Telkom

Submission to the Department of Telecommunications and Postal Services

Written Comments on Electronic Communication Amendment Bill published on 17 November 2017

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1 BACKGROUND

The National Integrated ICT Policy White Paper (the "**ICT Policy**") was published on 3 October 2016. The Electronic Communications Act Amendment Bill (the "**Bill**"), published in GG37481 on 17 November 2017, is one of the pieces of legislation envisaged by the Department of Telecommunications and Postal Services (the "**DTPS**") to enable implementation of the ICT Policy. Telkom SA SOC Limited ("**Telkom**") welcomes the opportunity to provide comments on the Bill.

In this submission, references in Telkom's submission to the "**Authority**" and "**ICASA**" are used interchangeably.

Telkom's submission consists of mainly three parts. A high-level executive summary of key points is provided in Section 2. Comments on key themes are provided in Section 3 followed by specific comments and proposals on the provisions of the Bill in Section 4.

2 EXECUTIVE SUMMARY

It is our understanding that the current Electronic Communications Amendment Bill of 2017 (the "**Bill**") is aimed at promoting service-based competition, and an inclusive, innovative, digital and knowledge-based society in South Africa. Telkom supports the general thrust of the Bill. In this submission, Telkom will make proposals on areas in which the Bill may be improved and to address any unintended consequences emanating from its current formulation. In this regard, Telkom makes submissions on the proposed amendments relating to the Wireless Open Access Network ("**WOAN**"), spectrum, open access, rapid deployment, the imposition of terms and conditions on licensees, universal service obligations ("**USOs**"), consumer matters and B-BBEE issues. In summary, Telkom submits as follows:

2.1 **Open access**: Telkom supports the application of open access principles in the mobile context, including cost-based pricing. This will decrease mobile network expansion costs and facilitate service-based competition. Telkom contends that applying open access principles to fixed services may be counterproductive and increase barriers to entry. There is already effective competition in this market. Cost-based pricing in the fixed space will stifle infrastructure deployment by disincentivising investment. This will negatively affect jobs and economic development. Furthermore, Telkom is already providing wholesale open access, which enables service-based competition.

2.2 **Rapid deployment**: Telkom is concerned that the proposed governance framework for rapid deployment adds more bureaucracy and institutions to the existing dispensation.

In our view, it is important that the envisaged interventions be located within the mandate of SIP-15 of the Presidential Infrastructure Coordinating Commission. The overall aim should be the lowering of regulatory, policy and administrative bottlenecks.

2.3 **The WOAN**: Telkom supports the creation of a viable WOAN. The latter is an ideal vehicle to level the playing field in mobile communications and challenge the power of the current duopoly. It should be designed in a manner that will lower the barriers to entry for smaller operators to effectively compete with Vodacom and MTN. For example, through the WOAN, smaller players will be able to expand their network coverage without incurring the associated CAPEX, especially in rural areas. It further presents the possibility for obtaining network capacity more cost-effectively.

In order to ensure the viability of the WOAN, Telkom supports the policy that all unassigned High Demand Spectrum (HDS) should be assigned to the WOAN. No HDS should therefore be assigned outside of the WOAN. Telkom proposes a high level WOAN construct, which can be practically and viably implemented in South Africa. This construct is discussed in section 3 below.

2.4 **Radio Frequency Spectrum:** The Bill proposes changes regarding the use of the radio frequency spectrum, especially relating to HDS. Many of these proposals are supported. Telkom does not support the return of currently assigned IMT spectrum. This will negatively affect investor confidence and hinder future network expansion. Telkom therefore supports a hybrid model of facilities based competition between the WOAN (with all unassigned HDS) and current MNOs (existing assigned HDS). Telkom also has concerns regarding the possible negative impact on the market resulting from proposed changes relating to spectrum trading and refarming. In our view, spectrum trading should be subject to competition and regulatory approval. In line with international best practice, spectrum refarming should not be regulated.

2.5 **Competition Commission and the Sector Regulator:** Telkom supports the proposed greater alignment and interaction between the sector regulator and the Competition Commission. In the submission, Telkom sets out the experience in other jurisdictions from which lessons may be drawn. The overriding principle should be regulatory certainty and stability.

2.6 **BEE:** Telkom recommends the full alignment between the B-BBEE Act, the ICT Sector Code and the ECA. Telkom proposes that adequate provision should be made to allow licensees to comply with all elements of the ICT Sector Code.

2.7 **USOs:** Telkom contends that USOs should not add an undue regulatory burden on operators. Telkom already has extensive USOs and makes a contribution to the Universal Service Fund. These USOs which were imposed on Telkom under a previous regulatory regime are more onerous than those of similarly licensed operators, and should be taken into account when proposing additional USOs. In addition, Telkom contends that additional USOs on spectrum licensees only be applied to HDS licensees with significant market power.

2.8 **Quality of Service ("QoS")**: ICASA is to prescribe minimum QoS for consumers in line with SA Connect. This is likely to increase the cost to communicate.

3 The WOAN

3.1 Telkom supports the creation of a WOAN. The implementation of a WOAN must be prioritised and incumbent mobile operators with significant market power must be mandated to share their networks with the WOAN operator to facilitate its expeditious entry into the market.

3.2 Drawing from international experience, Telkom proposes a WOAN construct relevant to the South African context. The proposed WOAN construct is contained in a technical report attached hereto as Annexure A.

3.3 The salient points of the technical report, which Telkom has identified as being able to contribute to the successful implementation of a WOAN in South Africa, are the following:

3.3.1 The WOAN licensee should be a wholesale-only operator giving open and equal treatment to all retail service providers. If a WOAN is to be operated and/or partially owned by one or more separate division/s of an existing network operator (which has virtues in terms of skill set and open access arrangements) then that operator must have a wholesale vs retail separation such that retail operators can be assured that the WOAN is not giving any advantage to any particular retail operator.

3.3.2 The WOAN should be an independent commercial entity which is privately owned, designed, built and operated.

3.3.3 There should be unwavering political and governmental support.

3.3.4 There should be a supportive, clear and stable regulatory framework. This may include mechanisms to swiftly resolve any challenges that may impede its implementation.

3.3.5 The WOAN should have access to sufficient capital. The licensing process should include a due diligence verification of the capacity of the proposed investors to fund the required deployment of the WOAN.

3.3.6 A licence period of 20 years is recommended within which the WOAN model, including the assignment of spectrum rights to the WOAN, will not be substantially changed. Spectrum must be assigned to the WOAN with a reasonable concession on the licence fees for this period.

3.3.7 To ensure the sustainability of the WOAN, all available HDS should be assigned to the WOAN. The more spectrum is made available to MNOs, the less incentive there will be to purchase bandwidth/capacity from the WOAN. Operators must be incentivised to purchase capacity from the WOAN, as this will in turn help assure economic viability of the WOAN as a business venture, which will allow it to attract and retain private capital.

3.3.8 The WOAN should have a lower cost structure, which can be achieved by the allocation of low band spectrum at no or little cost with a concession period of 20 years, the achievement of a minimum sales volume and open access to existing (passive) infrastructure assets of wireless service providers at near incremental cost.

3.3.9 The WOAN should be as minimally prescriptive with respect to technology as possible to ensure that the structure does not distort economically efficient choices of technology, and that the model is robust in that the most economically efficient choices are made over time as technology costs and capabilities change.

3.3.10 The WOAN should support multiple application and customer types as well as ensure service reliability and quality.

3.3.11 The WOAN must be granted additional spectrum rights to cope with growth and must not be prohibited from conversion of sites to more sectors, nor from cell-site splits, nor from micro-cellular deployments in loaded hotspots.

3.3.12 In order to enable the WOAN to rapidly achieve national coverage objectives, regulation must allow it immediate access to the infrastructure of existing MNOs. This would avoid the WOAN duplicating assets unnecessarily. The regulation of rapid deployment should prioritise the deployment of the WOAN.

3.3.13 Telkom proposes a pragmatic, three-phased rollout. Phase 1 envisages a rapid nationwide deployment at low costs on existing sites where the focus is on improving affordability and coverage using existing MNO sites through mandatory open access. Phase 2 addresses extension of coverage in areas that are not covered and economically not feasible. There should be subsidisation of coverage in areas that would not otherwise have been economically attractive in Phase 2 deployment. A Phase 3 for additional capacity augmentation in urban areas will be needed around the 2025 timeframe.

3.3.14 Telkom proposes adequate regulatory oversight to ensure that planning, deployment and sale of capacity does not undermine effective service-based competition.

3.3.15 Furthermore, as pointed out in the attached economic report, included as Annexure B to this submission, there are certain regulatory interventions that need to be addressed to contribute to the successful functioning of the WOAN, which would enhance competition in the electronic communications sector.

4 Spectrum

4.1 Spectrum planning and oversight

4.1.1 Telkom supports the spectrum planning function, including the preparation of the national radio frequency plan, to move to the Minister responsible for ICT in Africa, as this is an extension of the ITU World Radiocommunication Conference (WRC) process, which is also under control of the Minister of DTPS. These and other matters are covered in section 4.

4.2 Return of spectrum

4.2.1 The return of spectrum in the amendments propose in section 31E(6) of the Bill has created uncertainty in the market. If this amendment is carried through, it will have an

adverse impact on future investments in the network. It may also negatively affect the value of stock in licensed entities.

4.2.2 Telkom proposes that a firm decision be taken in this regard and a hybrid model be followed, in the sense that the currently assigned spectrum remains with licensees and unassigned spectrum is licensed to the WOAN.

4.3 Spectrum trading

4.3.1 Telkom is of the view that trading of HDS could be allowed but should be subject to strict competition and regulatory scrutiny. This is further elaborated on in the economic report attached as Annexure B hereto. The Authority and the Competition Commission must scrutinise any transaction involving HDS.

4.3.2 The prohibition on HDS trading may have a negative impact on the market as it may limit potential Mergers and Acquisitions (M&As). South Africa's duopolistic mobile telecommunications market makes it very difficult for smaller operators, such as Telkom, to grow their market share. This is despite there being a strong policy focus on increasing competition in the sector. Allowing smaller firms to grow through M&As, can further enhance competition. If spectrum trading or the transfer of spectrum is not allowed, the value of these transactions will be severely diminished, and will cause the duopolistic market structure to remain in place for a longer period.

4.4 Spectrum refarming

4.4.1 The Bill proposes a move away from the internationally accepted model of technology neutrality to a system of command and control where technology changes must be approved by the Authority. Spectrum licences are currently assigned on a technology neutral basis, which gives licensees broad rights in terms of deploying radio equipment in the assigned spectrum. The proposed introduction of section 31D could have a negative impact on the market and operator's ability to introduce new technologies.

4.4.2 Whereas Telkom appreciates the objective of avoiding negative impact on competition through the proposed regulation of spectrum refarming, Telkom is concerned that it could curtail, or as a minimum, delay the efforts of the operators to introduce, for

example, faster broadband services (e.g. moving from 4G to 5G technology) and thus reducing investments, or as a minimum, delaying such efforts.

4.4.3 Instead of regulating spectrum refarming, Telkom recommends that any party intending to refarm spectrum should notify the Authority accordingly.

4.4.4 Telkom is also concerned that the use of the word “technology” in respect of radio frequency spectrum may be subjected to an interpretation that is too wide and over-reaching and will lead to uncertainty and possible abuse. For example, it is assumed that a change from 4G to 5G or changing fixed services to mobile services (as examples) will require regulatory approval under the proposed provisions. However, it is not clear if subtle changes will also require regulatory approval, for example, implementing certain elements of a new standard (e.g. 3GPP release 13 is deployed and elements of release 14 is introduced). Telkom recommends that a narrower definition of “technology” be provided or that the term “technology” be defined for the purposes of its use in the ECA.

4.4.5 All current spectrum licences are technology neutral, and there is no indication on the licence as to what “technology” has been deployed in each frequency band. It is not clear how the transition to the new regime will be implemented. This uncertainty applies equally in relation to the period prior to the necessary regulations being prescribed. It is also noted that licensees have not deployed the same technology in similar frequency bands so it is not clear which technology will be the “standard” for each frequency band.

4.4.6 Considering the above, Telkom recommends that the provisions pertaining to refarming be removed from the Bill. The internationally accepted regime of technology neutrality must be retained. This is necessary, not only for the WOAN, but also for the incumbent operators to ensure effective competition.

5 Open access

5.1 Telkom notes that, although the Bill defines ‘general open access principles’ with reference to the provision of wholesale open access, the phrase ‘wholesale open access’ is itself not defined. In this regard Telkom is of the view that the principle of wholesale open access should refer to operators making available to other licensed

entities, based on economically sound principles, the use of the fixed and/or mobile last-mile (access) infrastructure of such operators.

5.2 Telkom is further of the view that wholesale open access should refer to network operators facilitating service based competition.

5.3 The obligation on fixed operators to offer access to all network layers is undesirable as networks are already shared and any additional regulatory burden will be a disincentive to fibre roll-out. Telkom is of the view that cost-based pricing in the fixed space will stifle infrastructure deployment, investment, jobs and economic development, which will have a negative impact on consumers and the population at large. Please refer to the economic report attached as Annexure B in this regard.

5.4 Telkom however supports the application of open access principles in the mobile context, which is dominated by vertically integrated duopolists. Regulated access to the RANs of MNOs, including cost-based pricing, will facilitate service based competition and decrease operators' expansion costs. This is also covered in Annexure B.

5.5 Telkom is further of the view that technical and economic feasibility and the efficient use of electronic communications networks should remain as criteria for access to infrastructure.

6 Rapid deployment

6.1 While Telkom welcomes the rapid deployment guidelines, it would like to caution that intergovernmental coordination and approvals have a potential to complicate and delay the rapid deployment processes.

6.2 The creation of a new structure in the form of Rapid Deployment National Coordinating Centre (RDNCC) and the rapid deployment steering committee (RDSC) add unnecessary bureaucracy to an already cumbersome and long process. With regard to the involvement by the Minister in the affairs and establishment of RDNCC and RDSC, the proposed coordination and engagement with so many stakeholders and government structures will delay the approvals. The extent of the influence of the RDNCC on other government departments is unclear and must be clarified.

6.3 The expectation to have confidential information shared in the form of central GIS database with competitors is further problematic as it exposes commercially sensitive information.

6.4 Government may consider a coordinating team representing all operators to drive rapid deployment. The Minister may consider a role as adjudicator in the resolution of disputes. Telkom proposes processes to ensure collaboration between various entities to ensure rapid infrastructure deployment. Such collaboration will assist in having fewer companies applying for wayleaves and building and trenching. Further, the costs for deployment are shared, collaboration eliminates deprivation of wayleaves by those hoarding land but have no intention to build and the work of the proposed RDNCC is limited as it deals with fewer applications.

6.5 Telkom is further concerned that section 20F is not clear on the recourse and/or enforcement measures available to the Centre and ultimately the Authority, where a municipality refuses to make provision for the installation of electronic communications networks and facilities. A similar concern may be applied to sections 20B and 20D, regarding the intergovernmental co-operation with municipalities and other organs of state.

6.6 Further, the streamlined processes of municipalities involved in the rapid deployment of infrastructure are proposed in this submission to be prescribed by regulation. Such regulated obligations should seek only to streamline processes for the efficient and rapid roll-out of electronic communications networks and facilities. In this way, the proposed streamlined processes are to be attained in pursuance of a legitimate government object and does not detract from the rights of municipalities to plan and decide on infrastructure. This is especially so, given the provisions of section 41(1)(h)(v) of the Constitution which provides that "*All spheres of government and all organs of state within each sphere must… co-operate with one another in mutual trust and good faith by… adhering to agreed procedures*". Municipalities should not therefore unreasonably refuse to comply with the obligations arising from the amendments.

6.6 In the case of deployment of electronic communication facilities, where possible, notification and application procedures for rapid deployment should take no more than 30 days, from the date of complete application submission to date of final decision by the relevant entities (see page 98 of the ICT Policy White Paper); and decision-making

entities must be required to communicate with applicants, within the 30-day period, if any delay will be experienced, including providing reasons for the delay.

7 Additional licence terms and conditions

7.1 Telkom notes that ICASA is required to consider prescribing additional terms and conditions that may be applied to any individual licence or class licence without a market study. Telkom is of the view that a market study is consistent with the principle of evidence-based regulation and that a market study must be undertaken prior to any amendment of licence terms and conditions.

7.2 Moreover, Telkom is of the view that any additional terms and conditions to be imposed by the Authority must be based on market reviews in order to ensure that such terms and conditions are relevant and must not distort competition.

8 USOs

8.1 The Bill proposes that the Authority may, by regulation, make provision of the designation of licensees to whom USOs are to be applicable and may prescribe additional terms and conditions in respect of the relevant USOs on such designated licensees. Telkom submits that it already carries onerous USOs, which other similarly licensed operators do not have, such as the maintenance of basic voice and public payphone services. In this regard, Telkom proposes that the allocation of USOs should be based on a market study which identifies market access gaps; that allocation be equitable amongst licensees; and that the Authority should quantify the financial impact of legacy USOs prior to prescribing any additional obligations.

8.2 This approach must be supported by a USO allocation, funding and management model which is properly designed to ensure alignment between regulation and ICT policy objectives.

8.3 Further, Telkom is of the view that imposing additional obligations on all “deemed” operators should be limited to the dominant MNOs with significant market power (SMP) rather than including all those with access to HDS.

8.4 USO projects can be funded by means of a government subsidy from the Universal Service and Access Fund (USAF) or any such relevant fund. These projects should be contracted in a fair, open and transparent basis.

9 Consumer issues

9.1 Telkom notes that the Authority must prescribe quality of service standards with reference to targets in the SA Connect policy of 2013. It is unclear whether these standards refer to network performance standards which must be met by licensees over various technologies in line with a technical interpretation of Quality of Service ("QoS"), or whether they refer to the minimum standards for end-user and subscribers as currently prescribed in the End-User and Subscriber Service Charter regulations. If they refer to network QoS, this may negatively affect the ability of operators to differentiate and provide service to customers based on service levels.

9.2 Telkom is further of the view that such QoS standards may add additional performance standards and compliance costs to licensees, which may adversely affect the cost to communicate. Any alignment of QoS with targets in SA Connect must be realistic, feasible and achievable.

10 B-BBEE

10.1 Telkom notes that ICASA must prescribe regulations to apply the B-BBEE ICT Sector Code to existing and new licences, exemptions or other authorisations including spectrum assignment to promote B-BBEEE within 12 months of the ECA. The application to 'all authorisations' is too broad and it is unclear which authorisations are being referred to.

10.2 Telkom is of the view that industry will need more time to ensure compliance with the provisions of the B-BBEE ICT Sector Code, which are extensive. In this regard Telkom proposes that firms be afforded time to comply with ICASA regulations on the B-BBEE sector code after a period of 12 months has expired from the date of promulgation of such regulations.

10.3 Telkom recommends that the following factors be considered as appropriate to apply the ICT Sector Code:

10.3.1 ICASA must determine the minimum requirements or targets of achievement for B-BBEE achievement as a licensing requirement;

10.3.2 the minimum requirements should be prescribed as a particular minimum B-BBEE status level of contribution, by regulation e.g. ICASA prescribes that licence applicants are to demonstrate the attainment of a B-BBEE Status Level 6; and

10.3.3 the manner in which applicants are to determine their B-BBEE Status Level of Contribution is then determined by a B-BBEE Verification Agency in terms of the ICT Sector Code, resulting in a B-BBEE certificate being issued.

11 Transitional provisions

11.1 In several instances, the Bill introduces new provisions mandating ICASA to prescribe regulations. In many cases, no time lines have been prescribed for promulgating such new regulations. This is a concern as the uncertainty as to when such regulations will be promulgated will negatively impact the functioning of the sector, especially considering the lack of transitional provisions.

11.2 There are no transitional provisions to deal with the fact that, in many cases, there are already currently prescribed regulations which deal with the specific topics addressed in the Bill. This may cause uncertainty and a vacuum regarding the current regulations and it may be unclear whether such regulations will remain in force post-amendment. Accordingly, suitable transitional provisions must be prescribed in the Bill for the continuity and certainty of subordinated/secondary legislation i.e. regulations. Telkom's submission addresses these matters further and proposes specific transitional provisions.

12 Competition regulation

12.1 Telkom proposes that the mandates of the Competition Commission and the Authority be clearly spelled out. The cooperation between these two entities must avoid an increase in regulatory costs, forum shopping and lessen the potential for contradictory decisions in respect of the same matter.

12.2 Accordingly, Telkom recommends that any concurrency agreement between the sector regulator and the competition regulator clearly sets boundaries regarding the respective mandates of the two to ensure that each body is given a mandate that is best suited to it. The current memorandum of agreement between the parties has often led to uncertainty, forum shopping and a number of delays in those cases in which the

parties had concurrent jurisdiction. An example is the abandoned merger between Vodacom and Neotel.

12.3 A number of approaches have been developed in a number of jurisdictions in order to better deal with the concerns and / or conflicts that emanate from concurrent jurisdictional issues. Telkom suggests that these be considered. The United Nations Conference on Trade and Development cited in CUTS in 2008 ("**UNCTD**")[1] identified five possible frameworks that can be used in resolving conflicting mandates between competition authorities and sector regulators as set out below:

12.3.1 **Approach I**: combining technical and economic regulation in a sector regulator and leaving competition enforcement exclusively in the hands of the competition authority;

12.3.2 **Approach II**: combining technical and economic regulation in a sector regulator and giving it some or all competition law enforcement functions (United States);

12.3.3 **Approach III**: combining technical and economic regulation in a sector regulator and giving it competition law enforcement functions which are to be performed in collaboration with the competition authority (South Africa, United Kingdom and Namibia - Namibia appears to be in favour of an approach in which the Namibia Competition Commission has primacy over competition law issues);

12.3.4 **Approach IV**: technical regulation as a standalone function for the sector regulator and economic regulation is handled by the competition authority; and

12.3.5 **Approach V**: relying solely on competition law enforced by the competition authority for all aspects of regulation (Australia has adopted a hybrid model of (IV) and (V)).

12.4 In the paragraphs that follow, we discuss the approaches that have been adopted by the United Kingdom, Namibia, Australia and United States of America to resolve or avoid conflicting mandates between competition authorities and sector regulators.

12.4.1 **United Kingdom**

12.4.1.1 The UK's concurrency arrangements refer primarily to the powers given to the sector regulators to apply aspects of competition law in their industry. These

[1] http://www.cuts-international.org/pdf/Viewpointpaper-CompAuthoritiesSecRegulators.pdf.

powers are set out in the United Kingdom Competition Act 1998. These powers refer to powers to investigate and take action against:

12.4.1.1.1 firms engaging in anticompetitive agreements (e.g. price fixing, cartels, etc); and

12.4.1.1.2 abuse by firms of their dominant market position (e.g. imposing unfair prices or trading conditions; limiting production markets or technical developments to the detriment of consumers, etc).[2]

12.4.1.2 The concurrency regime in the United Kingdom can be seen as a model to deal with conflicting mandates between competition authority and sector regulators. The Competition and Markets Authority (the "**CMA**") has concurrent powers under specific consumer protection legislation and within the framework of competition law for the information and technology communications sector. The sector regulators are required to consider whether the use of their competition law powers is more appropriate than using sector specific regulatory powers before taking action.

12.4.1.3 The concurrency regulatory regime is enhanced by the Enterprise and Regulatory Reform Act 2013 (the "**ERRA**") which encourages the sector regulators to consider the use of their ex post competition powers before using their direct ex-ante regulatory powers. This is important as it ensures that a consistent and coordinated approach is taken for concurrent matters and to decide which body is best placed to lead in each case. The current Memorandum of Understanding between the Competition Commission and ICASA does not provide for this approach and can be seen as the reason for protracted litigation, forum sharing and delays with processing mergers in the information and communication technology space.

12.4.1.4 The ERRA sets out institutions and mechanisms for co-operation between the CMA and the sector regulators over concurrency policy, procedures and case allocation. The ERRA led to the establishment of the UK Competition Network (the "**UKCN**"). The UKCN is the independent forum to facilitate communication and cooperation between the regulators and the CMA. It coordinates the use of competition powers and concurrency in the United Kingdom. The UKCN ensures the coordination of cases and exchanges of specialist CMA and regulator staff on a case-by-case basis

[2] Jon Stern '*The use of competition powers by sector regulators – the origins, experience and pote nti al f utur e of t he U K's c onc urr enc y arr ange men ts'* (2014).

through bilateral coordination. This means that the sector regulator can second its employee to the CMA to assist with an investigation of a merger or a prohibited practice instead of taking a leading role that may lead to a duplication of processes and delays.

12.4.1.5 Another important feature of the concurrency regime that has led to the success thereof, is that the ERRA empowers the Secretary of State (we anticipate that this will be the Minister responsible for competition law in South Africa) to make an order to remove the competition functions from the sector regulator if he or she considers that it is appropriate to do so for the purpose of promoting competition, within any market or markets in the United Kingdom for the benefit of consumers.[3] We do caution that such a power if it were to be adopted in South Africa, must be used with circumspection.

12.4.1.6 The ERRA allows the CMA, in certain circumstances, to take over a case from a concurrent regulator. This should not be seen as usurping the powers of the regulator as it would facilitate the expeditious resolution of cases.

12.4.1.7 Another added benefit of the concurrency regime model in the United Kingdom relates to how market studies are conducted to avoid duplication. While the sector regulators have the power to conduct market investigations with references to the CMA with respect to activities in their sectors, the sector regulator and CMA can work together on the market investigation to avoid any duplication. The drafters of the Bill should take this into account as it will ensure that outcomes of the market review by ICASA and market inquiries by the Competition Commission do not conflict or lead to unintended outcomes and uncertainty.

12.4.1.8 While the regulatory regime in the United Kingdom may be seen to be usurping the powers of the sector regulators, Telkom is of the view that such an approach places competition law primacy on the Competition Commission and ensures that issues such as forum shopping and delays with processing matters are eliminated and brings certainty to the fast developing market.

12.4.2 **Namibia**

[3] Section 52 of the Enterprise and Regulatory Reform Act 2013.

12.4.2.1 Namibia also appears to apply Approach III of the UNCTD approaches to resolving conflicting mandates between competition authorities and sector regulators.

12.4.2.2 However, in many of the cases handled by the Namibia Competition Commission (the "**NaCC**"), more than one approach has been used depending on the sector regulator involved, the mandate it has over competition issues and its specific interest in the case.

12.4.2.3 For instance, in the absence of co-operation between the NaCC and a sector regulator, particularly during the drafting of respective legislation, it appears that that Approach II is inadvertently taken in Namibia. Approach II entails that in addition to the technical and economic regulation function, sector regulators are also tasked with some or all of the competition law enforcement functions.

12.4.2.4 Namibia's adoption of Approach II in certain instances implies sharing jurisdiction over competition with sector regulators. In this event, the NaCC and the concerned sector regulator may not employ the same methods in dealing with competition cases, which –

12.4.2.4.1 creates inconsistencies in handling cases dealt with by the NaCC and those dealt with by the sector regulator; and

12.4.2.4.2 leads to forum shopping whereby firms choose to turn to the institution which is likely to address their cases in their best interests.

12.4.2.5 The ideal situation, which the NaCC and sector regulators are working towards is the conclusion of Memoranda of Understandings ("MOUs") which places competition matters with the NaCC and leaving technical and economic regulation issues with the sector regulators.

12.4.2.6 The Namibia concurrency approach appears to have the same prevailing problems that are experienced in South Africa at present and would not assist in addressing the current concurrency challenges.

12.4.3 **United States**

12.4.3.1 Here it is acknowledged that the electronic communications sector is characterised by highly complex products and services and rapid technological advances. It is accordingly essential to have detailed regulations governing aspects such as

technical standards, interconnection, numbering and spectrum allocation.[4] It appears that the preferred model in the US is to confer concurrent powers on competition and telecommunications regulators to regulate competition in the sector. Particularly over merger reviews, where the sector specific regulator is given authority to evaluate mergers in the communications sector.[5]

12.4.3.2 The Federal Communications Commission ("FCC") is the US telecommunications regulator created by the Communications Act of 1934. It regulates interstate communications by radio, television, wire, satellite, and cable and addresses matters relating to broadband, competition, the spectrum, the media, public safety and homeland security.

12.4.3.3 Although the competition authorities do have the right to file comments in any FCC proceeding as there is an obligation on the telecommunications regulator to accord "substantial weight" to the submissions of the competition authority, we note that this approach encourages the regulator to adjudicate and make determinations on anti-competitive matters falling outside the expertise of the regulator.

12.4.3.4 The Federal Trade Commission ("**FTC**"), which the FCC shares jurisdiction with, is an independent agency of the United States government, its principal mission being the promotion of consumer protection and the elimination and prevention of anticompetitive business practices, such as coercive monopoly.

12.4.3.5 Towards the end of the year 2017, the FCC and FTC released a Memorandum of Understanding regarding each agency's role in policing internet service providers after the proposal to roll back net neutrality protections is passed,[6] an important development in the telecommunications sector. Once the proposal is approved, both the FTC and FCC will share jurisdiction over internet service providers going forward.

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[4] H Irvine and L Granville 'Who to Call? Concurrent Competition Jurisdiction in the South African Electronic Communications Sector' (2009) *Conference Paper for The Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa and Celebration of 10 years of the Competition Act and Competition Authorities* at 1.

[5] Op cit Irvine and Granville at 4.

[6] M Locklear 'FCC and FTC outline how they'll cooperate after net neutrality vote' available at https://www.engadget.com/2017/12/11/fcc-ftc-outline-cooperation-net-neutrality-vote/.

12.4.3.6 The two agencies have agreed that the FCC will monitor broadband market entry barriers and review complaints it receives from consumers, and it will also have the ability to take action against companies that do not properly inform the public of any throttling, blocking or prioritization practices as per the new order. The FCC and FTC will also meet regularly to discuss any investigations against ISPs and will share legal and technical expertise when necessary.

12.5.4 **Australia**

12.5.4.1 In Australia, the government wanted to inject more competition into the domestic market, but there was a fear of 'regulatory capture' of the telecommunications regulator. Therefore jurisdiction over all competition issues was removed from the telecommunications regulator and conferred on the competition law authority.

12.5.4.2 The Communications Act establishes the Australian Communications Authority (the "**ACA**") with the following obligations -

12.5.4.2.1 the issuing of carrier and cabling licences;

- the administration of consumer safeguard provisions (e.g. customer service guarantees);
- technical regulation; and
- the monitoring of the performance of carriers and carriage service providers.

12.5.4.3 This is by no means a closed list, but it serves to highlight the key competencies of the ACA for the purposes of this submission.

12.5.4.4 The Australian Competition and Consumer Commission (the "**ACCC**") is the body responsible for enforcing the Competition Act. There are three distinct regulatory roles within the regulated industries. These are:

- **technical regulation:** this involves setting and enforcing product and process standards as well as resource allocation;
- **economic regulation**: directly controlling or specifying production technologies, eligible providers, terms of sales and standard marketing practices; and

- **competition enforcement**: this entails, inter alia, the control of abuse of dominance, anti-competitive agreements, and anti-competitive mergers and acquisitions.[7]

12.5.4.5 Australia has tended to favour general rather than industry-specific regulation. However, where regulators exist, they are empowered with technical as well as economic regulatory responsibilities.

12.5.4.6 The ACCC therefore has sole jurisdiction in relation to competition matters in all industries, including the telecommunications industry. This jurisdiction encompasses merger review. In this respect, it should be noted that an amendment to the Radio Communications Act of 1992 deemed the allocation of spectrum and apparatus licences to be acquisitions. This amendment empowers the commission to act where it forms the view that an allocation would have the effect or likely effect of substantially lessening competition.[8]

12.5.4.7 The Telecoms Act[9] does provide for collaboration between the ACA and the ACCC. An example of this is with regards to the issue of technical standards. In this regard, the Telecoms Act states that the ACA may make a technical standard relating to the interconnection of facilities but cannot do so unless it is directed by the ACCC. This direction cannot be given unless the ACCC is of the view that it will promote the long-term interests of end-users or of services supplied by means of carriage services, or reduce the likelihood or hindrance to the provision of access to 'declared services'.[10]

12.5.4.8 The approach taken by Australia has the following advantages which can be considered when drafting the Bill:

- where there is concurrent jurisdiction, there tend to be lengthy delays in the approval of mergers. This has been a constant issue in the United States, where a telecommunications merger can take up to twelve months. This delay has significant financial and strategic drawbacks for the parties involved; and

[7] *Competition Authorities and Sector Regulators: what is the best operational Framework.* ViewPoint; October 2008
[8] *Telecommunications industry – ACCC Role an outline* October 19997.
[9] Part 2
[10] This relates to certain infrastructure facilities which are of national significance which a person can apply to be given access to in the even that negotiation with the service provider does not yield results.

- competition enforcement is best handled by a dedicated competition authority. This is simply because competition law generally applies to all sectors of an economy and its implementation should therefore be consistent. For this reason, a more general approach rather than a sector specific approach is more appropriate.

13 SECTION SPECIFIC AMENDMENTS AND PROPOSED WORDING

Telkom suggests alternative wording to a number of specific sections of the Bill and has comments on other sections. It will however restrict its comments to sections where it differs with the proposed content and / or have suggested amendments to the proposed content. Its alternative wording and comments are provided in a format that mirrors the Bill for ease of reading.

SECTION 1 OF EC AMENDMENT BILL: DEFINITIONS

13.1.1 Insertion after the definition of "broad-based black economic empowerment" of the following definition:

"'**B-BBEE I CT Sect or Code'** means the Broad-Based Black Economic Empowerment Information, Communications and Technology Sector Code, a sector code on broad- based black economic empowerment, issued in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of

Telkom Commentary

The reference to the Broad-Based Black Economic Empowerment Act is incomplete – it should refer to Act 53 of 2003.

Telkom Proposed Amended Wording

"'**B-BBEE ICT Sector Code**' means the Broad-Based Black Economic Empowerment Information, Communications and Technology Sector Code, a sector code on broad-based black economic empowerment, issued in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);";

13.1.2 Substitution for the definition of "broadband" of the following definition:

"'**broadband**" means an always available, multimedia capable connection with a minimum download speed and quality as annually determined by the Minister responsible for ICT by notice in the *Gazette*, following recommendation by the Authority;"

Telkom Commentary

It will not be ideal for the Minister to prescribe, upon ICASA's recommendation, quality standards for the availability of broadband. Operators differentiate on the basis of quality of service, which encompasses various characteristics including latency, jitter etc. There is further no definition of the term 'quality' in this context.

13.1.3 Substitution for the definition of "essential facility" of the following definition:

"'**essential facility**" means—

(a) an electronic communications facility or combination of electronic communications or other facilities that is exclusively or predominantly provided by a single or limited number of licensees and cannot feasibly (whether economically, environmentally or technically) be substituted or duplicated in order to provide a service in terms of this Act; or

(b)broadband infrastructure in the International Standardisation Organisation Open Systems Interconnect model layer 2 or layer 3 as prescribed by the Authority; "

Telkom Commentary

Telkom is concerned that the inclusion of Layer 2 or 3 in the definition of essential facility is unnecessarily intrusive. This must be linked to the specific market that the Authority had identified. A separate definition of "essential facility" is not required, as the definition in the Competition Act is sufficient. This is more so since the deletion of sections 43(8) and 43(8A) of the ECA. Access to broadband infrastructure below level 3 will lead to access to sensitive passive elements of network infrastructure and will cause significant concerns with regard to security issues. This may further expose operators' critical infrastructure to

possible damage and unreasonably force operators to make the infrastructure available to competitors, even if it is not economically and technically feasible, pursuant to the amended clause 43.

Telkom is already providing open access to layer 3 infrastructure which is more than sufficient to address the issue of open access to broadband infrastructure.

Telkom Proposed Amended Wording

Paragraph (b) of the definition of essential facility be amended as follows –

"(b) broadband infrastructure in the International Standardisation Organisation Open Systems Interconnect model layer 3 and above as prescribed by the Authority;"

13.1.4 Insertion after the definition of "free-to-air service" of the following definition:

" '**general open access principles**" m eans provid ing wholesale open access t o electronic communications networks on terms that are effective, transparent and non- discriminatory;"

Telkom Commentary

The definition of "wholesale" in the ECA contemplates the sale, lease or otherwise making available of an ECNS or ECS to an ECNS licensee or an ECS licensee or person exempt from a licence.

The definition of 'general open access principles" detracts from the "wholesale" definition in the ECA by referring to electronic communications networks only.

Telkom Proposed Amended Wording

"'**general wholesale open access principles**" means the sale, lease or otherwise making available of an electronic communications network or an electronic communication service to an electronic communications network licensee or an electronic communications service licensee or person exempt from a licence on terms that are effective, transparent and non-discriminatory;"

13.1.5 Insertion after the definition of "harmful interference" of the following definition:

"'**high demand spectrum**" means spectrum where —

(a)demand for access to the radio frequency spectrum resource exceeds supply; or

(b)radio frequency spectrum is fully assigned, as determined by the Minister responsible for Telecommunications and Postal Services, by notice in the Gazette, after consultation with the Authority;"

Telkom Commentary

Telkom agrees with the definition of high demand spectrum but requests that the process within which the Minister responsible for ICT consults with ICASA must be transparent and clear and, with regards to the assessment of demand for spectrum, after ICASA has completed a market review. Telkom recommends the use of the term "radio frequency band", which is defined in the ECA (rather than "radio frequency spectrum resource"). Considering the huge effect that declaration of spectrum as "high demand spectrum" will have on licensees specifically and industry in general, ICASA and the Minister responsible for the ICT must consult industry and ICASA must conduct a market review before spectrum is declared as "high demand spectrum".

Telkom Proposed Amended Wording

Telkom proposes the following amendment to paragraph (b):

"'high demand spectrum" means spectrum where,

(a) pursuant to a market study, ICASA has determined that demand for access to ~~the~~ a radio frequency spectrum ~~resource~~ band exceeds supply; or

(b) radio frequency spectrum is fully assigned, as determined by the Minister responsible for Telecommunications and Postal Services, by notice in the Gazette, after consultation with the Authority and interested persons;"

13.1.6 Insertion after the definition of "radio frequency spectrum licence" of the following definitions:

" '**radio frequency spectrum sharing**' means a collaboratve effort which allows rradio frequency spectrum licensees allocated spectrum in the same or adjacent bands to harmonise their spectrum to enhance the utilisation of the radio frequency spectrum;

‘**radio frequency spectrum trading**’ means the transfer or transfer of control, re-sale, leasing or sub-letting of spectrum by a licensee to a third party, whether on a stand- alone basis or as part of a the sale or transfer of control of a business or any part thereof;

‘**radio frequency spectrum refarming**’ means the re-use of an assigned frequency band for a different technology;”;

Telkom Commentary

In the definition of radio frequency spectrum sharing, the word “allocated” should be changed to “assigned.” Further, the use of the word “harmonised” is not clear and should be improved; Telkom recommends the use of the word “coordinate”, which is used within the ECA and well known within spectrum management fraternity. Telkom agrees with the definition of “radio frequency spectrum trading” with one small editorial change as indicated. Whereas Telkom appreciates the objective of avoiding negative competition through the proposed regulation of spectrum refarming, Telkom is concerned that it could curtail, or as a minimum delay, the efforts of the operators to introduce, for example, faster broadband services (e.g. moving from 4G to 5G technology). Further, Telkom is concerned that the use of the word *“technology*” in respect of radio frequency spectrum may be subjected to an interpretation that is too wide and over-reaching and will lead to uncertainty and possible abuse. Telkom recommends that a narrower definition for “*different technology*” be provided or that the term “technology” be defined for the purposes of its use in terms of spectrum refarming. Further comments on spectrum sharing, trading and refarming are contained below in the comments to sections 31B, 31C and 31D.

Telkom Proposed Amended Wording

“'radio frequency spectrum sharing' means a collaborative effort which allows radio frequency spectrum licensees ~~allocated~~ who have been assigned spectrum in the same or adjacent bands to ~~harmonise~~ coordinate the use of their spectrum to enhance the utilisation of the radio frequency spectrum;

'radio frequency spectrum trading' means the transfer or transfer of control, re-sale, leasing or sub-letting of spectrum by a licensee to a third party, whether on a stand-alone basis or as part of a ~~the~~ sale or transfer of control of a business or any part thereof;

13.1.7 Addition of the following definition:

" '**Wireless Open Access Netw ork'** means the entity contemplated in section 19A that must provide wholesale electronic communications network services on open access principles."

Telkom Commentary

Telkom provides further commentary under Chapter 3A – Section 19A below.

Telkom Proposed Amended Wording

Telkom proposes the following amendment:

"'**wireless open access network**' means the entity contemplated in section 19A that must provide wholesale open access ~~electronic communications network.~~

14 SECTION 2 OF EC AMENDMENT BILL: OBJECT OF ACT

14.1 Substitution for the words preceding paragraph (a) of the following words:

"The primary object of this Act is to provide for the regulation of electronic communications in the Republic **[in the public interest**] 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 and for that purpose to—";

Telkom Commentary

Telkom notes the amendment to the introductory text to section 2 of the ECA ("Object of the Act"). The wording is proposed to be amended to refer to regulating in line with relevant ICT policies and public interest objectives, as there may be future ICT policies which should be taken into account.

Telkom Proposed Amended Wording

"The primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and in line with relevant ICT policies ~~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~~ as well as other relevant policies as promulgated from time to time and for that purpose to—"

14.1.2 Insertion of the following paragraphs after paragraph (c):

"(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.";

Telkom Commentary

The move away from infrastructure-based competition to service-based competition will stimulate competition in the electronic communications market. While open access to electronic communications networks is supported, but it must be clarified at which level of the Open Systems Interconnection Model such open access is envisaged to take place. Telkom submits that open access is not necessary at fixed infrastructure level as a number of competitors have entered the fixed line market since 2008. Furthermore, regulated pricing in this market would also not stimulate investment in this market. Telkom already provides wholesale open access at level 3 and above in terms of the Open Systems Interconnection Model and thus there is no need for open access below layer 3. Layer 2 poses various access and security difficulties, as it contains key infrastructure (including in Telkom's case, copper cabling) that are susceptible to possible damages by third parties. Please see proposed definition of 'wholesale open access.' Wholesale open access must apply to both fixed and mobile networks. In respect of fixed networks, access to infrastructure at layer 3 is recommended.

14.2 SECTION 3 OF EC AMENDMENT BILL: MINISTERIAL POLICIES AND POLICY DIRECTIONS

14.2.1 By substitution in subsection 3(1)(e) of the following:

"(e) **[guidelines for]** the determination by the Authority of licence 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;**"**

Telkom Commentary

Telkom recommends that the determination by ICASA of licence and spectrum fees must be based on market studies.

Telkom Proposed Amended Wording

"(e) **[guidelines for]** the determination by the Authority of licence and spectrum fees associated with the award of the licences contemplated in Chapter 3 and Chapter 5 pursuant to a market study, 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;**"**

12.3.2 By insertion after section 3(2)(b) of the following:

"(bB) universal service or universal access obligations or both, having identified any access gaps";

Telkom Commentary

Telkom already carries extensive and cumbersome USO obligations which were imposed under the previous regulatory regime, before the entry of the MNOs and the licensing of numerous electronic communications operators who all have the same ECS and ECNS licenses. Thus Telkom's legacy USO obligations, which obligations are not incurred by other operators, must be taken into account and the imposition of additional USOs must be fair and equitable between operators. Telkom further submits that any additional USO obligations to be imposed on ECS and ECNS licensees must be clearly defined, together with the duration of such USOs USO obligations should also be limited to HDS assigned to dominant licencees with SMP. In all cases the Authority must conduct a market study and a public consultation process before any new obligations are imposed on licensees. Any new obligations on spectrum licensees must only be imposed pursuant to a market review and a public consultation process.

Funds from the Universal Service and Access Fund (USAF) or similar fund must be used to fund the USO obligations. See also Telkom's comments on USOs in section 3.

14.2.2 By the substitution in subsection 3(2)(d) of the following:

"(d) **[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"

Telkom Commentary

The Authority must base its decisions to publish regulations on comprehensive regulatory impact assessments (RIAs). See also Telkom's commentary in section 5.3.1 pertaining to policy/policy directions.

Telkom Proposed Amended Wording

Telkom proposes the following amendment by the substitution in subsection 3(2)(d) of the following:

"(d) **[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, pursuant to a regulatory impact assessment"

14.3 SECTION 4 OF EC AMENDMENT BILL: REGULATIONS BY THE AUTHORITY

14.3.1By the insertion of subsection 4(1A)(a) and (b):

"(1A) *(a)* Any regulations prescribed by the Authority on radio frequency spectrum fees must be in accordance with any policy or policy directions issued by the Minister as contemplated in section 3(1)*(e)* and 3(2)*(d)*.

(b) The Authority must amend any existing radio frequency spectrum fees regulations which are in force when the Minister issues a policy direction as contemplated in section 3(2)*(d)*, within six months after the Minister issues such policy direction."

Telkom commentary

See Telkom's commentary in section 5.3.1 above.

14.4 SECTION 8 OF THE EC AMENDMENT BILL: TERMS AND CONDITIONS FOR LICENCES

14.4.1 By substitution of section 8(2) for the following:

"(2) Such standard terms and conditions **[may]** must include, but are not limited to;"

Telkom Commentary

Telkom emphasises that the imposition of USOs as a licence condition must be exercised with caution. Telkom has extensive cumbersome USO which are more wide-ranging than any other operator. Thus Telkom proposes that the USOs in section 8(2)(g) must take into account Telkom's legacy USO obligations which obligations are not incurred by other operators. It is further recommended that the imposition of any additional terms and conditions be imposed pursuant to a market study. See also Telkom's comments on USOs in section 3.

Telkom Proposed Amended Wording

Telkom proposes the following amendment to section 8(2)(g) –

"(g) any universal access and universal service obligations, taking into account the historical and current universal access and universal service obligations of existing licensees;"

14.4.2 By deletion of the word "and" at the end of section 8(2)(d)(iii); and

By the insertion after section 8(2)(d)(iii) of the following:

"(iiiA) informing subscribers and end-users about the quality of service standards contemplated in section 69A; and"

Telkom Commentary

It is not clear how the process to ascertain quality of service standards will be initiated and there is no definition for "QoS." There is also concern that the result of ICASA prescribing regulations on QoS which will preclude operators from differentiating between their customers.

Licenced operators must be informed and be given opportunity to make representations before ICASA informs subscribers and end-users about the quality of service standards.

Any process by ICASA to inform subscribers and end-users about the quality of service standards must be based on a market review.

Telkom notes that various issues including quality of service issues are dealt with in the End User Subscriber Quality Regulations Charter.

14.3.3 By substitution for sections 8(3) and (4) of the following:

"(3) The Authority may prescribe additional terms and conditions that may be applied to any individual licence or class licence **[subject to the provisions of Chapter 10]**.

(4) The Authority **[may]** must by regulation make provision for the designation of licensees to whom universal service and universal access obligations are to be applicable and **[may]** must prescribe additional terms and conditions in respect of the relevant universal service and universal access obligations on such designated licensees."

Telkom Commentary

The removal of the reference to Chapter 10 of the ECA is regrettable as such a market study is necessary for healthy economic regulation. Telkom therefore recommends that the reference to Chapter 10 be retained.

ICASA must look at the impact on the market (preferably after a market review) before seeking to impose any additional standards and conditions. Any additional standards and conditions must be quantified and be related to the purpose sought to be achieved.

Please see previous comments with regard to USOs.

Telkom Proposed Amended Wording

Telkom suggests that the wording "subject to the provisions of Chapter 10" be retained in section 8(3).

Telkom proposes the following amended wording in respect of section 8(4):

(4) The Authority **[may]** must by regulation make provision for the designation of licensees to whom universal service and universal access obligations are to be applicable and **[may]** must prescribe additional terms and conditions in respect of the relevant universal service and universal access obligations on such designated

licensees, taking into account the current universal service and universal access obligations of such licensees.

14.3.4By insertion after section 8(4) of the following:

"(4A) The Authority must review the regulations contemplated in subsection (4) at least every five years and the review must include an assessment of—
(a)the appropriateness of target levels set in universal service and universal access obligations;
(b)the timelines set for achieving such targets;
(c) the level of service to be provided; and
(d) mechanisms to enforce compliance, including reporting frameworks."

Telkom Commentary

Telkom supports the proposed review by ICASA, but proposes that in light of the dynamic nature of the information communication and technology sector, such review should take place every three years.

Telkom Proposed Amended Wording

Telkom proposes the following amendment to section 8(4A):

"(4A) The Authority must review the regulations contemplated in subsection (4) at least every three years…'

15 SECTION 9 OF EC AMENDMENT BILL: APPLICATION FOR AND GRANTING OF INDIVIDUAL LICENCES READ WITH THE SCHEDULE

12.5.1 By substitution in section 9(2)(b) of the following:

"(b) include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as **[may be]** prescribed under section 4(3)(k) of the ICASA Act;"

and

The following amendments are inserted in the Schedule to the principal Act after Act No. 63 of 1996:

SCHEDULE

No. and year of Act	Short Title	Extent of repeal or amendment

Act No. 13 of 2000	Independent Communications Authority of South Africa Act, 2000	By the insertion after the definition of "Broadcasting Act" of the following definition: "B-BBEE ICT Sector Code" means the Broad-Based Black Economic Empowerment Information, Communications and Technology Sector Code, a sector code on broad-based black economic empowerment, issued in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); By the substitution in section 4(3) for paragraph (k) of the following paragraph: "(k) **[may]** must make regulations **[on empowerment requirements]** to apply the B-BBEE ICT Sector Code to existing and new licences, exemptions or other authorizations including spectrum assignment to promote broad-based black economic empowerment within 12 months of the promulgation of the Electronic Communications Am endment Act , 201…. ".

Telkom Commentary

The ICT Sector Code is a voluntary compliance-based mechanism published for the measurement of entities operating in the ICT sector, in terms of their respective contributions to B-BBEE. The ICT Sector Code contains the ICT Sector Scorecard assigning the elements and weighting for scoring, namely, Ownership, Management Control, Employment Equity, Skills Development, Preferential Procurement, Enterprise Development, Socio-Economic Development Initiatives.

The prioritisation of compliance with the ICT Sector Code is discretionary in that ICT stakeholders are afforded the opportunity to structure their business and operations within varying recognition levels. The end result of the ICT Scorecard measurement is the allocation of a particular B-BBEE status level of contribution which the measured stakeholder wishes to attain, based on operational sustainability and fiscal feasibility.

In terms of the proposed amendment to section 9(2)(b) of the ICASA Act, as read with the proposed amendment to section 4(3)(k) of the ICASA Act, ICASA must prescribe regulations:

- *to apply* the ICT Sector Code for existing and new licences, exemptions or other authorisations including spectrum assignment to promote B-BBEE,

- within 12 months of the promulgation of the Amendment Act.

- The promulgation of regulations "to apply" the ICT Sector Code presents a number of difficulties relating to the substantive actualisation of transformative imperatives, as follows:

  - As detailed above, the ICT Sector Code is voluntary compliance-based mechanism with variable measurable elements and weightings assigned to transformation imperatives. The ICT Sector Code provides intricate formulation of B-BBEE recognition levels for the weighting and compliance targets of the elements.

  - It is anticipated that the regulations published for the promotion of B-BBEE (including the empowerment of women, youth and persons with disabilities) must take into account the ICT Sector Code, which is in itself a complex measuring instrument or tool in a varied application based on a measured entity's business structure.

  - The intended publication of regulations will set out definitive prescribed requirements for ICT stakeholders to obtain a licence. This will, in effect, mean that ICT stakeholders no longer enjoy the discretionary compliance under the ICT Sector Code.

Telkom recommends that the following factors be considered as appropriate to apply the ICT Sector Code:

- ICASA must determine the minimum requirements or targets of achievement for B-BBEE achievement as a licensing requirement;

- the minimum requirements should be prescribed as a particular minimum B-BBEE status level of contribution, by regulation e.g. ICASA prescribes that licence applicants are to demonstrate the attainment of a B-BBEE Status Level 6;

- the manner in which applicants are to determine their B-BBEE Status Level of Contribution is then determined by a B-BBEE Verification Agency in terms of the ICT Sector Code, resulting in a B-BBE certificate being issued.

In this way, the appropriate manner in which the ICT Sector Code is intended to apply to measured entities is given effect to, as a licence requirement under the ECA, read with the ICASA Act.

Telkom further proposes that a reasonable amount of time is required to comply with a regulation-based prescribed condition as a licensing requirement.

This specific amendment may allow entities operating in the ICT Sector a reasonable amount of time i.e. 12 months to comply with the prescribed B-BBEE requirements for licensing.

Telkom Proposed Amended Wording

Telkom recommends that the following amendment is made to section 4(3)(k) of the ICASA Act:

"By the substitution in section 4(3) for paragraph (k) of the following paragraph –

(k) **[may]** must make regulations **[on empowerment requirements]** to prescribe the minimum B-BBEE Status Level of Contribution of licence holders that is determined in terms of the B-BBEE ICT Sector Code for existing and new licences, exemptions or other authorizations including spectrum assignment to promote broad-based black economic empowerment within 12 months of the promulgation of the Electronic Communications Amendment Act, 201…., provided that compliance with such regulations only becomes mandatory after the lapse of a further 12 months of publication".

16 By the substitution in section 13(5) of the following:

"(5) Regulations contemplated in subsection (3) must be made with due regard to the objectives of this Act, the related legislation and where applicable, any other relevant legislation."

Telkom Commentary

Please refer to commentary under section 9(2)(b) above which applies with the necessary changes to the transfer of licences or changes in ownership.

Telkom Proposed Amended Wording

Please refer to proposal under section 9(2)(b) above which applies with the necessary changes to the transfer of licences or changes in ownership.

17 CHAPTER 3A: WIRELESS OPEN ACCESS NETWORK

17.1 By insertion of the following as Chapter 3A:

"CHAPTER 3A
WIRELESS OPEN ACCESS NETWORK

19A. (1) The Authority must ensure that an individual electronic communications network service licence and a radio frequency spectrum licence is issued to a Wireless Open Access Network.

(2)The Wireless Open Access Network must –

(a)provide wholesale open access to its 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 in accordance with the terms and conditions of a wholesale open access agreement entered into between the parties, in accordance with the general open access principles;

(b)in addition to the requirement in subparagraph (a), comply with the following open access principles on its electronic communications network:
(i)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;
(ii) cost-based pricing;
(iii) access to its electronic communications network or electronic communications facilities as prescribed by the Authority; and
(iv) specific network and population coverage targets.

(3)The Minister may issue a policy direction to the Authority in terms of section 5(6) to issue an invitation to apply for the Wireless Open Access Network licences after—

(a)the Authority has made recommendations on the terms and conditions including universal service and access obligations which will apply to the Wireless Open Access Network as contemplated in section 31A and 31E; and

(b)the Minister has considered incentives that will apply as contemplated in subsection (4).

(4)The Minister must, for purpose of licensing the Wireless Open Access Network, consider incentives that may be granted to the Wireless Open Access Network including—

(a)reduced or waived spectrum fees as contemplated in section 3(2)(d) of the Act;

(b)access to rights of way, public infrastructure as well as public electronic communications facilities through government facilitation; and

(c)allocation of funds as contemplated in section 88 of the Act to construct or extend an electronic communications network in under-serviced areas."

Telkom Commentary

Telkom supports the establishment of the "Wireless Open Access Network" ("WOAN") as it will stimulate competition in the market and represent a shift from infrastructure based competition to service based competition. Detailed comments on the WOAN is contained in section 3. Nonetheless, Telkom would like to state the following –

- all unassigned high demand spectrum must be assigned to the WOAN;
- all the incumbents must be compelled to partake in the WOAN and those with significant market power must share their networks with the WOAN operator as per the open access obligations

Please refer to Appendix A regarding Telkom's proposed WOAN model.

18 CHAPTER 4: RAPID DEPLOYMENT OF ELECTRONIC COMMUNICATIONS NETWORKS AND ELECTRONIC COMMUNICATIONS FACILITIES

18.1 By insertion of section 20A:

" **Role of the Minister**

20A. (1) The Minister must provide oversight over the implementation of this Chapter and liaise with other Ministers responsible for aspects of rapid deployment of electronic communications networks and facilities.

(2)The Minister must establish a Rapid Deployment National Coordinating Centre and a Rapid Deployment Steering Committee to oversee the activities of the Centre."

Telkom Commentary

Telkom recommends that the following amendments be considered:

- a clear and concise process that must be followed in establishing both the centre and the steering committee; and
- minimum requirements and competencies that the people serving on the committee must have.

12.7.2 By insertion of section 20B:

" **Role of the Rapid Deployment National Co-ordinating Centre**

20B. (1) The Rapid Deployment National Co-ordinating Centre must support rapid deployment of electronic communications networks and facilities and must work with the SIP 15 infrastructure team.

(2)The Rapid Deployment National Co-ordinating Centre must interface with local municipalities to fast track rights of way and wayleave approvals.

(3)The Rapid Deployment National Co-ordinating Centre must—

(a)oversee the establishment of common automated wayleave application system or systems based on an understanding of common information requests across various bodies;

(b)oversee the creation of a geographic information system database and mapping of all fibre deployments and other electronic communication network and facility deployments. The database must include the requirement to prevent damages to networks and facilities as contemplated in section 29(1)(a);

(c)oversee the coordination of infrastructure rollout and participation in other infrastructure coordination fora such as SIP 15;

(d)oversee the engagement with relevant industry bodies dealing with rapid deployment or any aspect thereof; and

(e)provide advice to electronic communications network service licensees on the provision of electronic communications networks and facilities."

Telkom Commentary

- Fast tracking and streamlined processes

Telkom submits that the process relating to Rapid Deployment may be cumbersome and involve many barriers to ensure seamless access and deployment of broadband roll-out. In this regard, please refer to the substantive commentary provided under section 20F below.

Please refer to commentary under section 20F below, regarding Telkom's substantive submissions regarding the streamlining of processes for rapid deployment.

The Rapid Deployment National Coordinating Centre's establishment as a national organ of state and the extent of its influence on other government departments and local government is unclear and must be clarified.

Reference to "and facilities" is superfluous as electronic communication network deployment includes facilities. Telkom proposes it be deleted.

- Section 20B(2):

The interface between the Rapid Deployment National Co-ordinating Centre and the municipalities to fast track right of way and wayleave approvals should be clarified.

- Telkom recommends that the approval process and timelines contained in the ICT Policy White Paper are adhered to, in respect of the following:

- all processes relating to the implementation of electronic communication facilities, including processes relating to application for any approval, authorisation, licence, permission or exemption and processes relating to any consultation and participation required by the relevant law must, as far as it possible and in order to expedite the matter, run concurrently. This may serve to expedite the deployment of infrastructure for electronic communications (see page 97 of the ICT Policy White Paper);

- in the case of deployment of electronic communication facilities, where possible, notification and application procedures for rapid deployment should take no more than 30 days, from the date of complete application submission to date of final decision by the relevant entities.

Telkom Proposed Amended Wording

Telkom suggests the following amended wording:

"**20B.** (1) The Rapid Deployment National Co-ordinating Centre must support rapid deployment of electronic communications networks ~~and~~ facilities between and amongst electronic communication network service licencees, municipalities and other infrastructure bodies including ~~and must work with~~ the SIP 15 infrastructure team by fulfilling the actions listed in subsection (3).

(2) The Rapid Deployment National Co-ordinating Centre must, within 12 months of its establishment interface with local municipalities to fast track rights of way and way-leave approvals, which decision-making process may not exceed 30 days, unless just case is shown and provide guidance on application processes and application templates for rights of way and wayleaves, supporting geographic spatial information of existing networks.

(3) The Rapid Deployment National Co-ordinating Centre must—

(a) oversee the establishment of common automated wayleave application system or systems based on an understanding of common information requests across various bodies;

(b) oversee the creation of a geographic information system database and mapping of all fibre deployments and other electronic communication network and facility deployments. The database must include the requirement to prevent damages to networks and facilities as contemplated in section 29(1)(a);

(c) oversee the coordination of infrastructure rollout and participation ~~in~~ between and amongst electronic communication network service licensees and other infrastructure coordination fora such as SIP 15; and

(d) ~~oversee the engagement with relevant industry bodies dealing with rapid deployment or any aspect thereof; and~~

(e) (d) provide advice to electronic communications network service licensees to expedite the deployment of their networks on the provision of electronic communications networks and facilities.

(4)The regulations contemplated in section 20C must provide for –

(a)the concurrent engagement of municipal competencies where various municipal competencies are required in the consideration of rights of way and wayleave applications; and

(b)the prompt notice to be given to applicants where municipalities acting as approval authorities will exceed the 30 day period, which notice must be delivered within the initial 30 days period and include the reasons for the delay.

18.2 By insertion of section 20C:

"**Role of Authority**

20C. (1) The Authority must prescribe rapid deployment regulations which must include-

(a)the structure of the GIS database contemplated in section 20B(3)(b), its security and the manner in which it can be accessed;

(b)obligations applicable to electronic communications network service licensees for the rapid deployment of electronic communications networks or facilities;

(c)alternatives to new deployment of electronic communications networks and facilities, in order to use suitable existing electronic communications networks and facilities;

(d)processes and procedures to enable a landowner to object to the Authority at least 14 days before the electronic communications network service licensee commence with the activity, if the proposed electronic communication network or facility will cause significant interference with the land;

(e)high sites that are not technically feasible for access and use by an electronic communications network service licensee for the deployment of electronic communications networks and facilities that promote broadband;

(f)processes and procedures that electronic communications network service licensee must follow to request access to high sites of government for the installation of electronic communications networks and facilities that promote broadband, including the determination of cost-based rentals;

(g)processes and procedures that enable single trenching for fibre in each geographic location where it is technically feasible to do so;

(h)guidelines on reasonable access fees that may be charged by landholders to electronic communications network service licensees for deploying electronic communications networks or facilities that are intrusive.

(2)The regulations must provide for procedures and processes for resolving disputes that may arise between an electronic communications network service licensee and any landowner on an expedited basis, in order to satisfy the public interest in the rapid rollout of electronic communications networks and electronic communications facilities.

(3)The Authority must ensure that electronic communications network service licensees—

(a)provide information on existing and planned electronic communications networks and facilities, including alterations or removal thereof as contemplated in this Chapter, to the Rapid Deployment National Coordinating Centre for inclusion into the geographic information system database;

(b)provide information on existing and planned electronic communications networks and facilities to the Authority and other electronic communications network service licensees;

(c)seek out alternatives to new deployment of electronic communications networks and facilities, notably through the sharing or leasing of existing facilities;

(d)contribute to research and development on new deployment methods;

(e)comply with environmental requirements;

(f)co-ordinate activities wherever appropriate, avoiding anti-competitive behaviour; and

(g)advise landholders in writing of their right to recourse through the Authority."

Telkom Commentary

Since the GIS database will be managed by the Centre, there needs to be close coordination and alignment between RDNCC and the Authority.

Section 20C(1)(g):

- Telkom proposes that the single trench policy should be applicable only to new deployments.

- Section 20C(3)(a):

Telkom recommends that the information that network operators provide be qualified. Only information that would suffice for co-ordination purposes and information on existing networks. Information on planned networks should have 'limited time' from when it can be submitted to protect commercially sensitive information.

- Section 20(C)(3)(c):

ECNS licensees already enjoy this right to construct, maintain and operate their networks. Part of network construction includes efficient build, which forces licensees to also look at alternative means of building their networks.

- Section 20C(3)(e):

Other legislation already requires this from network licensees. It is unclear what additional outcome this sub-section will achieve. The sub-section is therefore redundant.

Telkom Proposed Amended Wording

Telkom proposes that the reference in section 20C(1)(g) to single trench regulations be deleted.

Telkom proposes the following amendment to section 20C(2):

"(2) The regulations must –
(a)provide for procedures and processes for resolving disputes that may arise between an electronic communications network service licensee and any landowner on an expedited basis, in order to satisfy the public interest in the rapid rollout of electronic communications networks ~~and electronic communications facilities~~."

Telkom proposes the following amendment to section 20C(3):

"(3) The Authority must ensure that electronic communications network service licensees—

(a) provide information on existing and planned electronic communications networks and facilities, including alterations or removal thereof as contemplated in this Chapter, to the Rapid Deployment National Co- ordinating Centre for inclusion into the geographic information system database, upon request from the Rapid Deployment National Co-ordinating Centre;

(b) provide information on existing and planned electronic communications networks and facilities to the Authority and other electronic communications network service licensees;

(c)~~seek out alternatives to new deployment of electronic communications networks and facilities, notably through the sharing or leasing of existing facilities;~~

(d) ~~contribute to research and development on new deployment methods;~~

(e) ~~comply with environmental requirements;~~

(f) (c) co-ordinate activities wherever appropriate, avoiding anti-competitive behaviour; and

(g) (d) advise landholders in writing of their right to recourse through the Authority.

19 By insertion of section 20D

"**Role of South African Local Government Association and Municipalities**

20D. (1) Processing of rapid deployment of electronic communications networks and facilities takes place at municipal level.

(2)The South African Local Government Association must promote uniformity in processes and prices, which prices must be cost-based, charged by municipalities for wayleave applications.

(3)Municipalities must, when planning municipal infrastructure, make provision for the installation of electronic communications networks and facilities including without limitation ducts for fibre optic cabling, conduit pipes and space for radio equipment.

(4)Municipalities must provide information on existing and planned municipal infrastructure including ICT infrastructure to the Rapid Deployment National Co-ordinating Centre in a digitised format for inclusion into the geographic information system database.

(5)The Department of Telecommunications and Postal Services may render the necessary support to ensure that the objectives of subsection (3) are achieved."

Telkom Commentary

In respect of section 20D (3), which is a peremptory provision, it is unclear as to what recourse and/or enforcement measures are available to the Authority in the case where a municipality refuses to make provision for the installation of electronic communications networks and facilities.

Please refer to section 20F, regarding Telkom's substantive commentary on intergovernmental relations and co-operation, which also relates more specifically to the Rapid Deployment National Co-ordinating Centre's interaction with local municipalities.

A specific time period must be included in the Amendment Bill regarding the municipal obligation in section 20D(4).

There is need to provide for enforcement measures and/or recourse in the event that a municipality refuses to make provision for the installation of electronic communications networks and facilities.

Telkom Proposed Amended Wording

Telkom proposes the following amendments to section 20D(4) –

"(4) Municipalities must provide information on existing and planned municipal infrastructure including ICT infrastructure to the Rapid Deployment National Co-ordinating Centre, within 12 months of publication of the Electronic Communications Am endment Act, 201…, in a digitised format for inclusion into the geographic information system database."

19.1 By insertion of section 20E

"**Obligations of landowners at municipal, provincial and national government levels**

20E. Landowners at municipal, provincial and national government levels must—

(a)provide information on existing and planned infrastructure including ICT infrastructure to the Rapid Deployment National Co-ordinating Centre in a digitised format for inclusion into the geographic information system database;

(b)provide clear rules and guidelines relating to access to their facilities, and comply with any national policy and rules published in that regard;

(c)when developing infrastructure deployment strategies and plans, make provision for the installation of electronic communications networks and facilities including without limitation fibre ducts;

(d)act on all similar requests to access their land or other property within a reasonable time, subject to the streamlined processes envisaged in section 20F, taking into account the nature and scope of the request and must treat electronic communications network service licensees equally; and

(e)must treat electronic communications network service licensees equally when imposing technical standards and are not allowed to impose different setback, height, or safety restrictions in residential and commercial zones."

Telkom Commentary

- **Time period for considering access requests**

Paragraph (d) provides that "*Landowners at municipal, provincial and national government* levels must act on all similar requests to access their land or other property within a reasonable time" (It is not clear what reasonable time means and what time period would be considered reasonable).

The time period in which the landowners at municipal, provincial and national government levels must act on all similar requests to access their land or other property must be set out clearly. Telkom recommends that all requests must be processed and finalised within 30 days from the date that a written request is made by a licensee.

The process to obtain approvals and/or permits from landowners must be simple and efficient.

Appropriate safeguards must be in place to protect the confidential information of a licensee.

The time period in which the landowners at municipal, provincial and national government levels must act on all similar requests to access their land or other property must be set out clearly (all requests must be processed and finalised within 30 days from the date that a written request is made by a licensee).

- **Confidential information**

There is no provision to deal with the confidential information of a licensee to avoid the information being accessed by a competitor. Appropriate safeguards must be in place to protect the confidential information of a licensee.

Telkom recommends that the process to obtain approvals and/or permits from landowners must be simple and efficient. In this regard, please refer to Telkom's commentary on the streamlining of applications in section 20F below.

Telkom Proposed Amended Wording

Telkom proposes the following amendment to section 20E(b) –

"*(b)* provide clear rules and guidelines relating to access to their facilities, the confidentiality of information submitted by licensees and comply with any national policy and rules published in that regard;

Telkom proposes the following amendment to section 20E(d) –

"*(d)* act on all similar requests to access their land or other property within 30 days of a request being submitted, subject to the streamlined processes envisaged in section 20F, taking into account the nature and scope of the request and must treat electronic communications network service licensees equally; and"

12.7.5 By insertion of section 20F

"**Other Authorities**

20F. (1) The Rapid Deployment National Co-ordinating Centre must within 24 months of its establishment, develop coordinated, efficient and streamlined processes for the granting of an approval, authorisation, licence, permission or exemption, in consultation with environment, health, safety, security, heritage, building, aviation or any other authorities, to enable rapid deployment of electronic communications networks and facilities.

(2)The Rapid Deployment National Co-ordinating Centre must consult with relevant authorities to ensure the alignment of the said processes.

(3)The Rapid Deployment National Co-ordinating Centre must promote and encourage consistency in the time taken by authorities to grant approvals for the deployment of electronic communications networks and facilities.

(4)Any request and decision accepting or denying a request must be in writing and substantiated by evidence contained in the written record of the Authority."

Telkom Commentary

- **Intergovernmental relations and co-operation**

Telkom emphasises that section 40 of the Intergovernmental Relations Framework Act, 2005 specifically provides as follows:

"***40. Duty to avoid intergovernmental disputes***

(1) All organs of state must make every reasonable effort-

(a) to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions; and

(b) to settle intergovernmental disputes without resorting to judicial proceedings.

(2) Any formal agreement between two or more organs of state in different governments regulating the exercise of statutory powers or performance of statutory functions, including any implementation protocol or agency agreement, must include dispute-settlement mechanisms or procedures that are appropriate to the nature of the agreement and the matters that are likely to become the subject of a dispute" (emphasis added).

Telkom proposes that it is preferable that inter-governmental co-operation and the streamlined processes, including the recourse and/or enforcement measures to be imposed for uncooperative stakeholders in rapid rollout processes, is regulated through regulations, which are binding on all the stakeholders and relevant authorities.

- **Prescribed procedural timelines**

Telkom recommends further that a timeline for the streamlined processes contemplated in section 20F(1) be specifically prescribed as per the timelines proposed in the ICT Policy White Paper, in terms of the following:

- all processes relating to the implementation of electronic communication facilities, including processes relating to application for any approval, authorisation, licence, permission or exemption and processes relating to any consultation and participation required by the relevant law must, as far as it possible and in order to expedite the matter, *run concurrently* as opposed to running sequentially. This may serve to expedite the deployment of infrastructure for electronic communications (see page 97 of the ICT Policy White Paper);

- in the case of deployment of electronic communication facilities, where possible, notification and application procedures for rapid deployment should take no more than 30 days, from the date of complete application submission to date of final decision by the relevant entities (see page 98 of the ICT Policy White Paper); and

- decision-making entities must be required to communicate with applicants, within the 30-day period, if any delay will be experienced, including providing reasons for the delay (see page 98 of the ICT Policy White Paper).

The period of 24 months for the Rapid Deployment National Co-ordinating Centre to, develop coordinated, efficient and streamlined processes is too long.

It is not clear why the request and decision accepting or denying a request must be substantiated by evidence contained in the written record of the Authority and what the Authority's role will be in that regard.

Section 20(F) should go further and provide for the timeline in which all approvals and/or permits must be considered and approved. Telkom proposes that any decision accepting or denying a request by a licensee must be in writing and provided by the relevant authority within 30 days of the request.

A provision must be included under section 20F for the treatment of requests for authorisations and/approvals as being confidential information.

Telkom Proposed Amended Wording

Telkom proposes the following amendments to section 20F –

"**20F.** (1) The Rapid Deployment National Co-ordinating Centre must within 12 months of its establishment, develop coordinated, efficient and streamlined processes, which processes may not exceed 30 days, for the granting of an approval, authorisation, licence, permission or exemption, in consultation with environment, health, safety, security, heritage, building, aviation or any other authorities, to enable rapid deployment of electronic communications networks and facilities.

(2) ~~The Rapid Deployment National Co-ordinating Centre must consult with relevant authorities to ensure the alignment of the said processes~~ The rapid deployment

regulations contemplated in section 20C must provide for the alignment of the processes contemplated in subsection (1) and provide for –

(a)the concurrent engagement of competencies of the authorities;

(b)the prompt notice to be given to applicants where authorities will exceed the 30 day period, which notice must be delivered within the initial 30 day period, including the reasons for the delay;

(c)the confidential treatment of information submitted to authorities within the streamlined processes contemplated in subsection (1).

(3) The Rapid Deployment National Co-ordinating Centre must promote and encourage consistency in the time taken by authorities to grant approvals for the deployment of electronic communications networks and facilities, the consideration of which must be undertaken by authorities concurrently as contemplated in section 20O."

19.2 By insertion of section 20G

ECNS right to enter and use property

20G. (1) Electronic communications network service licensees have the right to enter upon and use public and private land for the deployment of electronic communications networks and facilities, subject to subsection (5).

(2)Electronic communications network service licensees are entitled to select appropriate land and gain access to such land for the purposes of constructing, maintaining, altering or removing their electronic communications networks or facilities.

(3)Electronic communications network service licensees retain ownership of any electronic communications networks and facilities constructed.

(4)Property owners may not cause damage to electronic communications networks or facilities.

(5)An electronic communications network service licensee must, for the purposes of subsection (1)—

(a)give written notice of its proposed property access activity to an owner and if applicable, occupier of the affected land which must specify the reasons for engaging in the activity and the date of commencement of such activity, outline the objection process to its plans and provide environmental, health and safety information, as may be applicable;

(b)provide all information required by the automated application process, if any, and obtain a wayleave certificate from the relevant authority which must specify information such as the presence, height and depth of other infrastructure such as water pipes, electricity cables and gas pipes in the area;

(c)exercise due care and diligence to minimise damage which must include, act according to good engineering practice, and take all reasonable steps to restore the property to its former state including the repair of damages caused;

(d)ensure the design, planning and installation of the electronic communications network or facility follow best practice and comply with regulatory or industry standards;

(e)take all reasonable steps to ensure the activity interferes as little as practicable with the operations of a public utility;

(f)update the geographic information system database about the type and location of electronic communications networks and facilities deployed as contemplated in section 20C(3)(a); and

(h) uphold the principle of open access and infrastructure sharing and seek out alternatives to new deployment of electronic communications networks and facilities in accordance with the rapid deployment regulations prescribed by the Authority, in order to use suitable existing electronic communications networks and facilities.

(6)A landowner may object to the Authority in the prescribed manner at least 14 days before the electronic communications network service licensee commence with the activity and only if the proposed electronic communication network or facility will cause significant interference with the land."

Telkom Commentary

Telkom recommends that in the event that the landowner is an ECNS licensee, the applicant ECNS licensee and the landowner must enter into a service level agreement to ensure that disputes are minimised and provide for ICASA as final arbiter in the case of a dispute. Provision must be made to treat the request to enter and use property as confidential information belonging to the ECNS licensee concerned.

Telkom Proposed Amended Wording

Telkom proposes the following amendment to section 20G(3):

"(3) Electronic communications network service licensees –

(a)retain ownership of any electronic communications networks and facilities constructed[.]; and

(b)are entitled to the confidential treatment of information submitted in terms of this section."

Telkom proposes the following amendment to section 20G by the addition of subsection (7) as follows:

"(7) Where a landowner is an electronic communications network service licensee, –

(a)such landowner may object to the Authority in the prescribed manner at least 14 days before the electronic communications network service licensee contemplated in section 20G commences with the activity;

(b)the Authority in considering the objection, may resolve that access must be granted on condition that the parties enter into a service level agreement to regulate the activities and provide for the Authority as the final arbiter in the event of disputes arising."

12.7.7 By insertion of section 20H

Access to high sites for radio-based systems

20H. (1) For the purpose of this section ''high site' means any structure or feature, constructed or natural, including buildings, which is suitable for radio-based systems.

(2)An electronic communications network service licensee may access and use any high site for the deployment of electronic communications networks and facilities that promote broadband, except for high sites that are not technically feasible for this purpose, as may be prescribed by the Authority.

(3)An owner of a high site may not refuse access to an electronic communications network service licensee for the installation of electronic communications networks and facilities that promote broadband.

(4)All spheres of government that own high sites must upon request make such high sites available for the installation of electronic communications networks and facilities that promote broadband, at a cost based rental in accordance with the rapid deployment regulations prescribed by the Authority.

Telkom Commentary

Telkom recommends that any agreement entered into for access to high sites must provide for a dispute resolution by ICASA in the event that an owner of a high site refuses access (ICASA must be final arbiter). Provision must be made for the treatment of the requests for access as confidential information.

Telkom Proposed Amended Wording

Telkom recommends the amendment of section 20H by the addition of subsection (5):

"(5) Any agreement entered into between the owner of a high site and an electronic

communications network service licensee to access and use a high site, must provide

for appropriate dispute resolution clauses and include the Authority as the final arbiter for disputes arising from such agreement".

19.3 By insertion of section 20I

"**Access to trenches**

20I. (1) The Authority must, in order to ensure a single trench for fibre in each geographic location where it is technically feasible to do so,
prescribe the processes and procedures that enable a single trench for fibre under the rapid deployment regulations.

(2) The regulations contemplated in subsection (1) must specify, among other things—
(a) that electronic communications network service licensees must consult with other parties in the interest of the single trench policy;
(b)how other electronic communications network service licensees can get access or capacity at a later stage if they are unable to participate at the time of trenching;
(c)obligations on electronic communications network service licensees to include excess capacity in their deployment and to lease spare
capacity to other licensees at reasonable rates or such rates as prescribed under the open access policy regulatory framework contemplated in Chapter 8, whichever is lower;
(d)procedures and processes for resolving disputes that may arise between the electronic communications network service licensee, any
landowner or other stakeholder; and *(e)* the role of Rapid Deployment National Co-ordinating Centre to coordinate with key stakeholders.

Telkom Commentary

The Bill should provide for a prescribed timeline as to when ICASA would prescribe the processes and procedures that enable a single trench for fibre under the rapid deployment regulations. Further, the content of the rapid deployment regulations, especially in relation to dispute resolution, is already determined in section 20C(2) (Role of Authority). Provision must be made for the treatment of the requests for access as confidential information.

Telkom Proposed Amended Wording

Telkom proposes the amendment of section 20I(2)(d) as follows:

"(d) procedures and processes for resolving disputes that may arise between the electronic communications network service licensee, any landowner or other stakeholder regarding access to trenches;[and]

(e) the role of [Rapid Deployment National Co-ordinating Centre] the Authority to coordinate with key stakeholders; and
(f)the confidential treatment of information submitted in terms of this section."

19.4 By insertion of section 20M

"**Adequately served**

20M. (1) For the purposes of this section "adequately served" means—

(a)an electronic communications network or facilities that enables electronic communications services including voice services and broadband services at the quality and speeds provided in SA Connect, has already been deployed to and within a set of premises such as a gated complex, an office park, a shopping mall, a government building or a block of flats, by an electronic communications network service licensee ("in this section referred to as the access provider"); and

(b)the access provider has the ability to connect each and every occupant or user within such premises.

(2)The Authority must ensure that the access provider complies with the following rules when premises are 'adequately served':

(a)The electronic communications network or facilities or elements thereof should be available from the access provider to access seeking licensees on an open-access basis as contemplated in section 43. Such electronic communications network or facilities or elements thereof are deemed essential facilities;

(b)an occupant within the premises is not obliged to receive an electronic communications service from the access provider and may select and receive a service from any electronic communication service provider of choice; and

(c)the access provider must establish a "meet-me" facility at a suitable point within the premises at which all access seeking licensees may install their own electronic communications facilities or equipment so as to interconnect with the electronic communications network of the access provider, or that the access seeking licensee may use those facilities of the access provider as would enable it to provide services as requested.

3) No electronic communications networks or facilities may be deployed in adequately served premises except with the approval of the Authority, if such deployment will not discourage service-based competition."

Telkom Commentary

The section defines specifically that meet-me rooms must be established at each adequately served premises. Depending on the scale and number of access seekers, this might not be practical and probably uneconomical for the last-mile

access provider. Flexibility should be provided to extend into other localities, such as extensions into exchanges. It is also noted that the section seems to refer to fixed access only, which does not allow for parity with Mobile Operators who have significant market power in these instances. If the meaning is to exclude Mobile Operators it should be noted that such an approach will be short-sighted strategically, with the emergence of 5G and other last-mile Fixed-Wireless Access use cases.

Telkom Proposed Amended Wording

Telkom proposes the following amendment to section 20M(2)(c):

"(c) the access provider must establish a "meet-me" facility at a suitable point ~~within the premises~~ at which all access seeking licensees may install their own electronic communications facilities or equipment so as to interconnect with the electronic communications network of the access provider, or that the access seeking licensee may use those facilities of the access provider as would enable it to provide services as requested, provided it is technically possible to do so."

19.5 By insertion of section 20P

"**Fees, charges and levies**

20P. (1) No access fee may be charged by landholders to electronic communications network service licensees for deploying electronic communications networks or facilities in cases where the electronic communications networks or facilities are not intrusive, such as buried or overhead cabling, that does not constitute a cost to the landholder, or deprive the landholder of its own use of the land.

(2)*(a)* Reasonable access fees may be charged in cases where more intrusive electronic communications networks or facilities, such as masts, are erected on property.

(b) In such cases any access fee must be reasonable in proportion to the disadvantage suffered and must not enrich the landowner or exploit the electronic communications network service licensee.

(3)In the case of any dispute on access fees, the reasonableness of the access fees must be determined by the Authority on an expedited basis.

(4)If access to land involves an administrative process, a once-off administrative fee may be charged by the landholder that is based on the administrative cost of dealing with the application.

(5)A landholder is entitled to reasonable compensation agreed to between the landholder and the electronic communications network service licensee, for any financial loss or damage, whether permanent or temporary, caused by an electronic communications network service licensee entering and inspecting land, or installing, deploying or maintaining electronic communications networks or facilities.

(6)In the case of any dispute on compensation, the reasonableness of the compensation must be determined by the Authority on an expedited basis.

(7)An electronic communications network service licensee may continue to deploy electronic communications networks and facilities while awaiting the resolution of the dispute by the Authority."

Telkom Commentary

The Authority must give guidance on acceptable fee structure to avoid inconsistencies and to promote uniformity.

20 SECTION 25 OF EC AMENDMENT BILL: REMOVAL OF ELECTRONIC NETWORK FACILITIES

20.1 CHAPTER 5 OF EC AMENDMENT BILL: RADIO FREQUENCY SPECTRUM

20.1.1By insertion of section 29A

"**Functions of the Minister of Telecommunications and Postal Services**

29A. The Minister of Telecommunications and Postal Services is responsible for—

(a)representing the Republic on radio frequency spectrum at international, multi-lateral and bi-lateral level;

(b)representing the Republic at the ITU including radio frequency spectrum planning, allocation, and international coordination of radio frequency spectrum use;

(c)issuing policies and policy directions in relation to radio frequency spectrum as contemplated in section 3;

(d)the development and approval of the National Radio Frequency Plan including the allocation of spectrum for the exclusive use by national security services as contemplated in section 34;

(e)establishment of a National Radio Frequency Spectrum Planning Committee and National Radio Frequency Spectrum Division as contemplated in section 34A;

(f)coordination across Government including sector-specific agencies; and

(g)coordination with the Minister of Communications on issues relating to spectrum that has been allocated to the broadcasting services."

Telkom Commentary

Telkom does not propose any amendment to the wording of section 29A. However, Telkom recommends the Amendment Bill must take into account the potential future change in titles that usually occurs in the executive cabinet.

20.1.2 By substitution of section 30 for the following:

"**[Control] Administration of radio frequency spectrum**

30. (1) In carrying out its functions under this Act and the related legislation, the Authority **[controls, plans,]** administers and manages the **[use]** assignment, **[and]** licensing, monitoring and enforcement of the radio frequency spectrum use except as provided for in section 34.

(2) **[In controlling, planning, administering, managing, licensing and assigning the use of the radio frequency spectrum, the]** The Authority must, in the performance of the functions contemplated in subsection (1) -

(a) comply with the applicable standards and requirements of the ITU and its Radio Regulations, as agreed to or adopted by the Republic, as well as with the national radio frequency plan contemplated in section 34 and ministerial policies and policy directions as contemplated in section 3;

(b) take into account modes of transmission and efficient utilisation of the radio frequency spectrum, including allowing shared use of radio frequency spectrum when interference can be eliminated or reduced to acceptable levels as determined by the Authority, subject to section 31C;

(c) give high priority to applications for radio frequency spectrum where the applicant proposes to utilise digital electronic communications facilities for the provision of broadcasting services, electronic communications services, electronic communications network services, and other services licensed in terms of this Act or provided in terms of a licence exemption;

(d) plan for the conversion of analogue uses of the radio frequency spectrum to digital, including the migration to digital broadcasting **[in the Authority's preparation and modification of the radio frequency spectrum plan]**; **[and]**

(e) give due regard to the radio frequency spectrum allocated to security services**[.]**;

(f) conduct periodic radio frequency spectrum audits and evaluation, that should also be made available to the Minister and published on the Authority's website;

(g)maintain a high quality and appropriately accessible real-time database of radio frequency spectrum assignments, excluding assignments to security services, that includes real-time updates from sector-specific agency databases as contemplated in section 34B;

(h)advise the Minister of Telecommunications and Postal Services on areas for future research, development and planning; and

(i)ensure that radio frequency spectrum licensees submit an annual report on its spectrum usage to the Authority and Minister that includes at least the following information:
(aa) Frequency;
(bb) bandwidth;
(cc) geographic location;
(dd) effective radiated power;
(ee) utilisation of the network;
(ff) efficiency and technology utilised;
(gg) network rollout;
(hh) investment in the network;
(ii) achievement of spectrum license obligations, as applicable; and
(jj) alignment of its network plans with national objectives and targets.

(3) The Authority must, in performing its functions in terms of subsection (1), ensure that in the use of the radio frequency spectrum harmful interference to authorised or licensed users of the radio frequency spectrum is eliminated or reduced to the extent reasonably possible.

(4) The Authority must investigate and resolve all instances of harmful interference to licensed services that are reported to it.

(5)For the purposes of Chapter 5, management of spectrum by the Authority is the technical term for the process of regulating the spectrum"

Telkom Commentary

Control and use of radio frequency spectrum

Telkom supports reassigning spectrum “control” from ICASA to ministerial level, in which case ICASA is then responsible to manage the “use” of spectrum (i.e. ICASA administers spectrum) in line with the NRFP:

- the ministerial planning of radio frequency spectrum through the development of the NRFP, as contemplated in section 34, is best placed at the DTPS as the allocation and control of spectrum in deciding which services are entitled to use a particular frequency band, including frequency migrations as necessary, is an extension of the ITU WRC process; and

- ICASA is then mandated in section 30(1) to administer the assignment of spectrum and licence operators accordingly, with the necessary discretion applied to different services.

- **Periodic Spectrum Audits**

In terms of s 30(2)(f), ICASA must conduct periodic spectrum audits and evaluations, make these available to the Minister and publish them on its website. Whereas the intention of the section is evident and supported, the details are not clear.

For example, the granularity of the audit (i.e. the type of network deployment details required) is not evident. Also, "spectrum evaluations" is not clear and should be clarified.

It is also not clear what should be made available on the Authority's website e.g. the details of the audit or a report only.

- **Real-time database**

In terms of section 30(2)(g), ICASA must maintain appropriately accessible real-time database of all spectrum assignments including real-time updates from sector-specific agency databases.

The granularity of the information to be made available in the database has not been defined (e.g. should frequency band assignments or assignment of each individual transmitter be made available).

It is also not clear if this section is linked with the obligation to provide annually a report of spectrum usage, as contemplated in s 30(2)i). Linking of the online database with the automated licensing system to be developed as per s. 31(11) , if any, should also be addressed.

The introduction of a real-time database, available online, may breach confidentiality pertaining to network deployment and therefore, contravene the right to privacy of licensees and limit their competitive advantage. This will be the case in particular if all network deployment details are to be made available, such as the information contemplated in s 30(2)(i).

- **Spectrum Usage Annual Reports**

In terms of s 30(2)(i), licensees must provide an annual report on spectrum use to the Authority and the Minister. In terms of s 31(3A)(i) the submission of this annual report on spectrum use is a condition for the renewal of a radio frequency spectrum licence.

Telkom notes that the renewal of spectrum licences is dependent on the annual reports on spectrum use, for various reasons.

- It is not clear what the objective is of the information provided to the Authority, noting that most of this information is already contained in the spectrum licence issued by the Authority or as part of the Register of Assignments.

- ICASA may not be adequately staffed to assess applications for the renewal of spectrum licences due to the large number of spectrum licence holders and the magnitude of the information provided to the Authority. This was previously experienced when ICASA regulations determined that annual spectrum renewal applications be submitted (with far less information), which process was abandoned after just one cycle because ICASA could not handle the amount of information received. It should also be considered that most spectrum licences are currently renewed on the same day i.e. 31 March.
- It is not clear what level of assessment of the data provided, if any, will be done by the Authority and what action will be taken on non-compliance to, for example, achievement of spectrum licence obligations.
- The reason to provide some of the specified information is not clear; for example, network investment. Use of "network" (i.e. "network rollout" and "investment in the network") in the context of radio frequency spectrum licences may be inappropriate as a "network" is build using various spectrum licences. Use of the term "radio apparatus" may be more appropriate.
- This section includes both high demand and other radio frequency spectrum licences.

Where only high-level reporting on spectrum use is required, this may be manageable for the process of licence renewals. Annual reporting should be limited to general or high-level use of the spectrum licence rather that a requirement to submit to the Authority detailed information, which is in any event with the Authority. Submitting detailed information to the Authority on an annual basis, may reduce the process to a tick-box exercise, without any real assessment of the information submitted.

Telkom recommends that the level of detail required in the annual report must be high level, this may avoid recurrence of previous annual spectrum licence renewals/audits which we understand ICASA has done away with owing to a lack of capacity/personnel to conduct such assessments.

Licensees must be given an opportunity to address any shortcomings arising from the annual report including filing a supplementary report or address any concern emanating from the annual report.

Telkom Proposed Amended Wording

In this regard, Telkom proposes the following amendment to the proposed subsection 30(2)(i) and the addition of subsection (2)(j):

(i) ensure that radio frequency spectrum licensees submit annually a high-level report on its spectrum usage to the Authority and Minister that includes at least the following information:

(aa) Frequency band assigned or used on shared basis;

(bb) bandwidth assigned or used on a shared basis;
(cc) geographic location of assignment or use of shared spectrum;
~~(dd) effective radiated power~~
(ee) utilisation of the ~~network~~ radio apparatus deployed;
(ff) ~~efficiency and technology utilised~~ technology utilised and its spectral efficiency;
(gg) network rollout or radio apparatus deployed;
(hh) investment in the network or radio apparatus;
(ii) achievement of spectrum license obligations, as applicable; and
(jj) alignment of spectrum use with national objectives and targets, relevant.

"(j) publish guidelines on the particulars of information required to be submitted in the annual report contemplated in subsection (i), including the procedure to allow licensees to submit a supplementary annual report to address concerns which the Authority may identify in accordance with this section".

21 SECTION 31 RADIO FREQUENCY SPECTRUM LICENCE

21.1 By substitution for section 31(3) of the following:

"(3) The Authority may, taking into account the objects of the Act, prescribe procedures and criteria for **[—**

(a) radio frequency spectrum licences in instances where there is insufficient spectrum available to accommodate demand;

(b)] the amendment, **[transfer, transfer of control,]** renewal, suspension, cancellation and withdrawal of radio frequency spectrum licences**[; and]**.

[(c) permission to assign, cede, share or in any way transfer a radio frequency spectrum licence, or assign, cede or transfer control of a radio frequency spectrum licence as contemplated in subsection (2A).]

Telkom Commentary

Please refer to the commentary under section 31C below regarding the deletion of subsections 31(2A) and 31(3)(c) regarding the potential impact and vacuum created pertaining to regulations currently in force.

12.9.2 By insertion after section 31(3) of the following:

" (3A) (a) Radio frequency spectrum licences are renewable annually, despite the duration of the licence.

(b) The Authority must include compliance with section 30(2)(i) as a condition for renewal of a radio frequency spectrum licence."

Telkom Commentary

Please refer to commentary and proposals under section 30(2)(i) above and section 31E below.

21.2 By the addition in section 31(4) of the following:

" (f) if the Authority has approved an application for spectrum sharing, spectrum trading or spectrum refarming."

Telkom Commentary

Telkom submits that it is not ideal that ICASA amends a licence for a firm that seeks to refarm its spectrum as it could stall the development of new faster technologies including LTE. It also implies that all existing spectrum licences must be amended to capture the current technology deployed, noting also that licensees use the same frequency bands are currently used for different technologies by licensees. Telkom submits that spectrum refarming should not be subject to approval by the Authority, but same can be notified to the Authority. Telkom recommends that the process to amend a radio frequency licence for spectrum sharing, spectrum trading and refarming must be transparent with clear timelines set as to when the application to amend the licence will be approved. Timelines should be short to limit impact on the use of radio frequency spectrum. Transitional arrangements must also be addressed, as discussed in Telkom's commentary to Sections 31B, 31C and 31D below.

21.3 By the amendment of section 31(4) as follows:

"(f) if the Authority has approved an application for spectrum sharing or spectrum trading."

21.4 By the insertion of section 31(8A) as follows:

" (8A) (a) The 'use it or lose it' principle contemplated in subsection (8) does not apply to passive science services due to the nature of their operations which do not transmit signals frequently.

(b) The Minister may, upon recommendation by the Authority, exempt SMMEs and new entrants from the 'use it or lose it' principle contemplated in subsection (8), upon good cause shown."

Telkom Commentary

Telkom argues that the use it or lose principle must apply to all spectrum licensees, including the passive science services. Although Telkom agrees that passive science services does not involve the transmission of signals it still involves a receiver to receive either the natural emissions from earth, sea, etc. or transmissions from space science satellites. The same applies to radio astronomy, which uses a radio receiver to receive radio waves of cosmic origin. The frequency assignment is therefore used when the necessary receivers are deployed to receive such natural emissions or to perform astronomy observations.

If a frequency band is therefore assigned to a science institution for passive services, such assignment is used only when the necessary receivers are deployed. If no receivers are deployed, then the spectrum is not used and the use it or lose it principle must apply.

The use it or lose it principle must equally apply to all government services; there is no reason why certain government agencies should be excluded from the "*use it lose it*" principle.

Whereas Telkom could agree to the addition of section 8A(b), Telkom recommends that exemptions to SMMEs and new entrants not be indefinite in time.

Government agencies that intentionally do not use spectrum or hoard it must be compelled to use it or lose it.

Telkom Proposed Amended Wording

Telkom recommends that section 8A (a) be deleted. If the Minister however wishes to retain the reference to passive services, Telkom recommends the wording be changed as follows:

"*The 'use it or lose it' principle contemplated in subsection (8) ~~does not~~ equally applies to passive ~~science~~ services ~~due to the nature of~~ due to the fact that ~~frequently~~, it involves the reception of emissions.*"

Telkom recommends that section 8A(b) be amended as follows: "*The Minister may, upon recommendation by the Authority, exempt SMMEs and new entrants from the 'use it or lose it' principle contemplated in subsection (8), upon good cause shown and for a defined period.*"

21.5 By the addition of section 31(11) as follows:

"(11) The Authority must develop an automated licensing system for radio frequency spectrum that is not high demand radio frequency spectrum."

Telkom Commentary

Telkom supports this proposal as it is long overdue. The current spectrum licensing system is based on many manual processes, which leads to data errors, lost applications and delays in issuing invoices and licences. The licensing system must however also include the ability to perform complex radio frequency spectrum management tasks such as frequency coordination between the same and different services.

Telkom recommends that such system be implemented as a matter of urgency, noting also that the Authority is already working on an automated licensing system.

Telkom Proposed Amended Wording

Telkom recommends the following change to section 31(11): "*The Authority must develop and implement, within 6 months after the promulgation of the EC amendment Bill, an automated licensing and spectrum management system for radio frequency spectrum that is not high demand radio frequency spectrum.*"

22 By insertion of section 31A

"**Universal access and universal service obligations of radio frequency spectrum licences.**

31A. (1) In addition to any universal access and universal service obligations contemplated in section 8, the Authority must impose universal access and universal service obligations on existing and new radio frequency spectrum licencees.

(2) The Authority must obtain the Minister's approval on the nature and form of all universal access and universal service obligations before they are imposed on any radio frequency spectrum licensees to ensure that the obligations are coordinated, relevant and aligned with national policy objectives and priorities.

(3)Radio frequency spectrum licensees assigned radio frequency spectrum in similar radio frequency spectrum bands must have similar universal access and universal service obligations.

(4)Radio frequency spectrum licensees must report annually to the Authority on their compliance with their universal access and universal service obligations that the

Authority must make publicly available.

(5)Universal access and universal service obligations should be specific, attainable and measurable and compliance should be evaluated by the Authority on an annual basis, as a condition of renewal of the radio frequency spectrum licence."

Telkom Commentary

Telkom contends that its current USOs must be taken into account. See also Telkom's comments on USOs in section 3. Imposition of additional USO obligations on Telkom will be onerous as these licensees have already incurred extensive USO obligations. Telkom proposes that USOs should be linked to market share of licensees; imposing equal obligations to all licensees (even for the same spectrum) will further entrench the dominance of those with SMP. Market studies are therefore required. ICASA must conduct a market review before imposing any new USO obligations in order to ensure that the identified USO obligations address the concerns identified in the market review. The Authority must also consult licensees in all cases where any new USOs are formulated.

Telkom Proposed Amended Wording

Telkom recommends the following amendments to section 31A –

"31A (2) The Authority must within three months of completion of the market review obtain the Minister's approval on the nature and form of all universal access and universal service obligations [before they are imposed] to be imposed on any radio frequency spectrum licensees to ensure that the obligations are coordinated, relevant and aligned with national policy objectives and priorities.

(3) Radio frequency spectrum licensees assigned radio frequency spectrum in similar radio frequency spectrum bands must have similar universal access and universal service obligations, subject to subsection (5).

(4) Radio frequency spectrum licensees must [report annually] within three months of the end of the preceding year submit annual reports to the Authority on their compliance with their universal access and universal service obligations that the Authority must make publicly available, after consultation with the radio frequency spectrum licensees.

(5) Universal access and universal service obligations [should] imposed shall be based on the outcome of a market review, which shall take into account market share of licensees, and must be specific, attainable and measurable and compliance should be

evaluated by the Authority on an annual basis, as a condition of renewal of the radio frequency spectrum licence."

12.9.8 By insertion of section 31B

"**Radio Frequency Spectrum Trading**

31B. (1) The Authority may consider applications for spectrum trading of non-high demand spectrum in accordance with spectrum trading regulations.

(2)The Authority must prescribe spectrum trading regulations for non-high demand spectrum that include—

(a)the spectrum trading application process; and

(b)the criteria and conditions for spectrum trading.

(3)The criteria and conditions for spectrum trading must include the following:

(a)Competition may not be distorted by any spectrum trade or by the accumulation and hoarding of spectrum rights of use;

(b)licence obligations will be passed on to the new user of the radio frequency spectrum;

(c)the current radio frequency spectrum licensee must have used the radio frequency spectrum in the year prior to the spectrum trade to ensure that the trade is not used to subvert the 'use it or lose it' principle;

(d)the current and new radio frequency spectrum licensee should be in compliance with all relevant legislation; and

(e)submission to the Authority of the particulars of the spectrum trade transaction including the legal, technical and financial terms and conditions to ensure that the spectrum trade does not undermine policy objectives.

(4)No high demand spectrum may be traded.

(5)The Minister may issue policy directions to the Authority on spectrum trading and spectrum use rights in order to fulfil specific national objectives.

Telkom Commentary

Spectrum trading is addressed above. In summary, Telkom argues that trading in HDS should be allowed, similarly to non-HDS, subject to regulatory and competition approval and if it does not undermine

competition. Both ICASA and the Competition Commission must investigate any transaction involving HDS.

The period in which ICASA will consider and approve or decline an application for spectrum trading must be clearly set out to avoid delays.

Regulations pertaining to spectrum trading should be developed as a matter of urgency to ensure that market developments are not restricted.

No transitional provisions are provided for the regulations currently in force under the ECA, such as the current Radio Frequency Spectrum Regulations, 2015 ("**RFS Regulations**") and various Radio Frequency Spectrum Assignment Plans (RFSAPs) prescribed for IMT frequency bands. Consequently, Telkom is concerned that the Amendment Bill creates a potential vacuum regarding certain regulations that are currently in force, or where no regulations have been prescribed. See also Telkom's comments on transitional provisions above.

Telkom Proposed Amended Wording

Telkom recommends the following amendments to section 31B –

"**Radio Frequency Spectrum Trading**

31B. (1) The Authority may consider applications for spectrum trading of ~~non-high demand~~ spectrum in accordance with spectrum trading regulations.

(1a) Both the Authority and the Competition Commission must investigate any spectrum trade involving high demand spectrum.

(2) The Authority must prescribe spectrum trading regulations for ~~non-High demand spectrum~~ within 12 months of the promulgation of the Electronic Communications Amendment Act that include—

(a) the spectrum trading application process; and

(b) the criteria and conditions for spectrum trading.

(3) The criteria and conditions for spectrum trading must include the following:

(a) Competition may not be distorted by any spectrum trade or by the accumulation and hoarding of spectrum rights of use;

(b) licence obligations will be passed on to the new user of the radio frequency spectrum;

(c) the current radio frequency spectrum licensee must have used the radio frequency spectrum in the year prior to the spectrum trade to ensure that the trade is not used to subvert the 'use it or lose it' principle;

(d) the current and new radio frequency spectrum licensee should be in compliance with all relevant legislation; and

(e) submission to the Authority of the particulars of the spectrum trade transaction including the legal, technical and financial terms and conditions to ensure that the spectrum trade does not undermine policy objectives.

(4)~~No high demand spectrum may be traded.~~

(4)An application for spectrum trading must be considered within 30 days, unless a longer time is agreed between the parties due to unique circumstances.

(5) The Minister may issue policy directions to the Authority on spectrum trading and spectrum use rights in order to fulfil specific national objectives.

12.9.9 By insertion of section 31C

"**Radio Frequency Spectrum Sharing**

31C. (1) Radio frequency spectrum licensees may share licenced spectrum subject to approval from the Authority.

(2)The Authority may not approve spectrum sharing if it will—

(a)have a negative impact on competition;

(b)amount to spectrum trading; or

(c)compromise emergency services and other services that meet public interest goals.

(3)The Authority must prescribe spectrum sharing regulations that include

(a)the spectrum sharing application process; and

(b)the criteria and conditions for spectrum sharing including for sharing of sector-specific spectrum assigned to sector-specific agencies contemplated in section 34B."

Telkom Commentary

Section 31C(3) mandates the Authority to prescribe spectrum sharing regulations that include (i) the spectrum sharing application process; and (ii) the criteria and conditions for spectrum sharing. The proposed amendment replaces section 31(3)(c) of the ECA which empowers ICASA to prescribe procedures and criteria for permission to, amongst others, share a radio frequency spectrum licence.

There are currently regulations made by ICASA in terms of section 4, read with sections 31(4), 34(7)(c) (iii), 34(8) and 34(16) of the ECA. These include Regulation 18 of Radio Frequency Spectrum Regulations of 2015 ("RFS Regulations"). Regulation 18 of the RFS Regulations prescribes spectrum sharing aspects relating to the application process, criteria and conditions. These are the same issues the proposed section 31C(3) of the Amendment Bill requires the Authority to prescribe by regulations. Accordingly, unless Regulation 18 of the RFS Regulations is repealed, the proposed amendment appears to require that the Authority make regulations on matters already regulated by Regulation 18.

Telkom is concerned that the proposed amendment does not stipulate transitional provisions and makes no reference to the regulations currently in force, including the RFS Regulations, and thus potentially creates a vacuum on matters that are addressed in the current regulations, including Regulation 18 of the RFS Regulations.

Generally, the absence of an appropriate saving clause in a provision repealing an earlier one, from which subordinate measures are dependent, may bring about a repeal of such subordinate legislation. However, section 11 of the Interpretation Act 33 of 1957 provides that "*When a law repeals wholly or partially any former law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation*".

It appears that by implication section 31C(3) seeks to replace the current regulations. If so, the current regulations will, in accordance with section 11 (*also Langklip See Produkte (Pty) Ltd and others v Minister of Environmental Affairs and Tourism and others* 1999 (4) SA 734 (C) and *Waymark and others v Meeg Bank Ltd* 2003 (4) SA 114 (TkH)), continue to apply until new regulations come into effect. Accordingly, pending the coming into force of regulations as contemplated in the amendment, the current regulations, including the RFS regulations would apply.

Notwithstanding, to avoid uncertainty, Telkom proposes that express provision must be made in the amendment for the continued application of current regulations, in so far as they are not in conflict with the amended Act, until the Authority has made regulations in terms of section 31C.

Telkom Proposed Amended Wording

Telkom proposes that the following amendment to subsection (3) under section 31C:

(3) The Authority must prescribe spectrum sharing regulations within 12 months of the promulgation of the Electronic Communications Amendment Act that include-

(a) the spectrum sharing application process; and

(b) the criteria and conditions for spectrum sharing including for sharing of sector-specific spectrum assigned to sector-specific agencies contemplated in section 34B."

Telkom proposes that the following paragraph be included under section 31C:

An application for spectrum sharing must be considered within 30 days, unless a longer time is agreed between the parties due to unique circumstances.

Telkom proposes that the following paragraph (4) be included under section 31C:

"(4) Section 31C becomes operational after the repeal of any current regulations which govern Radio Frequency Spectrum Sharing and the substitution of such regulations with new regulations under section 31C(3)".

23 By insertion of section 31D

"**Radio Frequency Spectrum Refarming**

31D. (1) Radio frequency spectrum licensees may refarm licenced spectrum subject to approval from the Authority.

(2)The Authority may not approve spectrum refarming if it will have a negative impact on competition.

(3)Universal access and universal service obligations must be imposed on radio frequency spectrum licensees if other assigned spectrum in similar bands to the refarmed spectrum, carry universal access and universal service obligations, as contemplated in section 31A.

(4)Spectrum fees must be imposed on radio frequency spectrum licensees for refarmed spectrum commensurate with other assigned spectrum in similar bands.

(5)The Authority should prescribe spectrum refarming regulations that include
(a) the spectrum refarming application process; and

(b) the criteria and conditions for spectrum refarming."

Telkom Commentary

Spectrum refarming is addressed above.

In summary Telkom proposes that the provisions pertaining to spectrum refarming be deleted from the Amendment Bill.

Licensees should not have to seek the permission of ICASA in order to refarm spectrum in order to encourage innovation and development of faster more efficient technologies.

The current spectrum licensing regime is based on the internationally accepted model of technology and service neutrality. Spectrum licences are currently assigned on a technology neutral basis, which gives licensees broad rights in terms of using radio equipment in the assigned spectrum.

The proposed introduction of section 31D could have a negative impact on the market and operator's ability to introduce new technologies.

The use of the term "technology" may be subjected to an interpretation that is too wide and over-reaching. For example, it is assumed that a change from 4G to 5G or changing fixed services to mobile services (as examples) will require regulatory approval under the proposed provisions. However, it is not clear if subtle changes will require regulatory approval, for example, implementing certain elements of a new standard (e.g. 3GPP release 13 is deployed and elements of release 14 is introduced).

Telkom is concerned that no time line has been included in the Bill pertaining to refarming. To minimise impact on the industry it is recommended that refarming regulations must be prescribed within 12 months following the promulgation of the EC Amendment Bill. Alternatively, transitional provisions should be included that will allow spectrum refarming without approval until the necessary regulations have been prescribed to ensure that the market can continue to developed by deploying the latest technologies.

Since all current spectrum licences are technology neutral, and there is no indication on the licence as to what "technology" has been deployed in each frequency band, it is not clear how the transition to the new regime will be implemented. This includes the period prior to the necessary regulations having been prescribed. It is also noted that licensees have not deployed the same technology in similar frequency bands so it is not clear which technology will be the "standard" for each frequency band? Will licensees be allowed to "move" to the same technology deployed by other licensees in the same frequency band without approval?

See also Telkom's comments regarding transitional provisions as provided above.

It is also not clear why a licensee with extensive USO Obligations would have to incur additional USO Obligations if it refarms spectrum; i.e. deploying an alternative technology in the same spectrum. In any event, in such cases, previous USO

obligations applicable to the particular frequency band should be considered when determining any new USOs.

Telkom Proposed Amended Wording

Noting the above, Telkom proposes that section 31D pertaining to spectrum refarming be deleted from the Amendment Bill. If retained, extensive changes will have to be introduced to cover the issued raised above.

24 By insertion of section 31E

"**High demand spectrum**
31E. (1) The Minister responsible for telecommunications and postal services must, within 6 months of the commencement of the Electronic Communications Amendment Act , …, and t her eaf t er as r eq uir ed, det erm ine –

(a)what constitutes high demand spectrum; and

(b)which unassigned high demand spectrum must be assigned to the Wireless Open Access Network, by notice in the *Gazette*, after consultation with the Authority.

(2)The assignment of high demand spectrum is—

(a)subject to the principles of open access as contemplated in Chapter 8; and

(b)in line with the principle of non-exclusivity, subject to the provisions of the national radio frequency plan.

(3)The Authority must, within 12 months of the commencement of the Electronic Comm unications Am endm ent Act , … f inalise an inq uir y as cont em plated in section 4B of the ICASA Act and make recommendations to the Minister on the terms and conditions which will apply to the Wireless Open Access Network.

(4)The unassigned high demand spectrum as determined by the Minister of Telecommunications and Postal Services in terms of subsection (1) must be assigned to the Wireless Open Access Network following a policy direction issued by the Minister in terms of section 5(6) as contemplated in section 19A.

(5)The Authority may issue radio frequency spectrum licences for unassigned high demand spectrum not assigned to the Wireless Open Access Network as contemplated in subsection (4), on condition that—

(a)the Wireless Open Access Network is functional;

(b)the licensee procures a minimum of 30% capacity or such higher capacity as determined by the Authority, in the Wireless Open Access Network for a period determined by the Authority; and

(c)universal access and universal service obligations contemplated in section 31A are imposed on the licensee, and such obligations are complied with in rural and under-serviced areas before the assigned spectrum may be used in other areas by the licensee.

(6)The Authority must, within 24 months of the commencement of the Electronic Communications Amendment Act, … conduct an inquiry as contemplated in section 4B of the ICASA Act and make recommendations to the Minister on the terms and conditions, as well as the time frame, under which the exclusively/individually assigned high demand spectrum, excluding the high demand spectrum assigned to the Wireless Open Access Network, must be returned to the Authority, taking into account policy, market developments and extent of availability of open access networks."

Telkom Commentary

See also Telkom's comments above regarding the establishment of the WOAN and the assignment of high demand spectrum.

Telkom supports all unassigned HDS to be assigned to the WOAN. In this regard, section 31 E must be amended and in particularly, Telkom recommends that subsection (5) be deleted in its entirety.

Telkom further does not support the return of the currently assigned HDS. In this regard, Telkom recommends that subsection 6 be deleted in its entirety.

Telkom in principle agrees with the definition of high demand spectrum, however the requirement in section 31E(1) requires clarification as to whether a public consultation process will ensue pursuant to the publication of the notice in the *Government Gazette*, and whether such notice constitutes a policy decision by the Minister. In any event, considering the huge impact that the declaration of a frequency band as HDS will have on a licensee specifically and the industry in general, public consultation is of utmost importance.

The assignment of high demand spectrum must take into account sector monopolies / duopolies and uncompetitive market structures in order to promote the ability of smaller entities and late entrants to compete.

The impact of additional spectrum on market and competition, must also be considered.

Telkom proposes that - (i) only in very narrowly defined circumstances may ICASA remove any radio frequency spectrum licence or assigned radio frequency spectrum from a licensee; and (ii) licence withdrawal should only take place after a hearing is held into the lack of use of that licence by that licensee. In addition, Telkom proposes that expropriation of spectrum must be with just and equitable compensation.

The proposed amendment provides for the recall or return of HDS which is presently held in terms of a radio frequency spectrum licence. While section 31(8) of the ECA permits the withdrawal of a licence or assigned radio frequency spectrum if the

licensee fails to utilize the assigned radio frequency spectrum in accordance with the licence conditions, it appears that the amendment may contemplate the return of HDS in circumstances other than or in addition to section 31(8).

Telkom submits that the return of exclusively/individually assigned spectrum at the instance of the Authority may constitute expropriation.

Telkom proposes that to give effect to the requirement for procedural fairness, the terms and conditions would have to stipulate that the Authority must give notice of intention to recall the spectrum and afford affected parties the opportunity to make representations.

Telkom submits that the Authority must consult with stakeholders on terms and conditions that it proposes to make to the Minister, alternatively that the Minister must consult with stakeholders before he makes a decision on recommendations made to him by the Authority.

Telkom accordingly proposes that the section be amended to provide for consultation with stakeholders before a decision is made on the terms and conditions for the return of spectrum.

Telkom Proposed Amended Wording

"31E. (1) The Minister responsible for telecommunications and postal services must, within 6 months of the commencement of the Electronic Communications Amendment Act, …, and thereafter as required, invite comments from interested parties on the following and thereafter make a determination –

(a) on what constitutes high demand spectrum; and

(b) on which unassigned high demand spectrum must be assigned to the Wireless Open Access Network, by notice in the *Gazette*, after consultation with the Authority."

SECTION 34: RADIO FREQUENCY PLAN

25 By the insertion of section 34(7A) as follows:

"(7A) If the national radio frequency plan includes migration of existing users, the time period for migration may not exceed five years, unless otherwise specified by the Minister and the plan must indicate whether any licensee or another party is responsible for the migration costs."

Telkom Commentary

ICASA prescribed frequency migration regulations and a frequency migration plan, which include the migration of several radio frequency bands. Transitional provisions are required to address the existing prescribed regulations and migration plan in the interim until the Minister publishes a new migration plan. See also the comments on transitional arrangements as provided above. The use of the term "audio visual services" in section 34(7)(v) needs to be clarified. Whereas "broadcasting" is defined in the NRFP as well as the ITU Radio Regulations, the term "audio visual service" is not defined. Telkom recommends that the term "audio visual services" be deleted or be defined.

12.8 CHAPTER 8 ELECTRONIC COMMUNICATIONS FACILITIES LEASING

26 By substitution of the section 43 heading for the following:

"Obligation to [lease electronic communications facilities] <u>provide open access</u>"

<u>Telkom Commentary</u>

Section 43 is proposed to be substantially amended however "open access" as a concept is not defined in the Amendment Bill. This may lead to unintended consequences of a wide interpretation thereof to the prejudice of operators.

27 By substitution of section 43(1) for the following:

"<u>(1) All electronic communications network service 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 in accordance with the terms and conditions of a wholesale open access agreement entered into between the parties, in accordance with the general open access principles.</u>"

<u>Telkom Commentary</u>

Telkom in principle does not oppose the "general open access principles" but has a number of concerns regarding the manner in which these principles are defined and applied. The fixed wholesale market is sufficiently competitive and does not require regulation. The clause should be amended to include technical and economic feasibility as reasons for refusal to lease ECN.

Telkom Proposed Amended Wording

Telkom proposes the following amendment to section 43(1):

"(1) All electronic communications network service licensees must provide wholesale open access to their electronic communications networks and facilities upon request, if it is technically and economically feasible and will promote the efficient use of electronic communication networks and services, to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of a wholesale open access agreement entered into between the parties, in accordance with the general open access principles."

28 By the insertion of sections 43(1A) and (1B) as follows:

"(1A) An electronic communications network service licensee that is determined a vertically integrated operator by the Authority in the wholesale open access regulations must, in addition to the requirement in subsection (1), do accounting separation.

(1B) 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."

Telkom Commentary

Imposing additional obligations on an entity that is considered a "*deemed entity*" should be limited to those managed network operators with significant market power rather than including all those with access to High Demand Spectrum. There is sufficient competition in the fixed market (fibre) with a number of new entrants since 2008 thus negating the need for cost based pricing/regulation in that market. Cost based pricing in the fixed market will stifle infrastructure deployment, investment, job creation and economic development (It is ideal that a market review be conducted in the fixed line market to ascertain the feasibility of having a cost-based price model in the fixed market).

29 By the deletion of sections 43(2), (3) and (4) as follows:

[~~(2) Where the reasonableness of any request to lease electronic communications facilities is disputed, the party requesting to lease such electronic communications facilities may notify the Authority in accordance with the regulations prescribed in terms of section 44.~~

~~(3)The Authority must, within 14 days of receiving the request, or such longer period as is reasonably necessary in the circumstances, determine the reasonableness of the request.~~

~~(4)For purposes of subsection (1), a request is reasonable where the Authority determines that the requested lease of electronic communications facilities –~~

~~(a)is technically and economically feasible; and~~

~~(b)will promote the efficient use of electronic communication networks and services.~~]

Telkom Commentary

The deletion appears to remove the concept of whether the request is reasonable i.e. whether the request is economically and technically feasible and will promote efficient use of networks.

Telkom Proposed Amended Wording

Telkom recommends that the nuances in section 43 relating to ICASA's determination on whether sharing requests are economically and technically feasible be retained.

30 By substitution of sections 43(5), (6) and (7) for the following:

"(5) In the case of unwillingness or inability of an electronic communications network service licensee to negotiate or agree on the terms and conditions of **[an electronic communications facilities leasing agreement]** a wholesale open access agreement, either party may notify the Authority in writing and the Authority may—

(a) impose terms and conditions consistent with this Chapter;

(b) propose terms and conditions consistent with this Chapter which; subject to negotiations among the parties, must be agreed to by the parties within such period as the Authority may specify; or

(c) refer the dispute to the Complaints and Compliance Committee for resolution on an expedited basis in accordance with the procedures prescribed in terms of section 46.

(6) For the purposes of subsection (5), unless otherwise agreed in writing by the parties, a party is considered unwilling to negotiate or unable to agree if **a [facilities leasing agreement]** wholesale open access agreement is not concluded within the time frames prescribed.

(7) The **[lease of electronic communications facilities]**
open access provided to electronic communications networks or facilities by an electronic communications network service licensee in terms of subsection (1) must, unless otherwise requested by the **[leasing]** requesting party, be non-discriminatory as among comparable types of electronic communications networks or facilities being **[leased]** provided and not be of a lower technical standard and quality than the technical standard and quality provided by such electronic communications network service licensee to itself or to an affiliate or in any other way discriminatory compared to the comparable network services provided by such licensees to itself or an affiliate."

Telkom Commentary

Telkom recommends that the timeline in which ICASA must propose terms and conditions subject to negotiations among the parties, must be clearly set out. The CCC must be final arbiter on disputes relating to the terms and conditions of a wholesale open access agreement.

31 By the insertion of the following subsection after subsection (7):

"(7A) Subject to section 4D of the ICASA Act, licensees must provide to the Authority any information specified by the Authority in order that the Authority may carry out its duties in terms of this Chapter."

Telkom Commentary

The purpose for the information sought must only be directly related to ICASA carrying out its duties in terms of this Chapter.

32 SECTION 44 OF THE EC AMENDMENT BILL: ELECTRONIC COMMUNICATIONS FACILITIES LEASING REGULATIONS

33 by the substitution for subsection (3) of the following subsection:

" (3) Matt ers which t he wh olesale open access r egulations m ust address include but are not limited to—

(a)wholesale open access agreement principles including—
(i)reference offers containing model terms and conditions for the different open access categories contemplated in section 43;
(ii) the time frame and procedures for—
(aa) the negotiation of wholesale open access agreements;
(bb) t he conclusion of wholesale open access ag reem ent s; and
(cc) the technical implementation of the wholesale open access agreements;

(b)implementation and enforcement of open access principles;

(c)a list of vertically integrated entities including the criteria used to determine vertically integrated entities;

(d)accounting separation procedures for vertically integrated entities;

(e)determination of deemed entities;

(f)the quality, performance and level of service to be provided, including time to repair or restore, performance, latency and availability;

(g) wholesale rates as contemplated in section 47;

(h) the sharing of technical information including obligations imposed in respect of the disclosure of current and future electronic communications network planning activities;

(i) contractual dispute resolution procedures;

(j) billing and settlement procedures;

(k)a list of essential facilities

(l)services associated with open access such as support systems, collocation, fault reporting, supervision, functionality, unbundling, and co-operation in the event of faults;

(m) access and security arrangements;

(n)the requirement that an electronic communications network service licensee negotiate and enter into a wholesale open access agreement with an applicant for an individual licence;

(o)the manner in which unbundled electronic communications facilities are to be made available; and

(p)any other matter necessary for the effective regulation of open access in accordance with this Act."

Telkom recommends wholesale open access applies from level 3 and above.

34 SECTION 47: FACILITIES LEASING PRICING PRINCIPLES

35 The following section is hereby substituted for section 47 of the principal Act:

"**[Facilities leasing] Open access pricing principles**

47. (1) The Authority **[may]** must prescribe regulations establishing a framework for the establishment and implementation of wholesale rates applicable to specified types of **[electronic communication facilities and associated services taking into account the provisions of Chapter 10]** open access including cost-based pricing for deemed entities.

(2) The regulations must be updated at least every second year".

Telkom Commentary

It is not ideal that open access in the fixed line should be cost price based or regulated as there is sufficient competition in the fixed line market.

35 SECTION 67: COMPETITION MATTERS

37 By the insertion of the following subsections after subsection (3):

"(3A) (a) The Authority must, within 12 months of the coming into operation of the Electronic Communications Amendment Act …, 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, by notice in the Gazette.

(b) The notice must set out a schedule in terms of which the Authority will 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.

(3B) The Authority must thereafter at least every three years review and update the market definitions and schedule in terms of which the Authority will conduct market reviews by notice in the Gazette to among other things assess the impact of convergence on existing market definitions.

(3C) The Authority must give notice of its intention to define or review and update all the relevant markets and market segments in the Gazette and in such notice invite interested parties to submit their written representations to the Authority within such period as may be specified in such notice."

Telkom Commentary

The definition of all the relevant markets and market segments must take place within 12 months.

38 by the substitution for section 67(4) of the following subsection:

"(4) The Authority must, when conducting a market review, prescribe regulations that must, among other things—

(a) det er m ine whet her t here is ef f ect ive compet it ion in such m ark et or m ark et seg m ent;

(b)determine which, if any, licensees have significant market power in such market or market segment wher e ther e is inef f ect ive com pet it ion;

(c)impose appropriate pro-competitive license conditions on those licensees having sig nif icant m ark et power t o r emedy t he m ark et f ailure;

(d)set out a schedule in terms of which the Authority will undertake periodic review of the market or market segment, taking into account subsection (8) and the determination in respect of the effectiveness of competition and application of pro-competitive m easures in such m ark et or m ark et seg m ent ; and

(e)provide for monitoring and investigation of anti-competitive behaviour in the market or market segment."

Telkom Commentary

The period reviews in terms of which the Authority will undertake periodic review of the market or market segment must be set out clearly to avoid arbitrariness of such reviews.

12.14.3 By the addition of the following subsection:

"(13) The Authority must perform the market definition and market review proceedings under this Chapter, after consultation with the Competition Commission."

Telkom Commentary

Telkom recommends that the terms of the consultation between the Competition Commission and ICASA must be set out in the Memorandum of Agreement.

39 By insertion of section 67A and 67B

"**Concurrent jurisdiction agreement between the Authority and the Competition Commission**

67A. (1) The Authority must enter into a concurrent jurisdiction agreement with the Competition Commission in terms of section 4(3A) of the ICASA Act and such agreement must be published.

(2)Any existing concurrent jurisdiction agreement between the Authority and the Competition Commission must be amended within three months of the coming into operat ion of t he Elect ronic Comm unications Am endment Act, … t o include a

mechanism to facilitate consultation between the Authority and the Competition Commission on market definition, market reviews and mergers as contemplated in this Chapter, and any other matter."

"**Mergers**

67B. (1) The Authority and the Competition Commission must coordinate with and consult each other when—

(a)the Competition Commission considers an intermediate or a large merger as contemplated in section 13A of the Competition Act and one or more parties to the merger are licensed to provide electronic communications services, electronic communications network services or broadcasting services; or

(b)the Authority considers a licensing matter as contemplated in sections 13(1) or 31B, relevant to an intermediate or a large merger as contemplated in section 13A of the Competition Act.

(2) The Authority and the Competition Commission should,
when coordinating and consulting as contemplated in subsection (1), align their decisions, approvals or recommendations to the extent possible."

Telkom Commentary

Telkom submits that key learnings may be drawn from foreign jurisdictions relating to the interrelationship between ICASA and the Competition Commission.

40 By substitution for section 69 of the following:

"**Code of conduct, end-user and subscriber service charter**

69. (1) The Authority must **[, as soon as reasonably possible after the coming into force of this Act,]** prescribe regulations, that must be reviewed and updated at least every two years, setting out a code of conduct on consumer protection for licensees subject to this Act and persons exempted from holding a licence in terms of section 6 to the extent such persons provide a service to the public.

(1A) The code of conduct must include without limitation, provision for the protection of different types of end-users and subscribers including persons and institutions as well as users of wholesale services.

(2) The Authority may develop different codes of conduct applicable to different types of services. All electronic communications network services licence and electronic communications service licensees must comply with the Code of Conduct for such services as prescribed.

(3) The Authority must **[, as soon as reasonably possible after the coming into force of this Act,]** prescribe regulations, that must be reviewed and updated at least every two years, setting out the minimum standards for **[and]** end-user and subscriber service charters.

(4) The Authority may develop different minimum standards for [**and]** end-user and subscriber service charters for different types of services.

(5) The matters which an end-user and subscriber service charter **[may]** must address include, but are not limited to—

(a) the provision of accurate, understandable and comparable information to end-users and subscribers regarding services, rates, and performance procedures;

(aA) standards of service that end-users and subscribers can expect;

(b) provisioning and fault repair services;

(c) the protection of private end-user and subscriber information;

(d) end-user and subscriber charging, billing, collection and credit practices;

(e) complaint procedures and the remedies that are available to address the matters at issue; and

(f) any other matter of concern to end-users and subscribers.

(6) Where an end-user or subscriber is not satisfied after utilising the complaint procedures set out in the regulations, his or her complaint may be submitted to the Authority in accordance with the provisions of section 17C of the ICASA Act.

(7)The Authority must enter into a concurrent jurisdiction agreement with the National Consumer Commission in terms of section 4(3A)of the ICASA Act, to ensure coordination of consumer protection within the ICT sector."

Telkom Commentary

There is a risk that the regulations on quality will preclude operators from being able to differentiate between their customers and lead to inequitable outcomes. The End User Subscriber Quality Regulations / Charter are sufficient to deal with any concerns relating to services standards.

41By substitution of section 82(3)(a) for the following:

"The Agency must from time to time, with due regard to circumstances and attitudes prevailing in the Republic including the needs of persons with disability and broadband, and after obtaining public participation to the greatest degree practicable, make recommendations to enable the Minister to determine what constitutes."

Telkom Commentary

Typographical error to be corrected.

Telkom Proposed Amended Wording

"The Agency must from time to time, with due regard to circumstances and attitudes prevailing in the Republic including the needs of persons with disability and broadband, and after obtaining public participation to the greatest degree practicable, make recommendations to enable the Minister to determine what constitutes. – "

END OF REPORT