401 Old Pretoria Main Road
Halfway House, Midrand 1685
South Africa

T +27 11 585 0000

The Committee Secretary
The Portfolio Committee on Telecommunications and Postal Services,
P.O. Box 15
Cape Town
8000

Attention: Ms Hajiera Salie
By email: hsalie@parliament.gov.za

20 November 2018

Dear Ms Salie

Invitation to provide written comment on Electronic Communications Amendment Bill [B31-2018]

1. We refer to the above Electronic Communications Amendment Bill [B31-2018] ("the Bill") tabled in Parliament on 19 September 2018 and published in Government Gazette No. 41880 of 31 August 2018 and the invitation for written comments by the Portfolio Committee on Telecommunications and Postal Services ("**the Committee**").

2. We also refer to the Bill published by the Department of Telecommunications and Postal Services ("**DTPS / the Department**") in Government Gazette No. 41261 on 17 November 2017 ("**the Draft Bill**").

3. We thank the Committee for the opportunity to provide written comments to the Bill. We believe that the Bill (and the preceding version contained in the Draft Bill published by the DTPS), articulates a refreshed vision for the sector but is also a fundamental restructure of the market and a radical change to the institutional arrangements responsible for regulation. It therefore has the potential to have far-reaching consequences for the sector.

4. Our previous written submission on the Draft Bill, which we note is somehow not referred to in the consultations recorded in the explanatory memorandum to the Bill, were submitted to the DTPS with the intention to highlight the potential for various unintended consequences that may emerge, in an effort to ensure that the Department avoids those to the greatest extent possible in the Bill that will eventually be sent to Parliament and this Committee. To the extent necessary, we repeat those submissions here. We note that certain of our recommendations regarding the Draft Bill have possibly influenced some of the revised language that appears in

the Bill. To avoid prolixity we have not attached that previous submission to this current submission.

5. As we did in respect of the Draft Bill, we wish to confirm our support for several aspects of the Bill that are long overdue and entirely necessary to create efficiency in regulation and to enhance competition and consumer welfare.

6. Subject to our comments below regarding the apparently rushed scheduling of hearings and deliberations, we affirm our willingness, where we can on short notice, to participate in the oral hearings to be held in Parliament in the weeks 22 – 30 November 2018.

7. We would appreciate being allocated a presentation time slot. We would appreciate a 30 minute presentation slot with additional time for questions and answers as the Chairperson may allow.

We request that you kindly acknowledge receipt of this submission.

Yours sincerely

LIQUID TELECOMMUNICATIONS SOUTH AFRICA PROPRIETARY LIMITED

Per: Mike Silber
General Counsel

401 Old Pretoria Main Road
Halfway House, Midrand 1685
South Africa

T +27 11 585 0000

Submission to the Department of Telecommunications and Postal Services

by

Liquid Telecom

on

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

INTRODUCTION

1 Liquid Telecommunication South Africa ("**Liquid Telecom**") thanks the Portfolio Committee on Telecommunications and Postal Services ("**the Committee**") for the opportunity to comment on the Electronic Communications Amendment Bill [B31-2018] ("**Bill / the ECA Amendment Bill**").

2 This Bill proposes a radical revision of the Information and Communication Technology ("**ICT**") sector and appears to be part of a "package" of legislation that will be required in order to do so. While we appreciate the need to "fast-track" the proposed and necessary amendments to the Electronic Communications Act (No 36 of 2005) ("**the ECA**") in light of the radical revision contemplated, this Bill requires a reasonable period of consultation and deliberation by the Committee to ensure a meaningful result.

3 Our submission will follow the following format:

3.1 An overview of Liquid Telecom;

3.2 **General comments** in respect of the Bill and the sector;

3.3 **Specific comments** to specific provisions of the Bill.

About Liquid Telecom

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

5 For those less familiar with our operations who may read this submission, our business is to supply fibre optic, satellite and international carrier services to Africa's largest mobile network

operators, Internet Service Providers ("**ISP's**") and businesses of all sizes. Liquid Telecom also provides payment solutions to financial institutions and retailers, as well as data storage and communication solutions to businesses across Africa.

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

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

8 Liquid itself has experienced the impact of a skewed market structure in South Africa and its deleterious impact on competition and lower prices. On the basis of our joint and nascent histories, Liquid Telecom supports the explicitly articulated objectives underlying the draft amendment:

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

9 If the intent underlying the objectives stated above is to be meaningfully realised, many aspects of the Bill will require amendment or reconfiguration both at the conceptual level and within the technical drafting proposed. Below, in our general comments, we set out the conceptual orientation of the Bill that concerns us, underpinned by the important question of "what is the mischief the Bill actually seeks to remedy by these proposals?" we submit that a

thorough understanding of the problems and their individual and collective genesis is critical to fixing those aspects of the SA ICT sector that require remedy.

PART A: GENERAL COMMENTS

10 Our general comments are divided into three aspects:

10.1 The **timing** of the consultations to be held;

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

10.2.1 Wholesale services and open access;

10.2.2 Spectrum management, and;

10.2.3 Independent regulation.

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

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

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

10.3.3 The amount of re-regulation required;

10.3.4 The lack of institutional capacity; and

10.3.5 The appropriate separation between policy formulation and regulation.

We address these concerns collectively, below.

Timing concerns

11 We note that a clear process for further stakeholder consultation has yet to be articulated formally. We are aware of various times that have been set aside for the Committee to deliberate on the Bill (including discussions on the submissions received) from 08h30-19h00 on 20 November 2018 (the very day upon which submissions are due by 16h00) as well as 21, 22, 23, 26 27, 29 and 30 November 2018 (all from 09h30 – 19h00).

12 While we certainly appreciate and support the need to "fast track" proposed amendments that have been in draft form for almost a year, this programme appears extremely rushed and may create significant cost burdens for interested parties wishing to participate in the hearings and create a situation in which complex technical, economic and regulatory matters are hastily addressed and not thoroughly evaluated for their potential impact they may have on the sector.

13 Specifically, we are concerned that at the time of this submission, no formal programme for oral submissions has been circulated to interested parties which we submit may be extremely problematic in respect of travel planning to attend the hearings on the assigned days. This may well preclude the voices of many interested parties apart from those with pure commercial interests in the sector.

14 More importantly, we remain concerned that this schedule does not allow the Committee to process the extensive submissions made and apply their minds to the complex questions and issues some of the proposed amendments raise. Should this consultation be unreasonable rushed, we submit that the good work of the Committee may be subjected to avoidable review, if sufficient time were allocated for the Committee to fully and reasonably consider the submissions made.

15 We submit that such consultation is necessary (and will undoubtedly be of significant utility) in order to finalise a Bill that has broad support and agreement in terms of its implementation. Accordingly, we respectfully submit that the Committee reconsider the proposed timing of its hearings and deliberations schedule in terms of this Bill.

Structural Concerns

16 This concern is central to the formulation of any amendment to the current regime. Several decades of policy and legislative reform in the SA ICT sector has yielded many positive outcomes and many unintended consequences. These are well documented by academic and sector commentators.[1] These arguments essentially examine the policy reform process in South Africa against the objectives stated in legislation, for example, in one case, affordable access to services and accelerated development to meet the needs of a modern economy. Gillwald, has shown how laudable policy objectives lacking effective

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

implementation have impacted negatively on affordable access and has inhibited market innovation. At the root of this result lies market structure, which over the period until 2005 and the ECA, saw reform designed entirely for the benefit of a the vertically integrated incumbent operator, which induced "inherently anti-competitive imperatives, which in turn demanded a resource-intensive regulatory response". The critique further noted that concomitantly, the regulator often did not have the statutory powers, nor the capacity, to circumscribe the behaviour of the incumbent so that it does not impact negatively on new entrants. As such, the so-called benefits sought by the policy (a highly debated and consulted upon policy) did not materialise.

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

17.1 it proposes a single wholesale provider for spectrum access;

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

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

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

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

19 Undoubtedly an incentive based, light touch regulatory model is required. Income disparities and inequality require regulation that drives costs down, not up. If the fourth industrial revolution is a reality, all citizens require access to innovative and affordable services and platforms. Under-serviced areas need to be, finally and forever, addressed. **The market**

undoubtedly requires a restructure. However, this must be done in a way that does not result in the creation of single operators who can drive costs up, destroy existing wholesale business models that have painstakingly developed over time and remove the confidence investors, both local and global need to grow the sector.

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

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

Conceptual Concerns

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

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

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

22.1.3 The amount of re-regulation required; and

22.1.4 The lack of institutional capacity; and

22.1.5 The appropriate separation between policy formulation and regulation.

23 The conceptual concerns pertain to various concepts that we submit, with respect, need to be considered at a general level. Where relevant, we address these in the specifics of our comments in the sections to follow.

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

25 One of the effects of what became known as "the *Altech* decision" was that with the harmonised licensing for all existing players, many of the visionary pro-competitive measures that policy proposed – which were provided for in the ECA – which were initially to be implemented in a phased manner (local loop unbundling, number portability, carrier pre-selection, an *ex ante* competition framework), were, "leapfrogged" by an unanticipated change in the market structure. This was a largely positive move for the sector, but the regulatory lag and re-regulation exercise that followed, with a regulator that had capacity (and budgetary) deficits meant that the sector evolved without those pro-competitive measures materialising. The licence conversion process itself only occurred 3 years after the ECA was gazetted.

26 Conceptually, this Bill heralds many of these same risks. The current ECA certainly requires fixing, however Liquid Telecom submits that the most important initiative is actually implementing the full extent of the current ECA and specifically the pro-competitive measures therein need to be implemented – where they are still relevant. Unfortunately the Bill does not simply concern itself with minor adjustment and implementation. We are further concerned

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

that the Bill proposes excessive reliance on inter-governmental co-operation in erstwhile strictly regulatory domains (such as spectrum management, assignment and allocation).

27 The lack of institutional capacity has never been addressed at a structural level. The Bill offers no hope that it will be. We do not at this point even consider the fact that the enabling legislation – the package of laws – required to give effect to this Bill, have not yet materialised and they need to be considered holistically for efficient implementation. The package of legislation also needs to be considered as a collective for meaningful consultation. It is therefore our submission that the current ECA should be amended where necessary, but not overhauled to the extent proposed in the Bill and it (as yet unreleased) attendant elements of the legislative "package". The risks are significant for unintended consequences to arise along with a large vacuum if inactivity while the sector obtains piecemeal reform.

28 This contention is made clear when one does a cursory examination of the number of requirements for "busy" work that the Bill requires. We offer an example of this concern in the table below:

Requirement	Role Player	Time-period	Content
Section 4(1A)(b)	The Authority	Within 6 months after the Minister issues a policy direction	Amend any existing radio frequency spectrum and any fees which are in force when the Minister issues a policy direction in terms of section 3(2)(d).
Section 31B(2)	The Authority	Within 12 months of commencement of this section	The Authority must prescribe spectrum trading regulations.
Section 31C(3)	The Authority	Within 12 months of commencement of this section	The Authority must prescribe spectrum sharing regulations.
Section 31D(5)	The Authority	Within 12 months of commencement of this section	The Authority must prescribe spectrum refarming regulations.
Section 31E(1)	Minister	Within 6 months of commencement	Determine which unassigned high demand spectrum must be reserved for assignment to the wireless open access network service licensee.

Section 31E(7)	The Authority	Within 24 months before the expiry of RFS licences	Conduct a section 4B inquiry in terms of the ICASA Act and make recommendations to the Minister, at least six months before the expiry of the radio frequency spectrum licences contemplated in subsection (6), on the terms and conditions that may apply to such radio frequency spectrum licences, as a condition for their renewal.
Section 44(1):	The Authority	Within 18 months of the commencement	Prescribe wholesale open access regulations to facilitate wholesale open access.
Section 67(3A)(a):	The Authority	Within 12 months of the commencement	Define all the relevant markets and market segments relevant to the broadcasting and electronic communications sections, including ICT services dependent on the use and provision of the Internet, including internet exchange points, hosting and data centre services, by notice in the Gazette.[3]
Section 67(4C)	The Authority		A market review under this section shall not take longer than 12 months.

29 The above, non-exhaustive examples highlight not only the amount of work required, but the dependencies required to effect these amendments.

Absence of a regulatory impact assessment

30 Glaringly absent from the architecture of the Bill is any attention to an impact assessment. The sector has seen the effects of the implementation of the current legislation without having undertaken an impact assessment. Regulation carries costs and these need to be fully understood in the process of regulation. This will further accord with the Guidelines for the Implementation of the Regulatory Impact Analysis/Assessment (**RIA**) Process in South Africa published by the Presidency in 2012 and to the best of our knowledge not superseded.

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

31 We note that an "Economic Impact Assessment Study" is due to be presented to the Committee on 20 November 2018, though we have no insight as to the contents thereof. We further note that when the question of a Regulatory Impact Assessment was raised with the Department during stakeholder engagement meetings, Liquid Telecom was advised that no Regulatory Impact Assessment would be forthcoming.

32 Regulatory Impact Assessments are commonplace throughout the world and are necessary to ensure that the changes envisioned by legislative and policy amendments, have the outcome and effect intended by those changes. Liquid Telecom respectfully submits that a RIA is essential before the Bill can be finalised. This exercise can only serve to ensure that proposed amendments and their implementation have the intended effect or that where lacking, the gaps and pitfalls are fully understood so that budget and course correction can occur. This will in turn, serve to reduce the costs associated with a re-regulation exercise of this magnitude.

33 We do not labour the point here further and will address it appropriately elsewhere in the submission.

34 In concluding our general comments, our respectful submission is therefore to request the Committee to consider the structural and conceptual issues in this Bill. Specifically:

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

34.2 To ensure that spectrum management retains the discipline of international best practice and is not hampered by an overly operational function being assigned to the executive rather than the regulatory authority;

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

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

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

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

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

35 All the above need to be considered in the context of the White Paper acting as a roadmap for the evolution of the sector, with each step being carefully considered, implemented and then assessed before the next step is undertaken. The policy objective encapsulated in the White Paper will be with us for years to come and we should not do a disservice to those objectives by recklessly rushing to implementation.

Separation between policy formulation and regulation

36 After two decades of policy making and a number of high court reviews in respect of Ministerial powers and regulatory remit, it is worth reflecting on a basic principle, namely that when the Minister exercises his power to make policy and issue policy directions, he cannot encroach into the terrain of the Authority by seeking to prescribe or make binding policy directions.

37 While there is no immediate concern arising, we draw your attention to the views expressed in the Supreme Court of Appeal in *eTV (Pty) Ltd and Others v Minister of Communications and Others* 2016 (6) SA 356 (SCA), at para 57-58:

> "[57] ICASA is given regulation-making powers by s 4 of the ECA. It is specifically given the power to regulate broadcasting services in ch 9 of the ECA. The Minister, by contrast, is given no regulatory powers in respect of broadcasting by the ECA, nor can she make binding determinations. That was the effect of the decision in *eTV 2012*, which held that the Minister does not have the power to prescribe to free-to-air broadcasters how they should manage ST boxes, or to prescribe or make binding decisions relating to ST box control. The decision of Pretorius AJ in *eTV 2012* was not appealed against by Minster Pule, who announced that the Department accepted the decision. So too did the SABC and M-Net.

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

[58] The court in *eTV 2012* stated (paras 37 and 38):

> '[37] If one has regard to the clear distinction in the ECA between the authority and power of the Minister to make policy, and the power and obligations of ICASA to consider such policy when regulating the broadcasting industry, it is clear to me that the Minister does not have the power to prescribe to free-to-air broadcasters how they should manage set top boxes. Even if she had such powers, her decision would have been administrative action as part of policy execution rather than policy formulation.
>
> [38] It follows from what I have set out that the Minister has no legal power to prescribe or make binding decisions relating to set top box control. . . '". (underlining added)

38 Accordingly, policy and policy directions cannot bind the Authority. The Minister is not empowered to impose binding law, or issue policy directions that are intended to have binding effect, as this will exceed the bounds of his policy making powers.[5]

39 The Bill contains several examples that seem to be in conflict with this principle. See for example our comments regarding Sections 3 and 4 below. We further note other areas of the Bill that require ministerial oversight that appears to be operational in nature. For example, section 20A(1) which requires the Minister to "provide oversight over [the implementation of Chapter 4 – Rapid Deployment] and liaise with other Ministers responsible for matters affected by the rapid deployment of electronic communications networks and facilities. This is a laudable position to take but in an extremely operational area of local governance and municipal operations, we question whether this is practical or will indeed yield results. We discuss this further in our comments on Chapter 4.

[5] Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others [2017] ZACC 17, fn 12 which refers to the Constitutional Court's previous decision in Minister of Education v Harris [2001] ZACC 25.

PART B: SPECIFIC COMMENTS

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

Objects of the Act and Definitions

41 Liquid Telecom notes with relief that the over-arching object of the ECA, namely, "to provide for the regulation of electronic communications in the Republic in the public interest" is retained in this tabled version of the Bill, as the version published by the DTPS sought to exclude that governing interest.

42 Liquid Telecom notes the new proposed definitions and supports their inclusion.

43 We do however, further note the various proposed definitions that are to be amended to include or expand on the responsibility of the Minister of Telecommunications and Postal Services, for example:

43.1 *"allocation"* (entry into the table of frequency allocations) where the Minister is now indicated as having responsibility;

43.2 *"broadband"* the definition of which in respect of minimum download speeds and quality is to be determined every two years by the Minister;

43.3 *"high demand spectrum"* which can be defined by the Minister.

44 We draw your attention to our comments above regarding regulatory independence in respect of core roles of the regulator vis a vis the Minister.

45 We note the revised definition of "Broadband" as an always available, multimedia capable connection with a minimum download speed and quality as annually determined by the Minister responsible for telecommunications and postal services. We note that this amendment has been made to align with SA Connect targets and to ensure that ICASA makes recommendations as required under SA Connect.[6]

46 We further note the insertion of a definition of “wireless open access network service” that offends the principles of technology neutrality by referencing a specific (wireless) technology in the name. However despite the use of the term “wireless” the definition does not reference

[6] Government Gazette 37119, Government Notice No. 953 on 06 December 2013.

the relevant technology. Based on the definition provided, it would appear that a "wireless open access network service" could be based on a fixed line technology. Liquid Telecom recommends that if the definition is indeed required, then the use of wireless technologies be included in the definition.

47 Liquid Telecom notes the inclusion of a definition of a new form of licensee, namely the "wireless open access network service licensee". This approach is reminiscent of the piece meal approach to regulatory changes in the Telecommunications Act of 1996. Liquid Telecom had hoped that such approach had ended and that there would no longer be a need for such licensing exceptions. We will engage in more detail regarding the proposed Section 19A below, however from a conceptual framework Liquid Telecom does not believe that the legislation should stray from the approach of granting an Electronic Communications network Service licence to the proposed WOAN, just in this instance one with special licence conditions attached.

Object of the Act (section 2)

48 Liquid Telecom notes the proposed insertion of four new objects to the ECA, namely the proposed Sections 2 (cA), (cB), (cC) and (cD).

49 With regards the proposed Section 2(cB):

49.1 Liquid Telecom supports the promotion of services based competition, however fails to understand why infrastructure competition is neglected?

49.2 There is further some uncertainty regarding the use of the term "concentration … of electronic communications infrastructure" as there is no indication if the concern is concentration due to the limited number of infrastructure competitors, or geographic concentration? Liquid Telecom suggests that the most effective solution to both possible forms of "concentration" is promoting infrastructure competition.

49.3 Finally there is a suggestion that "duplication of electronic communications infrastructure" is to be avoided. Liquid Telecom again fails to understand why this is a valid object. Licensees require redundant networks to ensure reliability and network resilience. Market forces will determine whether infrastructure is an unnecessary duplication or desirable and pro-competitive redundancy.

50 On that basis, Liquid Telecom submits that the proposed Section 2(cB) is superfluous as it is already captured in the existing Section 2(f) “promote competition within the ICT sector” and the proposed Section 2(cB) may be deleted.

Policy (Section 3) and Regulations (Section 4)

51 By way of relatively minor amendments, the Bill seeks to increase ministerial power in respect of policy making with regard to universal service and access obligations (having identified any gaps) and policy directions in that regard;[7] the determination by the Authority of licence and spectrum fees[8] and policy directions in respect of radio frequency spectrum fees (including exemptions and reductions to fees).[9]

52 We refer to our general comment regarding the separation of policy and regulatory powers above.

53 The proposed amendment provides that "any regulations prescribed by the Authority on radio frequency spectrum and radio frequency spectrum fees must be in accordance with the policies and policy directions issued by the Minister as contemplated in section 3(1)(e) and 3(2)(d). It goes on to state that (b) The Authority must amend any regulations on existing radio frequency spectrum and radio frequency spectrum fees which are in force when the Minister issues a policy direction in terms of section 3(2)(d), within six months after the Minister issues such policy direction.

54 We also make these comments in the context of the proposed amendments to section 4(1)(1A)(a) and (b).

55 We respectfully suggest that whilst the making of policy is within the Minister's remit, the determination of fees and incentives is very much a policy implementation function that would be best left to the regulator.

56 Moreover, while the Minister is well placed to make policy on universal access and service, the precise implementation of how the Minister will assess "any gaps" (proposed Section 3(1)(bA)) before making policy and policy directions, requires amplification.

[7] Section 3(1)(bA) and 3(2)(bB).
[8] Section 3(1)(e)
[9] Section 3(2)(d).

Standard Terms and Conditions (Section 8)

57 Liquid Telecom welcomes the proposed amendments to this section conditions to strengthen the protection of subscribers and end-users in relation to quality of service standards[10] but question the overall approach on universal service obligations (including those proposed in section 31A(1)) and the now, peremptory requirement to ICASA to make regulations on universal service and access obligations ("**USAO**") and to designate licensees that carry such obligations.[11]

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

59 While Liquid Telecom supports the policy objective underpinning USAO's, it is arguably time to pause and reflect on the effectiveness to date, of the command and control manner in which these have been designed and measured since 1996 and whether in fact, they have worked.[12]

60 The idea of applying an "obligation" in exchange for the right to a licence, is one that sits appropriately in a monopoly and duopoly sector – and was arguably appropriate in the first 5 years of liberalisation post the promulgation of the erstwhile *Telecommunications Act.*[13]

61 It is however, arguable that the various obligations imposed to date have not worked. Consider, for example, the:

61.1 churn and roll-back on the requirement for Telkom to effectively double its network roll-out and its resultant churn in fixed line subscribers set in its licence obligations;

61.2 failure of the initial Universal Service Agency ("**USA**") – under staffed and lacking in budget – and the relative lack of progress made since by the Universal Service and Access Agency ("**USAASA**") that succeeded it. Neither have ever defined "needy persons" for the purpose of achieving a subsidy to ensure affordability. We note the proposed

[10] Subsection 8(2).
[11] Subsection 8(4).
[12] Our comments here apply equally in respect of the discussion on the proposed new section 31A(1) in regard to USO's for RFS licences at paragraph 150 ff.
[13] Act 103 of 1996.

amendment to section 88 which still refers to determining the types of needy persons to whom assistance may be given, (for the purposes of payments from the USAF), and that such recommendations must consider the needs of persons with disabilities in assessing the access gap and setting universal service and access definitions and targets. We question if this type of direction is even possible and whether the approach we set out is not preferable from an implementation perspective;

61.3 relative success of the then Community Service Telephones ("**CST's**") and their ultimate culmination in a massive court case between the mobile operators;

61.4 failure of the Under Services Area Licences ("**USAL's**") to do anything (bar for one entity) with the R5 million seed capital afforded with the grant of their licence;

61.5 the failure of the e-rate;

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

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

62 The reason for all these examples of well-intended policy but poor outcomes, is because the sector has been liberalising since the Millennium and the obligations hark back to a sector with very few operators. As the sector has liberalised, so too, should requirement to ensure universal access and service.

63 That is not to say that it should be eradicated, but that **universal service and access obligations should rather be relevant, replete with incentive and market mechanisms that direct operators to compete for subsidies to roll-out networks and offer services**. One option that bears consideration is the reverse style auction of obligations that has been very successful in other parts of the world, such as Chile.

64 Instead the current process awards contracts for network roll-out and connectivity to entities that are not even licensed and which have no incentive to maintain network infrastructure

once it has been installed and they have been paid. The proposed changes seem unlikely to change this approach.

65 In other words, the approach should ensure that universal service and access should still require a levy be applied to licensees, but that such levy be used to fund operators in "winning" well-determined infrastructure projects that roll out networks and services in under or non-served areas. The exact parameters of this can be discussed once the theoretical shift away from old-styled "obligations" is accepted into policy and legislation.

66 Finally, we must query the curious placement of the proposed amendment to section 8(6) which provides that, "The Authority must, by regulation, make provision for obligations applicable to electronic communications network service licensees for the rapid deployment of electronic communications networks or facilities and must prescribe additional terms and conditions for such licences." This provision makes no clear sense in legislation and we respectfully request clarity on its implementation.

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

68 Chapter 10 for example requires to be implemented in full. Once the Authority has done so, it will be able to examine any market in which it believes competition is not effective and remedies are required. ICASA also has the power to make regulations on universal service, which it must exercise, but it must do so with a different theoretical underpinning from the current one of "obligations" to one of competitive reverse auction tender (i.e. the lowest cost wins).

69 Accordingly, Liquid Telecom sees little value in the proposed revisions to this section that permit of further obligations being placed on licensees.

Licensing (section 9 – 14)

70 Liquid Telecom notes the minor changes to these sections and has no comment in that regard. However, we would respectfully suggest that, like other forms of legislation in the

region that have emerged (e.g. Malawi, Zambia, Uganda) time periods for the processing of licensing applications, renewals and amendments, be included in legislation to bring certainty into regulatory operations. While such timelines might well be best placed in regulation rather than legislation, these have not emerged beyond "best effort" commitments by ICASA to process applications (at least in the case of a transfer or transfer of control in a licence). The time for processing stock regulatory matters and processes appears to be getting longer, rather than more efficient.

71 While Liquid Telecom accepts that there are cogent and complex reasons for this, our respectful submission is that regulation needs to become more effective and arguably bounded to time frames to be measurable. Deeming provisions within timeframes is a very useful means of ensuring that the delays that are currently in place are avoided. We request this be considered, mindful of our comments above that a remedy in this regard does not mean a new regulator – as envisaged by the White Paper - needs to be established. Liquid Telecom accordingly respectfully requests the committee to obtain a timeframe commitment from ICASA and insert a deeming provision in the Bill to ensure adherence by ICASA to such timeframes.

Public consultation and ownership and control (Section 13)

72 Liquid Telecom notes with some concern, the proposed amendment in section 13(5) which, in effect, deletes the requirement for an inquiry in terms of 4B.

73 Section 13 of the ECA is an important one. To date, the regulations required for limits on ownership and control have not been finalised and remain a concern for the sector.[14] These regulations, when finalised, on the current version of the ECA, are required to be made "with due regard to the objectives of [the ECA]" and " after [ICASA] has conducted an inquiry in terms of section 4B of the ICASA Act, which may include, but is not limited to, a market study."

74 It is Liquid Telecoms submission that this proposed amendment trespasses onto the mandate ICASA holds with respect to broadcasting and severely undermines a central tenet of the regulatory regime – namely, public consultation, which is obtained when ICASA holds a

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

section 4B inquiry.

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

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

76 Our comments here must also be read in the context of the provisions of open access in Chapter 8, which we refer to where relevant, further on in our submission. We also refer to our comments made above at paragraphs **Error! Reference source not found.-Error! Reference source not found.** in respect of policy directions and the Authority, particularly in regard to licensing matters.

77 Liquid Telecom notes that a Draft Policy Direction has already been issued by the Minister in respect of the WOAN. To avoid unnecessary distractions in respect of this submission, we have not dealt with the provisions of the Draft Policy Direction here.

78 The section requires that ICASA must effectively, licence an ECNS licence (specifically the WOAN) to provide wholesale electronic communications network services on open access principles.

79 The Bill determines a set of applicants who may apply, notably that an applicant may not be dominated or controlled by any single entity or have any members in the consortium that either separately or collectively possess a market share of more than 50% in electronic communications services.

80 It is evident from this that the WOAN license should not therefore be granted to any current large operator or shareholder in a large operator currently operating in the sector. This is a laudable objective but may need to be reconsidered in light of the requirements to raise funds to build and operate a large-scale network.

81 The provisions of section 19A also call for functional separation between an ECS licensee who may qualify to participate in the WOAN (less than 50% market share) but the requirement for and costs associated with functional separation for a smaller player, may be prohibitive. As a result, the WOAN may not in fact, attract the skills and technical know-how already in the sector, to ensure its build and operation.

82 We submit that the concept of a WOAN is an idea that is not entirely un-workable and one

that must be given due consideration. However its envisaged purpose, articulated in the White Paper is to facilitate entry, stimulate competition in retail wireless services, reduce backbone and backhaul prices and facilitate national coverage.[15] Open access models are thought to create efficiencies that can attract more market entrants who do not have the capital or expertise (or spectrum) to duplicate networks of their own. However, as the GSMA Association notes, " turning this vision into a working reality is difficult. Research shows that of five countries originally considering this option, only one, Rwanda, has rolled out a network. Problems include cost and a lack of competition." [16]

83 However, the concerns regarding single wholesale networks cluster around a number of themes in addition to the above, which include as follows: the WOAN will create a monopoly wholesale access supplier that will have a negative effect on access and pricing; that will not be efficient (because monopolies are not); that it will not need to innovate and it may, depending on its overall make-up and structure, discriminate between customers and operators; that it may not succeed and attract the requisite business from operators; that the WOAN will negatively affect investment in the sector; that the spectrum required to make it viable would be obtained by force, creating regulatory uncertainty and negatively impacting investment; that the models elsewhere (including Nigeria; "the Red Compartida" in Mexico; Kenya; "Yota" in Russia; and Tanzania) are either not relevant to South Africa,[17] or not advanced enough to assess for relative success[18] and in fact, appear to failing.

84 In fact, the evidence suggests that mandatory open access networks have not increased competition in services at all, decreased pricing or stimulated demand. Critically, the success of a SWN requires astute and mature regulation by an independent agency equipped to do so. Notably, the evidence suggests that "policy tensions can arise from applying open access principles to network extension in contexts of investment shortages and regulatory incapacity".[19]

85 Moreover, the proposal to in effect, divert spectrum for the WOAN from that potentially

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

available to existing operators and to require minimum purchase commitments (see our comment of Section 31E below) from the sector will lead to economically skewed incentives and legal review. Even if both challenges are addressed, the current formulation of the WOAN will lead to the decimation of other wholesale business models in the sector and create deleterious and negative investment sentiment. Ultimately, the WOAN proposal will have to exist at a significant cost (or at the expense of) investment and innovation and to date, no current example offers comfort that the WOAN proposed in the ECA, is likely to produce any different outcomes.

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

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

88 Our submission therefore, is that far more preparatory work and deliberation is necessary, and that this work should be moved to the remit of the Authority after a proper RIA is conducted. We are of the view that this proposal is important enough to warrant its own RIA, separate from any general RIA that might be undertaken, regarding the Bill as a whole.

89 We note further that a report was commissioned by the Minister from the Council for Scientific and Industrial Research ("**CSIR**") regarding the spectrum needs of the proposed WOAN. This Report ("**the CSIR Report**") was published together with the Draft Policy Directive on 27 September 2018. Our comments follow below regarding the technical issues that this report gives rise to and which require consideration.

90 Liquid Telecom has considered the content of the CSIR Report and appreciates the level of thought and diligence that is evident therein. The CSIR Report is based on a number of assumptions and we are of the view that the conclusions are largely justified in the context of the assumptions used.

91 However, we are concerned with the assumption made regarding the baseline for number of users to be served by WOAN at 20% of projected mobile user population. While we note that this baseline was derived from studies that show that a mobile operator needs to achieve a

market share of 10%-15% to be viable, there is no explanation given why an even higher market share has been chosen? It also seems to ignore the fact that the WOAN is intended as a wholesale only network and as such:

91.1 the WOAN is dependant for its market share on the ability of the licensees who are its wholesale customers to garner market share;

91.2 the WOAN will not incur the sales and marketing costs traditionally associated with a retail operator and which constitute a large part of its cost base; however the WOAN will also not enjoy some of the margin benefits associated with retail services and revenue uplift from device sales and value added services;

91.3 it is likely that most if not all of the WOAN's wholesale customers will not be new entrants but rather licensees with existing market share – however there is no indication how those customer's existing retail market share is counted in the determination of the assumed WOAN market share.

92 Liquid Telecom further notes that there is no discussion regarding fixed / mobile substitution, WiFi offload using fixed networks and particularly the increasing prevalence of the roll-out of WiFi networks associated with municipal and provincial broadband networks.

93 Liquid Telecom has previously raised the concern that the CSIR was limited to the spectrum question and did not consider other WOAN success determinants, such as the backhaul network, market dynamics, and network economics. Liquid Telecom has noted the disclaimer in the CSIR Report exactly to that effect and the limited scope of the study.

94 It is respectfully submitted that this is the most significant weakness in the CSIR Report and one that raises serious concerns regarding the possible viability of the WOAN. Liquid Telecom therefor suggests that ICASA should be requested to give due regard to economic issues and specifically the backhaul network, market dynamics, and network economics in the licensing process.

Rapid Deployment (Chapter 4)

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

appears to be overlapping requirements between roles of the Minister and the regulator.

96 It is well known now that the result of this failure to implement Chapter 4 resulted in the only avenue available to licensees – that of the courts. We refer specifically here to what has become known as the "*Link Africa*" decision of the Constitutional Court.[20]

97 However, as useful as the judgement has been, it does not solve the challenges of access as it lacks specificity on key considerations such as terms of access, rights of land owners and the compensation payable for access. The sector is now experiencing unprecedented "access rights" battles – both with public and private land owners - with any party to a claim, viewing *Link Africa's* dicta as advancing their side of the matter. Specifically, licensees are engaged in complex legal wrangling with municipalities across the country that have taken very different approaches to understanding the meaning and import of *Link Africa* and what their rights and obligations are in respect of approvals for rights of way and the granting of wayleaves.

98 In some cases, municipalities appear to be viewing this area of activity as a lucrative rent-seeking one with excessive fees being levied and, in some cases, rendering future builds economically not viable.

99 This creates unnecessary legal fees, further delays to improving network infrastructure and availability and resulting in disparate local government approaches to the issue. The longer the delay in remedying it and creating a single, unified framework to rapid deployment issues, the more complicated this will become. It requires urgent attention that with respect, cannot await the passage of legislation, particularly where other remedies in exciting law – within the ECA itself, exist. We amplify this submission further below.

100 To this end, Liquid Telecom welcomes the proposed amendments to this Chapter but we raise a number of considerations below. **Our overall submission in regard to chapter 4 is to urge the DTPS to convene on an urgent basis, a consultative workshop, to develop the specifics of this Chapter in conjunction with all role players to effect a workable, simplified set of provisions that are capable of immediate implementation and immunised from legal challenge**.

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

Excessive detail and over-regulation

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

Single trench policy may lead to unintended adverse consequences

102 Section 20F introduces the concept of a single trench policy and directs the Authority to prescribe the processes and procedures that enable a single trench for fibre under the rapid deployment regulations, "where feasible". The single trench policy to enable a single trench for fibre in each geographic location where it is technically feasible to do so, is understandable, but ill advised.

103 Liquid Telecom submits that implementation of such an approach **will result in single points of failure and have adverse unintended consequences for service delivery and further investment**.

The concept of "adequately served" requires further detail

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

105 Our submission however is that the definition of "adequately served" is on its own, not sufficient to ensure the co-operation of all operators in these scenarios. The use of words like "technical inability" and the future acts by the Authority of prescribing "wholesale rates" will delay a solution to what is already a pressing problem of customers of one operator not being able to receive services over the network of another in an office park or shopping centre. We

are therefore encouraged by the proposal that "an occupant within the adequately served premises is not obliged to receive an electronic communications service from the access provider and may select and receive a service from any electronic communications service provider of choice", contained in section 20H(2)(b).

106 ICASA has also been assigned a role to determine whether a deployment in an adequately served area, may be permitted.[21] As this amendment likely to be a bone of contention between access and service providers, further clarity is urgently required as to what factors would warrant this deviation, how it is applied for, the time frames for consideration by ICASA, and a bounding of the apparent wide discretion afforded to ICASA as to what may or may not "discourage services based competition". Timelines for determinations in this regard is absolutely essential.

The Application Procedure requires further detail

107 Section 20J provides for applications and related processes for approval, authorization, licence, permission or exemption and processes relating to consultation and participation required by various laws for the deployment of networks and facilities. Undoubtedly, the sector needs assistance in smoothing the process across all spheres of government. Section 20(J)(1) is therefore welcomed to ensure the granting of approvals, authorisations, licences, permissions or exemptions required to deploy networks and facilities.

108 Liquid Telecom supports the sentiment that all approvals are to run concurrently but remains concerned as to how the Rapid Deployment National Co-ordinating Centre will effect this nuanced level of co-ordination as the manner to effect and ensure such co-ordination is absent from the Bill. There appears to be no mechanism to ensure that the entities who are intended to be bound by the requirement, are in any way obligated to give effect to the provisions.

109 Liquid Telecom accordingly suggests that further consideration to give practical effect to this provision is given through convening an urgent industry workshop with municipal authorities and to promote and encourage the alignment of these processes.

[21] Section 20H(3).

Dispute resolution needs industry assistance

110 Section 20C(2) provides for the Authority to establish procedures and processes to resolve disputes that may arise between an ECN licensee and any landowner on an expedited basis.

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

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

113 Ultimately, it is our submission that this item should be one of the key items tabled for resolution at an industry consultation directed for this purpose.

The compensation debate (Fees and charges)

114 Section 20K is arguably one of the most critical innovations of the new proposed Chapter 4.

115 It proposes that no fee should be levied where there is no nuisance to the deployment (no intrusion or costs for the land owner) and which does not deprive the landholder of its own use of the land. This is welcomed and supported but again we raise the question of how it will be implemented and if disputed, adjudicated, apart from it being "adjudicated by the Authority on an expedited basis". These words carry no clarity for the sector and timelines must be specified.

116 The rest of the section attempts to fill the gaps left unaddressed by the *Link Africa* judgement. It stipulates the levying of reasonable fees or charges for the deployment of networks and facilities. This is important as the judgement has not been particularly clear on the ambit of "compensation" and regrettably both public and private landowners who are requested to

grant access have also interpreted the ruling to mean that fees for access, approvals and compensation for the relative deprivation experienced, are all to be treated in the same way.

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

118 Liquid Telecom therefore strongly supports the legislative intervention proposed here and the inclusion of these provisions on the principles stated in the Bill.[22]

119 **However, given that the passage of this Bill may take time and given further that the current ECA and the ICASA Act[23] gives sufficient authority to ICASA to make regulations, Liquid Telecom proposes that this provision be the subject of urgent regulations on an expedited basis, without the need to finalise this Bill as a pre-condition, to ensure that the objective of this section is realised**.

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

121 We do however wish to make a few further points on the matter of "compensation" as considered in the *Link Africa* decision and the future determinations to be made as to "reasonable". The issue of compensation arises as ECNS licensees are required – when exercising their rights under section 22 of the ECA, to have due regard to “the applicable law”, including the common law and any other applicable legislation.

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

122 When applied with the common law – i.e., the common law governing servitudes imposed on landowners without their consent, whether by a court or statute – section 22(1) imposes the following powers and constraints on ECNS licensees:[24]

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

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

122.3 compensation in proportion to the disadvantages suffered by the owner is payable in respect of the exercise of the public servitudes section 22(1) grants. If the owner suffers disadvantage then the quantum of the compensation may also take into account the advantage gained by the network licensees; and

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

123 In the case of local government, the municipality is arguably, therefore empowered and entitled to regulate the manner in which ECNS licensees exercise their rights under s 22(1). By-laws promulgated by the municipality would constitute "applicable laws" to which the ECNS licensee must have due regard under s 22(2). However, this is subject to the limit that the bylaws may not "thwart the purpose of the statute by requiring the municipality's consent".[25] It follows that compensation is, in principle, payable to municipalities as servient landowners when ECNS licensees exercise their rights under s 22(1) of the ECA. The *Link Africa* judgement indicates:

> *"In this Court, the City has equally shown no harm. The City's attack on the statute and the vital broadband expansion it permits is entirely notional, based on the idea of intrusion on municipal powers, without any real--world substance.*

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

There is no iota of evidence that installing Link Africa's electronic communications network damages or impairs City infrastructure. Nor is there any evidence that it could cause harm or prejudice to the City or its people. Precisely put, the City has provided no evidence that Link Africa's installation of fibre--optic cables is beyond normal restriction of use and enjoyment of the property where the cables are installed".[26]

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

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

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

127 Most notably, none of the charges that municipalities seek to levy can be done so at will. The levying must be done through a duly promulgated by-law, in line with sections 75 and 98 of the Municipal Systems Act, which require a municipal council to adopt by--laws to give effect to the implementation and enforcement of its tariff policy and debt--collection policy.[27]

128 **It is our submission that the Bill must ensure that ICASA develops a detailed framework for managing rapid deployment and access and that such framework is tabled for sector consultation. We further submit that the DTPS must further develop (in conjunction with SALGA) a uniform and standardised compensation framework for**

[26] Link Africa para 172.
[27] No 32 of 2000.

municipalities to lawfully implement. Neither requires legislative amendment and can be undertaken immediately. In fact, Liquid Telecom questions why the long-awaited promulgation under Chapter 4 of policy and policy directions for the rapid deployment and provisioning of electronic communications facilities has not yet taken place? This delay has impeded ICASA's ability to promulgate Regulations.

New structures that appear vague and overly complicated

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

130 In light of our comments above, the RDNCC is envisaged to play a vital co-ordinating role between licensees, municipalities, relevant authorities and relevant Strategic Infrastructure Projects and "support, promote and encourage" the rapid deployment of networks and facilities. This includes:

130.1 Cooperation with local municipalities to promote and encourage the fast-tracking of rights of way and wayleave approvals;

130.2 Providing guidance on application processes and application templates for rights of way and wayleaves;

130.3 overseeing the establishment of common wayleave automated application systems based on an understanding of common information requests across municipalities;

130.4 overseeing the creation of a geographic information system database and mapping of all fibre deployments and other network and facility deployments;

130.5 overseeing the co-ordination of infrastructure rollout and participating in other infrastructure co-ordination forums such as SIPs;

130.6 supervising engagement with industry bodies and providing advice on rapid deployment of networks.

131 The RDNCC must also be a repository of updated information requirements for an approval, authorisation, licence, permission or exemption and processes relating to any consultation and participation required by the relevant laws, required for deployment; must propose co-ordinated, efficient and streamlined processes for the granting of an approval, authorisation, licence, permission or exemption, in consultation with the relevant authorities; must consult with the relevant authorities to align these processes and ensure their consistency.

132 Liquid Telecom submits that this is a massive and necessary set of tasks if rapid deployment is to be a reality in the sector. However, the Bill is silent on the organisational structure of the RDNCC (other than it being supervised by the RDSC): Will it be a desk in the DTPS? To whom will it account? What budget allocation will it have?

133 While we accept that this may simply be a matter for the DTPS in the organisation of its affairs, our submission is that this entity has a critical role to play and one that need not await the passage of an amendment Bill.

134 This function (rather than structure) could be undertaken by ether the DTPS or ICASA. It should be effected immediately, and the role envisaged by the Bill for it to play, effected immediately – it is one that does not require legislative authority to commence.

135 In line with our comments above, we have taken the liberty below, of proposing, on the basis as set out in the Bill for the RDNCC, the appropriate roles and responsibilities for ICASA, the RDNCC and industry, which in our view, would be more effective. The text highlighted in red, are priorities for the sector and should, we submit, rather be assigned to a core regulatory function to be performed by ICASA, with firm time periods for implementation.

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

ICASA
• Interface with local municipalities to fast track rights of way and way leave approvals; • Oversee establishment of common automated wayleave application system or systems for common information requests across bodies; • 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; • Must consult with relevant authorities to ensure the alignment of the said processes; • Oversee the engagement with relevant industry bodies dealing with rapid deployment; • Provide advice to ECNS licensees; • Any request and decision accepting or denying a request must be in writing and substantiated by evidence contained in the written record of ICASA; and • Hear appeals to disputes heard by an industry body.

INDUSTRY BODY
• Oversea the creation of a GIS database and mapping of all fibre deployments and other ECN and facility deployments; and • Provide an optional forum for speedy dispute resolution.

136 Liquid Telecom is concerned at the omission of any reference to the South African Local Government Association ("SALGA") in this Bill, noting the critical role envisaged for SALGA to play in the DTPS Draft Bill. This was not without some concerns, regarding the ability of the Draft Bill to impose obligations on entities such as SALGA (which were noted in our previous submission regarding the Draft Bill). However now the complete omission of SALGA may have gone too far - as SALGA could, if tasked by relevant legislation and regulation, play a significant role in undertaking some of the responsibilities of municipal co-ordination. This should be re-considered.

137 Finally, we again refer to the requirement in section 20C and repeated in section 25(8) referring a dispute between a property owner and a licensee to be resolved by the Authority on an expedited basis. To be effective, some timeline / guideline as to the time period should be included in legislation. Again, we repeat our submission that an industry body may be best placed to manage first round disputes, only referring to ICASA or the RDNCC, those that are appealed or not capable of resolution.

Radio Frequency Spectrum (Chapter 5)

138 Chapter 5 is another aspect of the ECA that sees significant increase in Ministerial responsibility. This is evidenced by section 29B which sets out new powers and functions for the Minister. While the Minister is correctly the responsible entity for policy formulation, many of these functions bleed into implementation, a function more appropriately reserved for an independent regulator. Of concern are those in regard to:

138.1 spectrum planning, allocation, and international co-ordination of radio frequency spectrum use;

138.2 the development of the radio frequency plan;

138.3 the establishment of a National Radio Frequency Spectrum Planning Committee.

139 Moreover, the ECA currently describes ICASA's current function in regard to Radio Frequency Spectrum ("RFS") as "*control*" of the radio frequency spectrum and the Bill proposes a somewhat reduced "*administration*" role, whilst at the same time, section 30(2)(a) instructs ICASA to "comply with Ministerial policies and policy directions". Liquid Telecom is unclear as to why the legislation should have to explicitly require ICASA's compliance with Ministerial policy, given that policy is instructional and requires ICASA to be mindful of it at all times? It is only properly executed policy directions with which ICASA must comply but not – as a compliance obligation per se – Ministerial policy.

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

141 This chapter is another area in which we submit, pockets of excessive and arguably misplaced detail are provided for: For example: Section 30(2)(c) the Bill stipulates that ICASA must "give high priority to applications" for RFS where the use thereof is proposed for digital

electronic communications services…". Liquid Telecom undoubtedly welcomes the sentiment expressed in this requirement but query if this should not be more suitably placed in regulations which specify the criteria for which "high priority" would be give and the applicable time frames which would determine that "high priority" is given. As it currently stands, the wording is abstract and does not lend to meaningful implementation.

142 We also note the expanded responsibility for ICASA in section 30(2) (f)-(i) with regard to monitoring and evaluation of radio frequency spectrum; spectrum audits; an accessible real-time database of spectrum assignments, and also an increased reporting role to the Minister in respect of spectrum monitoring, advice on areas for future research, development and planning; and annual reporting particularly in regard to the achievement of spectrum license obligations. Liquid Telecom urges that all information regarding spectrum use should be made publicly available, save for those pertaining to security services.

Spectrum Trading, Sharing and Refarming and Section 31(1)

143 Liquid Telecom supports the progressive approach to including spectrum trading,[28] spectrum sharing[29] and spectrum refarming[30] in the Bill. This framework is overdue and signals considerable development in the policy approach to managing scarce resources. It is an approach we have campaigned for in previous submissions and we support its inclusion here.

144 We note the amount of work required by ICASA to ensure that these provisions come into effect and wish to point out that this need not wait for legislative amendment to be undertaken. ICASA could, following a policy direction by the Minister[31] and based on section 4(1)(j) of the ICASA Act, (and at least in so far as spectrum sharing is concerned, read with the Spectrum Regulations[32]) develop the regulatory framework envisaged in the proposed section 31B(2), 31C(3) and 31D(5).

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

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

146 While the Bill proposes a more progressive environment for the trading, sharing and refarming of spectrum, it fails to address the increasingly unnecessary constraints imposed by section 31(1), a technical constraint which is being rendered irrelevant by the realities of the sector as more operators enter into "roaming arrangements". The section currently states that "no person may transmit any signal by radio or use radio apparatus to receive any signal by radio except under and in accordance with a radio frequency spectrum licence granted by the Authority to such person in terms of this Act", which eliminates the ability to trade, lease, share or otherwise utilise excess capacity.

147 Section 31B stipulates that licensees may trade, share or re-farm licenced spectrum, subject to approval from the Authority and compliance with various requirements (including no adverse impact on competition). It further stipulates that the Authority must prescribe spectrum trading, sharing and re-farming regulations within 12 months of the commencement of this section.

148 This appears to indicate that there is reserved discretion for these three provisions to be effected at a different time to the commencement of the Act. Liquid Telecom submits that this would be a wasted opportunity at further and necessary liberalisation in the sector and that the provisions of the Act should commence in full and on one date.

149 Notwithstanding these welcomed innovation, the failure to address the constraint imposed by section 31(1) while making new innovations on spectrum use, will render the latter nugatory. It is our submission that this is rectified in the final version of the Amendment Act.

Universal Access and Universal Service

150 Section 31A(2) requires ICASA to obtain the Minister's approval on the nature and form of universal service obligations before they are imposed on RFS licensees, to ensure that the obligations are "co-ordinated, relevant and aligned with national policy objectives and priorities". Again, and in line with our earlier comments, this begs the question as to whether

this is not the specific role and remit of ICASA whose work must always, align with national policy objectives and priorities.

151 Liquid Telecom draws the Department's attention to our comments at paragraphs 57- 67 pertaining to the current regulatory approach to universal service and access in the sector. Accordingly, and based on this view, we see no reason to introduce further USO's for existing and new RFS licences, particularly in a legislative vision that contemplates (finally) spectrum trading, sharing and re-farming.[33] Rather, we submit, that the Committee consider the payment of a levy on a sliding scale, variable on the type of spectrum licensed (whether high-demand or not) which would be applied on an annual basis to the licensee, which fees would then be applied to incentive based roll-out projects, as proposed earlier in the submission.

152 In the framework of overlapping roles and responsibilities between the regulator and the Minister, currently (albeit probably unintentionally) proposed by the Bill, we query the efficacy of section 31A(6) which links annual renewal of a RFS licence to a level of compliance to be evaluated by ICASA as a condition of renewal. This proposal is neither fair on ICASA who lacks the capacity to undertake such audits on an annual basis and on licensees who – in the nature of the investment – may need longer run periods to achieve results. If a provision of this nature must find place in legislation (which again we argue is misplaced, along with the entire approach to USOs), then it should be a period of 2-4 years for evaluation.

High-demand Spectrum

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

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

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

required (which we would argue is debatable) should be tested on a phased-in basis.

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

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

155.1 the RFS licensee providing immediate wholesale open access to its networks or facilities in urban areas, to the WOAN licensee;

155.2 the licensee procuring a minimum of 30% capacity or higher (if determined) in the WOAN a period yet to be determined – which means an assumption that the WOAN will be "functional" (which is entirely out of the control of a licensee requiring spectrum), and

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

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

157 Further concerns relate to the proposal contained in section 31E(7) which requires ICASA within 24 months of the commencement of the Act, to hold an enquiry and make recommendations to the Minister on timeframes, terms and conditions, under which currently

assigned high demand spectrum, might be renewed, given the requirement of section 31E(6) that RFS licences that include exclusively or individually assigned high demand spectrum may not be renewed on the same terms and conditions at the end of the licence term. Whilst a reasonable improvement on the version of withdrawing spectrum postulated in the DTPS Bill, this proposal remains at adds with the goal of attracting and retaining continued investment in the sector. Accordingly, it needs to be reconsidered.

No trades in high-demand spectrum

158 We note that the Bill improves on the previous Draft Bill by removing the outright ban on spectrum trading in high-demand bands that was previously contained in the Draft Bill – at section 31B(4). We note however that the relevant section in the current Bill is fairly open ended and provides that the Minister may issue policy directions to the Authority on spectrum trading and spectrum use rights in order to fulfil specific national objectives. We remain hopeful that such policy directions will not prohibit trading on high-demand spectrum as this will have a negative impact on market consolidation activity in the sector. This concern is not completely without foundation, given that section 31C(2) in respect of spectrum sharing, provides that no sharing arrangement in regard to high-demand spectrum will be effected if it (b) amounts to spectrum trading.

159 Moreover, the effect of the proposed deletion to section 31(3)(c) in the Bill, is also to effectively prohibit a transfer of control in a spectrum licence. As it is unclear what spectrum will constitute high-demand spectrum (as this needs to be determined) the effect of these provisions may frustrate any future merger activity so critical to the level of maturation in which the sector currently finds itself. As such, any positive benefits of investment or even consolidation (access to capex necessary for infrastructure and services, job creation or retention, innovation, etc) would be lost.

160 This amendment has far reaching and potentially negative consequences and needs to be re-evaluated. Liquid Telecom submits that during an application for transfer or transfer of control in a licence and a RFS licence under Section 13(1) and 31(2A), the impact of such transfer can be evaluated on the extant framework. The extended application procedures for the transfer of RFS licences under Annexure E of the Spectrum Regulations[34] is so detailed and requires such significant amounts of information, that a regulator appropriately seized with

[34] Government Gazette No. 38641, GN 279, 30 March 2015.

that evaluation, would be well placed to consider the benefits or risks of a transfer or transfer of control. Accordingly, we respectfully urge the Committee to re-consider this approach in finalising the Bill.

Use it or lose it

161 Liquid Telecom supports the inclusion of the 'use it or lose it' principle contained in section 31(8) which empowers ICASA to withdraw any spectrum licence or assigned spectrum where the licensee has failed to use it for a period of 2 year. The Minister is however given the power exempt from this provision, small and medium enterprises and new entrants from this clause "upon good cause shown".

162 The inclusion of this clause gives ICASA the ability to introduce a spectrum management principle it has been contemplating since 2008. The market has however, changed considerably since then and while the risks of spectrum hoarding do of course remain, the introduction in 2010 of an administered incentive pricing system for spectrum fees, had a similar effect.[35] To this end, Liquid Telecom is of the view that a well-managed, relevant spectrum pricing regime will have the same outcome as the use it or lose it principle, without having any negative consequences for investment and the expansion plans of licensees, for which a 2 year time horizon is often too short to implement large scale network planning.

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

Excessive reliance on inter-governmental co-ordination

164 In line with the comments made earlier in this submission under "conceptual concerns" pertaining to excessive reference to inter-governmental co-ordination, we point out that section 34A is one such example that may, while well-intended, suffer from this policy malaise. Policy and Ministerial oversight is certainly required in various aspects of spectrum

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

planning, co-ordination and allocation, but the operational requirements thereof, processing, licence fees, assignment mechanisms, frequency co-ordination and resolution of interference, etc is the domain of an independent agency and must remain, in our view, with a specialised one equipped to perform this role.

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

International Roaming – (Chapter 7A)

166 Liquid Telecom supports the inclusion of the new chapter 7A on International Roaming, specifically in the Southern African Development Community ("SADC"). These provisions are consumer friendly and are overdue, particularly when viewed in the context of cross-border migration of foreign workers.

167 We do however consider the proposals to be ambitious in that they seek to regulate commercial arrangements between international companies not subject to local jurisdiction. There are countless jurisdictions in which regulators have not imposed roaming tariffs, rendering the requirement for reciprocity somewhat meaningless in the absence of agreement.

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

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

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

on two interrelated pillars - defining "general open access principles" and amending the definition of "essential facility".

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

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

172 Similarly, we raise concerns regarding the proposed amendments in section 43(1A) (vertical integration) and section 43(1B) and 44(3A) (determination of deemed entities) and how the Bill proposes to measure communications infrastructure for the purposes of evaluating the "25% of the total electronic communication infrastructure in such market" and declaring a licensee to be a "deemed entity"? Such status will also be afforded to licensees that "control an essential facility" or "a scarce resource such as exclusively assigned radio frequency spectrum".

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

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

pricing and compliance with specific network and population coverage requirements.[36] Further matters of determination require elucidation: subsection (1A) requires those licensees who are determined to be "vertically integrated" to provide accounting separation.

175 The Bill proposes this guidance by instructing ICASA, within 18 months of the commencement of the ECA amendment, to prescribe regulations to determine the above and in fact, a long list of issues that must form part of wholesale open access regulations. These include, for example, wholesale open access agreement principles, reference offers containing model terms and conditions for the different open access categories; the time frame and procedures for negotiating and concluding agreements; and the definition of various terms such as 'effectiveness', 'transparency' and 'non-discrimination'; wholesale rates; a list of essential facilities; and numerous other matters required to assemble this framework.

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

177 Once again, we submit that the ECA currently contains the necessary provisions to commence this inquiry immediately and ICASA need not wait for the amendment of the ECA to consider at least some of the regulations that are required in terms of the proposed section 44(3)(a)-(p).[37]

[36] Section 43(1B)(a)-(c).

[37] The approach can clearly be derived in terms of section 4B if the ICASA Act, section 67 of the ECA and section 1(1) and 7 of the Competition Act. Section 1(1) defines market power to mean *"the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers"*. Section 7 reads as follows: *"A firm is*

178 Our comments regarding the expected delays and time required become even more stark when one has regard to the proposed section 44(3A) which cross refers to section 67(3A) which requires as a precondition for determining deemed entities, the completion of a market definition exercise. Again, a matter with which ICASA is currently empowered and tasked in terms of the. The proposed amendments to the ECA do not need to occur for this process to commence. This notwithstanding, we have already raised previously the concern that if section 67 is amended in the current proposed form, it will limit or eliminate public participation in the market definition process. This can only serve to exacerbate the concern that the definitions may not be correct and, if defined incorrectly, will have a negative effect on the relatively new entrants to the market that have invested heavily in infrastructure development. Alternatively, the definitions may be correct, but may not be sustainable if an administratively sound process has not been followed. The same concern exists for the 25% threshold that is being suggested in the Bill. Notably, this approach to determining dominance does not align with the approach of the Competition Act.[38]

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

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

Consumer Issues (Chapter 12)

181 Liquid Telecom supports the renewed focus on consumer welfare evidenced by the proposed changes to Chapter 12, specifically the requirement to regularly (at least every 3 years) review regulations for a code of conduct and minimum standards for end-users and

dominant in a market if – it has at least 45% of that market; it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or it has less than 35% of that market but has market power."

[38] Act No. 89 of 1998.

subscribers and quality of service. [39]

182 Our respectful submission is first, to require ICASA to consider publishing a confirmed turn around commitment for the speedy and efficient investigation and processing of consumer complaints. Second, with a recognition of the type of sector the Bill is trying to shape, it is our view that the existence of an open access regime should also force a requirement for service providers providing data services to consumers, to offer less restrictive contract periods (for example month to month contracts). This can easily be addressed in the required end-user and subscriber charter regulations where the requirement is stipulated as per section 69(5) of the ECA. However, we note our frustration that the current code of conduct and minimum standards for end-users and subscribers and quality of service as heavily skewed to mobile services. We accept that the majority of consumers are connected to mobile services, however the current regulations and reporting requirements remain inappropriate for the majority of data services. We would encourage the Department to amend the proposed section to specifically reference the need for ICASA to promulgate technology neutral regulations, or at a minimum sub-divide the regulations to avoid the current "one size fits all" approach which conflates voice, data, mobile and fixed.

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

General

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

184.1 ICASA is required by section 79C(1) annually, to publish a market performance report in respect of the broadcasting, electronic transactions, postal and electronic communications sectors which report must include an assessment of affordability and accessibility to

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

services, quality of service, impact on users of market trends and compliance by licensees with conditions and obligations and it must further consider the effects of convergence, including monitoring of the extent and impact of horizontal and vertical integration and bundling of services. Our submission here is that this is an onerous requirement, which has a corresponding obligation placed in licensees to provide "any information" specified by ICASA for this purpose.

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

184.3 We note the amendment to the definition and to section 5(9) of the ECA regarding licensing which cumulatively obliges ICASA to make regulations that will apply the B-BBEE ICT Sector Code to existing and new licences, licence exemptions and spectrum assignment to promote broad-based black economic empowerment within 12 months of the promulgation of the ECA Amendment Act.

CONCLUSION

185 Liquid Telecom once again thanks the Committee for the opportunity to comment on the Bill.

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

186.1 ***More consultation is required, focused on implementation:*** The passage of a Bill of this nature requires extensive consultation. Notwithstanding the fact that the DTPS is of the view that in the process preceding the Bill, extensive consultation has in fact taken place, much more is required to ensure it is capable of effective implementation.

186.2 To this end, we respectfully request the Committee to consider hosting various focussed workshops to address concerning aspects of the Bill. Most notably, an urgent workshop

should be convened to resolve the regulations regarding Chapter 4 – rapid deployment, as it is our submission that these do not need to await an amendment to be addressed.

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

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

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

186.6 The **structural concerns** that permeate the Bill remain:

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

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

186.6.3 Independent and effective regulation must remain a policy priority and radical re-design to the institutional arrangements for regulation in the SA ICT sector should be avoided, except where strictly necessary for operational improvement. There are two aspects to this point: first, *regulatory independence* – a point we have not dealt with excessively in this submission but will do so if required when presented with draft legislation to effect chapter 13 of the White Paper. There is no doubt that the constitutional status of ICASA has been well canvassed and which status as a Chapter 9 Institution is placed above

question.[40] Second, our submission has focussed rather on the *risks to regulation by restructuring the regulatory institutions* as envisaged in the White Paper. This will take many years to effect and will lead to lengthy delays to the multiple processes and "busy" work that is prescribed for the regulator by this Bill. Significant changes should be avoided.

186.7 The **conceptual concerns** that permeate the Bill include:

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

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

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

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

187.2 The continued retention of the current approach to universal service and access obligations. There are many ways in which this policy objective can be met that would be

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

more effective and would also reduce the burden on operators whilst simultaneously creating opportunities for all market players.

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

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

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

191 We wish the Committee well in its further deliberations on the Bill.