Intentions, Poor outcomes: Telecom Reform in South Africa, Telecommunications Policy, Vol.29. Issue 4. Elsevier. Pergamon

14.3 it proposes a forced purchasing model for capacity, which will not be positive for pricing; and

14.4 it centralises spectrum management inappropriately in the executive and it considers removal of spectrum from networks that have long run sunk costs which will place investment and jobs at risk.

15 Unintended outcomes from unnecessary structural reforms will not help SA meet the challenges it faces in the sector, nor enable it to improve its digital readiness.

16 Undoubtedly an incentive based, light touch regulatory model is required. Income disparities and inequality require regulation that drives costs down, not up. If the fourth industrial revolution is a reality, all citizens require access to innovative and affordable services and platforms. Under-serviced areas need to be, finally and forever, addressed. **The market undoubtedly requires a restructure. However, this must be done in a way that does not result in the creation of single operators who can drive costs up, destroy existing wholesale business models that have painstakingly developed over time and remove the confidence investors, both local and global need to grow the sector.**

17 All of this will require, as it always has required, a strong, resourced and effective regulator. We address this is more detail in the specific comments section of this submission but splitting the regulator is unlikely to achieve this objective. We would venture that some of the proposals are in fact potentially unlawful and may suffer constitutional challenge. This is a battle that should be avoided. The dictates of section 192 and 181 of the Constitution and the integrity of Chapter 9 institutions should be a debate only visited in historical research. It is not a debate we should as a sector (or as a country) be ventilating again. This matter is settled and policy reflected in this draft Bill that undermines any tenet of independent regulation for the sector, should be revisited and excluded from a Bill the focus of which should be to remedy, not aggravate any deficiencies in current legislation.

18 Equally, whilst it is undoubtedly the role of the executive to formulate policy, the draft Bill oversteps that discipline and hands operational allocation powers to the Minister – a move that defies all best practice and reduces a core competence of the regulator to a mere administrative role. We respectfully suggest that this approach is revisited at a conceptual level as course correction on operational matters will determine the outcome of the policy the executive rightfully has the central role in.

Conceptual Concerns

19 This concern is central to the formulation of any amendment to the current regime.

19.1.1 Drafting new legislation to provide for matters that are currently enabled by the ECA, but not implemented;

19.1.2 The risk of excessive reliance on inter-governmental co-operation;

19.1.3 The amount of re-regulation required;

19.1.4 The lack of institutional capacity.

20 The conceptual concerns pertain to various concepts that we submit, with respect, need to be considered at a general level. Where relevant, we address these in the specifics of our comments in the sections to follow. However, at a general level, we wish to raise several conceptual issues which we hope the Department will consider in its next iteration of the draft Bill.

21 The ECA was gazetted in 2005 and became operational in 2006. The re-formulation of our legislation was necessary. It offered a fundamental revision to the ICT sector. The problem statement was clear – technical convergence needed to be addressed, the market needed to be liberalised, technology developments needed to be catered for and licensing and regulation needed to evolve, and legislation needed to advance the ICT sector into a modernised era. The government's vision however, to shift gradually from service and technology specific monopoly / duopoly market structure, to effect a policy realm of "managed liberalisation" based on a technologically neutral licensing framework was embodied in the ECA. That vision however was rapidly advanced through legislative fiat when the courts opened the same licences to all sector players.[2]

22 One of the effects of what became known as "the *Altech* decision" was that with the harmonised licensing for all existing players, many of the visionary pro-competitive measures that policy proposed – which were provided for in the ECA – which were initially to be implemented in a phased manner (local

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2 *Altech Autopage Cellular (Pty) Ltd v Chairperson of the Council of the Independent Communications Authority of South Africa* and Others (20002/08) [2008] ZAGPHC 268 (29 August 2008).

loop unbundling, number portability, carrier pre-selection, an *ex ante* competition framework), were, "leapfrogged" by an unanticipated change in the market structure. This was a largely positive move for the sector, but the regulatory lag and re-regulation exercise that followed, with a regulator that had capacity (and budgetary) deficits meant that the sector evolved without those pro-competitive measures materialising. The licence conversion process itself only occurred 3 years after the ECA was gazetted.

23 Conceptually, this draft Bill heralds many of these same risks. The current ECA requires fixing, not necessarily re-drafting. Many of the pro-competitive measures therein need to be implemented – where they are still relevant. New legislation is not necessarily required for that. Moreover, the draft Bill proposes excessive reliance on inter-governmental co-operation in erstwhile strictly regulatory domains (such as spectrum management, assignment and allocation). As we have indicated above, whilst it is undoubtedly the role of the executive to formulate policy, the draft Bill oversteps that discipline and hands operational allocation powers to the Minister – a move that defies all best practice and reduces a core competence of the regulator to a mere administrative role. We respectfully request that this approach is revisited at a conceptual level as course correction on operational matters will determine the outcome of the policy in which the executive rightfully has the central role.

24 The lack of institutional capacity has never been addressed at a structural level and now the draft Bill proposes a radical revision to split the current regulator into two. A close look at the lessons learned from merging the Independent Broadcasting Authority ("**IBA**") and the South African Telecommunications Regulatory Authority ("**SATRA**"), followed by absorbing the Postal Regulator into the Independent Communications Authority of South Africa ("**ICASA / the Authority**") will offer significant tutelage on institutional change management. These things take time. They require budgets, impact assessments, costing, time frames, project plans, etc. If not addressed in detail upfront, they risk creating a vacuum of regulation while the institutions proposed find their footing and are staffed. We do not at this point even consider the fact that the enabling legislation – the package of laws – required to give effect to this draft Bill, have not yet materialised and they need to be considered holistically for efficient implementation. The package of legislation also needs to be considered as a collective for meaningful consultation. It is therefore our submission that the current ECA should be amended where necessary, but not overhauled to the extent proposed in the draft Bill and it (as yet unreleased) attendant elements of the legislative "package". The risks are significant for unintended consequences to arise along with a large vacuum if inactivity while the sector obtains piecemeal reform.

25 This contention is made clear when one does a cursory examination of the number of requirements for "busy" work that the draft Bill requires.

26 We offer an example of this concern in the table below:

Requirement	Role Player	Time-period	Content
Section 31E	Minister	Within 6 months of commencement	Determine what constitutes high demand spectrum; and which unassigned high demand spectrum must be assigned to the Wireless Open Access Network, by notice in the *Gazette*, after consultation with ICASA
Section 31E(3)	ICASA	Within 12 months of the commencement	Finalise an inquiry as contemplated in section 4B of the ICASA Act and make recommendations to the Minister on the terms and conditions which will apply to the Wireless Open Access Network.
Section 31E(6)	ICASA	Within 24 months of the commencement	Conduct an inquiry as contemplated in section 4B of the ICASA Act and make recommendations to the Minister on the terms and conditions, as well as the time frame, under which the exclusively/individually assigned high demand spectrum, excluding the high demand assigned to the Wireless Open Access Network, must be returned to ICASA
SADC Roaming Section 42A(2)	ICASA	Within 6 months of the commencement	Prescribe SADC roaming regulations
Section 44(1)	ICASA	Within 18 months of the commencement	Prescribe wholesale open access regulations to facilitate wholesale open access
Section 67(3A)(a)	ICASA	Within 12 months of the commencement	Define all the relevant markets and market segments relevant to the broadcasting and electronic communications sections, including ICT services dependent on the use and provision of the Internet, including internet exchange points, hosting and data centre services, by notice in the *Gazette*.[3]
Section 673A (2)	ICASA & Competition Commission	Within 3 months of the commencement	Amend concurrent jurisdiction between ICASA and the Competition Commission to include a mechanism to facilitate consultation between ICASA and the Competition Commission on market definition, market reviews and mergers as contemplated in this Chapter, and any other matter.
Section 4(3)(k)	ICASA	Within 12 months of the commencement	Must make regulations [**on empowerment requirements**] to apply the B-BBEE ICT Sector Code to

[3] It is worth noting that section 67 has been in operation since April 2006 and apart from one process undertaken by ICASA to attempt to define markets per Chapter 10 in 2006/7, this has not been done in a decade of the ECA's existence.

			existing and new licenses, exemptions or other authorizations including spectrum assignment to promote broad-based black economic empowerment.
Section 4(1A)(b)	ICASA	Within 6 months after the Minister issues a policy direction	Amend any existing radio frequency spectrum fees regulations which are in force
Section 20F	Rapid Deployment National Co-ordinating Centre	within 24 months of its establishment	Develop coordinated, efficient and streamlined processes for the granting of an approval, authorisation, license, permission or exemption, in consultation with environment, health, safety, security, heritage, building, aviation or any other authorities, to enable rapid deployment of electronic communications networks and facilities.
Section 20L	Relevant organ of state	Within 24 months of the commencement	Align the National Building Regulations and Building Standards Act, 1977 (Act No. 103 of 1977), or any other relevant regulations, to give effect to the provisions of this [section on rapid deployment]

The above, non-exhaustive examples highlight not only the amount of work required, but the inter-governmental dependencies required to effect these amendments (highlighted in green). However, glaringly absent from the architecture of the draft Bill is any attention to an impact assessment. The sector has seen the effects of the implementation of the current legislation without having undertaken an impact assessment. Regulation carries costs and these need to be fully understood in the process of regulation. This will further accord with the Guidelines for the Implementation of the Regulatory Impact Analysis/Assessment (RIA) Process in South Africa published by the Presidency in 2012 and to the best of our knowledge not superseded.

27 Regulatory Impact Assessments ("**RIA's**") are commonplace throughout the world and are necessary to ensure that the changes envisioned by legislative and policy amendments, have the outcome and effect intended by those changes. Liquid Telecom respectfully submits that if not prior to the next iteration of this draft Bill, a RIA is speedily undertaken in conjunction with the next round of revisions to the draft Bill but completed prior to its finalisation. This exercise can only serve to ensure that proposed amendments and their implementation have the intended effect or that where lacking, the gaps and pitfalls are fully understood so that budget and course correction can occur. This will in turn, serve to reduce the costs associated with a re-regulation exercise of this magnitude.

28 We do not labour the point here further and will address it appropriately elsewhere in the submission. In concluding our general comments, our respectful submission is therefore to request the Department to consider the structural and conceptual issues in its re-draft of the next version of this draft Bill. Specifically:

28.1 To ensure that the draft Bill avoids unintended outcomes of creating a monolithic infrastructure provider that also discourages infrastructure competition and thwarts the growth of hard won wholesale business models;

28.2 To ensure that spectrum management retains the discipline of international best practice;

28.3 To preserve the integrity and structure of independent regulation and promote efficiency in regulation (which is unlikely to result from de-converging a converged regulator);

28.4 To re-consider what needs to be fixed in an amendment Bill as opposed to a large-scale overhaul – to manifest quick wins in reforming the sector;

28.5 To re-consider the requirements placed on ICASA and others for re-regulation where no impact assessments have been done or budgets provided;

28.6 to reduce the risk of delays in implementing the amended legislation because of potential legal challenges arising from overlaps in regulatory and Ministerial powers; and

28.7 To reconsider the full package of amendment legislation that would be required if the National Integrated ICT White Paper ("**White Paper**")[4] is to be given effect to and have such bundle of laws gazetted for consultation and meaningful input simultaneously, rather than on an ad hoc or piecemeal basis.

29 All the above need to be considered in the context of the White Paper acting as a roadmap for the evolution of the sector, with each step being carefully considered, implemented and then assessed before the next step is undertaken. The policy objective encapsulated in the White Paper will be with us

[4] *National Integrated ICT Policy White Paper*, Department of Telecommunications and Postal Services ("DTPS"), 28 September 2016.

for years to come and we should not do a disservice to those objectives by recklessly rushing to implementation.

PART B: SPECIFIC COMMENTS

30 Our specific comments follow below, adhering to the structure of the draft Bill.

Objects of the Act and Definitions

31 Liquid Telecom notes the revised stated object of the draft Bill to "provide for the regulation of electronic communications in the Republic" but remains concerned about the proposed deletion of the wording "in the public interest". While it is replaced with a policy objective and the public interests contained therein, it makes a theoretical shift from a general definition of the term, public interest to one bounded and defined by a threshold contained in a policy.

32 It is arguable to debate the exact parameters of the term "public interest", but generally "a body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. To bound that interest by a policy may serve to frustrate its intended application.[5] We view this as a step backwards in consumer welfare and suggest the absolute standard of "public interest" be restored to the objects of the ECA.

33 We note the various proposed definitions that are to be amended to include the responsibility of the Minister of Telecommunications and Postal Services. e.g. "allocation" (entry into the table of frequency allocations) and draw your attention to our comments above regarding regulatory independence in respect of core roles of the regulator vis a vis the Minister.

34 We note the proposed new definition of "Broadband" as an always available, multimedia capable connection with a minimum download speed and quality as annually determined by the Minister responsible for telecommunications and postal services. We note that this amendment has been made

[5] De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (1995) 5 ed at 167, cited in *M & G Limited and Others v 2010 FIFA World Cup Organising Committee South Africa Limited and Another* (2011 (5) SA 163 (GSJ)) [2010] ZAGPJHC 43; 09/51422 (8 June 2010).

to align with SA Connect targets and to ensure that ICASA makes recommendations as required under SA Connect.[6]

Policy (Section 3) and Regulations (Section 4)

35 Our comments regarding the proposed amendments in this section are two-fold:

35.1 First, while relatively minor amendments, the draft Bill increases Ministerial power in respect of policy making with regard to the determination by ICASA of licence and spectrum fees[7] and policy directions in respect of radio frequency spectrum fees (including exemptions and reductions to fees).[8] We respectfully suggest that whilst the making of policy is within the Minister's remit, the determination of fees and incentives is very much a policy implementation function that would be best left to the regulator.

35.2 Second, whilst in is trite that it is the Minister's role to formulate policy, the formulation thereof in the draft Bill links in turn to benchmarks and thresholds derived from other policy documents. For example, reference to "the quality and speeds ***provided in SA Connect***"[9] (emphasis added) defined elsewhere in the bill as "South Africa's National Broadband Policy"[10] and references to policy documents such as the *"SADC Model Roaming Regulations"*, and the *"SADC Roaming Policy Guidelines",* means that the draft Bill forces those thresholds into fixed and static ones precluding amendments or development without further legislation.

35.3 As a further example, we highlight our comments above at paragraphs 31 and 32 in respect of regulation "in the public interest" which would also become a fixed version thereof on the current draft. We thus recommend that the next iteration of the draft Bill precludes as far as is possible, cross references to other policy documents as definitional benchmarks for this legislation.

[6] Government Gazette 37119, Government Notice No. 953 on 06 December 2013.
[7] Section 3(1)(e)
[8] Section 3(2)(d).
[9] Section 20L(1).
[10] Government Gazette 37119, Government Notice No. 953 on 06 December 2013.

Standard Terms and Conditions (Section 8)

36 Liquid Telecom welcomes the proposed amendments to this section conditions to strengthen the protection of subscribers and end-users in relation to quality of service standards[11] but question the overall approach on universal service obligations (including those proposed in section 31A(1)) and the now, peremptory requirement to ICASA to make regulations on universal service and access obligations ("**USAO**") and to designate licensees that carry such obligations.[12]

37 The draft Bill further requires ICASA to undertake do a regular review (every 5 years) of such USAO regulations and considerations relevant to such review, which must include considerations such as the appropriateness of target levels set in USAO's; timelines for achievement; level of service to be provided; mechanisms to enforce compliance.

38 While Liquid Telecom supports the policy objective underpinning USAO's, it is arguably time to pause and reflect on the effectiveness to date, of the command and control manner in which these have been designed and measured since 1996 and whether in fact, they have worked.[13]

39 The idea of applying an "obligation" in exchange for the right to a licence, is one that sits appropriately in a monopoly and duopoly sector – and was arguably appropriate in the first 5 years of liberalisation post the promulgation of the erstwhile *Telecommunications Act.*[14]

40 It is however, arguable that the various obligations imposed to date have not worked:

40.1 Consider the churn and roll-back on the requirement for Telkom to effectively double its network roll-out and its resultant churn in fixed line subscribers set in its licence obligations. Consider the failure of the initial Universal Service Agency ("**USA**") – under staffed and lacking in budget – and the relative lack of progress made since by the Universal Service and Access Agency ("**USAASA**") that succeeded it. Neither have ever defined "needy persons" for the purpose of achieving a subsidy to ensure affordability. We note the proposed amendment to section 88 which still refers to determining the types of needy persons to whom assistance may be given, (for the purposes of payments from

[11] Subsection 8(2).
[12] Subsection 8(4).
[13] Our comments here apply equally in respect of the discussion on the proposed new section 31A(1) in regard to USO's for RFS licences at paragraph 72 ff.
[14] Act 103 of 1996.

the USAF), and that such recommendations must consider the needs of persons with disabilities in assessing the access gap and setting universal service and access definitions and targets. We question if this type of direction is even possible and whether the approach we set out is not preferable from an implementation perspective.

40.2 Consider the relative success of the then Community Service Telephones ("**CST's**") and their ultimate culmination is a massive court case between the mobile operators, or the failure of the Under Services Area Licences ("**USAL's**") to do anything (bar for one entity) with the R5 million seed capital afforded with the grant of their licence.

40.3 Consider the failure of the e-rate.

40.4 Consider the relative ineffectiveness of the 5 million SIM card obligation that was placed on mobile operators in exchange for spectrum and the conversion of that obligation into the delivery of handsets for use by security services during the 2010 World Cup (and the fate of those handsets).

40.5 More recently, consider the revised universal service obligations to connect schools using a pre-determined set of specifications for hardware that has proven to hold very mixed results but hardly an example of a resounding success.

41 The reason for all these examples of well-intended policy but poor outcomes, is because the sector has been liberalising since the Millennium and the obligations hark back to a sector with very few operators. As the sector has liberalised, so too, should requirement to ensure universal access and service. That is not to say that it should be eradicated, but that it should rather be made relevant, replete with incentive and market mechanisms that direct operators to compete for subsidies to roll-out networks and offer services. The reverse style auction of obligations that was so successful in other parts of the world, such as Chile. Instead the current process awards contracts for network roll-out and connectivity to entities that are not even licensed and which have no incentive to maintain network infrastructure once it has been installed and they have been paid. The proposed changes seem unlikely to change this approach.

42 In other words, the approach should ensure that universal service and access should still require a levy be applied to licensees, but that such levy be used to fund operators in "winning" well-determined infrastructure projects that roll out networks and services in under or non-served areas. The exact

parameters of this can be discussed once the theoretical shift away from old-styled "obligations" is accepted into policy and legislation.

43 To confirm, Liquid Telecom supports the intention of the draft Bill to address continued skewed access to services and networks and what has become commonly referred to now as the “costs to communicate”. However, there is sufficient scope within the ECA for ICASA to re-examine the approach to universal service obligations ("**USO's**") the issue of affordability / costs (or the effects of market dominance) in the sector.

44 Chapter 10 for example requires to be implemented in full. Once ICASA has conformed to this requirement, it will be able to examine any market in which it believes competition is not effective and remedies are required. ICASA also has the power to make regulations on universal service, which it must exercise, but it must do so with a different theoretical underpinning from the current one of "obligations" to one of competitive reverse auction tender (i.e. the lowest cost wins). Accordingly, Liquid Telecom sees no value in the proposed revisions to this section that permit of further obligations being placed on licensees.

Licensing (section 9 – 14)

45 Liquid Telecom notes the minor changes to these sections and has no comment in that regard. However, we would respectfully suggest that, like other forms of legislation in the region that have emerged (e.g. Malawi, Zambia, Uganda) time periods for the processing of licensing applications, renewals and amendments, be included in legislation to bring certainty into regulatory operations. While such timelines might well be best placed in regulation rather than legislation, these have not emerged beyond "best effort" commitments by ICASA to process applications (at least in the case of a transfer or transfer of control in a licence). The time for processing stock regulatory matters and processes appears to be getting longer, rather than more efficient.

46 While Liquid Telecom accepts that there are cogent and complex reasons for this, our respectful submission is that regulation needs to become more effective and arguably bounded to time frames to be measurable. Deeming provisions within timeframes is a very useful means of ensuring that the delays that are currently in place are avoided. We request this be considered, mindful of our comments above

that a remedy in this regard does not mean a new regulator – as envisaged by the White Paper - needs to be established.

Public consultation and ownership and control (Section 13)

47 Liquid Telecom notes with some concern, the proposed amendment in section 13(5) which, in effect, deletes the requirement for an inquiry in terms of 4B. To date, the regulations required for limits on ownership and control have not been finalised and remain a concern for the sector.[15] These regulations, when finalised, on the current version of the ECA, are required to be made "with due regard to the objectives of [the ECA]" and " after [ICASA] has conducted an inquiry in terms of section 4B of the ICASA Act, which may include, but is not limited to, a market study."

48 It is Liquid Telecom's submission that this proposed amendment trespasses onto the mandate ICASA holds with respect to broadcasting and severely undermines a central tenet of the regulatory regime – namely, public consultation, which is obtained when ICASA holds a section 4B inquiry.

49 Our respectful recommendation therefore is that the proposed amendment to this section is reconsidered and the requirement for notice and comment is re-instated into the section.

Wireless Open Access Network ("WOAN") (Chapter 3A)

50 Our comments here must also be read in the context of the provisions of open access in Chapter 8, which we refer to where relevant, further on in our submission.

51 The section requires that ICASA must licence a WOAN (also known as a "Single Wholesale Network" ("**SWN**") to provide wholesale electronic communications network services ("**ECNS**") on open access principles and refers to various pre-requisites necessary before it may be licensed, such as for example, the terms and conditions including universal service and access obligations which will apply to the WOAN.

52 This new chapter is arguably one of the most contentious innovations of the draft Bill. We submit that the concept of a SWN is an idea that is not entirely un-workable and one that must be given due

[15] The latest version of this document is contained in Government Gazette No. 40759, Notice 274 OF 2017, "*Discussion Document: Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code in the ICT Sector in terms of S4B of the ICASA Act, 2000 as amended*", 31 March 2017.

consideration. However, we further submit that concept, as manifested in its current format, is entirely un-workable and unless addressed, will likely be the subject of legal review.

53 As we understand them, the mechanics envisaged in the draft Bill will result in the following process:

53.1 A WOAN must be licensed (by legislative fiat);

53.2 The Minister must consider various incentives for this WOAN (reduced or waived spectrum fees, access rights, funds, etc) that may be granted to it;

53.3 The Minister will then issue a policy direction to ICASA to issue an ITA for the WOAN licence, after ICASA has made recommendations on the terms and conditions including Universal Service and Access Obligations ("**USAO's / USO's**") and the Minister has considered incentives that will apply;[16] and

53.4 ICASA must then run a process to licence the WOAN, commencing with the speedy issuance of an "invitation to apply" ("**ITA**").

54 At the outset, the drafting formulation fails: chapter 2, section 3(3) of the ECA makes it plain that the Minister may not make any policy or issue any policy direction regarding the "*granting, amendment, transfer, renewal, suspension or revocation of a licence*, except as permitted in terms of this Act". Unless the proposed new section 19A(3) amounts to that "which is permissible in terms of this Act", the Minister may not issue a policy direction at all, in respect of licencing.

55 While Liquid Telecom assumes that this proposed section empowers the proviso ("except as permitted in terms of this Act"), it is likely to be challenged as an overreach of administrative action. There are important reasons for this barrier in regard to licensing, between executive (policy formulation) and regulatory (policy implementation) functions and the proposed amendment blurs these Ministerial and core regulatory roles in an unacceptable fashion. The section must be, with respect, removed from the proposed amendments.

56 Much has been said in the media regarding this new entity. Its envisaged purpose, articulated in the White Paper is to facilitate entry, stimulate competition in retail wireless services, reduce backbone and

[16] In terms of section 5(6) of the Act

backhaul prices and facilitate national coverage.[17] Open access models are thought to create efficiencies that can attract more market entrants who do not have the capital or expertise (or spectrum) to duplicate networks of their own. However, as the GSMA Association notes, " turning this vision into a working reality is difficult. Research shows that of five countries originally considering this option, only one, Rwanda, has rolled out a network. Problems include cost and a lack of competition." [18]

57 However, the concerns regarding single wholesale networks cluster around a number of themes in addition to the above, which include as follows: the WOAN will create a monopoly wholesale access supplier that will have a negative effect on access and pricing; that will not be efficient (because monopolies are not); that it will not need to innovate and it may, depending on its overall make-up and structure, discriminate between customers and operators; that it may not succeed and attract the requisite business from operators; that the WOAN will negatively affect investment in the sector; that the spectrum required to make it viable would be obtained by force, creating regulatory uncertainty and negatively impacting investment; that the models elsewhere (including Nigeria; "the Red Compartida" in Mexico; Kenya; "Yota" in Russia; and Tanzania) are either not relevant to South Africa,[19] or not advanced enough to assess for relative success[20] and in fact, appear to failing.

58 In fact, the evidence suggests that mandatory open access networks have not increased competition in services at all, decreased pricing or stimulated demand. Critically, the success of a SWN requires astute and mature regulation by an independent agency equipped to do so. Notably, the evidence suggests that "policy tensions can arise from applying open access principles to network extension in contexts of investment shortages and regulatory incapacity".[21] As such, the concomitant proposal in the White Paper to re-invent the regulatory arrangements for the sector will only serve to complicate this.

59 Moreover, the proposal to in effect, divert or even expropriate spectrum for the WOAN from existing operators and to require minimum purchase commitments from the sector will lead to economically skewed incentives and legal review. Even if both challenges are addressed, the current formulation of

[17] At least in the sub-1GHz frequencies band.
[18] GSMA Association, 'The Risks associated with Wholesale Open Access Networks", (https://www.gsma.com/spectrum/woan-report/), August 2017.
[19] Gillwald, A et al, An evaluation of open access broadband networks in Africa: the case of Nigeria and South Africa", November 2016 (https://researchictafrica.net/publications/Other_publications/2016).
[20] Detecon, "Open Access with a Mobile Wholesale NetCo", 17 March 2016, (https://www.detecon.com/en/Publications/open-access-mobile-wholesale-netco)
[21] Gillwald, Op cit, supra.

the WOAN will lead to the decimation of other wholesale business models in the sector and create deleterious and negative investment sentiment. Ultimately, the WOAN proposal will have to exist at a significant cost (or at the expense of) investment and innovation and to date, no current example offers comfort that the WOAN proposed in the ECA, is likely to produce any different outcomes.

60 Accordingly, Liquid Telecom submits that the concept itself is a novel one, but it must be developed using existing state-owned networks and its pricing mechanisms must be strictly controlled along with clear rules on access and non-discrimination.

61 The legal impediments to licensing of such an entity must be carefully examined and the approach thoroughly thought-through from the perspective of implementation and its possible negative effects.

62 Our submission therefore, is that far more preparatory work and deliberation is necessary, as is greater engagement and a consideration of the proposals made by the "Operators Forum" which includes Liquid Telecom. Furthermore, we respectfully suggest that the terms of reference and outcomes from the Council for Scientific and Industrial Research ("**CSIR**") are published and that an opportunity to engage Is afforded to affected parties. In addition, we further submit that this work should be moved to the remit of ICASA after a proper RIA is conducted. We are of the view that this proposal is important enough to warrant its own RIA, separate from any general RIA that might be undertaken, regarding the draft Bill as a whole.

Rapid Deployment (Chapter 4)

63 The SA ICT sector has suffered enormous cost and delays as a result of this Chapter (and specifically section 20(3)) never having been implemented from 2006. Once again, the failure to implement "good legislation" is even more tragic in the sense that the legislative and regulatory tools were available for the last 11 years, but have not been used because of what appears to be overlapping requirements between roles of the Minister and the regulator.

64 It is well known now that the result of this failure to implement Chapter 4 resulted in the only avenue available to licensees – that of the courts. We refer specifically here to what has become known as the "*Link Africa*" decision of the Constitutional Court.[22]

[22] *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others 2015.*

65 However, as useful as the judgement has been, it does not solve the challenges of access as it lacks specificity on key considerations such as terms of access, rights of land owners and the compensation payable for access. The sector is now experiencing unprecedented "access rights" battles – both with public and private land owners - with any party to a claim, viewing *Link Africa's* dicta as advancing their side of the matter. Specifically, licensees are engaged in complex legal wrangling with municipalities across the country that have taken very different approaches to understanding the meaning and import of *Link Africa* and what their rights and obligations are in respect of approvals for rights of way and the granting of wayleaves. This is creating unnecessary legal fees, further delays to improving network infrastructure and availability and resulting in disparate local government approaches to the issue. The longer the delay in remedying it and creating a single, unified framework to rapid deployment issues, the more complicated this will become. It requires urgent attention that with respect, cannot await the passage of legislation, particularly where other remedies in exciting law – within the ECA itself, exist. We amplify this submission further below.

66 To this end, Liquid Telecom welcomes the proposed amendments to this Chapter but we raise a number of considerations below. These are examples and not exhaustive of the many issues that require consideration. Our overall submission in regard to Chapter 4 is to urge the Department to convene on an urgent basis, an industry consultative workshop, to develop this chapter in conjunction with all role players such that the next version of this draft Bill contains workable, simplified provisions that are capable of immediate implementation and immunised from legal challenge.

67 Liquid Telecom notes that it is a member of the FTTX Council Africa and has an opportunity to contribute to the Council's submission, which we endorse.

Excessive detail and over-regulation

67.1 This is a detailed and well considered chapter but may well be a case of too little too late. Much of what is envisaged here has (albeit painstakingly) occurred and while it requires co-ordination, should not be deluged by a battery of over-regulation. Simply put, there is too much detail in the legislation itself. This detail needs to be extracted into guidelines and regulations and as much as possible should be considered for industry self-regulation, at least in so far as dispute resolution mechanisms are concerned.

Single trench policy may lead to unintended adverse consequences

67.2 The single trench policy to enable a single trench for fibre in each geographic location where it is technically feasible to do so, is understandable, but ill advised. It will result in single points of failure and have adverse unintended consequences for service delivery and further investment. Further, the requirement in proposed 20I, will lead to lengthy delays in implementation as ICASA must first prescribe processes and procedures, hold consultations and then ECN and other parties are required to agree on various elements, such as access or capacity at a later stage if they are unable to participate at the time of trenching; obligations on ECN to include excess capacity in deployment; reasonable rates; processes for resolving disputes between ECN licensee, landowner or other stakeholder and the role of Rapid Deployment National Co-ordinating Centre to coordinate with key stakeholders. This will take too long and it is Liquid Telecom's submission that the establishment or utilisation of an industry body for this purpose should be considered to draft a framework to be agreed with and implemented by ICASA.

Inappropriate instruction from legislation to other sectors

67.3 Section 20L proposes that new property developments and buildings must provide for the installation of electronic communication networks and facilities such as ducts for fibre optic cabling, conduit pipes and space for radio equipment that will enable electronic communication services, including voice services and broadband services, at the quality and speeds provided in SA Connect. The draft Bill further dictates that the entities responsible for approval of new property developments and buildings at all three spheres of government must make such approvals conditional on this requirement. Further, that *the National Building Regulations and Building Standards Act, 1977*[23] and any relevant legislation must be aligned to give effect to this provision within 24 months of the Act.

67.4 Liquid Telecom supports this proposal which is underpinned by an adherence to open access principles.

[23] Act No. 103 of 1977.

67.5 However, from a legislative perspective, it is unclear how amendments to the ECA can lawfully "bind entities responsible for approval of new property developments and buildings", or how the *National Building Regulations and Building Standards A*ct, can be aligned through the amendments. Liquid Telecom urges the Department to remedy this in its next iteration of the draft Bill to make the sentiment capable of implementation and to avoid unnecessary challenge.

The concept of "adequately served" requires further detail

67.6 Section 20M proposes a novel and welcomed amendment to speed up access to facilities and remove duplication. It is logical that where existing and adequate facilities exist, and where built on an open access basis, they should be available, to the extent that there is capacity, to other licensees. This is crucial in dense premises such as a gated complex, office parks, shopping malls, apartment buildings, etc. we also welcome the proposal that customers / subscribers should have the right to receive an electronic communications service from the access and service provider of their choice and not be required to use one that has entered into a restrictive agreement with the landlord / owner of that premises.

67.7 Our submission however is that the definition of "adequately served" requires further clarity as do the allied concepts of premises and "meet me" rooms. ICASA has also been assigned a role to determine whether a deployment in an adequately served area, may be permitted.[24] As this amendment likely to be a bone of contention between access and service providers, further clarity is urgently required as to what factors would warrant this deviation, how it is applied for, the time frames for consideration by ICASA, and a bounding of the apparent wide discretion afforded to ICASA as to what may or may not "discourage services based competition".

The Application Procedure requires further detail

67.8 Section 20O provides for applications and related processes for approval, authorization, licence, permission or exemption and processes relating to consultation and participation required by various laws for the deployment of networks and facilities. Liquid Telecom supports the sentiment that all approvals are to run concurrently, but the manner to effect and ensure that is absent from the draft

[24] Section 20M(3).

Bill and there appears to be no mechanism to ensure that the entities who are intended by the draft Bill to be bound by the requirement, are in any way obligated to give effect to the provisions. This includes the requirement that "employees are familiar with the requirements of the ECA" and the requirement to “align their processes with the processes contemplated in section 20F(1)". Liquid Telecom accordingly suggests that further consideration to give practical effect to this provision is given in the next iteration of this Bill.

Dispute resolution needs industry assistance

67.9 The revised section contains a woefully inadequate approach to access dispute resolution. Its respectfully, disjointed and ad hoc and does not adequately delineate the types of disputes that might arise (that we see daily in the sector) or the different interests of the various parties to disputes that exist.

67.10 Our submission in this regard is simple: in the interests of efficient regulation and swift resolution of disputes, we urge the DTPS to consider an industry body styled approach, much like that of the Broadcasting Complaints Commission of South Africa; the Internet Service Providers Association, the Advertising Standards Authority and the like. An industry representative structure (for example the FTTX Council) should be tasked with developing the structures and procedures required to swiftly address disputes between licensees.

67.11 Similarly, the next iteration of the draft Bill should enable alternative dispute resolution mechanisms such as private mediation or arbitration. While Liquid Telecom also believes that the Complaints and Compliance Committee (“**CCC**”) may also be well placed to undertake dispute resolution, specifically where public entities such as municipalities are concerned, we have reservations in terms of the length of time this body still takes to hear disputes and to render decisions.

67.12 Ultimately, it is our submission that this item should be one of the key items discussed at an industry consultation in preparation for the next iteration of the draft Bill.

The compensation debate (Fees and charges)

67.13 Section 20P is arguably one of the most critical innovations of the new proposed Chapter 4. It stipulates the levying of fees or charges for the deployment of networks and facilities. It is critical

because the *Link Africa* judgement is not clear on the *ambit* of "compensation" and regrettably both public and private landowners who are requested to grant access have also interpreted the ruling to mean that fees for access, approvals and compensation for the relative deprivation experienced, are all to be treated in the same way.

67.14 As a result, the industry has seen wildly varying requests for compensation for access whether a deprivation has occurred or not, and excessively high charges for wayleave approvals. Some municipalities have started to interpret "compensation" based on a list of factors, including: the value of the affected land; the potential future costs of moving facilities and services; public liability risks for any interruption of services and other damage; administrative costs and the financial information of electronic communication network services licensees.

67.15 Liquid Telecom therefore believes legislative intervention is required and supports the inclusion of these provisions on the principles stated in the draft Bill.[25]

67.16 Given that the passage of this Bill may take time and given further that the current ECA and the ICASA Act[26] gives sufficient authority to ICASA to make regulations, Liquid Telecom proposes that this provision be the subject of urgent regulations on an expedited basis, to ensure that the objective of this section is realised.

67.17 ICASA should rather, immediately be promulgate regulations for comment – to conclude a final version within 3 months – giving effect to this section. Such regulations should include: all the listed principled in the section, definitions of compensation; definition of appropriate access fees; processing and administrative fees; fees applicable to government, municipal and private landowners, amongst others.

67.18 We do however wish to make a few further points on the matter of "compensation" as considered in the *Link Africa* decision. The issue of compensation arises as ECNS licensees are required – when exercising their rights under section 22 of the ECA, to have due regard to “the applicable law”,

[25] Namely that: no fee is payable where the access does not constitute a cost to the landholder, or deprive the landholder of its own use of the land (i.e. is intrusive); fees based on proportionality between "disadvantage suffered" by the landowner and reasonableness in fees; reasonable compensation for financial loss or damage incurred in the deployment of the network or facility; dispute resolution by ICASA; access fees and compensation (regarding reasonableness) must be determined by ICASA speedily; actual costs only for administrative fees where an administrative process is involved to grant access, see section 20P(1)-(7).
[26] *The Independent Communications Authority of South Africa Act* (No.13 of 2000).

including the common law and any other applicable legislation. When applied with the common law – i.e., the common law governing servitudes imposed on landowners without their consent, whether by a court or statute – section 22(1) imposes the following powers and constraints on ECNS licensees:[27]

67.18.1 The right to select the premises and access to them for the purposes of constructing, maintaining, altering or removing their electronic communications network or facilities in taking action in terms of section 22(1);

67.18.2 this selection must be done in a civil and reasonable manner, including giving reasonable notice to the owner of the property where they intend locating their works and determining the proposed access to the property in consultation with the owner; and,

67.18.3 that compensation in proportion to the advantage gained by the network licensees and the disadvantages suffered by the owner is payable in respect of the exercise of the public servitudes section 22(1) grants;

67.18.4 where disputes arise about the manner of exercising the rights under section 22(1) or the extent of the compensation payable, these must be determined by way of dispute resolution to the extent that it is possible, or by way of adjudication. Access to the property in the absence of resolution will be unlawful."

67.19 The municipality is arguably, therefore empowered and entitled to regulate the manner in which ECNS licensees exercise their rights under s 22(1). By-laws promulgated by the municipality would constitute "applicable laws" to which the ECNS licensee must have due regard under s 22(2). However, this is subject to the limit that the bylaws may not "thwart the purpose of the statute by requiring the municipality's consent".[28] It follows that compensation is, in principle, payable to municipalities as servient landowners when ECNS licensees exercise their rights under s 22(1) of the ECA.

67.20 However, it is not clear from the judgement whether the duty to pay compensation depends on the landowner showing that it has suffered some actual "disadvantage" or burden as a result of the exercise of the rights of servitude, or whether the mere vesting of the servitude in ECNS licensees

[27] *Link Africa* para 142, 134 and 151.
[28] Having due regard to section 151(4) and 156(3) of the Constitution of the Republic of South Africa Act (no 108 of 1996).

obliges them to pay compensation to the landowner for such "advantage" as they may derive from the exercise of the right and it is also not clear what the measure and/or limits of the compensation that is payable.

67.21 Notably, the majority in the *Link* Africa judgement observed that the City (of Tshwane) did not show any actual prejudice as a result of ECNS licensees' exercise of their s 22(1) rights – although the Court did so in considering whether there was a deprivation of property rights under s 25(1) of the Constitution. The majority stated:

"In this Court, the City has equally shown no harm. The City's attack on the statute and the vital broadband expansion it permits is entirely notional, based on the idea of intrusion on municipal powers, without any real--world substance. There is no iota of evidence that installing Link Africa's electronic communications network damages or impairs City infrastructure. Nor is there any evidence that it could cause harm or prejudice to the City or its people. Precisely put, the City has provided no evidence that Link Africa's installation of fibre--optic cables is beyond normal restriction of use and enjoyment of the property where the cables are installed".[29]

67.22 Compensation is therefore not equivalent to damages for harm or loss caused by the exercise of the servitude (as in a delictual claim). The purpose of the compensation is not to place the affected landowner in the position it would have been in but for the exercise of the right, as would be the case in a private law damages claim. Rather, compensation for the deprivation of property is directed at ameliorating the effect of an otherwise lawful or legitimate regulatory measure, so that it is not unreasonable, excessive or arbitrary.

67.23 This is a complex matter and requires detailed consideration. This submission is not the forum for that treatment. The essence of the argument is that ECNS licensees should not be liable to pay any compensation to a municipality beyond that required to make good any actual financial loss that is directly incurred as a result of the ECNS licensee's use of municipal land. This excludes any hypothetical, possible future losses or indirect losses that the Municipality may incur.

67.24 At the same time, a municipality could impose additional charges on ECNS licensees or end--users, provided that it does not do so on a scale that materially hampers or disincentivise the provision or use of services.

[29] *Link Africa* para 172.

67.25 Most notably, none of the charges that municipalities seek to levy can be done so at will. The levying must be done through a duly promulgated by-law, in line with sections 75 and 98 of the *Municipal Systems Act*, which require a municipal council to adopt by--laws to give effect to the implementation and enforcement of its tariff policy and debt--collection policy.[30]

67.26 It is our submission that the DTPS must: ensuring that with ICASA, it develops a detailed framework for managing rapid deployment and access and that such framework is tabled for sector consultation. The DTPS must further – we submit - develop with SALGA, a uniform and standardised compensation framework for municipalities to lawfully implement. Neither requires legislative amendment and can be undertaken immediately. In fact, Liquid Telecom questions why the long-awaited promulgation under Chapter 4 of policy and policy directions for the rapid deployment and provisioning of electronic communications facilities, to be followed by the prescription of regulations by has not yet taken place?

New structures that appear vague and overly complicated

67.27 The Chapter also proposes new structures - the Rapid Deployment National Coordinating Centre ("**RDNCC**") and the Rapid Deployment Steering Committee ("**RDSC**"), which potentially overreach into core regulatory functions and increase Ministerial influence in the sector. The proposals indicate that the DTPS Minister will provide oversight over the implementation of this Chapter and liaise with other Ministers responsible for aspects of rapid deployment of electronic communications networks and facilities. Undoubtedly, some form of inter-governmental co-ordination is required, but as noted earlier in this submission, such co-ordination should not be at the foundation of the operational aspects of proposed amendments. We discuss this further below.

67.28 Moreover, the draft Bill is exceedingly vague on detail with respect to the RDSC. In fact, there is no detail whatsoever, save for 20A(2) which simply states what the role of the RDSC is – namely to "oversee the activities of the [Coordinating] Centre." While the RDNCC has many functions assigned to it, it too lacks any detail as to its organisational structuring. Will it be a desk in the DTPS? To whom will it account? What budget allocation will it have? How will it interact with ICASA? Our submission here is simply that there is not enough detail in the draft Bill to enable either the RDNCC or the

[30] Act No 32 of 2000.

RDSC's establishment. We respectfully submit that this needs to be addressed in the next iteration of the bill, taking into account, our respectful submission below on roles and responsibilities.

Roles and responsibilities

67.29 In line with our comments above, we have taken the liberty below, of proposing, on the basis as set out in the draft Bill for the RDNCC, the appropriate roles and responsibilities for ICASA, the RDNCC and industry, which in our view, would be more effective.

67.30 This also offers a summary of the functions of the RDNCC relative to the dearth of detail proposed regarding the RDSC (essentially no detail at all) and the roles and responsibilities we can at this stage, ascertain from the amendments in section 20.

67.31 The text highlighted in red, are priorities for the sector and should, we submit, rather be assigned to a core regulatory function to be performed by ICASA, with firm time periods for implementation.

RDNCC
• Support rapid deployment of ECN and facilities and work with SIP 15 infrastructure team; • Oversee the coordination of infrastructure rollout and participation in other infrastructure coordination fora such as SIP 15; • Must promote and encourage consistency in the time taken by authorities to grant approvals;

ICASA
• Interface with local municipalities to fast track rights of way and way leave approvals; • Oversee establishment of common automated wayleave application system or systems for common information requests across bodies; • ~~RDNCC~~ [ICASA, with representation from SALGA] must within 24 months of establishment, develop coordinated, efficient and streamlined processes for the granting of an approval, authorisation, licence, permission or exemption, in consultation with environment, health, safety, security, heritage, building, aviation or any other authorities, to enable rapid deployment ((20 F)) • Must consult with relevant authorities to ensure the alignment of the said processes • Oversee the engagement with relevant industry bodies dealing with rapid deployment • Provide advice to ECNS licensees • Any request and decision accepting or denying a request must be in writing and substantiated by evidence contained in the written record of ICASA.

INDUSTRY BODY
• Oversea the creation of a GIS database and mapping of all fibre deployments and other ECN and facility deployments

67.32 Below, we offer a further summary of what the draft Bill currently proposes to be the roles of each ICASA, the Municipalities and SALGA. Where text is highlighted in one of the above colours, it is our submission that such role would be better played by the corresponding entity. The key below is provided for ease of reference:

ICASA (section 20C)	SALGA and Municipalities (section 20D)
Prescribe rapid deployment regulations, including: - obligations for ECNS - alternatives to new deployment - processes and procedures to enable a landowner to object to ICASA at least 14 days before the ECNS commences with the activity, if it will cause significant interference with the land - high sites that are not technically feasible for access and use - processes and procedures for an ECNS licensee to request access to government high sites including the determination of cost-based rentals; - processes and procedures that enable single trenching for fibre in each geographic location where it is technically feasible to do so; - guidelines on reasonable access fees that may be charged by landholders to ECNS licensees for deploying ECN or facilities that are intrusive. - the structure of the GIS database and its security; Regulations must provide processes and procedures for dispute resolution between ECNS and landowners, on an expedited basis. ICASA must ensure that ECNS licensees provide information on: - existing and planned networks and facilities, (including alterations / removal) to the RDNCC for inclusion in GIS; - existing and planned networks / facilities to ICASA and other licensees - seek out alternatives means of deployment through sharing or leasing of existing facilities; - contribute to research and development on new deployment methods; - comply with environmental requirements; - co-ordinate activities wherever appropriate, avoiding anti-competitive behaviour; and - advise landholders in writing of their right to recourse through ICASA	1. Processing of rapid deployment of electronic communications networks and facilities takes place at municipal level. 2. SALGA must promote uniformity in processes and prices charged by municipalities for wayleave applications which must be cost based. **Municipalities** - When planning municipal infrastructure, Municipalities must make provision for the installation of ECN and facilities including ducts for fibre optic cabling, conduit pipes and space for radio equipment. - Municipalities must provide information on existing and planned municipal infrastructure including ICT infrastructure to the RDNCC in a digitised format for inclusion into the GIS. - The DTPS may render support.

ECNS rights / obligations to enter and use property	Landowners – municipal, provincial, national
The right to enter upon and use public and private land for ECNS deployment, but subject to: - written notice of proposed property access to an owner and specify reasons for engaging in the activity and the date of commencement, outline the objection process to its plans and provide environmental, health and safety information, as may be applicable; - provide all information required by the automated application process, and obtain a wayleave certificate from the relevant authority which must specify information such as the presence, height and depth of other infrastructure such as water pipes, electricity cables and gas pipes in the area; We submit the above to be developed by an industry body in consultation with SALGA and ICASA - exercise due care and diligence to minimise damage; - act according to good engineering practice, and take all reasonable steps to restore the property to its former state including the repair of damages caused; - ensure the design, planning and installation of the ECN/ facility follow best practice and comply with regulatory or industry standards; - take all reasonable steps to ensure the activity interferes as little as practicable with the operations of a public utility; - update the GIS about the type and location of ECN / facility deployed; - uphold the principle of open access and infrastructure sharing; - seek out alternatives to new deployment in order to use suitable existing ECN / facilities - entitled to select appropriate land and gain access to such land for the purposes of constructing, maintaining, altering or removing ECN /facilities.	- provide information to RDNCC on existing and planned infrastructure in a digitised format for GIS; We submit ICASA should be the entity to receive such information - provide clear rules and guidelines relating to access to their facilities and comply with any national policy and rules; - when developing infrastructure deployment strategies, make provision for the installation of ECN and facilities including, fibre ducts; - act on requests to access land in a reasonable time, taking into account the nature and scope of the request; - treat ECNS equally when imposing technical standards and are not allowed to impose different setback, height, or safety restrictions in residential and commercial zones.

Radio Frequency Spectrum (Chapter 5)

68 Chapter 5 is another aspect of the ECA that sees significant increase in Ministerial responsibility. This is evidenced by section 30 whereby the ECA currently describes ICASA's current function in regard to Radio Frequency Spectrum ("**RFS**") as "control" of the radio frequency spectrum and the amendment

proposes a somewhat reduced "administration" role, whilst at the same time, section 30(2)(a) instructs ICASA to "comply with Ministerial policies and policy directions". Liquid Telecom is unclear as to why the legislation should have to explicitly require ICASA's compliance with Ministerial policy, given that policy is instructional and requires ICASA to be mindful of it at all times? It is only properly executed policy directions with which ICASA must comply but not – as a compliance obligation per se – Ministerial policy.

69 Similarly, Liquid Telecom notes the amendment to where ICASA may make regulations including for what was previously "control" and is now "use" of the RFS. The removal of "control" is necessary for the new proposed clause 29A and amendments to section 30 to clarify the role of the Minister (as supported by the National Radio Frequency Spectrum Planning Committee and National Radio Frequency Spectrum Division) vis-a-vis ICASA and Sector-Specific Agencies, on spectrum. In any event and in respect of the overall amendment to this chapter, we urge the DTPS respectfully to reconsider what falls to the remit of operational regulatory work and what falls to the remit of policy. It is our respectful view, that the full gamut of increased responsibility in respect of spectrum control, management and administration of the RFS, that the draft Bill assumes for the Minister, should be very carefully re-examined for operational efficiency.

70 This chapter is another area in which we submit, pockets of excessive and arguably misplaced detail are provided for: For example:

70.1 Section 30(2)(c) the draft Bill stipulates that ICASA must "give high priority to applications" for RFS where the use thereof is proposed for digital electronic communications services…". Liquid Telecom undoubtedly welcomes the sentiment expressed in this requirement but query if this should not be more suitably placed in regulations which specify the criteria for which "high priority" would be give and the applicable time frames which would determine that "high priority" is given. As it currently stands, the wording is abstract and does not lend to meaningful implementation.

70.2 Section 31A(2) requires ICASA to obtain the Minister's approval on the nature and form of universal service obligations before they are imposed on RFS licensees, to ensure that the obligations are "co-ordinated, relevant and aligned with national policy objectives and priorities". Again, this begs the question as to whether this is not the specific role and remit of ICASA whose work must always, align

with national policy objectives and priorities.

71 Liquid Telecom further requests clarity on the meaning of section 30(5) which seems to specify something that is not entirely clear: that is, if regulating the spectrum is the objective, what is the purpose of specifying that for the purpose of this chapter, "management of spectrum" by ICASA is the "technical term" for the process of "regulating the spectrum". What is the intended purpose of this provision?

Universal Access and Universal Service

72 Liquid Telecom draws the Department's attention to our comments at paragraphs 36- 44 pertaining to the current regulatory approach to universal service and access in the sector. Accordingly, and based on this view, we see no reason to introduce further USO's for existing and new RFS licences, particularly in a legislative vision that contemplates (finally) spectrum trading, sharing and re-farming.[31] Rather, we submit, the DTPS should consider the payment of a levy on a sliding scale, variable on the type of spectrum licensed (whether high-demand or not) which would be applied on an annual basis to the licensee, which fees would then be applied to incentive based roll-out projects, as proposed earlier in the submission.

73 In the framework of overlapping roles and responsibilities between the regulator and the Minister, currently (albeit probably unintentionally) proposed by the draft Bill, we query the efficacy of section 31A(5) which links annual renewal of a RFS licence to a level of compliance to be evaluated by ICASA as a condition of renewal. This proposal is neither fair on ICASA who lacks the capacity to undertake such audits on an annual basis and on licensees who – in the nature of the investment – may need longer run periods to achieve results. If a provision of this nature must find place in legislation (which again we argue is misplaced, along with the entire approach to USOs), then it should be a period of 2-4 years for evaluation.

Spectrum Trading, Sharing and Refarming

74 Liquid Telecom supports the progressive approach to including spectrum trading,[32] spectrum sharing[33]

[31] Our comments in respect of USO's apply wherever the draft Bill proposes new USO's are to be developed and applied.
[32] Section 31B.
[33] Section 31C.

and spectrum refarming[34] in the draft Bill. This framework is overdue and signals consider development in the policy approach to managing scarce resources. It is an approach we have campaigned for in previous submissions and we support its inclusion here.

75 We note the amount of work required by ICASA to ensure that these provisions come into effect and wish to point out that this need not wait for legislative amendment to be undertaken. ICASA could, following a policy direction by the Minister[35] and based on section 4(1)(j) of the ICASA Act, (and at least in so far as spectrum sharing is concerned, read with the Spectrum Regulations[36]) develop the regulatory framework envisaged in the proposed section 31B(2), 31C(3) and 31D(5).

76 We would add that strict time frames for approval need to be developed to ensure that this innovation is not lost in the quagmire of slow turn-around times currently experienced at ICASA, as the very purpose of such provisions is to enable efficiency and promote effective use of scarce resources.

High-demand Spectrum

77 Section 31E is another contentious proposal contained in the draft Bill. It is, in its current form, arguably un-workable and requires some re-consideration to be effective. Our comments regarding this proposal are listed below:

77.1 Liquid Telecom has no principle objection to the proposal for a WOAN or the proposal to assign some *unassigned* high-demand spectrum to the WOAN (subject to a clear and workable administrative process). However, the WOAN itself is a significant innovation within the sector, holds the potential to skew investment decisions negatively, will potentially create a monopoly wholesale network and ultimately requires considerable more thought (and consultation, beyond a closed list of stakeholders) before being implemented. It is a concept that should be carefully assessed (including a detailed Regulatory Impact Assessment) and if required (which we would argue is debatable)

[34] section 31D.
[35] As proposed in section 31B(5) of the draft Bill.
[36] Government Gazette No. 38641, GN 279, 30 March 2015. Regulation 18 already provides as follows:
"(1) Radio frequency spectrum sharing is where two or more licensees have been granted radio frequency spectrum licences for all or part of the same frequency assignment.
(2) ICASA may require a licensee to share an assigned frequency with other licensees.
(3) Two or more persons may apply to ICASA for radio frequency spectrum licences for spectrum assignments on a shared basis in terms of Form D of Annexure A.
(4) All radio frequency spectrum sharing agreements are subject to approval by ICASA, and to a non-discriminatory approach."

should be tested on a phased-in basis.

77.2 We point out that by the Minister assigning spectrum (which itself is licensed) the Minister is crossing into the barrier of licensing prohibited by section 3(3) of the ECA. If such assignment must occur, the impact of removing unassigned high-demand spectrum from the sector and placing it in the hands of an as yet unknown entity, needs to be carefully measured in terms of the ongoing operations of existing licensees. The terms and conditions applicable to the WOAN are also undetermined beyond general reference to open access principles and non-discrimination (and must be determined by recommendation to the Minister within 12 months of the commencement of the ECA amendment Act).[37]

77.3 In line with our concerns above regarding business continuity and operations, the remaining unassigned spectrum available to existing licensees is then envisaged by the draft Bill to be licensed and assigned, conditional on:

77.3.1 the WOAN being "functional" (which is entirely out of the control of a licensee requiring spectrum and at least 24 months away from occurring following the commencement of the ECA amendment – assuming functional means "operational");

77.3.2 a licensee (by legislative fiat) procuring at least 30% capacity (or higher as determined by ICASA) in the WOAN (whose timeline for functionality is currently undetermined); and

77.3.3 USO's are imposed and such obligations are complied with in rural and under-served areas before the spectrum (assuming hurdles in 77.3.1 and 77.3.2 above have been met) can be used in other areas by that licensee.

77.4 It is our respectful submission that this section as proposed in the draft Bill is at war with itself and at odds with the overall objectives of the ECA. The timelines are muddled and the sequencing is bizarre and effectively operates as a complete barrier against any current licensee obtaining unassigned high demand spectrum for many years to come. For example, 31E(5)(b) posits 30% capacity requirement, meaning there could never be more than three licensees who meet this threshold and any other licensee would be blocked from future access to high demand spectrum.

[37] Section 31(3) and (4).

77.5 Further concerns relate to the proposal contained in section 31E(6) which requires ICASA within 24 months of the commencement of the Act, to hold an enquiry and make recommendations to the Minister on timeframes, terms and conditions, under which the exclusively / individually (i.e. currently) assigned high demand spectrum, must be returned to ICASA. We note the rider that this must require ICASA to consider market developments and the extent of availability of open access networks (of which there are already many in the country).

77.6 Nonetheless, we urge the Department to seek detailed legal opinion (assuming it has not already done so) as to when this action might amount to an expropriation / unlawful deprivation. Legal authority on the matter is easily available but we do not see a need to discuss it further at this juncture. While different facts and dissenting judgements offer interesting views, they serve to indicate the type of argument pertaining to the arbitrary deprivation of property (and whether licences are in fact property as protected under the constitution) that will eventually be heard in the Constitutional Court, should this provision be confirmed in the final amendment.[38]

No trades in high-demand spectrum

78 In the context of the WOAN and the overall policy view expressed by the White Paper and animated in the draft Bill, we understand the reason as to why section 31B(4) prohibits outright, a trade in high-demand spectrum.

79 Apart from potentially having a negative impact on spectral efficiency and business operations, this bar is deleterious for market consolidation and inorganic growth: the effect of the proposed deletion to section 31(3)(c) in the draft Bill, effectively also prohibits a transfer of control in a spectrum licence. As it is unclear what spectrum will constitute high-demand spectrum as this needs to be determined within 6 months of the commencement of the ECA Amendment Act (and thereafter as required), the effect of these provisions will be to frustrate any future merger activity so critical to the level of maturation in which the sector currently finds itself.

[38] See for example *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* (CCT 216/14) [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) (30 June 2015).
See also *Agri South Africa v Minister for Minerals and Energy* (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (18 April 2013), and *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002).

80 In other words, if an investor seeks (for cogent commercial reasons) to acquire a licensee and the licensee has high demand spectrum licensed to it (which is determined "as required") the entire transaction may be rendered impossible because the transfer of control in that spectrum would amount to an unlawful spectrum trade. As such, any positive benefits of investment or even consolidation (access to capex necessary for infrastructure and services, job creation (or retention), innovation, etc) would be lost.

81 This amendment has far reaching and potentially negative consequences and needs to be re-evaluated. There is no reason why on application for a section 13 and 31(2A) application for transfer or transfer of control in a licence and a RFS licence, the impact thereof cannot be evaluated on the extant framework. The extended application procedures for the transfer of RFS licences under Annexure E of the Spectrum Regulations[39] is so detailed and requires such significant amounts of information, that a regulator appropriately seized with that evaluation, would be well placed to consider the benefits or risks of a transfer or transfer of control. Accordingly, we respectfully urge the DTPS to re-consider this approach in the next iteration of this draft Bill.

Use it or lose it

82 Liquid Telecom supports the inclusion of the 'use it or lose it' principle contained in section 31(8) which empowers ICASA to withdraw any spectrum licence or assigned spectrum where the licensee has failed to use it for a period of 1 year. The Minister is however given the power exempt from this provision, small and medium enterprises and new entrants from this clause "upon good cause shown".

83 The inclusion of this clause gives ICASA the ability to introduce a spectrum management principle it has been contemplating since 2008. The market has however, changed considerably since then and while the risks of spectrum hoarding do of course remain, the introduction in 2010 of an administered incentive pricing system for spectrum fees, had a similar effect.[40] To this end, Liquid Telecom is of the view that a well-managed, relevant spectrum pricing regime will have the same outcome as the use it or lose it principle, without having any negative consequences for investment and the expansion plans of

[39] Government Gazette No. 38641, GN 279, 30 March 2015.
[40] See Government Gazette No. 33495, R 754, 27 August 2010, as amended. The International Telecommunication Union ("**ITU**") has published Guidelines for the Review of Spectrum Pricing Methodologies and the Preparation of Spectrum Fee Schedules, which if properly implemented, evidence the effect of averting hoarding without distorting investment or market dynamics. See https://www.itu.int/en/ITU-D/Spectrum-Broadcasting/Documents/Publications/Guidelines_SpectrumFees_Final_E.pdf

licensees, for which a 1 year time horizon is often too short to implement large scale network planning.

84 Accordingly, we submit that this section should be revised to extend the "good cause shown" to any licensee holding spectrum and should ensure a proviso that the time frame contemplated in section 31(9) is extended to a more reasonable one than that currently contemplated at 30 days written notice by ICASA of its intention and 7 days for reply by the licensee.

Excessive reliance on inter-governmental co-ordination

85 In line with the comments made earlier in this submission under "conceptual concerns" pertaining to excessive reference to inter-governmental co-ordination, we point out that section 34A is one such example that may, while well-intended, suffer from this policy malaise. Policy and Ministerial oversight is certainly required in various aspects of spectrum planning, co-ordination and allocation, but the operational requirements thereof, processing, licence fees, assignment mechanisms, frequency co-ordination and resolution of interference, etc is the domain of an independent agency and must remain, in our view, with a specialised one equipped to perform this role.

86 The requirement for the Minister to establish a National Radio Frequency Spectrum Planning Committee and National Radio Frequency Spectrum Division is understandable for the functions set out in the proposed section 34A. However, the mandate of such a committee and division need to be carefully set out and understood so that there is no risk of overlap into core regulatory functions performed currently by ICASA or any future specialised regulatory agency for this purpose.

SADC Roaming – (Chapter 7A)

87 Liquid Telecom supports the inclusion of the new chapter 7A on SADC Roaming. These provisions are consumer friendly and are overdue, particularly when viewed in the context of cross-border migration of foreign workers. We have one concern and that is in respect of the usage of vague language in provisions of this nature. For example, provisions requiring prices for roaming services to be cost-based and not be "too excessive" in comparison with prices charged for the same services at national level are not particularly helpful. We respectfully suggest that these provisions are specified as clearly as possible to render them capable of meaningful implementation.

Open Access (Chapter 8) and Competition Matters (Chapter 10)

88 Liquid Telecom is of the view that these two chapters, proposed for amendment must be read together. Our comments in this regard therefore are dealt with below.

89 Liquid Telecom has always supported the value and premise of an open access regime. Had such been in place over the last decade, undoubtedly the level of ICT infrastructure development in the country would be more advanced. Faithful to the vision contained in the White Paper, significant proposals for amendment are made to Chapter 8 to create the basis of an open access regime. This drives a move away from the framework of leasing electronic communications facilities, to a starting point of open access. This in turn is effected in the draft Bill on two interrelated pillars - defining "general open access principles" and amending the definition of "essential facility".

90 To some extent, the approach in the draft Bill is not as critical as it once was and may even now be partially redundant as many of the more recent infrastructure providers in the country (including Liquid Telecom) have built their networks on open access principles and many have seen the value and revenue generating opportunities offered by doing so. We thus have nothing to add regarding the adoption of the principle: it is the correct approach and should be supported.

91 Conceptually however, the concern the draft Bill seeks to address, namely market dominance and concentration of facilities, whilst driving services-based competition – will have the adverse consequence of deterring infrastructure-based competition and investment, which is a continual requirement for network expansion and upgrade. Discouraging infrastructure-based competition – and redundancy - will also create the risk of a higher incidence of network failures. Once again, we recommend an urgent and arguably separate RIA to more fully understand and appreciate the potential adverse consequences that could flow.

92 Similarly, we raise concerns regarding the proposed amendments in section 44(3A) (determination of deemed entities) and how the draft Bill proposes to measure communications infrastructure for the purposes of evaluating the "25% of the total electronic communication infrastructure in such market" and declaring a licensee to be a "deemed entity"? Such status will also be afforded to licensees that "control an essential facility" or "a scarce resource such as exclusively assigned radio frequency spectrum".

93 Yet, the very basis of the amended new definition of "essential facility" as "broadband infrastructure in the International Standardization Organization ("ISO") Open Systems Interconnect Model layer 2 or layer 3 as prescribed by ICASA" will create significant overreach. By pinning it to the ISO layered model, it in effect, will render significant parts – in fact, most of the current deployed networks - as "essential facilities".

94 We note that the Open System Interconnection (OSI) model has defined the common terminology used in networking discussions and documentation. However, this model is not directly implemented in the TCP/IP networks that are most common today. While we accept that it is a valuable conceptual model that helps relate different technologies to one another and implement the right technology in the right way, it has its limitations. According to Tom Nolle of CIMI Corporation:

> *"Despite the longevity of the references to the OSI model, the conception of the OSI model has changed over the years. Some 'layers' have been added, and some don't seem to be getting used very much. Most recently, there is talk about concepts like 'virtual networks' and 'abstract topologies' that don't clearly relate to the old OSI concepts. To make matters worse, the Internet's evolution, based on TCP/IP, never strictly followed the old OSI model at all. A reasonable person might ask whether people who talk about 'Layer 1' or 'Layer 3' aren't blowing kisses at an old friend instead of recognizing the relevance of the original OSI model."*[41]

95 Liquid Telecom cautions the Department against over-reliance on a networking model that is over 40 years old and which has not been updated. Certainly, the OSI layered approach can be useful in determining network elements, however it should not be authoritative.

96 Several interrelated questions present for further discussion: will the determination be based on for example, the number of masts an operator has, or the amount of capacity, or measured in terms of fibre laid or strung overhead, or a combination of all three or more factors not considered here?

97 This matters because once determined by ICASA to be such a "deemed entity", various additional obligations to providing general open access apply, including a requirement to provide active infrastructure sharing (including radio access network sharing), cost-based pricing and compliance with

41 http://www.webtorials.com/main/resource/papers/kubernan/paper21/V2-N10.pdf

specific network and population coverage requirements.[42] Further matters of determination require elucidation: subsection (1A) requires those licensees who are determined to be "vertically integrated" to provide accounting separation.

98 The draft ECA proposes this guidance by instructing ICASA, within 18 months of the commencement of the ECA amendment, to prescribe regulations to determine the above and in fact, a long list of issues that must form part of wholesale open access regulations. These include, for example, a timeframe and procedures for the negotiation and conclusion of wholesale open access agreement; [43] the implementation and enforcement of open access principles;[44] wholesale rates;[45] a list of essential facilities;[46] and various other matters required to assemble this framework.

99 We raise this to note that in our opinion the completion of a piece of work of this magnitude is simply not possible within the 18-month period provided. For example, in over a decade, ICASA has still not defined a list of "essential facilities" as enjoined to do by section 44(8) of the ECA. Determinations as to Significant Market Power ("**SMP**") have never been done as per Chapter 10 and in fact, the entire *ex ante* regulatory framework provided for in chapter 10 has never progressed past ICASA's early process in 2006. It is necessary to revise these regulations speedily, but given the extent and immensity of a regulation making exercise of this nature, so critical to the sector, and of such impact to licensees, it is unlikely. Add to that the institutional upheaval that will undoubtedly result from restructuring the regulatory functions and this process is doomed to fail, either due to a lack of capacity or because it is done in a manner so rushed that is will not sustain any objection.

100 Once again, we submit that the ECA currently contains the necessary provisions to commence this inquiry immediately and ICASA need not wait for the amendment of the ECA to consider at least some of the regulations that are required in terms of the proposed section 44(3)(a)-(p).[47]

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[42] Section 43(1B)(a)-(c).
[43] Section 44(a).
[44] Section 44(3)(b).
[45] Section 44(3)(g).
[46] Section 44(3)(k).
[47] The approach can clearly be derived in terms of section 4B if the ICASA Act, section 67 of the ECA and section 1(1) and 7 of the Competition Act. Section 1(1) defines market power to mean *"the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers"*. Section 7 reads as follows: *"A firm is dominant in a market if – it has at least 45% of that market; it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or it has less than 35% of that market, but has market power."*

101 Our comments regarding the expected delays and time required become even more stark when one has regard to the proposed section 44(3A) which cross refers to section 67(3A) which requires as a precondition for determining deemed entities, the completion of a market definition exercise. Again, a matter with which ICASA is currently empowered and tasked in terms of the. The proposed amendments to the ECA do not need to occur for this process to commence. This notwithstanding, we have already raised previously the concern that if section 67 is amended in the current proposed form, it will limit or eliminate public participation in the market definition process. This can only serve to exacerbate the concern that the definitions may not be correct and, if defined incorrectly, will have a negative effect on the relatively new entrants to the market that have invested heavily in infrastructure development. Alternatively, the definitions may be correct, but may not be sustainable if an administratively sound process has not been followed. The same concern exists for the 25% threshold that is being suggested in the draft Bill. Notably, this approach to determining dominance does not align with the approach of the Competition Act. [48]

102 Liquid Telecom supports the inclusion of a proposal for a 3-year review of market definitions in section 67(3B), but again draws the DTPS's attention to the concerns above regarding the current lack of implementation of the existing Chapter 10 of the ECA. It is respectfully submitted therefore that a prudent approach may well be to remove the proposal for an *ex ante* determination of markets and simply determine them on an ad hoc basis when necessary, when conducting inquiries.

103 We note the requirements in section 67A for a further revision to the existing concurrent jurisdiction agreement in terms of section 4(3A) of the ICASA Act. We query why this revision is being considered in legislation as the requirement to consult between ICASA and the Competition Commission within their respective mandates, already exists.

104 We find the proposed section 67B particularly concerning as it is likely to have an unintended outcome of creating the possibility of administrative review in regard to mergers involving licensees. We accordingly request the Department to reconsider this section in its entirety.

105 In any event, it is our view that the proposed amendments to Chapter 10 of the ECA proposed in the draft Bill will require re-evaluation in terms of the subsequent publication of amendments to the

[48] Act No. 89 of 1998.

Competition Act, gazetted after the draft Bill on 1 December 2017. The Competition Amendment Bill contains several proposals that are likely to have an impact on those envisaged in the draft Bill with respect to proposed changes in the evaluation of mergers vis-a-vis applications for transfers of control or licence transfers. Notably, proposed amendments to section 8(a) of the Competition Act regarding abuse of dominance; section 12A(2) of the Competition Act concerning the consideration of mergers; section 12B of the Competition Act providing a new concept of "creeping" mergers that occur through a series of transactions during a 3-year period; and section 43A of the Competition Act regarding market inquiries. Accordingly, we do not address competition matters further and will undertake to do so when these are considered and addressed in a subsequent iteration of the draft Bill that takes the provisions of the Competition Amendment Bill into consideration.[49]

Consumer Issues (Chapter 12)

106 Liquid Telecom supports the renewed focus on consumer welfare evidenced by the proposed changes to Chapter 12, specifically the requirement to regularly (at least every 2 years) review regulations for a code of conduct and minimum standards for end-users and subscribers and quality of service. [50]

107 Our respectful submission is first, to require ICASA to consider publishing a confirmed turn around commitment for the speedy and efficient investigation and processing of consumer complaints. Second, with a recognition of the type of sector the draft Bill is trying to shape, it is our view that the existence of an open access regime should also force a requirement for service providers providing data services to consumers, to offer less restrictive contract periods (for example month to month contracts). This can easily be addressed in the required end-user and subscriber charter regulations where the requirement is stipulated as per section 69(5) of the ECA. However, we note our frustration that the current code of conduct and minimum standards for end-users and subscribers and quality of service as heavily skewed to mobile services. We accept that the majority of consumers are connected to mobile services,

[49] Competition Amendment Bill, Government Gazette No. 41294, GN. 1345, 01 December 2017. The Competition Amendment Bill also has similar objectives the draft ECA Amendment Bill, namely addressing economic concentration and the racially-skewed spread of ownership of firms in the South African economy. It also seeks to enhance the policy, institutional and procedural framework of the Act.

[50] See section 69(1), (3) and 69A(1). Similarly, we note and support the amendments to section 82 to ensure that when USAASA makes recommendations to the Minister, to enable the Minister to determine the meaning of universal service and access, the Agency must also consider the needs of persons with disabilities.

however the current regulations and reporting requirements remain inappropriate for the majority of data services. We would encourage the Department to amend the proposed section to specifically reference the need for ICASA to promulgate technology neutral regulations, or at a minimum sub-divide the regulations to avoid the current "one size fits all" approach which conflates voice, data, mobile and fixed.

108 We also respectfully suggest that ICASA's compliance division is tasked with developing detailed turnaround times for confirming the submission of compliance reporting and the content thereof, preferably within 3 months of submission. Currently, the submission of a compliance reporting is either unanswered or responded to by ICASA, or lags several years behind the most recent reporting period.

General

109 We make a number of further points on the remaining issues in the draft Bill below.

109.1 ICASA is required by section 79C(1) annually, to publish a market performance report in respect of the broadcasting, electronic transactions, postal and electronic communications sectors which report must include an assessment of affordability and accessibility to services, quality of service, impact on users of market trends and compliance by licensees with conditions and obligations and it must further consider the effects of convergence, including monitoring of the extent and impact of horizontal and vertical integration and bundling of services. Our submission here is that this is an onerous requirement, which has a corresponding obligation placed in licensees to provide "any information" specified by ICASA for this purpose.

109.2 While Liquid Telecom sees merit in this publication and the information it will yield, we would respectfully request that specific provisions are made to require the protection of commercially sensitive information which may be submitted in the preparation of the report. We also suggest that specific provision should be made to assist ICASA in the completion of this task. Importantly, as required under SA Connect, an obligation is placed on ICASA to monitor and advise the Minister on the review of national broadband policy targets, and compliance with broadband quality of service standards.

109.3 We note the amendment to the definition and to section 5(9) of the ECA regarding licensing which cumulatively obliges ICASA to make regulations that will apply the B-BBEE ICT Sector Code to

existing and new licences, licence exemptions and spectrum assignment to promote broad-based black economic empowerment within 12 months of the promulgation of the ECA amendment Act. In this regard, we refer to our comments at paragraph 47 and our comments in respect of the Competition Amendment Bill at paragraph 105.

109.4 We note that one of the drivers underlying the proposed amendments to the Competition Amendment Bill is also a transformative one. In the list of factors to be considered when evaluating mergers, a proposed amendment in section 12(A3) would require the Commission to also consider "the promotion of a greater spread of ownership in the economy, in particular to increase the levels of ownership by historically disadvantaged persons of the firms in the market".[51]

109.5 Our comment here is that there are, between the two proposed amendments to the ECA and the Competition Act, respectively, various new requirements regarding how mergers (and transactions within the remit of ICASA as per section 13) are considered. With the unresolved regulations on ownership and control still pending, we respectfully submit that the DTPS should establish a work stream with ICASA and the Competition Commission to streamline and resolve the various requirements in order to avoid varying different outcomes on similar evaluations. It would also be necessary to have this clarity so that the evaluation of such transactions is not further delayed. Given the nascent stages of both draft amendment Bills, we do not discuss this further and reserve more detailed comments for the next iteration of the draft Bill (as well as The Competition Amendment Bill) where they are likely to be more applicable.

CONCLUSION

110 Liquid Telecom once again thanks the DTPS for the opportunity to comment on the draft Bill.

111 We have made an extensive submission and do not wish to further re-state our contribution in detail. However, we do wish to note the following key points:

111.1 ***More consultation is required, focused on implementation:*** The passage of a draft Bill of this nature requires extensive consultation. Notwithstanding the fact that the DTPS is of the view that in

[51] Section 12A(2), Competition Act.

the process preceding the Bill, extensive consultation has in fact taken place, much more is required once in Bill form, to ensure it is capable of effective implementation.

111.2 To this end, we respectfully request the DTPS to consider hosting various focussed workshops to address concerning aspects of the draft Bill. Most notably, an urgent workshop should be convened to resolve the regulations regarding Chapter 4 – rapid deployment, as it is our submission that these do not need to await an amendment to be addressed.

111.3 We have also suggested that in order to enable full and meaningful consultation, the rest of the legislation anticipated to be necessary to give effect to the White Paper (such as that effecting institutional arrangements for the sector) should be considered side by side with the draft Bill. An opportunity to comment on both together, at the appropriate time, would be welcomed and is necessary to make input most capable of implementation.

111.4 **"If it isn't broken, don't fix it":** we have argued that this Bill is overly extensive and that while some amendments are needed, a general amendment is not strictly necessary. To ensure speed and efficiency in amending the ECA, we have respectfully submitted that the DTPS should rather consider the strictly necessary amendments only, whilst simultaneously implementing those parts of the ECA as it stands that are capable of immediate implementation, such as chapters 4 and 10.

111.5 **Regulatory Impact Assessments** must urgently be undertaken, overall in respect of the draft Bill and specifically in respect of the WOAN and rapid deployment issues. We cannot see how this legislation could be effectively implemented without clarity as to the effects of it, constraints in and requirements of implementation.

111.5.1 The **structural concerns** that permeate the draft Bill remain:

111.5.1.1 the approach to wholesale services and open access which we argue must not be subverted by unintended, anti-competitive outcomes and disincentives for investment;

111.5.1.2 spectrum control and administration from a regulatory and operational perspective, must remain within the remit of the regulator so that operational efficiencies are not compromised;

111.5.1.3 Independent and effective regulation must remain a policy priority and radical re-design to the institutional arrangements for regulation in the SA ICT sector should be avoided, except where

strictly necessary for operational improvement. There are two aspects to this point: first, *regulatory independence* – a point we have not dealt with excessively in this submission but will do so if required when presented with draft legislation to effect chapter 13 of the White Paper. There is no doubt that the constitutional status of ICASA has been well canvassed and which status as a Chapter 9 Institution is placed above question.[52] Second, our submission has focussed rather on the *risks to regulation by restructuring the regulatory institutions* as envisaged in the White Paper. This will take many years to effect and will lead to lengthy delays to the multiple processes and "busy" work that is prescribed for the regulator by this draft Bill. Significant changes should be avoided.

111.6 The **conceptual concerns** that permeate the draft Bill include:

111.6.1 A suggestion to avoid drafting new legislation to provide for matters that are currently enabled by the ECA, but not implemented. We have provided various examples of this, notably Chapter 4 and Chapter 10 of the ECA. These provisions can be attended to by the regulator without the need for large-scale legislative amendment and can be done so immediately: regulatory intervention in these areas – competition matters and rapid deployment, amongst others, can be effected immediately;

111.6.2 The risk of excessive reliance on inter-governmental co-operation and the amount of re-regulation required by the draft Bill, are cause for concern. We have gone to great lengths to evidence the amount of inter-governmental co-operation required to give effect to the draft Bill and to also show how large the regulatory exercise will be, bounded by considerably tight timeframes set in the draft legislation. This is concerning when set against an already stretched regulator with a significant lack of institutional capacity to deliver work flows against improved turnaround times. Undoubtedly the regulatory framework needs adjustment and the regulator needs more resources and an improved organisational design, but this should not militate for an entire institutional overhaul at a time when regulatory demands placed in it by amended legislation will be extreme.

[52] "Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions", 31 July 2007, Parliament of the Republic of South Africa (2007), chaired by the late Hon AK. Asmal.

112 We have also set out in detail, our concerns pertaining to:

112.1 The proposals for the return of high-demand spectrum and the impact this will have on existing and future investment;

112.2 Issues pertaining to open access and the creation of a wholesale open access regime in terms of determining "deemed entities" and vertically integrated operators, as well as the proposed thresholds for measurement;

112.3 The likely interaction between the draft Bill and the provisions contained in the draft Competition Amendment Bill, which given its publication after the ECA draft Bill, necessitates alignment and reconsideration in the areas where both bills overlap, namely ownership and control considerations, merger considerations and concurrent jurisdiction; and,

112.4 The continued retention of the current approach to universal service and access obligations. There are many ways in which this policy objective can be met that would be more effective and would also reduce the burden on operators whilst simultaneously creating opportunities for all market players.

113 We noted provisions in the draft Bill that are important improvements to the ECA including the majority of the proposals regarding rapid deployment and the increased focus on consumer welfare and subscriber benefit.

114 Undoubtedly the draft Bill has many positive proposals for consideration and the ECA requires considerable improvement. There is much benefit in the proposals contained in this Bill, many of which can be used to benefit the sector. Much greater consultation with the sector and all stakeholders at this juncture in the trajectory of this draft Bill is necessary however, to effect this outcome.

115 Liquid Telecom remains available to assist further and wishes to clearly state its request to be included in any further consultations or processes involved in the development of this Bill to final legislation. Accordingly, we record our request to also participate in any public hearings to be held on this draft Bill at the appropriate time.

116 We wish the DTPS well in its further deliberations on this version of the ECA draft Amendment Bill.