



**MTN'S SUBMISSION ON THE ELECTRONIC
COMMUNICATIONS AMENDMENT BILL AS
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EXECUTIVE SUMMARY

The Electronic Communications Amendment Bill (“the Bill”) proposes a comprehensive U-turn on a model that delivered tens of billions of investments, competitive broadband infrastructure (even in rural areas), and world-class choice and innovation in favour of an untested and extreme regulatory model centred around re-monopolization of infrastructure, cost-based access and expropriation of property. The Bill represents the most aggressive telecommunications legislative intervention into a developed telecommunications market anywhere.

Against this radical policy background, MTN submits the Bill is unconstitutional in several aspects: it violates the property clause in the Constitution; it fails to meet the rationality requirement imposed by section 1(c) and section 22 of the Constitution and it is impermissibly vague.

Aside from its legal shortcomings, the Bill promises to radically alter investment incentives, the engine behind the delivery of the Electronic Communications Act’s (“ECA”) objectives. In an industry characterised by dynamism, all the economic evidence has shown that relying on what will essentially become a single solution infrastructure will undermine South Africa’s engine for economic growth and jobs.

This unique, untested and extreme regulatory model has been introduced on the basis of an Impact Assessment that is:

- a) entirely qualitative;
- b) focused on a list of hypothetical benefits, which appear to be unsupported by the economic literature and market research; and
- c) largely unconcerned about its impact on investment and innovation incentives.

MTN submits that even if the serious constitutional issues raised in the Bill are addressed, the legislative process should not proceed until an in-depth and quantitative understanding of the balance of costs and benefits for these radical proposals are fully understood and laid out before the Legislator.

BACKGROUND

Mobile Telephone Networks Proprietary Limited (“MTN”) appreciates this opportunity to make written submissions on the Electronic Communications Amendment Bill (“the Bill”).

The Bill has far-reaching implications for ICT policy and the South African economy in general. As we will demonstrate, the proposed amendments dealing with the Wholesale Open Access Network (“WOAN”) and the Open Access Regime will not achieve their stated objectives. Appropriate regulation should encourage economic transformation, promote competition, encourage investment, reduce unnecessary costs and remove obstacles for firms to compete. The proposed regulatory interventions in the Bill will not do so: on the contrary, they will harm incentives to invest, will harm competition and will harm consumers, in particular the poorest and most vulnerable consumers.

For these reasons, the implementation of the Bill will give rise to consequences that undermine the fundamental objects of the Bill and the ECA, which is to provide quality coverage to all South Africans at reasonable costs. In addition, the Bill is unconstitutional in several respects. MTN submits that the Bill should not be enacted into law in its current form.

MTN notes that the objectives of the Bill as articulated in paragraph 2 of the Explanatory Memorandum attached to the Bill are to amend the ECA, so as to align it with the National Integrated ICT Policy White Paper to provide for:

- a) transformation of the sector through enforcement of broad-based black economic empowerment;
- b) provide for lowering of cost of communications;
- c) reducing infrastructure duplications and encouraging service based competition through a wireless open access network;
- d) to provide a new framework for rapid deployment of electronic communications facilities;
- e) to provide for new approaches on scarce resources such as spectrum including the allocation of high demand spectrum on open access principles;
- f) to create a new framework for open access;
- g) to provide for the regulation of international roaming including SADC roaming to ensure regulated roaming costs, quality of service and transparency;
- h) to provide for regular market definition and review to ensure effective competition;
- i) to provide for improved quality of services including for persons with disabilities;
- j) to provide for consumer protection of different types of end-users and subscribers, including persons and institutions;
- k) to provide for enhanced cooperation between the National Consumer Commission and Authority as well as the Competition Commission and the Authority; and
- l) to provide for matters connected therewith.

MTN has reviewed all the objectives listed above and we emphasise that the Bill is not rationally connected to these objectives as stated in MTN's legal submission (Section A) herein.

Apart from the above, MTN welcomes the objective to transform the ICT sector, however the enforcement of broad-based black economic empowerment should be conducted in line with existing legalisation governing broad-based black economic empowerment which takes precedence in matters relating to broad-based black economic empowerment.

In relation to open access, what first needs to be put in place is a reasonable and objective economic rationale (threshold assessment) before the proposed amendment of open access and cost-based pricing is triggered. If the latter is not managed properly, unintended consequences are likely to occur which may give rise to disputes and litigation. Much-needed investment and innovation in the ICT sector will be stifled should this Bill be enacted in its current form.

Currently MTN remains committed to investing in its network and customer experience as demonstrated by its continued significant capex investments. It is this commitment which has resulted in MTN being acclaimed earlier in 2018 as the fastest broadband network in South Africa. Maintaining these high standards for consumers as well as the continued increasing demand for data will require more investment and scale and will furthermore require Government's support to the private sector.

MTN submits that the current ECA should be strengthened to ensure there is a clear balance between equity and efficiency for the ICT Industry. The big opportunity for South Africa remains data, this can be addressed by Government incentivising investment and releasing much-needed spectrum.

MTN seeks clarification regarding the Bill's amendments in respect of the WOAN construct and operation, open access provisions and the associated cost-based pricing application of these provisions. MTN also seeks clarity on how the Bill intends to achieve a balance between the inherent trade-off between cost-based access regulation and investment incentives. The implications of this Bill are significant for MTN.

Against the above background, MTN's submissions will be structured as follows:

Section A

First, MTN sets out its detailed legal submissions on the Bill and will deal with:

- a) the establishment and operation of the WOAN;
- b) the open access regime;
- c) how the WOAN and the open access regime undermine the objectives of the Bill; and
- d) why the Bill is unconstitutional.

Section B

Second, MTN will deal with issues relating to:

- a) Policy and Regulation;
- b) Licensing Framework;
- c) WOAN;
- d) Spectrum;
- e) SADC Roaming;
- f) Open Access; and
- g) Competition.

Finally, MTN will offer its conclusion.

SECTION A

MTN'S LEGAL SUBMISSIONS ON THE BILL

INTRODUCTION

1. On 17 November 2017 the Department of Telecommunications and Postal Services (“the Department”) published an Invitation for interested parties to provide written comments on the Electronic Communications Amendment Bill (“the Bill”).¹
2. The Bill amends the Electronic Communications Act 36 of 2005 (“ECA”) and was drafted pursuant to the National Integrated ICT Policy White Paper (“the White Paper”) approved by Cabinet on 28 September 2016.²
3. The Bill proposes to put in place an open access regime whereby existing and new individual electronic communication network and radio frequency spectrum licensees will be required to share electronic communications networks and infrastructure with other licensees. The regime includes the establishment and operation of an entity known as the Wireless Open Access Network (“WOAN”) which will be assigned high demand spectrum.
4. The implementation of the WOAN and open access principles will have far-reaching consequences for existing licensees and the ICT sector. In these submissions, MTN highlights the consequences that will be generated by the new regulatory scheme. MTN submits that the Bill will not achieve its stated objectives but will produce the very opposite results. This renders the Bill

¹ Government Gazette Vol 629 No. 41261.

² National Integrated ICT Policy White Paper published in Government Notice 1212 No 40325 on 3 October 2016.

unconstitutional because the Bill in its present form is not rationally connected to its stated purpose and permits an arbitrary deprivation of property.

5. MTN's legal comments will be structured as follows:

5.1. First, we articulate our understanding of the WOAN and the open access regime.

5.2. Second, we demonstrate that the Bill will not achieve its stated objectives.

5.3. Third, we address the constitutional implications of the Bill.

THE ESTABLISHMENT AND OPERATION OF THE WOAN

What is the WOAN?

6. The Bill defines a Wireless Open Access Network as "*the entity contemplated in section 19A that must provide wholesale electronic communications network services on open access principles.*"³

7. The Memorandum explains that the WOAN "*is an electronic communications network licensee as defined but may only render the electronic communications network services on a wholesale basis as defined.*"⁴

8. In the presentation on 4 December 2017 introducing the Bill, Mr M Masemola (the Acting Deputy Director-General: ICT Policy and Strategy Development) explained as follows:

"The WOAN will be a consortium of persons that adheres to principles such as voluntary participation by interested stakeholders, diversity of ownership and control, BroadBased

³ Proposed section 1(p).

⁴ Memorandum, para 3.1.

Black Economic Empowerment, effective participation by targeted groups including women, youth and persons with disabilities. Though it is called a wireless network due to the assignment of high demand spectrum to it, and in accordance with the name given to it in the White Paper, it is an electronic communications network service licensee as defined, but may only render the electronic communications network services on a wholesale basis as defined.”

9. The White Paper explains the role of the WOAN at paragraph 9.1.6:

“The Wireless OAN will be a public-private sector-owned and managed consortium, and will consist of entities that are interested in participating. Participants may include, but not be limited to, current holders of electronic communications service (ECS) and electronic communications network service (ECNS) licenses, infrastructure companies, private equity investors, SMME’s, ISPs, OTT players and MVNO’s. The participation of existing ECNS licensees will speed up the ability of the Wireless OAN to meet its coverage objective. Parties with retail businesses which participate in the network are likely to provide a natural incentive for the reduction of wholesale prices.”

10. There is no definition of “*wholesale electronic communications network services*” in the Bill. The following definitions in the current version of the ECA shed some light on the meaning of this phrase:

“Electronic communications services means any service provided to the public, sections of the public, the State or the subscribers of such service, which consists wholly or mainly of the conveyance by any means of electronic communication over an electronic communications network, but excluding broadcasting services.

Electronic communications network service means a service whereby a person makes available an electronic communications network, whether by sale, lease or otherwise-

- (a) for that person’s own use for the provision of an electronic communications service or broadcasting service;
- (b) to another person for that person’s use in the provision of an electronic communications service or broadcasting service;
- (c) for resale to an electronic communications service licensee, broadcasting service licensee or any

other service contemplated by this Act and “network services” is construed accordingly.”

Wholesale means the sale, lease or otherwise making available an electronic communications network service or an electronic communications service by an electronic communications network service licensee or an electronic communications service licensee, to another licensee or person providing a service pursuant to a licence exemption.”

11. The WOAN is therefore:

- an entity that is an electronic communications network service licensee
- that makes available electronic communications network services on a wholesale basis to another licensee or a person providing a service pursuant to a licence exemption
- on open access principles.

12. In order to provide wholesale electronic communications network services within the current regulatory scheme, the WOAN will require an assignment of spectrum on which to transmit the electronic communications, a physical infrastructure and licences issued by ICASA. We consider each of these below.

Obligations of the WOAN

13. The Bill prescribes that the WOAN must provide open access to its electronic communications networks and facilities upon request to any licensed entity or an entity with a licence exemption.⁵

⁵ Proposed section 19A (2)

14. Open access must be granted in accordance with:⁶
- the terms and conditions of a wholesale open access agreement entered into between the WOAN and the licensed entity; and
 - “general open access principles”.
15. “General open access principles” are defined as the provision of wholesale open access to electronic communications networks on terms that are effective, transparent and non-discriminatory.⁷
16. The WOAN must comply with a number of additional open access principles, including:
- active infrastructure sharing;
 - “cost-based pricing”;⁸
 - access to its electronic communications network or facilities as prescribed by ICASA; and
 - specific network and population coverage targets.

Licences

17. The WOAN may only provide the envisaged wholesale services if it obtains the necessary licences from ICASA.⁹

⁶ Proposed section 19A(2)(a)

⁷ Proposed section 1(g).

⁸ Proposed section 19A(2)(b)

⁹ Section 31(1) and (2) of the ECA provide that a person who wishes to transmit or receive any signal by radio may only do so if they are the holder of a radio frequency spectrum licence and the necessary IECSN or IECN licence envisaged in Chapter 3 of the ECA.

18. In this regard, the Bill provides as follows:

18.1. The Minister may issue a policy direction to ICASA to issue an invitation to apply for the WOAN licences.¹⁰ Before he or she does so, ICASA must make recommendations on the terms and conditions that will apply to the WOAN, and the Minister must consider the incentives to encourage applications.¹¹

18.2. ICASA must ensure that an IECNS licence and a spectrum licence are issued to the WOAN.¹²

18.3. The Minister may require that the spectrum licence be issued to the WOAN for reduced or no spectrum fees.¹³

Spectrum

19. The WOAN will require a spectrum allocation.¹⁴ The different characteristics of the bands comprising the radio frequency spectrum mean that certain spectrum frequencies are more valuable than others. This is the reason why some bands are called high-demand RF bands.¹⁵ Apart from the heightened demand for particular bands, spectrum in general is a limited natural resource.

20. The extent of an MNO's access to spectrum directly determines both its capacity to process telecommunication transactions (such as a call or a text

¹⁰ Proposed section 19A (3))

¹¹ These incentives may include reduced or waived spectrum fees, or the allocation of funds to construct or extend a network in under-served areas (proposed section 19A (4)).

¹² Proposed section 19A (1).

¹³ Proposed section 19A (4).

¹⁴ Radio Frequency Spectrum is defined in the ECA as "the portion of the electromagnetic spectrum used as a transmission medium for electronic communications and broadcasting."

¹⁵ See further Notice No. 469, Government Gazette 33248 of 28 May 2010, High Demand Radio Frequency Spectrum Licensing Regulations.

message) and also the quality of the telecommunication services it is able to offer to consumers. There are two aspects to this:

20.1. Spectrum access determines the “coverage” (that is, the geographic availability of its services) that an MNO is able to offer.

20.2. Spectrum access also determines the “speed” of data transactions. The quality of a data connection depends strongly on the amount of available capacity that can be dedicated to each connected user. The more capacity per user (in the cell that the user is connected to), the higher the throughput that each user will see and thus the better quality of service. With greater access to certain bands on the spectrum, an MNO can offer faster download and upload speeds at a more consistent rate.

21. In South Africa, radio frequencies in the bands 850, 900, 1800, 2100, 2300, 2600 and 3500 MHz are currently licensed for use in mobile telephony. In the normal course, ICASA assigns sections of the frequency bands to MNOs by way of licences issued in terms of section 31 of the ECA and the 2015 Spectrum Regulations. The individual spectrum licences give the licensees the exclusive right to use the spectrum for a defined period in a defined geographic area.
22. The definition of radio frequency spectrum licence in the ECA provides that it is “*a licence authorising the holder to use the radio frequency spectrum...*”. In its current form, the ECA prohibits the holder from permitting another person to “*use the radio frequency spectrum*”.

23. A key feature of the WOAN and the open access regime envisaged in the White Paper and the Bill is the “*paradigm shift towards non-exclusive assignment*” of high demand spectrum.¹⁶
24. The Minister in consultation with ICASA must determine what constitutes high demand spectrum. Upon the policy direction of the Minister, the high demand spectrum that has not yet been assigned to any MNO must be assigned to the WOAN:¹⁷
- subject to the principles of open access; and
 - in line with the principle of non-exclusivity, subject to the National Radio Frequency Plan published by ICASA in the Government Gazette on 28 June 2013 (“**the radio frequency plan**”).¹⁸
25. ICASA must undertake a section 4B enquiry and must make recommendations to the Minister on the terms and conditions to apply to the WOAN.¹⁹
26. The proposed section 31E (5) provides that ICASA may only issue a spectrum licence to a MNO permitting the use of any remaining high-demand spectrum once the WOAN is functional and on the condition that:
- the licensee procures a minimum of 30% capacity (or such higher capacity as determined by the Authority) in the WOAN for a specified period;
 - the universal access and universal service obligations contemplated in section 31A are imposed on the licensee; and

¹⁶ White Paper, para 9.2.

¹⁷ Proposed section 31E (1) and (4)

¹⁸ Proposed section 31E (2)

¹⁹ Proposed section 31E (3)

- those obligations are complied with in rural and under-serviced areas before the assigned spectrum may be used in other areas.

27. ICASA must undertake a section 4B enquiry into the existing spectrum licences for high-demand spectrum and must make recommendations regarding the “*return*” of this spectrum to ICASA.²⁰ In doing so, “policy, market developments and the extent of availability of open access networks” will be relevant factors.

Infrastructure

28. There is no provision in the Bill for the capital investment required by the WOAN to establish physical infrastructure nor, indeed, any requirement that the WOAN must possess or be able to provide the necessary infrastructure. The Bill merely provides that the Minister may include incentives regarding the allocation of funds from the Universal Service and Access Fund to construct or extend an electronic communications network in under-serviced areas.²¹

29. Instead, as we explain below, the Bill proposes a scheme whereby all licensees are obliged to provide the WOAN with wholesale open access to their electronic communications networks and facilities. This means that the WOAN will have a statutory right to access and use all existing infrastructure of the current MNOs. Simply put, the WOAN need not build its own

²⁰ Proposed section 31E (6)

²¹ Proposed section 19A (4)). The Universal Service Fund established by section 65(1) of the Telecommunications Act is preserved by the ECA and re-named the Universal Service and Access Fund. Section 88 of the ECA regulates the utilization of the funds in the Universal Service and Access Fund. Section 88(1)(b) permits money to be used for subsidies to any electronic communications network service licensee for the purpose of financing the construction or extension of electronic communications network in under-serviced areas as prescribed.

infrastructure but may instead choose to piggy-back on the infrastructure of the MNOs.

THE OPEN ACCESS REGIME

30. The amendments in the Bill propose to introduce a regulatory scheme where all licensees must share their electronic communications networks and facilities. This is in accordance with the White Paper's suggestion that, in order to avoid the "bottleneck" caused by spectrum constraints, a "*shared approach to spectrum use*" must be adopted.²² The Memorandum explains that the Bill implements "*an open access regime ... along the entire infrastructure and services value chain.*"²³

31. This regime will arise in three ways (although the Bill does not clearly distinguish between them):

31.1. *First:* the Authority must provide for "designated licensees" to whom universal service and access obligations apply and must prescribe additional terms and conditions for such designated licensees.²⁴

31.2. *Second:* in addition to the obligations on designated licensees, the Authority must impose specific, attainable and measurable universal access and universal service obligations on existing and new radio frequency spectrum licensees.²⁵

²² White Paper, para 9.1.6.

²³ Memorandum, para 3.24.

²⁴ Proposed section 8(4)

²⁵ Proposed sections 31A (1) – (5)

31.3. *Third*: the provisions in section 43 of the ECA that currently require facilities leasing, will be replaced by a compulsory open access requirement. All licensees will be compelled to provide other licensees with wholesale open access to their electronic communications networks and facilities.²⁶

32. We consider each of these aspects in more detail below.

Designated licensees

33. The Bill proposes that the Authority must by regulation make provision for the designation of licensees to whom universal service and universal access obligations are applicable.²⁷

34. Although this is not clear, it appears that the “designated licensees” are also the “deemed entities” referred to in the proposed section 43(1B). Those licensees will have to comply with the following open access principles on their network:²⁸

- active infrastructure sharing;
- “cost-based pricing”;
- access to electronic communications network or facilities as prescribed by ICASA; and
- specific network and population coverage targets.

²⁶ Proposed section 43

²⁷ Proposed section 8(4)

²⁸ Proposed section 43(1B)

35. Paragraph 9.1.5.3 of the White Paper provides:

“Cost based pricing that is regulated to address the high cost of providing network services and thus retail prices of communications services. In principle the wholesale price of a service should not exceed the minimum costs that an efficient firm would incur in the long run in providing the service. The relevant costs that the regulator should take into account when it designs the wholesale pricing regime and the forward looking or ongoing cost of providing the service, including a commercial return on efficient investment. The Minister will require the regulator to develop regulations on cost based pricing following the adoption of this White Paper.”

Universal access and universal service obligations

36. In addition to the specific obligations on designated licensees, ICASA must impose universal open access obligations on all new and existing spectrum licensees.²⁹ These obligations must be approved by the Minister³⁰, and must be specific, attainable and measurable.³¹ The licensees of radio frequency in similar frequency spectrum bands must have similar obligations.³²

37. Compliance will be evaluated annually as a condition of renewal of the spectrum licence.³³

Open access to networks and facilities

38. The Bill proposes to amend section 43 so as to require that all IECNS licensees must *“provide wholesale open access to their electronic communications networks and facilities, upon request, to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption.”* If

²⁹ Proposed section 31A (2)

³⁰ Proposed section 31A (3)

³¹ Proposed section 31A (5)

³² Proposed section 31A (3)

³³ Proposed section 31A (5)

the ECNS licensee is a “*deemed entity*”, then it will also have to comply with the open access principles listed in the proposed section 43(1B) – including “*cost-based pricing*”.

39. An electronic communications facility and an electronic communications network are defined in the ECA. They include all passive and active infrastructure used for or in connection with electronic communications.³⁴

³⁴ The ECA defines **electronic communications facilities** as including:

- “(a) wire, including wiring in multi-tenant buildings;
 - (b) *cable (including undersea and land-based fibre optic cables)*;
 - (c) *antenna*;
 - (d) *mast*;
 - (e) *satellite transponder*;
 - (f) *circuit*;
 - (g) *cable landing station*;
 - (h) *international gateway*;
 - (i) *earth station*;
 - (j) *radio apparatus*;
 - (k) *exchange buildings*;
 - (l) *data centres*; and
 - (m) *carrier neutral hotels*,
- or other thing, which can be used for, or in connection with, electronic communications, including, where applicable—
- (i) *collocation space*;
 - (ii) *monitoring equipment*;
 - (iii) *space on or within poles, ducts, cable trays, manholes, hand holds and conduits*; and
 - (iv) *associated support systems, sub-systems and services, ancillary to such electronic communications facilities or otherwise necessary for controlling connectivity of the various electronic communications facilities for proper functionality, control, integration and utilisation of such electronic communications facilities*”.

The ECA defines **electronic communications network** as

- “any system of electronic communications facilities (excluding subscriber equipment), including without limitation:
- (a) *satellite systems*
 - (b) *fixed systems (circuit and packed switched)*
 - (c) *mobile systems*
 - (d) *fibre optic cable systems (undersea and land-based)*
 - (e) *electricity cable systems (to the extent used for electronic communications services)*
 - (f) *other transmission systems, used for conveyance of electronic communications.*”

40. The wholesale open access agreements must be submitted to ICASA. ICASA must review the agreements to ensure they are consistent with the regulations prescribed.³⁵
41. ICASA will be required to publish regulations dealing with:
- wholesale open access regulations within 18 months;³⁶ and
 - the framework for the wholesale rates applicable to specified types of open access (including cost-based pricing for deemed entities).³⁷

Implications for the WOAN

42. Since the WOAN will be an ECNS licensee, it will be entitled to require that any other ECNS licensee shares its electronic communications facility and electronic communications network with the WOAN.³⁸ The ECNS licensee will be required to do so in accordance with the terms and conditions of a wholesale open access agreement entered into between the parties and in accordance with the general open access principles. If the ECNS licensee is a deemed entity, it will also have to adhere to the principle of cost-based pricing.³⁹

We assume that the existing MNOs will become “deemed entities”. If that assumption is correct, the WOAN will be entitled to require that the existing MNOs provide it with wholesale open access to their networks on the basis of cost-based pricing. As we shall indicate below, this has major implications for

³⁵ Proposed section 45

³⁶ Proposed section 44

³⁷ Proposed section 47

³⁸ Proposed section 43(1)

³⁹ Proposed section 43(1B)

the commercial incentives that will drive the MNOs and the WOAN under the proposed regulatory regime.

THE WOAN AND THE OPEN ACCESS REGIME UNDERMINE THE OBJECTIVES OF THE BILL

The Objectives of the Bill

43. The objectives of the Bill can be ascertained from:

- the text of the Bill read with the ECA;
- the White Paper;
- the Memorandum on the objects of the Electronic Communications Amendment Bill, 2017 (the “*Memorandum*”); and
- the final impact assessment released by the socio-economic impact assessment system on 26 February 2016 (the “*Impact Assessment*”).

44. We consider each of these sources in turn.

The Bill

45. The Minister explains that the over-arching objective of the Bill is the full implementation of the White Paper and the resolution of the “*supply side challenges*” in order to “*transform South Africa into an inclusive, people-centred and developed digital society*”.⁴⁰

46. The Department presentation explained the objectives of the Bill as follows:

“The Bill seeks to amend the Electronic Communications Act, 2005, to align the Act with the White Paper and for this

⁴⁰ Invitation to provide written comments on Electronic Communications Amendment Bill.

purpose to – • provide for transformation of the sector through enforcement of broad-based black economic empowerment. • provide for lowering of cost of communications. • reduce infrastructure duplications and encourage service-based competition through a wireless open access network.

Provide a new framework for rapid deployment of electronic communications facilities. • Provide for new approaches on scarce resources such as spectrum including the allocation of high demand spectrum on open access principles. • Create a new framework for open access. • Provide for the regulation of international roaming including SADC roaming to ensure regulated roaming costs, quality of service and transparency.”
(our underlining)

47. The Bill proposed to amend section 2 of the ECA so as to provide as follows:

“The primary object of this Act is to provide for the regulation of electronic communications in the Republic in line with the National Integrated ICT Policy White Paper, 2016 and the public interest objectives in such White Paper, since ICTs play an essential role in socio-economic development and effective participation of all South Africans in the affairs of the Republic...”⁴¹

48. The objects of the Bill are set out in detail. The list of objects retains many of the objects listed in the existing ECA. If the Bill were to come into force, section 2 would provide for the following objects:

- “(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;*
- (d) encourage investment and innovation in the communications sector;*
- (e) ensure efficient use of the radio frequency spectrum;*
- (f) promote competition within the ICT sector;*

⁴¹ Proposed section 2, our underlining

- (i) encourage research and development as well as new innovative services within the ICT sector;

- (m) ensure the provision of a variety of quality electronic communications services at reasonable prices;
- (n) promote the interests of consumers with regard to the price, quality and the variety of electronic communications services;
- (y) refrain from undue interference in the commercial activities of licencees while taking into account the electronic communication needs of the public;
- (z) *promote stability in the ICT sector.”* (our underlining)

The White Paper

49. The White Paper foreshadows the amendments to the ECA.⁴² The main purpose of the White Paper is to unlock the potential of ICTs to eliminate poverty and reduce inequality in the country by 2030.⁴³
50. The over-arching objectives of the White Paper are described as follows:

“A people-centred, development-oriented and inclusive digital society”

- *Equality: All South Africans must have affordable access to communications infrastructure and services and the capacity and means to access, create and distribute information, applications and content in the language of their choice.*
- *Accessibility: Services, devices, infrastructure and content must be accessible for all sectors of the population, including persons with disabilities, so that all can equally enjoy and benefit from communication services*
- *Social Development: All South Africans must benefit from the ability of the ICT sector to facilitate social development and improve the quality of life for individuals and communities.*
- *Economic Growth: Policy must facilitate access by all South Africans to quality communication infrastructure and services to enable economic growth, employment and wealth creation.*
- *Investment: Policy must promote and stimulate domestic and foreign investment in ICT infrastructure, manufacturing,*

⁴² White Paper, p6, para 1.3. This national policy framework for ICTs replaces the White Papers on Telecommunications (1996) and Postal Services (1998). Laws such as the Electronic Communications Act, no 36 of 2005 and the Electronic Communications Transactions Act, no 25 of 2002 will where necessary be amended in line with this White Paper.

⁴³ White Paper, p10.

services, content, and research and development. • *User Protection: End-users, from the most disadvantaged individual to the largest corporate, must be at the centre of ICT sector-related policies. Effective protection and empowerment of end-users*

and superior quality of service are therefore key objectives of this policy and necessary areas of regulatory intervention • *Privacy and Security: Provisions must safeguard the right of all South Africans to privacy, to protection of personal information, and to a safe and secure communications environment both online and off-line. This is essential to trust in ICTs.* • *Innovation and Competition: Innovation, fair competition and equitable treatment of all role players must be facilitated to ensure a range of quality services are available to end-users and audiences.* • *Transparency and Accountability: The right of South African citizens to access to information and to maximum transparency in how services are delivered and conditions under which they are delivered must be promoted.* • *Environmental Protection: Policy must ensure that the design, use, and eventual disposal of ICTs recognise and protect the right to an environment that is not harmful to health or well-being.* • *Technology Neutrality: Regulatory interventions should as far as possible be technologically neutral in order to stimulate innovation and facilitate the development of innovative new product and service offerings.* • *Open Access: Regulatory intervention should wherever possible be based on open access principles to ensure maximised, efficient and fully-leveraged use of available infrastructure and services, through encouraging infrastructure sharing, spectrum re-farming, optimal interconnection, balanced with the need for fair returns on investment.” (our underlining)*

51. The White Paper also sets out the following principles guiding its implementation:

“Government is committed to the NDP vision of a “state capable of playing a transformative and developmental role” 16. In line with this, the following principles and values have guided the development of this policy and will steer implementation of this White Paper framework:

• *Any interventions must be necessary to meet clearly defined public interest objectives.* • *Any interventions must be proportionate, consistent and evidence-based and determined through public consultation.* • *The policy maker and regulator must consider the least intrusive mechanism to achieve the defined public interest goal/s, and will consider, where appropriate, alternative models such as co-regulation and/or self-regulation.* • *The socio-economic and regulatory impacts of any action will be assessed and considered before imposing*

regulations, rules and/or conditions. • The policy maker and regulator will act fairly and ensure regulatory parity in defining markets and deciding on interventions. • The regulator must perform regulatory activities and functions in line with policy. When taking decisions, the regulator must function without undue external influences and carry out its decision-making functions independently.” (our underlining)

52. In respect of spectrum, the White Paper provides at paragraph 9.2.2:

“Objectives Government is committed to the effective allocation, assignment and management of the spectrum resource in order to: • Ensure its efficient use so that the economic, cultural and social benefits that South Africans derive from its use are maximised; • Support open access and the sharing of infrastructure to the greatest extent possible; • Promote broadband coverage in rural areas and underserved areas • Ensure that as many users and potential users as possible can benefit from its assignment; • Promote innovation in particular to the extent that it addresses national developmental challenges and goals.”⁴⁴

The Memorandum

53. The Memorandum describes the current regulatory framework, and the overarching policy framework that was set out in the National Integrated ICT White Paper, 2016:

“1.7 The National Integrated ICT Policy White Paper outlines the overarching policy framework for the transformation of South Africa into an inclusive and innovative digital and knowledge society. The White Paper outlines government’s approach to providing cross-government leadership and facilitating multi-stakeholder participation; interventions to reinforce fair competition and facilitate innovation in the converged environment; policies to protect the open Internet; policies to address the digital divide and new approaches to addressing supply-side issues and infrastructure rollout including managing scarce resources.” (our underlining)

⁴⁴ White Paper at p82.

54. The Memorandum also discusses the objects of the Bill:

“2. OBJECTS OF BILL

The objects of the Bill are to amend the Act, so as to align it with the National Integrated ICT Policy White Paper approved by Cabinet on 28 September 2016; to provide for transformation of the sector through enforcement of broad-based black economic empowerment; to provide for lowering of cost of communications, reducing infrastructure duplications and encouraging service-based competition through a wireless open access network; to provide a new framework for rapid deployment of electronic communications facilities; to provide for new approaches on scarce resources such as spectrum including the allocation of high demand spectrum on open access principles; to create a new framework for open access; to provide for the regulation of international roaming including SADC roaming to ensure regulated roaming costs, quality of service and transparency; to provide for regular market definition and review to ensure effective competition; to provide for improved quality of services including for persons with disabilities; to provide for consumer protection of different types of end-users and subscribers, including persons and institutions; to provide for enhanced cooperation between the National Consumer Commission and Authority as well as the Competition Commission and the Authority; and to provide for matters connected therewith.” (our underlining)

55. The Memorandum also provides a summary of the Bill, and again discusses the objects of the Bill:

“Amendment of section 2 of Act 36 of 2005

3.2 Section 2 is amended to align the objects of the Act with amendments in the Act emanating from the White Paper. The role that ICTs play in socio-economic development and effective participation of all South Africans in the affairs of the Republic is emphasized. Objects of the Act that were added include redressing the skewed ownership and control of economic and scarce resources such as radio frequency spectrum, to address the barriers to market entry including for SMMEs; to promote serviced-based competition and avoid concentration and duplication of electronic communications infrastructure in urban areas; to promote an environment of open access to electronic communications networks on terms that are effective, transparent and non-discriminatory; and the encouragement of new innovative services.” (our underlining)

The Impact Assessment

56. The Impact Assessment describes some of the critical policy issues under its discussion of the “problem to be addressed” by the new Bill:

“The 1996 White paper on telecommunications intended to address amongst other key policy issues the following: (i) not all citizens had access to affordable reliable and quality communication services (Stats); (ii) ineffective competition due to market structure inefficiencies (Price and market); transformation of the sector (previously disadvantaged individuals (PDIs) not participating meaningfully in the sector); (iii) need for effective regulation of these sectors and radio-frequency spectrum; (iv) affordability and tariff setting; (v) development of the equipment supplier industry and, (vi) human resource development for the sector. The issue of financing or funding of the sector and regional and international cooperation were fundamental for South Africa to achieve its goal of universal access and service.

[...]

Though a lot of gains have been made in the implementation of these objectives, more still needs to be done. The issue of universal access is still at the core of the ICT sector reform. Moreover, inefficiencies in competition, allocation of spectrum on a first come first serve basis, have sustained a highly concentrated market structure over time, making it impossible for government to extend communication services to the majority of citizens. Over nearly the past two decades, these policy challenges, coupled with convergence in technologies, compelled government to initiate a process to review the ICT sector.”

57. The Impact Assessment then describes the “overarching policy challenges being addressed by the National Integrated ICT Policy White paper”, as follows:

- *“Universal access gap;*
- *Lack of coherent Universal Service and Access Obligations (USAO) framework;*
- *Separate Policy frameworks governing the sector (Lack of convergence of policies); and,*
- *Outdated legislative framework.”*

58. The Impact Assessment contains a table expanding on the key problems that will be addressed by the White Paper:

“Overarching problem:

1. *Lack of universal communication access and Services (Availability, Accessibility, Affordability, Awareness and Ability):*
 - 1.1 *Availability of networks and coverage (Supply-side)*
 - 1.2 *Accessibility (Limited) of services – ability to use and access services regardless of education, race, gender, disability, location, etc. (Demand-side).*
 - 1.3 *Affordability of people to use and access services*
 - 1.4 *Awareness (Lack thereof) by users and potential of what is available and the benefits thereof*
 - 1.5 *Ability to use information and data to enhance quality of life*
2. *Lack of coherent Universal Service and Access Obligations (USAO) framework*
3. *Separate Policy frameworks governing the sector (Lack of convergence of policies)*
4. *Outdated legislative framework.”*

59. Finally, the Impact Assessment describes “the intended outcomes of the proposal” as follows:

“The National Development Plan states that “a new policy framework will be needed to realise the vision of a fully connected society”. In line with this vision, the National Integrated ICT Policy white Paper has been developed to set out new policies for the networks and resources necessary for communications technologies (including spectrum, fixed and mobile networks and the Internet), postal services (including letter, parcel, bulk mail and digital postal services) and the services, applications and content that can be accessed or sent via these technologies (digital government services, e-commerce, other applications, services and content). The key areas covered by the policy include:

- *Overarching interventions to promote access including universal service and access strategies and policies to facilitate fair competition and protect the Open Internet;*
- *An Internet policy framework covering governance of the Internet;*

- *A digital transformation framework (or e-strategy) covering issues such as digital government, the digital economy and digital services for all;*
- *New policy approaches to address supply side issues and infrastructure roll-out (such as the introduction of an open access approach and a policy on rapid deployment)*
- *New approaches on scarce resources such as spectrum and numbers – taking into account the changing environment;*
- *Updates on the previous White Paper on the Postal Sector; and*
- *The institutional framework to facilitate the realisation of policy approaches."*

The public presentation by the Department

60. In a public presentation of the Bill by the Department of Telecommunications and Postal Services on 4 December 2017, the Director General confirmed what he believes to be the key objectives of the Bill. He described them as follows:

- competition (service-based competition);
- innovation; and
- transformation.

THE BILL WILL NOT ACHIEVE ITS STATED OBJECTIVES

61. The Bill will not produce its stated objectives or the broad objectives of the White Paper. That is because the Bill will reduce competition; will reduce investment and employment; and will harm consumers, in particular the most vulnerable consumers. The main reasons for this may be summarised as follows:

61.1. Some of the key objects of the Bill, such as the promotion of investment, innovation, research and development,⁴⁵ cannot possibly be achieved by legislation that adds massive uncertainty and permits the deprivation of property of the MNOs. Moreover, the WOAN will not have incentives to invest efficiently, or efficiently to utilise the high demand spectrum that will be licensed to it.⁴⁶

61.2. The Bill will directly harm competition amongst MNOs⁴⁷ and will thereby directly hinder the pursuit of the most important objects of the Bill, which are (a) to promote the universal provision of electronic communications networks and electronic communications services and connectivity for all,⁴⁸ and (b) to promote the interests of consumers with regard to the price, quality and the variety of electronic communications services⁴⁹. Harming competition will also directly harm the efficiency with which radio frequency spectrum is used.

61.3. The Bill will disproportionately harm consumers, in particular the most vulnerable rural consumers, through harming investment in higher capacity, higher quality, and more efficient mobile networks.

61.4. Given these failures, the Bill fails to achieve a further object of the Bill, which is to refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs

⁴⁵ Section 2 (d) of the ECA and proposed section (i).

⁴⁶ Section 2 (e) of the ECA.

⁴⁷ Section 2 (f) of the ECA

⁴⁸ Section 2 (c) of the ECA

⁴⁹ Section 2 (m) and (n) of the ECA

of the public.⁵⁰ The Bill permits extensive interference in the commercial activities of licensees, while directly harming the public. Such direct and harmful intervention cannot achieve the final object of the Bill, which is to promote stability in the ICT sector.⁵¹

62. We elaborate on these submissions below.

The Bill will harm investment and innovation

63. Some of the key objects of the Bill, such as the promotion of investment, innovation, research and development,⁵² cannot possibly be achieved by legislation that adds considerable uncertainty and permits deprivation of the property of the MNOs.

Investment by the MNOs

64. It is trite, as a matter of economics, that investments are incentivised by the prospects of future recovery and returns on those investments. Policies that allow deprivation of property, and that add considerable uncertainty, will obviously disincentivise any future investments, in particular by the MNOs.

65. MNOs must continue to invest heavily in infrastructure in order to meet ongoing exponential growth in demand for data connectivity.

66. Two aspects of the Bill are likely to severely harm incentives to innovate on the part of the MNOs:

⁵⁰ Section 2 (y) of the ECA

⁵¹ Section 2 (z) of the ECA

⁵² Section 2(d) and (i) of the ECA

66.1. *First:* the WOAN will be entitled to access an MNO's infrastructure on request, and on the basis of "cost-based pricing" if the MNO is a deemed entity (which we assume will be the case).⁵³ This provision will destroy an MNO's incentives to invest in the maintenance and repair of existing infrastructure, and also investment in any further infrastructure. MTN alone has invested over ZAR 30 billion in infrastructure over the past 3 years alone, and over ZAR 70 billion in the past 10 years.

66.2. *Second:* existing MNOs may lose their existing spectrum licences, because the Bill requires ICASA to make recommendations to the Minister regarding the "return of spectrum".⁵⁴ Investments in network infrastructure are typically made several years in advance, to ensure that network capacity grows faster than network demand. Moreover, investments in network infrastructure are cumulative, and may only be recovered over a period of several years, if ever. This provision will severely harm an MNO's incentives to invest in further infrastructure. The requirements for infrastructure investment are intimately related to the anticipated spectrum holdings several years into the future. Moreover, the ability to recover infrastructure investments in future is critically dependent on spectrum holdings in those future years. If there is uncertainty over those future spectrum holdings, then this will significantly harm incentives to invest.

⁵³ Proposed section 43(1B)).

⁵⁴ Proposed section 31E (6)

Investment by the WOAN

67. The WOAN will not have incentives to invest sufficiently in infrastructure, either in its own right or to compensate for the harm that the Bill will cause to future investment by the MNOs. The WOAN will be obliged to provide wholesale open access to its network on request⁵⁵ and will have to do so on the basis of cost-based pricing.⁵⁶ This basis does not allow the WOAN to respond to normal incentives that should guide efficient levels of investment. Moreover, this basis does not provide the WOAN with incentives to utilise efficiently the high demand spectrum that will be licensed to it.

Innovation and research and development

68. Innovation and research and development are particularly risky types of investments. There is already significant uncertainty that any investment in an innovation or research towards the discovery of new products and services will yield any positive return in future.

69. Policies that allow deprivation of property, and that add considerable uncertainty, will obviously disincentivise any future investments in innovation and research, in particular by the MNOs.

The Bill will harm competition

70. Uncertainty and deprivation of property, and the resulting disincentives to investment and innovation, will directly harm competition and consumers.

⁵⁵ Proposed section 19A(2)(a)

⁵⁶ Proposed section 19A(2)(b)

Competition has served consumers well

71. The majority of South Africans have little or no access to fixed connectivity. By contrast, mobile connectivity gives millions of South Africans access to information, by providing extensive geographic and population coverage, and affordable costs to connect. Mobile connectivity is the pathway by which most people conduct business, and receive education, banking and financial services, government services and healthcare. Mobile connectivity is a vital contributor to economic growth, employment and the alleviation of poverty and inequality.
72. Fierce competition amongst MNOs has driven continuous and significant investments that have resulted in nearly universal coverage, the delivery of data volumes that have grown exponentially, network quality that has constantly improved, and pricing that has fallen dramatically year after year.
73. After more than a century of monopoly in relation to fixed-line services, Telkom had only reached around 4 million subscribers by 1994, and that number has not grown since. Indeed, fixed subscribers have fallen in the past few years. By contrast, in 2016, there were a total of 87 million active mobile SIMs or subscriptions on South Africa's networks,⁵⁷ and 37.5 million unique mobile subscribers, a 68% population penetration rate.⁵⁸
74. MTN has invested around ZAR 100 billion in capital expenditure over more than 20 years, with ZAR 70 billion in the past 10 years alone. MTN has long achieved over 98% coverage of the population with its 2G technology layer,

⁵⁷ ICASA, Report on the state of the ICT sector in South Africa, 15 March 2016, <https://www.ellipsis.co.za/wp-content/uploads/2015/10/ICASA-Report-on-State-of-SA-ICT-Sector-2016.pdf>

⁵⁸ Citing the GSMA Intelligence Mobile Economy report, The state of South Africa's mobile market vs the rest of Africa, BusinessTech, 11 July 2017,

3G coverage has grown to over 95%, and 4G or LTE services have expanded to over 60% of the population. MTN's data speeds have improved by more than 7 times over the past decade. The volume of mobile data handled by MTN has grown 18 times in the past 5 years, while MTN's data prices have fallen by 86% over this same period, and 4G LTE handset prices that it has imported have fallen by 86% over the past 3 years.

75. Moreover, MTN has engaged in a number of significant initiatives to improve access to connectivity, in particular for low-income subscribers, such as partnering to provide zero rated access to mobile banking apps, and free access to university e-learning applications and websites.
76. Within this context, and mindful of the ongoing debate regarding out of bundle ("OOB") rates, MTN reduced its out-of-bundle data rates by as much as 80% with effect from 1 December 2017. This new approach aimed to further bridge the digital divide by making data cheaper for the most economically marginalised within our society. MTN has 5.9 million customers using less than 5MB of OOB data each month. These customers are generally using data for nothing more than basic communication using an Over the Top platform such as "WhatsApp". MTN's new pricing will see these customers paying just 29c per MB, helping make internet access that much more possible, for South Africa's most economically marginalised citizens.
77. However, the proposals contained in the Bill, which directly harm incentives to invest, will harm competition amongst MNOs, in particular incentives to compete on continuously investing in improving network infrastructure to meet exponential growth in demand for data connectivity.

An uncertain and monopolistic WOAN will not serve consumers well

78. In the form proposed by the Bill, the WOAN would be antithetical to the promotion of competition. It would effectively operate as a monopolistic wholesale player, and would moreover be created and operate under considerable uncertainty. The WOAN would have no incentives to invest and compete, given the provisions in the Bill, which would not provide the WOAN with the incentives to invest in infrastructure or to use spectrum efficiently.
79. Following the release of the White Paper, the research consultancy BMI-TechKnowledge said that its research had found no case studies where a WOAN similar to the one proposed for South Africa had worked or shown positive benefits.⁵⁹
80. A report by the GSMA has shown that WOANs do not deliver on promises to provide better coverage, or lower prices for consumers, and that most have failed to even be implemented.⁶⁰ The GSMA report examines the performance of the WOAN model – also known as a single wholesale network (SWN) model – in five markets: Kenya, Mexico, Russia, Rwanda and South Africa. The report found that out of the five, there was only one where a network had rolled out, *"with all other markets plagued by slow progression and delayed and/or cancelled launches"*. *"Citizens are promised better coverage, more competition, and as a result, more affordable prices. However, research shows that of five countries originally considering this option, only one, Rwanda, has rolled out a network. Although it appears the network hasn't delivered on what was promised."* The GSMA report specifically looked at the effects that

⁵⁹ http://www.itweb.co.za/index.php?option=com_content&view=article&id=163970

⁶⁰ https://www.gsma.com/spectrum/wp-content/uploads/2017/07/GSMA_SWN-8-pager_R3_Web_Singles.pdf

implementing a WOAN has had on the development of Rwanda's network since 2014. As of July 2016, population coverage was only at 30% with the original target being 95%.⁶¹ The price of mobile broadband services increased by around 100%, from 2013 to 2016.

81. GSMA chief regulatory officer John Giusti has said that while some policymakers believe a WOAN can achieve greater network coverage compared to models that rely on network competition, the GSMA's research demonstrates this is not the case. *"We have found that network competition produces faster and more extensive network coverage, and the examples highlighted in the report indicate little evidence that a SWN/WOAN is likely to achieve this."*⁶²

Service competition depends on infrastructure competition

82. One of the proposed amendments to the objects of the Bill inserts a specific reference to "service-based" competition.⁶³ However, it would be contradictory of many other primary objects of the Bill, and would be directly harmful to consumers, if service-based competition were to be seen in a vacuum, isolated from infrastructure competition.
83. As described above, the MNOs have competed vigorously, in particular through their investment of hundreds of billions of Rand in infrastructure, to extend coverage to all South Africans, to continuously improve network quality and download speeds, and to accommodate exponential growth in demand.

⁶¹ GSMA report, "Wholesale Open Access Networks", August 2017. Last accessed January 2018 [https://www.gsma.com/spectrum/wp-content/uploads/2017/07/GSMA_SWN-8-pager_R3_Web_Singles.pdf]

⁶² http://www.itweb.co.za/index.php?option=com_content&view=article&id=163970

⁶³ Proposed section 2 (cB).

This investment in infrastructure has also allowed massive falls in the average price of data services.

84. Service-based competition depends on infrastructure competition, which makes available network capacity that can then be sold to subscribers. Obviously, service-based competition can only compete prices down to the level of the available network capabilities that are the result of infrastructure competition, and service-based competition cannot affect the quality or capacity of network infrastructure.
85. A selective and restricted focus on service-based competition, while destroying incentives for infrastructure competition, would be directly harmful to consumers. It would be as short sighted as legislating for a monopoly bread bakery, in the hope that competition between grocery retailers would drive good quality, low prices and widespread availability of bread.
86. Moreover, a selective reading that sought to elevate the object of service-based competition, without sufficient focus on the necessary incentives for preserving infrastructure competition, would be directly contradictory (and destructive of) many other objects of the ECA, including the following:
- 86.1. *Promoting universal provision of connectivity.*⁶⁴ Service-based competition alone cannot affect the coverage, quality or capacity of mobile connectivity.

⁶⁴ Section 2 (c) of the ECA

86.2. *Encouraging investment and innovation.*⁶⁵ Enhancing service-based competition while destroying the incentives for infrastructure competition will destroy incentives to invest and innovate.

86.3. *Promoting the interests of consumers with regard to the price, quality and the variety of electronic communications services.*⁶⁶ As noted above, service-based competition alone cannot affect the coverage, quality or capacity of mobile connectivity.

Spectrum deprivation hurts incentives to invest in coverage of rural areas

87. Finally, the aspects of the Bill that contemplate the “return of spectrum” will harm the ability and incentives of MNOs to continue investing in improving coverage and quality of networks, in particular in rural areas.

88. As noted above, MTN has invested around ZAR 100 billion in capital expenditure over more than 20 years, with ZAR 70 billion in the past 10 years alone. MTN has long achieved over 98% coverage of the population with its 2G technology layer, 3G coverage has grown to over 95%, and 4G or LTE services have expanded to over 60% of the population. MTN’s data speeds have improved by more than 7 times over the past decade.

89. Spectrum is a resource that is essential to any plans which MTN may have to continue expanding coverage, and driving down the costs of mobile connectivity. Accordingly, the inability to access additional spectrum by MTN has to date had a direct adverse impact on MTN's ability to compete effectively insofar as the price of data is concerned.

⁶⁵ Section 2 (d) and (i) of the ECA

⁶⁶ Section 2 (m) and (n) of the ECA

90. However, under the provisions of the Bill, existing MNOs may lose their existing spectrum licences, because the Bill requires ICASA to make recommendations to the Minister regarding the return of spectrum.⁶⁷
91. Investing in the coverage of rural areas is typically more costly, and less profitable than comparable coverage in urban areas. Any amendments that deprive MNOs of spectrum would make it even more costly, and even less profitable to invest in expanding coverage, improving the quality, and driving down the costs, of mobile networks, in particular in rural areas.

Summation

92. Appropriate regulation should promote competition, encourage investment, reduce unnecessary costs and remove obstacles for firms to compete. The proposed regulatory interventions in the Bill will harm incentives to invest, will harm competition and will harm consumers, in particular the poorest and most vulnerable consumers. For these reasons, the implementation of the Bill will give rise to consequences that undermine the fundamental object of the Bill and the ECA, which is to provide quality coverage to all South Africans and reasonable cost.⁶⁸

THE BILL IS UNCONSTITUTIONAL

93. Against the background set out above, MTN submits that the Bill in its present form is unconstitutional in several respects:

93.1. First, the Bill violates the property clause in the Constitution.

⁶⁷ Proposed section 31E (6)

⁶⁸ Proposed section 2 (m) and (n). See also the Memorandum, paragraphs 1.7, 2, and 3.2; the Impact Assessment, pages 2, 3 and 4.

93.2. Second, the Bill fails to meet the rationality requirement imposed by section 1(c) and section 22 of the Constitution.

93.3. Third, the Bill is impermissibly vague.

94. We elaborate on each of these submissions in turn.

Infringement of property rights

95. Section 25(1) of the Constitution provides that “[n]o one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.”

96. It is generally accepted that “property” in a constitutional sense includes a vast range of other rights and interests (both real and personal) that have economic value.⁶⁹ This includes the MNO’s network and facilities, and the rights arising from the assignment to the MNO of spectrum through a spectrum licence issued by ICASA.

97. The Bill will interfere with the property rights of the MNOs in at least two ways:

97.1. *First*: MNOs will be required to provide other licensees (including the WOAN) with open access to their electronic communications facilities and networks.⁷⁰ If the MNOs are deemed entities (which we assume will be the case), they will be required do so on the basis of cost-based pricing.⁷¹

⁶⁹ See Minister of Defence, *Namibia v Mwandighi* 1992 2 SA 355 (Nm SC) at 367E-F. Section 25(4)(b) states, for the purposes of section 25, “property is not limited to land.” See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services* 2002 (4) SA 768 (CC) at para 51 where the Court said “[a]t this stage of our constitutional jurisprudence it is [...] practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of s 25.”

⁷⁰ Proposed section 43(1)

⁷¹ Proposed section 43(1B)

97.2. *Second*: The Bill envisages a compulsory “return” of high-demand spectrum by the MNOs.⁷²

98. For the reasons that follow, both forms of interference with the property rights of the MNOs would violate section 25 of the Constitution.

Expropriation of property

99. Sections 25(2) and 25(3) of the Constitution provide for the limited circumstances in which property may be expropriated:

“(2) Property may be expropriated only in terms of law of general application—

- (a) for a public purpose or in the public interest; and*
- (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

- (a) the current use of the property;*
- (b) the history of the acquisition and use of the property;*
- (c) the market value of the property;*
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
- (e) the purpose of the expropriation.”*

100. The Bill envisages an expropriation of the property rights of the MNOs in the respects identified in paragraph 97 above. It does so without the payment of

⁷² Proposed section 31(6)

compensation, and in a manner that does not reflect an equitable balance between the public interest and the interests of those affected. The Bill is therefore unconstitutional.

Arbitrary deprivation of property

101. Even if there is no expropriation, the Bill in its present form permits arbitrary deprivation of property for the reasons that follow.
102. An interference or limitation with the use, enjoyment or exploitation of private property that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society is a deprivation of that property.⁷³
103. For the reasons given in paragraph 97 above, the Bill will produce a deprivation of the property rights of the MNOs. The question is whether that deprivation is “arbitrary”.
104. A “deprivation of property is ‘arbitrary’ when the ‘law’ referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair”.⁷⁴ There must be a rational connection between the deprivation and the end sought to be achieved and, where the deprivation is severe, it must be proportionate.⁷⁵ The stronger the property interest and the more extensive the deprivation, the more compelling the

⁷³ First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services 2002 (4) SA 768 (CC) at para 57 (“**First National Bank**”); Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005 (1) SA 530 (CC) at para 32 (“**Mkontwana**”)

⁷⁴ FNB at para 100. See also Reflect-All 1025 CC and Others v MEC For Public Transport, Roads and Works, Gauteng Provincial Government, and Another 2009 (6) SA 391 (CC) at para 39, where the Constitutional Court held that for applicants to ground a successful s 25(1) challenge “*they will have to show that the impugned provisions are either procedurally unfair, or that insufficient reason is proffered for the deprivation in question, in other words it is substantively arbitrary*” (emphasis added).

⁷⁵ Reflect-All (supra) para 48; Shoprite Checkers (Pty) Ltd v MEC for Economic Development Eastern Cape 2015 6 SA 125 (CC) para 80

State's purpose must be in order to justify the deprivation. In other words, where the deprivation is extensive, the test for non-arbitrariness does not merely have regard to considerations of rationality but also has regard to whether the means chosen are disproportionate to the purpose, with reference to the availability of less restrictive means. A proportionality analysis assesses the purpose of the law in question, the nature of the property involved, the extent of the deprivation and whether there are less restrictive means available to achieve the purpose.

105. We have explained above that the Bill in its present form is not rationally connected to its stated objectives. A striking illustration is provided by the vicious circle that will be created as between the WOAN and the MNOs when it comes to network investment:

105.1. The Bill envisages that the WOAN will be required to share its infrastructure with other licensees (such as the MNOs) on the basis of "cost-based pricing".⁷⁶

105.2. In order to discharge this obligation, the Bill provides that the WOAN may require the MNOs to make their networks available to the WOAN on the basis of "cost-based pricing" if they are deemed entities (which we assume will be the case).⁷⁷

105.3. What this means is that the WOAN may look to the MNOs for electronic communications facilities on the basis of cost-based pricing, and the MNOs in turn may look to the WOAN for electronic communications facilities on the basis of cost-based pricing. This

⁷⁶ Proposed section 19A(2)(b)

⁷⁷ Proposed section 43(1B)

creates a situation of investment stasis: neither the WOAN nor the MNOs would have any incentive to invest in their networks since each may look to the other for the provision of facilities on the basis of “cost-based pricing”. In short, there would be no incentive to invest in infrastructure at all – the very antithesis of what the Bill intends to achieve.

106. We submit that the test for arbitrariness includes considerations of proportionality, because the Bill will effect a far-reaching deprivation of property. Once regard is had to proportionality, the arbitrariness of the Bill becomes even more pronounced because there are less intrusive ways in which the legislature could have sought to achieve the stated objectives of the Bill.

107. MTN therefore submits that the Bill in its present form permits arbitrary deprivation of property, in violation of section 25(1) of the Constitution.

Rationality

108. A key constitutional constraint upon Parliament’s legislative powers is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. The absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose, will result in the measure being unconstitutional.⁷⁸

⁷⁸ New National Party of SA Government of RSA and others [1999] JOL 4904 (CC) at para 19.

109. We have set out above the explanation provided by the Department as to the purpose sought to be achieved by the Bill and the establishment and operation of the WOAN scheme and the open access framework.
110. For the reasons set out above, those objectives will not be achieved by the WOAN scheme and the open access regime, as they are presently formulated. The Bill in its current form is therefore unconstitutional because it is not rationally related to a legitimate governmental objective.
111. For the same reason, the Bill violates section 22 of the Constitution.⁷⁹ Section 22 provides that the state may regulate the manner in which activities have to be conducted, provided always that such regulations are not arbitrary.⁸⁰ We have explained above that the means adopted in the Bill cannot achieve the stated objectives. The Bill in its present form therefore infringes on the rights in section 22 in an arbitrary and impermissible manner.

Vagueness

112. The Constitutional Court has emphasised that “[i]t is an important principle of the rule of law that rules be stated in a clear and accessible manner.”⁸¹ It is essential that those who are affected by a law can ascertain the extent of their rights and obligations.⁸²
113. The Bill in its present form does not clearly define or explain various terms and concepts forming part of the WOAN scheme. We shall merely give one

⁷⁹ Section 22 provides: “Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

⁸⁰ *S v Lawrence; S v Negal; S v Solberg* 1997 (10) BCLR 1348 (CC) at para 33 – 34.

⁸¹ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 at para 47. *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para 12.

⁸² *Savoi and Others v National Director of Public Prosecutions and Another* [2013] 3 All SA 548 (KZP) at para 31.

example. The definition of “wireless open access network” in the Bill makes it clear that the WOAN will be “an entity”. However, neither the Bill, the Memorandum nor the White Paper explains how this entity will come into existence. It does not indicate whether the WOAN will be established by legislation or whether it will be incorporated under the Companies Act. There is also no clarity as to the manner in which the participants in the WOAN will hold ownership or rights in the WOAN. Finally, the Bill fails to indicate what will happen if rival parties show an interest in establishing rival WOANs: who will decide which of them is “the WOAN”?

CONCLUSION

114. For all the reasons set out above, MTN submits that the Bill in its present form is unconstitutional and should not be enacted into law.

SECTION B

POLICY AND REGULATION

General Comments

115. The Bill places a heavy focus on the creation of a wholesale open access network and open access regime as if it is key to the development of the ICT industry going forward to the exclusion of existing players. The White Paper as a policy document referred to the creation of two regulators, an economic regulator and a content regulator, however all regulators by the nature of their creation ought to drive economic development.

116. Spectrum drives convergence; however, the Bill proposes a fragmented approach to the management of spectrum with the ultimate control over spectrum handed to the Minister of Telecommunications and Postal Services. The manner in which the different components of the Bill have been composed will ultimately result in further delays in the implementation which undermines the stated objectives of the White Paper.

Amendment of section 3 of the Act – Ministerial Policy and Policy Directions

117. The Bill proposes to remove the discretion of the Authority with respect to spectrum. This creates a situation where the Minister is able to instruct the Authority and the Authority must comply with the Minister's instructions. This removes the Authority's independence.

118. For example, the substitution in subsection (1) for paragraph (e) of the following: "***guidelines for*** the determination by the Authority of licence fees and spectrum fees associated with the award of the licences contemplated in Chapter 3 and chapter 5, including incentives that may apply to individual

licences where the applicant makes binding commitments to construct electronic communications networks and provide electronic communications services in rural and underserviced areas of the Republic;"

119. The deletion of the words “*guidelines for*” from subsection 1(e) amounts to the removal of control from the Authority and a further dilution of the independence of the Authority in relation to matters of license and spectrum fees. MTN submits that it is critical for the Authority to retain its independence and proposes that the wording “*guidelines for*” be reinserted.

120. A second example in relation to the dilution of the independence of the Authority is with regard to the directives issued by the Minister to the Authority in terms of section 3 (2) (d). This section of the ECA empowers the Minister to issue directives to the Authority in relation to guidelines for spectrum fees. The Bill proposes the deletion of the words “*guidelines for*” so that all directives by the Minister become instructions which the Authority must carry out. The relevant reference in the Bill is the substitution in subsection 3 (2) for paragraph (d) as follows: “***[guidelines for]*** *the radio frequency spectrum and the determination by the Authority of spectrum fees including incentives, spectrum fee exemption and spectrum fee reductions that may apply; and...*”

121. The deletion of the words “*guidelines for*” from subsection 3 2(d) above amounts to the removal of control from the Authority and a further dilution of the independence of the Authority in relation to matters of license and spectrum fees. The Minister is also given additional powers to determine incentives and exemption from, or reduction in spectrum fees. These powers should lie with an independent regulator and the circumstances under which incentives and exemptions may be granted should be clearly defined for

regulatory certainty. MTN proposes that the wording “*guidelines for*” be reinserted.

LICENSING FRAMEWORK

Amendment of section 8 of the Act - Terms and Conditions for Licences

122. By the addition of the following subsection (6): “(6) *The Authority must by regulation make provision for obligations applicable to electronic communications network service licensees for the rapid deployment of electronic communications networks or facilities and must prescribe additional terms and conditions for such licences.*”

123. It is not clear what “*additional terms and conditions for licences*” means in the proposed insertion to the Bill. MTN believes that the proposed terms and conditions should be clearly defined to ensure regulatory certainty and to avoid unintended consequences from the suggested amendment.

124. Moreover, where there is an incentive to invest, market forces will drive the investment and the speed of such investment. Rapid roll out obligations in this respect should not be imposed on licensees (who have a proven track record of infrastructure roll out). Rapid roll out obligations should be directed at the administrative approval processes for the roll out of infrastructure such as Local Authority approval, way leave applications, water permits and building plan approval.

Amendment of section 13 of Act – Transfer of Individual Licences and Ownership

125. The proposed amendment to section 13 (5) of the Act removes the requirement to conduct an inquiry in terms of section 4B of the ICASA Act⁸³ which may include, but is not limited to, a market study prior to the Authority making regulations on ownership or control of an individual licence or individual licence for broadcasting services.

126. MTN believes that the proposed amendment removes the importance of conducting an inquiry. MTN submits that market intervention should always be premised on a market inquiry to ensure the equitable allocation of resources. A market inquiry will empower the Authority to understand the fundamental objectives of efficiency and welfare maximisation.

127. In any event, the policy maker or regulator is required to make “*evidence based*” regulations⁸⁴. The removal of an obligation to conduct a section 4B inquiry goes directly against the objectives of the White Paper itself.

WIRELESS OPEN ACCESS NETWORK (“WOAN”)

General comments on the creation of the WOAN

128. The White Paper proposed that all high demand spectrum be assigned to the WOAN. Spectrum is a resource that is essential to any plans which MTN may have to continue expanding coverage and increasing capacity driving down the costs of mobile connectivity. Accordingly, the inability to access additional

⁸³ Act no 13 of 2000

⁸⁴ National Integrated ICT Policy White Paper, 28 September 2016. Paragraph 2.2 “Principles and Values” and paragraph 5.3 “Objectives”

spectrum by MTN will have an adverse effect on MTN's ability to compete effectively in the market.

129. A report by the GSMA entitled "*Single Wholesale Network*" (GSMA 2016),⁸⁵ has shown that WOANs' do not deliver on promises to provide better coverage, or lower prices for consumers.⁸⁶

130. In response to the suggested WOAN, the Operators Forum ("the Forum"), comprising of the 6 operators (Cell C, MTN, Vodacom, Multisource Telecom, Neotel, and Telkom) engaged with government on the proposals in the White Paper. The Forum made a presentation to the Director General of the Department of Telecommunications and Postal Services ("DTSP") on the 24th of February 2017. The Forum supported the transformation goals in the ICT White Paper, and urged that the policy be applied in a sustainable manner.

131. The Forum's submission included the following points:

- The WOAN should be privately owned, with a level of 30% to 51% BBBEE ownership, and no operator should acquire a controlling share.
- The operators should keep the spectrum that has already been allocated to them, at least until those licences expire.
- The operators would commit to purchase at least 30% of the WOAN's capacity for the first 8-15 years.
- The operators should retain the right to compete on infrastructure, service and network services, and would be allowed to make available access to

⁸⁵ GSMA, "*Single Wholesale Network (SWN) Case Study Update*", GSMA 2016. Also refer to paragraphs 81 and 81 of Section A in this submission.

⁸⁶ https://www.gsma.com/spectrum/wp-content/uploads/2017/07/GSMA_SWN-8-pager_R3_Web_Singles.pdf

infrastructure and other required facilities to the WOAN at commercial and non-discriminatory prices.

132. An outcome of this engagement saw the Minister of Telecommunications and Postal Services acknowledging that the operators would keep their spectrum licences until they expire in 2029 during his budget vote in May 2017. The operators would purchase at least 30 percent of the capacity created by the WOAN.⁸⁷ Notwithstanding this acknowledgment, a provision to this effect is currently not reflected in the Bill.

133. MTN submits that apart from correcting the Constitutional issues⁸⁸ should the Minister wish to continue with the WOAN despite the constitutional issues, the Bill should clarify the structure and requirements of the WOAN. Moreover, uncertainty exists regarding the proposal for the Minister to provide incentives for the WOAN and how these suggested incentives are aligned to the objects of the Act.

134. The objectives for the granting of incentives to the WOAN must be clearly defined to avoid arbitrary incentives. This should be done in line with section 2 (g) of the ECA⁸⁹ which states: *“The primary object of this act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to – promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communication services.”*

⁸⁷ <http://af.reuters.com/article/topNews/idAFKBN18K2RL-OZATP>

⁸⁸ See paragraphs 96 to 114 in Annexure A – MTN’s legal submissions on the Bill.

⁸⁹ Act No. 36 of 2005 (ECA)

Service based competition vs infrastructure based competition

135. The Bill appears to be based on “service-based competition” rather than international best practice involving a balance between infrastructure-based competition and service-based competition. The exclusive reliance on service-based competition fails to acknowledge that innovation, network coverage, quality, speed, as well as pricing in the mobile industry has been driven by infrastructure-based competition in the mobile sector.
136. The success of infrastructure-based competition is not surprising as we would expect network competition to be more effective at driving innovation and the adoption of new technologies than that of a monopolist. It is widely recognised by economists and policy makers that a monopoly typically has weaker incentives (or no incentives) to innovate.
137. Monopolies will not generally benefit as much from introducing and developing innovative improvements to their products, as any innovation will displace the old profit that they have garnished from existing profit margins and the monopoly will want to retain the same level of monopoly profits as before. This is generally called the “replacement effect” and reduces the incentives of a monopolist to innovate. In competitive markets, the incentive to innovate is much stronger as there is a chance to steal competitors’ customers and hence earn higher profits or risk losing profits to a competitor who innovates before its competitor does.
138. MTN support the implementation of a “*Hybrid Model*” which will see to it that spectrum is equitably allocated to all players in the ICT sector. The “*Hybrid Model*” as supported by MTN was proposed and discussed with the Department of Telecommunications and Postal Services in the 2017

engagements. MTN does not see any reflection of the “*Hybrid Model*” contained in the Bill.

SPECTRUM

Amendment of section 30 of Act - Administration of Radio Frequency Spectrum

139. The proposed amendments to section 30 removes the Authority’s control over the administration of radio frequency spectrum. The proposed amendment turns the Authority into an administrator without discretion. The Authority is empowered by section 30 to control, plan, administer and manage the use and licensing of radio frequency spectrum. The control and planning of radio frequency spectrum is now within the purview of the Minister. This again dilutes the independence of the Authority and turns the Department of Telecommunications and Postal Services into a *de facto* non-independent regulator.

140. MTN proposes that the sector should be regulated by an independent regulator and should retain the functions to control and plan the licensing of radio frequency spectrum.

Amendment of Section 31 of the Act - Spectrum re-farming

141. The primary object of the ECA is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to, among others:

- *“promote and facilitate the development of interoperable and interconnected electronic networks, the provision of the services contemplated in the Act and to create a technologically neutral licencing framework⁹⁰”,*
- *“encourage investment, including strategic infrastructure investment, and innovation in the communications sector⁹¹”, and*
- *“encourage the efficient use of the radio frequency spectrum⁹².”*

142. In line with the objects of the ECA, the Authority currently issues licences for radio frequency spectrum on a technologically neutral basis and within the prescripts of the national radio frequency plan (“band plan”) and the relevant radio frequency assignment plans (“assignment plans”).

143. The band plan (which reflects spectrum allocations, radio regulations and foot notes as per the 2012 World Radio Conference) specifies services and applications as opposed to the technologies for which radio frequency spectrum has been allocated. The assignment plans on the other hand specify the requirements attached to the use of a frequency band in line with the allocation and other information in the band plan.

144. The Bill defines radio frequency spectrum re-farming (“spectrum re-farming”) as the re-use of an assigned frequency band for a different technology. This means that in its essence spectrum re-farming affects the technology used in an assigned band but not the type of services allocated for the band or the technical requirements for the band.

⁹⁰ Section 2(b) of the Electronic Communications Act, 2005.

⁹¹ Section 2(d) of the Electronic Communications Act, 2005.

⁹² Section 2(e) of the Electronic Communications Act, 2005

145. The Bill provides for spectrum re-farming by licensees in section 31D. This section “*seeks to introduce provisions on spectrum re-farming since no policy previously existed for it.*”⁹³ Accordingly, the new provisions proposed to subject spectrum re-farming to regulatory approval.
146. Although MTN welcomes the introduction of the definition of spectrum re-farming, we are not convinced by the reason provided for the introduction of regulatory intervention for spectrum re-farming, especially in light of the fact that spectrum re-farming has never resulted in any harm or competition concerns in the South African market.
147. MTN believes that spectrum re-farming as currently practised without regulatory approvals puts into effect the objects of the ECA of promoting innovation, investment in infrastructure and the efficient use of scarce radio frequency spectrum resources. The introduction of regulatory approval for spectrum re-farming may cause delays.
148. MTN notes that spectrum re-farming aligns with the technologically neutral licensing framework of the Authority, the band plan and the assignment plans has in fact been very beneficial to South African society. Without spectrum re-farming implemented and practised by MTN and other MNO’s because of the lack of adequate frequency assignments, South Africa would be trailing behind the rest of the world in the deployment Long-term Evolution (LTE) networks.
149. Spectrum re-farming is currently not regulated, and licensees are able to redeploy a portion of their existing spectrum with speed to establish LTE networks while awaiting the licensing of new high demand spectrum that can

⁹³ Paragraph 3.17 “Insertion of section 31D of the Act 36 of 2005”, Memorandum on the object of the Electronic Communications Amendment Bill, 2017. (Government Gazette 41291)

be dedicated to LTE. Consequently, MTN is of the view that there is no need for the regulation of spectrum re-farming as it currently functions effectively and efficiently to ensure that licensees can respond rapidly to advances in technology while ensuring interoperability of systems and avoiding harmful interference.

150. MTN believes that spectrum re-farming as a method of national spectrum management is an important tool in ensuring the efficient use of spectrum. The International Telecommunications Union (ITU) provides for such spectrum re-farming in recommendation ITU-R SM.1603-2 (08/2014). As can be seen from the recommendation, the focus of regulation for spectrum re-farming should be on wholesale redeployment to improve existing services or introduce new services for bands which are no longer in use or whose use has been repurposed by the outcomes of the ITU World Radio Conference (WRC), as opposed to spectrum re-farming by individual licensees in respect of their assigned spectrum.

151. MTN notes that provisions for spectrum re-farming or spectrum redeployment as a method of national spectrum management are already in place in South Africa in the form of the Radio Frequency Migration Regulations and the Radio Frequency Migration Plan⁹⁴. Consequently, MTN submits that there is no need for the introduction of additional regulatory intervention in respect of spectrum re-farming.

⁹⁴ Radio Frequency Migration Regulations and the Radio Frequency Migration Plan. (Government Gazette No. 36334)

152. MTN is of the view that the changes in the Bill should be limited to the introduction of the definitions for “radio frequency spectrum re-farming”, “radio frequency migration” and “radio frequency migration plan.”

High Demand Spectrum section

153. The Bill proposes that existing assigned high demand spectrum must be returned to the Authority within 24 months of the commencement of the Electronic Communications Amendment Act, taking into account policy, market developments and extent of availability of open access networks (Section 31E (6)).

154. As a result of the proposed amendment, there is no regulatory clarity on MNO’s existing rights to their assigned high demand frequency spectrum contained in their annual frequency spectrum licences. MTN has already addressed the regulatory uncertainty and subsequent investment disincentive that this creates. MTN is concerned about the terms and conditions on which MNO’s will be required to return their assigned frequency spectrum to the Authority.

155. Furthermore, the Bill does not provide legal certainty regarding the nature of the commercial agreements to be entered into between the WOAN and MNOs’ for utilising infrastructure. This ambiguity may lead to regulatory uncertainty and ongoing disputes and or litigation and disincentivise further investment in mobile networks.

156. The conditions for an licensee to lose its license in the existing regulatory environment are: non-payment of license fees, non-compliance with license

conditions and regulations and lastly a violation of the laws of the country.⁹⁵

The provision requiring operators to return spectrum without considering whether or not there is a transgression as per the aforementioned factors is arbitrary and against licensing best practise.

SADC ROAMING

General Comments on SADC Roaming

157. Chapter 7A of the Bill imposes an obligation on licensees to comply with the SADC Roaming Policy Guidelines, which have been set out in the Bill. MTN notes that there has been no consultation on the topic of international roaming during the ICT policy review process. The National Integrated ICT Policy Review Report⁹⁶ does not make any recommendations with respect to interventions in the international roaming market. Furthermore, the SADC Model Roaming Regulations and SADC Roaming Policy Guidelines are being imposed on licensees without proper consultation, a comprehensive regulatory impact assessment or the completion of an appropriate cost study to determine if there is any market failure which requires intervention.

158. A significant amount of work has been completed during 2016 and 2017 to address the concerns raised by the Authority and the SADC Ministerial committee for roaming in relation to the SADC Roaming Policy Guidelines and suggested glidepath. Licensees have submitted calculations illustrating that the roaming rates of South African Licensees do comply with the glidepath. This was achieved in the absence of any regulatory intervention. At a recent SADC ICT Ministers' meeting held in September 2017 on the topic of SADC

⁹⁵ See paragraph 65 in Section A regarding investment incentives by MNO's

⁹⁶ Department of Telecommunication and Postal Services, March 2015

roaming, the then Minister of Communications (Honourable Minister, Ayanda Dlodlo, MP) announced that South Africa is fully compliant with the roaming glidepath⁹⁷. For this reason, MTN submits that it is unclear why the SADC Roaming provisions have been inserted into the Bill and proposes that chapter 7A be deleted.

159. In general, and notwithstanding the, MTN supports the provision of transparent, fair and non-discriminatory SADC roaming prices and the provision of adequate information.

160. The Bill proposes that: “*prices for roaming services should be cost-based and not be too excessive in comparison with prices charged for the same services at national level*”⁹⁸. MTN submits that this provision is ambiguous because roaming services are not easily comparable with the same services at national level due to additional input costs required to implement international roaming services such as Inter Operator Tariffs (“IOT”) which are subject to bilateral commercial negotiations.

161. The proposed subsection 42A(1)(d) states that: “*prices charged and other obligations imposed on electronic communications service licensees should not distort the competitive conditions between electronic communications service providers within the SADC region;*”. It is not clear what process should be followed to determine that prices and obligations imposed distort the competitive conditions between licensees within the SADC region. Such a

⁹⁷ Minister Ayanda Dlodlo: Address by Minister of Communications, during the roundtable discussion on roaming at SADC ICT Minister's meeting, Fairmont Zimbali resort, KZN (05/09/2017). Available at: <http://www.polity.org.za/article/doc-ayanda-dlodlo-address-by-minister-of-communications-during-the-roundtable-discussion-on-roaming-at-sadc-ict-ministers-meeting-fairmont-zimbali-resort-kzn-05092017-2017-09-06>

⁹⁸ 42A(1)(d)

process would require an inquiry across various legal jurisdictions. The parameters for this review do not exist. As a result, MTN is not in a position to adequately comment on the proposal. It is vague and requires further clarification.

162. 42A (3) proposed that SADC roaming regulations may be conditional on reciprocal terms and conditions being imposed on other SADC countries or their National Regulatory Authority (“NRA”). It is not clear how Licensees or the Authority will be able to impose terms on SADC countries or the NRA in the absence of bilateral agreements between member states which are enforced by the NRA.

OPEN ACCESS

163. Section 43 1B of the Bill proposes the following: “An electronic communications network service licensee that is determined a deemed entity by the Authority in the wholesale open access regulations must, in addition to the requirement in subsection (1), comply with the following open access principles on its electronic communications network:

(a) Active infrastructure sharing that includes but not limited to national roaming, radio access network sharing and enabling mobile virtual network operators, for voice and data based on the latest generation of technologies;

(b) cost-based pricing;

(c) access to its electronic communications network or electronic communications facilities as prescribed by Authority; and

(d) specific network and population coverage targets.”

164. In relation to the cost based pricing principle in subsection 431B(b) which requires a deemed 'open access' network provider to provide cost-based pricing, the Bill does not explain how cost-based pricing will be determined nor does it clarify the criteria for the determination of an "open access" network.
165. Regarding the determination of an "open access" network, the Authority must ensure that the determination is clear and in line with the provisions of sound and efficient economic principles where cost-based remedies are imposed in monopoly markets where there is abuse of dominance. In addition, this may safeguard South Africa with respect to encouraging Foreign Direct Investment (FDI) for the economy.
166. MTN submits that the "open access" principles propose in the Bill are arbitrary and not in line with the principle that the Authority can only impose licence conditions on an operator that has Significant Market Power (SMP) to remedy the identified market failure where the abuse of dominance is evidenced.
167. Moreover, MTN submits that the Bill's proposals regarding "open- access" are unprecedented world-over, in that regulators are struggling with the issue of how and if to regulate markets where significant investments are needed to achieve broadband access for all.
168. The open access pricing principle proposed assumes that the cost of investment in telecommunications networks are fixed but not sunk which means that it can always be redeployed and used to provide an alternative service. This is not the case in telecommunication investments. Accordingly, the adoption of cost-based pricing provides limited economic incentives for new investment and innovation to licensees as there is no legal certainty that private firms will make an adequate return on investment. Therefore, the

proposed amendment ignores the fact that South Africa is dependent on continued new capital investment. This inherent trade-off between cost-based access regulation and investment incentives means the incentive for required capital investments may no longer exist for private sector firms if implemented.

COMPETITION MATTERS

The amendment of Section 67 (a) relating to market enquiry

169. The Bill seeks to require the Authority to define all the relevant markets and market segments relevant to the broadcasting and electronic communications sectors, including ICT services dependent on the use and provision of the Internet, including internet exchange points, hosting and data centre services, after 12 months. In addition, the Authority must conduct market reviews of the defined markets and market segments, prioritizing those markets with the most significant impact on consumer pricing, quality of service and access by users to a choice of services and markets relevant to policy directions issued by the Minister.

170. The ICT sector requires regulatory certainty and transparency, hence MTN welcomes the provision requiring the Authority to define the relevant markets. However, responses to one market definition are intrinsically linked to future market definition exercises and the inter linkages between wholesale and retail market definitions and the potential for retail markets to become fully deregulated if effective wholesale regulations are in place. Therefore, MTN would like to caution against the extremely ambitious timeline of twelve months and submits that eighteen months would be more realistic.

The insertion of subsection (4C)

171. The proposed insertion of 4C in the Bill states a market review under chapter 10 will not take longer than 12 months. MTN views this proposed provision as commendable, the reality is the market definition exercise is dependent on the complexity of the market under investigation and may therefore necessitate an analysis extending this timeframe beyond 12 months.

CONCLUSION

172. MTN supports the objectives of the Bill in respect of economic transformation and meaningful participation in the economy as well as expanding access to networks in rural and underserved areas. However, we believe that these objectives will not be achieved by a WOAN, as currently contemplated in the Bill. Such a WOAN would destroy investment incentives, and eliminate infrastructure competition, which has been the engine behind quantum improvements in mobile coverage, quality and consumer value.

173. MTN submits that the Bill will not achieve its stated objects but will produce the very opposite results. This renders the Bill unconstitutional because the Bill in its present form is not rationally connected to its stated purpose and permits an arbitrary deprivation of property.

174. Without derogating from what we have said above, MTN submits that the Bill should clarify the constitution and requirements of the WOAN. Moreover, uncertainty exists regarding the Minister providing incentives for the WOAN and how these suggested incentives are aligned to the objects of the ECA.

175. International practice has shown that where private sector firms have been permitted to invest and innovate in the ICT wholesale market, this has best suited the dynamic nature of the ICT industry. South Africa should follow and the suggested stockpiling of spectrum to a single wholesale network as the monopoly is not prudent for South Africa's advancement.
176. Cost-based open access devalues past investment and undermines any network advantage. Service-based competition on the basis of a common wholesale input means all players are competing on the same basis of price, product and are only differentiating themselves on their distribution strategy. This raises concerns for industrial policy towards a monopoly operator forcing competition only on the basis of its single cost, coverage and quality position.
177. MTN submits that the WOAN and cost-based open access should be reconsidered to include the elements of hosting on commercial terms, allowing secondary trading of existing spectrum and licensing of unreserved spectrum. The Amendments in the Bill give substantial leeway for highly intrusive legislation and regulations which MTN believes may be short-sighted and unprecedented world-over.
178. MTN understands this key policy requirements for South Africa and has previously proposed a workable alternative with industry alignment, as a compromise to agree to a limited spectrum set-aside for a WOAN with commitments to host the WOAN on existing infrastructure by private firms in the ICT sector. Throughout the MTN engagements with the DTSPS this has consistently been MTN's stance and approach and we strongly believe that it is in the interests of the ICT sector, consumers and the South African economy as a whole, that the Bill be reconsidered.