IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: _____

In the matter between:

TELKOM SA SOC LIMITED	Applicant
and	
INDEPENDENT COMMUNICATION AUTHORITY OF SOUTH AFRICA	First Respondent
CHAIRPERSON: INDEPENDENT COMMUNICATION AUTHORITY OF SOUTH AFRICA	Second Respondent
VODACOM (PTY) LIMITED	Third Respondent
MOBILE TELEPHONE NETWORKS (PTY) LIMITED	Fourth Respondent
CELL C (PTY) LIMITED	Fifth Respondent
WIRELESS BUSINESS SOLUTIONS (PTY) LIMITED	Sixth Respondent
LIQUID TELECOMMUNICATIONS SOUTH AFRICA (PTY) LIMITED	Seventh Respondent
MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES	Eighth Respondent
COMPETITION COMMISSION OF SOUTH AFRICA	Ninth Respondent
SOUTH AFRICAN COMMUNICATIONS FORUM	Tenth Respondent
SOUTH AFRICA BROADCASTING CORPORATION LIMITED	Eleventh Respondent
SENTECH SOC LIMITED	Twelveth Respondent
NATIONAL ASSOCIATION OF BROADCASTERS	Thirteenth Respondent

FOUNDING AFFIDAVIT

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I, the undersigned,

SIYABONGA MAHLANGU,

state under oath that:

THE INTRODUCTION

1 I am an adult male and the Group Executive: Regulatory Affairs and Government Relations of the applicant (**Telkom**).

2 I am authorised to depose to this affidavit and to act on behalf of Telkom.

3 The facts to which I depose are true and correct, and are within my knowledge except where it is apparent from the context that they are not.

4 Where I make submissions of law, I do so on the legal advice of Telkom's legal representatives, which I accept as correct.

THE STRUCTURE OF THE AFFIDAVIT AND NATURE OF THE RELIEF SOUGHT

5 On 2 October 2020, the first respondent (the **Authority**) issued the invitations to apply **(ITAs)** for radio frequency spectrum licences for international mobile telecommunication **(IMT)** spectrum bands **(Auction ITA)**[1] and a composite ITA for an individual electronic communications network services (**I-ECNS**)

[1] Invitation to apply notice on the licensing process for international mobile telecommunications in respect of the provision of mobile broadband wireless access services for urban and rural areas using the complimentary bands, IMT700, IMT800, IMT2600 and IMT3500, *Government Gazette* 43768, 2 October 2020.

and Radio Frequency Spectrum Licences for the purpose of operating a Wireless Open Access Network (WOAN) **(WOAN ITA)**.[2] The two ITAs are the subject of this application.

6 In this application, the relief Telkom seeks is three-fold:

6.1 In **Part A**, Telkom seeks an order for substituted service in terms of which the first respondent and Telkom will upload this application on their respective websites. The purpose is to ensure that any interested and affected parties are notified of this application and the relief sought in the application.

6.2 In **Part B**, Telkom seeks an order interdicting the completion of the spectrum assignment process contemplated in the two ITAs pending the outcome of Part C.

6.3 In **Part C**, Telkom seeks to review and set aside the Authority's decisions to publish the two ITAs.

7 I turn now to set out the details of the parties cited in the application. I must point out that the number of parties that ultimately participate may increase depending on the response to the notice of this application as contemplated in the relief for substituted service.

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[2] Composite Invitation to Apply (**ITA**) for an individual electronic communications network services (I-ECNS) and Radio Frequency Spectrum Licences for the purpose of operating a Wireless Open Access Network (WOAN), *Government Gazette* 43767, 2 October 2020.

THE PARTIES TO THE APPLICATION

8 The applicant is Telkom SA SOC Limited. Telkom is a company registered in terms of the company laws of South Africa. Telkom's registered address is at Highveld Techno Park, 61 Oak Avenue, Centurion, Gauteng. Telkom has an Individual Electronics Communications Network (**I-ECNS**) licence and an Individual Electronic Communications Services (**I-ECS**) licence. These are complemented by a suite of radio frequency spectrum licenses that enable it to provide fixed or wireless electronic communications services. Because of it being a fourth entrant in the mobile market, Telkom is the only mobile operator without access to radio frequency spectrum below 1000 MHz (**sub 1GHz**). Access to sub 1GHz radio frequency spectrum is important to a mobile operator because it enables in-building penetration and efficient deployment of mobile networks, i.e. it allows for the deployment of fewer base stations per distance covered.

9 Today, Telkom is the only credible mobile infrastructure competitor to Vodacom (Pty) Limited (**Vodacom**) and Mobile Telephone Networks (Pty) Limited (**MTN**). I explain the relevance of this fully below where I deal with the implications on the licensing of spectrum on infrastructure based competition in the mobile sector.

10 By subscriber base alone Telkom has approximately 12.5% of the total market share for mobile communication and data services. According to the latest available figures, drawn from the reports I will refer to more fully below, Vodacom and MTN have the largest combined market share of approximately

73%.[3] Telkom's service revenue share of the mobile communications and data market is also low, representing approximately 11% of the total revenue. Here, too, Vodacom and MTN have the largest combined market share of approximately 78%, according to the latest figures available.[4]

11 As the only infrastructure competitor Telkom has sought to lower prices in an effort to ensure affordable products and services for the consumer. However, the duopoly (consisting of Vodacom and MTN) is so entrenched that despite Telkom's championing of the consumer's interests through affordable products, the market shares of the two large operators were not affected.

12 The first respondent is the Independent Communications Authority of South Africa (**Authority**).

12.1 The Authority is a juristic person established in terms of section 3(1) of the Independent Communications Authority of South Africa Act 13 of 2000 (**ICASA Act**).

12.2 The Authority's registered offices are at 350 Witch-Hazel Ave, Eco-Park Estate, Centurion.

12.3 The Authority exercises the powers and performs the duties conferred and imposed on it by the ICASA Act and the underlying

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[3] Subscriber shares reflect data as at March 2020 for Vodacom, MTN, Telkom, and Rain (the latter is an estimate based on publically available information), and data as at December 2019 for Cell C and MVNOs. All data is taken from financial reporting.

[4] Service revenue shares reflect data as at March 2020 for Vodacom, MTN and Telkom, and data as at December 2019 for Cell C and MVNOs. Rain's service revenue is not known. All data is taken from financial reporting.

statutes, including the Electronic Communications Act 36 of 2005 (**ECA**).

12.4 The Authority regulates the electronic communications sector in the public interest. This includes the licensing of radio frequency spectrum.

13 The second respondent is the chairperson of the Authority, Dr Keabetswe Modimoeng (**Chairperson**). The Chairperson is cited in his official capacity as the person responsible for the leadership of the Authority's Council, the entity through which the Authority acts in terms of section 3(2) of the ICASA Act.

14 The third respondent is Vodacom (Pty) Limited **(Vodacom**). Vodacom is a private company, registered and incorporated in accordance with the company laws of South Africa. Vodacom's registered office and place of business is at Vodacom Corporate Park, 082 Vodacom Boulevard, Voda Valley, Midrand, Gauteng. Vodacom is also a holder of an I-ECNS and I-ECS licences. Vodacom is one of the two first-to-market operators in the introduction of mobile telephony services in South Africa. By all indices, i.e. network capacity, subscribers, and gross revenue, it is the largest of all the mobile operators. It commands more than 50% of gross revenues in this market. Vodacom has expressed an interest in the licensing of the unassigned IMT spectrum which is specified in the ITAs.

15 The fourth respondent is MTN (Pty) Limited (**MTN)**. MTN is a private company, registered and incorporated in accordance with the company laws of South Africa. MTN's registered office and place of business is at 216 14th Avenue, Fairland, Roodeport, Gauteng. MTN has similar licences to Vodacom. It, too, has an interest in the outcome of this application. MTN is the second largest mobile operator by revenue, subscribers, and network capacity. Together, Vodacom and MTN command over 76% of the subscribers in this market and over 78% of the annual gross revenues in the mobile market. The mobile market is thus characterized as a duopoly. MTN has also expressed an interest in the licensing of the IMT spectrum.

16 The fifth respondent is Cell C (Pty) Limited (**Cell C**). Cell C is a private company, registered and incorporated in accordance with the company laws of South Africa. Cell C's registered office and place of business is at Waterfall Campus, corner Maxwell Drive and Pretoria Main Road, Buccleuch, Gauteng. In 2001, the Authority licensed Cell C as the third mobile cellular provider in South Africa. It holds the same licences as Vodacom and MTN. Cell C competes with Vodacom, MTN and Telkom in the provision of mobile electronic communications services. Cell C is reported in the press to be facing major sustainability challenges. Telkom has now overtaken Cell C as the third ranked mobile services provider in South Africa.

17 The sixth respondent is Wireless Business Solutions (Pty) Limited t/a Rain (**Rain**). Rain is a private company, registered and incorporated in accordance with the company laws of South Africa. Rain's place of business is at The Main Straight 392 Main Road Block D, Bryanston, Sandton. Although Rain has

similar operating licences to Vodacom, MTN and Cell C, its spectrum holdings are different. It was initially licensed to provide mobile data services. From publicly available information it appears that the major part of its business consists of its wholesale spectrum arrangement with Vodacom. Its retail business is still at a nascent stage.

18 The seventh respondent is Liquid Telecommunications South Africa (Pty) Limited (**Liquid**). Liquid is a private company, registered and incorporated in accordance with the company laws of South Africa. Liquid's registered office and place of business is at 401 Old Pretoria Main Road, Midrand, Gauteng. Liquid bought Neotel. Neotel was initially licensed as the second national fixed line operator to compete with Telkom. It was also issued with certain spectrum which is now identified as IMT and of high demand. Significantly, Neotel, and now Liquid, have only exploited their radio frequency spectrum to a limited degree. What is relevant to this application is that Liquid, like Rain, has now opted to enter into wholesale spectrum arrangements that benefit Vodacom on the one hand and MTN on the other. Liquid has a material interest in the outcome of the licensing of spectrum by the Authority.

19 The third to seventh respondents are well-established providers of a variety of electronic communication network services and electronic communications services, including mobile voice and data services. They do so through radio frequency spectrum that has been licensed to them by the Authority. To the best of my knowledge they have expressed some desire to acquire additional radio frequency spectrum which the Authority intends to license through the auction process contemplated in the Auction ITA.

20 Although Telkom does not seek any relief against them, it has been advised to cite the third to seventh respondents by virtue of any interest they may have in these proceedings. Should any of these respondents choose to oppose the relief sought in the notice of motion, then, in that event, Telkom will seek costs against them.

21 The eighth respondent is the Minister of Communications and Digital Technologies (**Minister**). The Minister is cited in the application as the responsible Minister under the ECA and because part of the relief sought in the application relates to the digital migration process, for which she is the custodian. The Minister's offices are at iParioli Office Park, 1166 Park Street, Hatfield, Pretoria. This application will also be served on the Office of the State Attorney, Pretoria, Ground Floor, SALU Building, 316 Thabo Sehume Street, Gauteng.

22 The ninth respondent is the Competition Commission of South Africa. The Competition Commission is the regulatory body established in terms of section 19 of the Competition Act 89 of 1998. The Competition Commission's address is Block C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria. In terms of s67(11) of the ECA, the Authority may ask for assistance or advice from the Competition Commission on any matter relating to competition in the ICT sector.

23 The tenth respondent is the South Africa Communications Forum (**SACF**). The SACF is a non-profit industry association in the ICT sector. The SACF is a membership organisation and a representative forum of all the stakeholders

in the South African ICT sector. The SACF's offices are at central park office suit at the corner of Main Street & Orchard Avenue, Columbus building, Unit B2, Bordeaux, Randburg, Gauteng.

24 The eleventh respondent is the South African Broadcasting Corporation Limited (**SABC**). The SABC is a public company with limited liability and incorporated in terms of the company laws of South Africa, and the Broadcasting Act 4 of 1999. The SABC's main place of business is at Broadcasting Centre, Henley Road, Auckland Park, Johannesburg. The SABC is a public free-to-air terrestrial television broadcaster.

25 The twelfth respondent is Sentech SOC Limited (**Sentech**), a state owned company offering digital content delivery services to public and commercial entities, with its main place of business situate at Sender Technologu Park, Octave Road , Honeydew, Gauteng.

26 The thirteenth respondent is the National Association of Broadcasters (the NAB), a voluntary association, representing the interest of broadcaters in South Africa, with its main place of business situate at 410 Jan Smuts Avenue, Burnside Island Office Park, Building number 8, Ground Floor, Craighall.

27 The ninth to thirteenth respondent are cited as an interested parties herein, no order is being sought against them.

PART A: SUBSTITUTED SERVICE

28 From its consideration of documents emanating from the Authority, Telkom has reason to believe that there are a number of other interested parties who may be intending to bid in the upcoming auction contemplated in the Auction ITA or have an interest therein. Although Telkom is aware of several of these parties, it is not in a position to cause service of this application on them or their representatives, despite their possible material interest in the proceedings. In the light of this concern, Telkom seeks an order, on an urgent basis, authorising a substituted service on such parties, in the form and directions set out in Part A of the notice of motion. In what follows, I set out the basis of the relief urgently sought in Part A of the notice of motion.

29 On or about 17 November 2020, the Authority released its written response to several requests for clarifications addressed to it by interested parties who might wish to participate in the auction process referred to in the Auction ITA. A copy of the written clarification is annexed hereto and marked "**FA1**". Telkom received the written response from the Authority on 22 November 2020.

30 More recently, the Authority has released its "*reasons documents*" in respect of the ITAs in which, amongst other things, it sets out its reasons for the decisions which led to the ITAs. I refer to these documents as the RoDs. They were released on 4 December 2020 and copies thereof are attached and marked "**FA2.1** and **FA2.2**" respectively.

31 A fair consideration of the Authority's written response and the RoDs indicate that, in addition to the third to seventh respondents and tenth to thirteenth, there are numerous other interested parties who addressed their requests for clarification on matters of concern to them arising from the ITAs. Whilst the names of some of those interested parties are described in the table which appears on page 3 of the Authority's written response, Telkom has been unable to establish the registered offices or official business places of most of these parties. It has also not been able to establish the nature of their business activities, nor the status and type of interest they have regarding both or either of the ITAs.

32 However, the Authority is, or should be, aware of how many interested parties have expressed their interests in the ITAs, including the auction process, their addresses, places of business or registered offices. It can therefore ensure that those interested parties are notified of these proceedings so that they may choose to participate in the relief sought in Parts B and C of the notice of motion.

33 I respectfully submit that it is appropriate, in the circumstances of this case, that the Authority, the SACF and the NAB should be directed to send a written notice to all interested parties other than the third to seventh and tenth to thirteenth respondents (and upload a copy of the application and the notice on their respective websites), informing them that Telkom has initiated the present application, and that they can obtain a copy of the application from the offices of Telkom's attorneys, in electronic format. The format of the notice which Telkom proposes appears on annexure "**FA3**". Telkom tenders to compensate

the Authority, the SACF and the NAB for such reasonable expense as it incurs in executing the notices it requests.

34 In the light of the fact that Telkom seeks an expedited hearing of the relief sought in Parts B and C, I respectfully submit that the consideration and granting of the relief sought in Part A is urgent. I say so having regard to the following facts and circumstances:

34.1 All parties who intend to participate in the auction process must submit their applications by 28 December 2020.

34.2 The relief sought in Part A of the notice of motion is procedural in nature, and does not deal with the merits of Telkom's application.

34.3 The purpose of the relief sought in Part A is to notify interested parties of the relief sought in Parts B and C, in order to ensure that they are afforded an opportunity to be heard in Parts B and C proceedings, should they elect to participate therein. It is therefore designed to promote the right to be heard, consistent with the provisions of section 34 of the Constitution.

34.4 There is no other practical effective means through which the interested parties' attention can be drawn to the Parts B and C proceedings immediately and cost-effectively other than through the form of service sought in Part A.

34.5 The order and directions will ensure that this application is most likely to come to the attention of interested parties.

35 Based on the above considerations, I respectfully submit that it is just and equitable that the form of service sought in Part A of the notice of motion should be granted.

OVERVIEW OF THE INTERIM RELIEF (PART B) AND REVIEW APPLICATION (PART C)

36 As I have stated above, on 2 October 2020, the Authority decided to publish the Auction ITA and WOAN ITA.

37 Telkom considers the Authority's decisions to publish the Auction ITA and the WOAN ITA, respectively, (**Decisions**) to be unlawful and irrational as set out below.

38 I turn now to provide a summary of the several reasons for which Telkom considers the Authority's decisions to be irregular and unlawful. I will expand on the reasons in further detail in the section headed Part C of this affidavit: "*grounds of review*".

700MHz and 800MHz frequency bands are not available for use

39 The first fundamental flaw made by the Authority is that the Auction ITA involves the auction of portions of spectrum in the 703-733 MHz paired with 758-788 MHz (**the 700 MHz**) and the 791-821 MHz paired with 832-862 MHz (**the 800 MHz**) frequency bands. The portions of spectrum sought to be auctioned are not immediately available for use on a national basis by a

licensee who may ultimately succeed in its bid during the auction process contemplated in the Auction ITA.

40 As an obvious contender for such frequency bands during the auction process contemplated in the Auction ITA, Telkom is concerned about the lawfulness and rationality of the Authority's decision to include the 700MHz and 800MHz frequencies in the auction. This is because the 700MHz and 800MHz frequencies are not yet available for use and are not likely to be available for use for a long period after the auction.

41 Neither the Authority nor the Minister has formally committed to a date by which these frequencies will become available for use by any licensee. They have been unable to provide such clarity, notwithstanding the fact that Telkom and other interested parties have sought such clarity during their submissions flowing from the ITAs process. Another variable that impacts on the successful completion of the migration process is that funding is required from National Treasury.

42 Telkom has been advised and respectfully submits that the decision by the Authority to include the 700MHz and 800MHz frequencies in the auction process as part of the options described in the auction lots is unlawful on the clear premise that the Authority has no power or authority to assign and therefore license radio frequency spectrum which is not yet available for use by any licensee that may succeed in the auction process.

43 The Authority's statutory power to assign any radio frequency and therefore grant requisite licences for use of such spectrum is expressly set out in sections 30 and 31 of the ECA. Properly interpreted, these provisions of the ECA empower the Authority to only issue licences for radio frequency spectrum that is available for use by a successful bidder.

44 It is common cause that the 700MHz and 800MHz frequency bands that have been included in the auction lots are not yet available for use by any party who may successfully bid for any or all of such frequencies. The Authority and the Minister accept that as a fact. Those frequencies are currently occupied by television broadcasters, and are used for their broadcasting purposes. Whilst the process of migrating the broadcasting services from the 700MHz and 800MHz has begun, it has not yet been finalised and it remains unclear when it will be finalised, although the Department has informally communicated the target day as December 2021; the Minister's published performance agreement puts the date as 2023.

45 Based on the above, I respectfully submit that the Authority's decision is unlawful and invalid, on a proper interpretation of the relevant provisions of the ECA.

46 Telkom, and indeed other interested parties, have repeatedly requested the Authority not to proceed with the assignment of the 700 MHz and 800MHz spectrum included in the auction lots, until the frequencies become available after the migration process. As I demonstrate below, the Authority has not

dealt with this concern and, instead, proceeded with its unlawful and illegal decision.

47 Even if Telkom's interpretation of the relevant provisions of sections 30 and 31 of the ECA were to be mistaken, and it is held that the inclusion of the 700MHz and 800MHz in the lots referred to in the Auction ITA is lawful, Telkom contends that the Minister and the Authority must be ordered to ensure that the relevant spectrum is available for use by interested parties who successfully participate in the auction of any or all of that spectrum by the time the relevant spectrum licences are issued to the successful bidders. I explain the basis of that relief more fully below. For the present purposes, I submit that that relief will moderate the unlawfulness and irrationality of the auction process, should it be allowed to proceed.

48 Nevertheless, the unlawfulness and irrationality of the Decisions are heightened by the fact that:

48.1 The Authority is aware of and has made it clear that the availability of the 700MHz and 800MHz is not dependent on the Authority but the efficacy of the migration program that is executed and overseen by the Minister's department, once the process of migrating broadcasting transmitters from those frequencies has been concluded. It remains unclear, and uncertain, when the migration process will be completed, and when the ministerial certification of that completion, and freeing up of the relevant frequencies, will be done.

48.2 Nonetheless, Authority has gone ahead and designed an auction to assign this spectrum to bidders despite the fact that they will not be able to access that spectrum on a national basis immediately and will have to await the conclusion of the digital migration process for which the Minister is responsible.

48.3 Although the Authority has clarified, in its responses to clarification questions sent to it by interested participants in the Auction ITA process, that the term of the licence issued under the Auction ITA will be extended from 15 to 20 years to facilitate the availability of spectrum under the 700MHz and 800MHz bands and that the obligations associated with the aforementioned licence will only commence when the 700MHz and 800MHz spectrum bands become available, this does not cure the problem that the unavailability of the spectrum may result in the further entrenchment of the dominant market positions of Vodacom and MTN.

Prejudice to Telkom

49 Telkom is an obvious contender for portions of the frequencies in the 700MHz and 800MHz bands. Access to these bands of spectrum would enable Telkom meaningfully compete in the market for the provision of mobile communication services, and especially in the mobile data services market. Telkom is substantially prejudiced by the Decisions.

50 As I have foreshadowed above, the decision to proceed with the auction of the 700MHz and 800MHz under the current terms and conditions specified in the Auction ITA is severely prejudicial to Telkom because:

50.1 The date of availability of spectrum has an influence on the economic value of spectrum. There is therefore a risk of over bidding if the spectrum is freed and cleaned later than anticipated and under-bidding if the spectrum is freed and cleaned earlier and a bidder loses out by undervaluing the spectrum.

50.2 Because of the manner in which the ITAs have been structured, they will not promote competition in the market. On the contrary, they are likely to entrench the dominant position of Vodacom and MTN in the market, to the detriment of smaller players such as Telkom.

50.3 Telkom and any other bidder that may be successful in bidding for the 700 MHz and 800 MHz bands will have to commit capital that will be locked into the payment of these bands while not being able to generate a return thereon.

51 Additionally, in order to be more competitive, Telkom also needs to acquire spectrum in the 2.6 and 3.5 GHz bands. In particular, if Telkom wishes to compete effectively in the 5G space, it will need to augment its current holding of 28MHz in the 3.5GHz band. This is because according to accepted international technical standards, an operator needs at least 80 – 100 MHz of

contiguous spectrum in the 3.5 GHz band to offer enhanced mobile broadband which is the essence of 5G services.

52 Currently, Telkom is the only independent competitor to Vodacom and MTN in infrastructure based competition. Other competitors such as Cell C, RAIN and Liquid have made their capacity available to Vodacom and MTN through complex spectrum arrangements disguised as roaming.

53 The non-availability of 700 MHz and 800 MHz has the effect of worsening the ability of Telkom to compete effectively in the post-auction dispensation. The successful bidders who are able to access the spectrum assigned to them immediately will have the ability to improve their speeds and quality of service by deploying new spectrum immediately. This will widen the gap because Telkom will still not be able to enjoy the full commercial benefits of having access to sub 1GHz in terms of in-building penetration and efficient deployment of its network.

54 As part of the temporary spectrum assigned to Telkom to assist in combating the adverse effects of Covid 19, Authority made 2x10 MHz of 800MHz and 2x10 MHz of 700 MHz available to Telkom. In its attempt to deploy this spectrum, Telkom encountered difficulties in areas such as the Western Cape where it experienced interference with broadcasting transmitters.

ITAs issued without regard to competition in the industry

55 The second fundamental flaw in the ITAs is that they have been issued prematurely and without regard to the dynamics or structure of the competition in the ICT sector, including on the basis of the Authority's own competition "*assessment*" and without appropriate weight having been given to the guidance provided to Authority by the Competition Commission of South Africa. Here, too, I will refer to representations to the Authority made by various interested parties that requested the Authority to complete the formal competition inquiry it has instituted in terms of chapter 10 of the ECA in order to properly, rationally and reasonably design an auction process that meets the legitimate competition concerns that have been determined in terms of the chapter 10 of the ECA process which has not yet been completed.

The Authority's competition "assessment"

56 Instead of responding to the legitimate request that the Authority should complete the chapter 10 of the ECA process, the Authority claims, in the Auction ITA RoD, that it has undertaken a competition "*assessment*" of the wholesale and retail mobile communication services market and has been able to design the auction lots in the Auction ITA that deal with the historical imbalances in what it has itself apparently determined to be an uncompetitive market.

57 Telkom has been advised and respectfully submits that the decision of the Authority to rely on a competition assessment of limited scope whilst the

mobile broadband services inquiry (**MBSI**) being conducted by the Authority is pending is unlawful and irrational, *inter alia*, because:

57.1 That decision undermines and subverts the chapter 10 of the ECA process which is underway and has not yet been completed. Chapter 10 of the ECA mandates a statutory process involving public participation, where all interested parties are afforded an opportunity to participate and the Authority is thereafter obliged to publish its findings and reasons documents in terms of section 4C of the ICASA Act. The "*competition assessment*" upon which the Authority purportedly relied on does not meet the requirements of section 4C(6) of the ICASA Act.

57.2 The licensing of spectrum is an important process and will fundamentally affect the competition structure of the ICT sector. Therefore, the licencing of spectrum without concluding the MBSI removes access to spectrum as an option that would be available to the Authority to promote competition in the ICT sector. Hence the use of spectrum to promote competition will not be possible once it is licensed. There are other means available to the Authority which are less potent. The MBSI must be completed, and then the licencing of spectrum be conducted having taken into consideration the findings of the MBSI.

57.3 Secondly, the "*competition assessment*" anticipates and renders nugatory the outcome of the chapter 10 of the ECA inquiry. The statutory purpose and utility of the chapter 10 of the ECA inquiry is

undermined by the competition assessment now invoked by the Authority. There is no rational reason why the Authority ought not to have completed the chapter 10 of the ECA process before it initiated the ITAs process.

57.4 Thirdly, the Authority did not consult interested parties and the public on its "*competition assessment*". The "*competition assessment*" is the basis upon which the Authority determined mechanisms within the ITA such as the "*opt in*", the spectrum caps, and the split of the spectrum between the auction and the WOAN. The impact of the decisions taken by the Authority as a result of the "*competition assessment*" will have far reaching effects on the bidders and the structure of the sector after the auction. By virtue of this, the Authority had an obligation to consult the affected parties and the public before completing the assessment.

58 The Auction and WOAN ITAs ought furthermore to have been guided by the findings of the Competition Commission in its final Data Services Market Inquiry (**DSMI**) report of 2 December 2019. In the report, the Competition Commission reported on its findings, conclusion and recommendations following upon its inquiry into high prices for, amongst other things, mobile data services in the country, compared to other jurisdictions.

58.1 The terms of reference for the DSMI stated that:

> *"The concerns of the Minister [who requested the DSMI] relate to high data costs in South Africa and the importance of data affordability for the South African economy and consumers. Having considered the request of the Minister, the Commission is*

conducting a market inquiry because it has reason to believe that there are features of the sector that prevent, distort or restrict competition within the sector, and/or to achieve the purposes of the Act."

58.2 The DSMI was the first detailed and comprehensive study of the state of competition in South Africa's broadband market (fixed and mobile).

58.3 With respect to mobile markets, the Competition Commission found that pervasive competition problems exist The Competition Commission found that there was a *prima facie* case of excessive pricing by the two leading mobile operators, Vodacom and MTN. On the back of this, the Commission was able to secure commitments from these operators to reduce headline prices on certain mobile data products. Importantly, the DSMI found that Vodacom and MTN were able to maintain market shares while also being able to charge higher prices for many mobile products compared to the two smaller firms, Telkom and Cell C. The market is duopolistic and competition is ineffective. The lowering of prices by the challenger operators such as Telkom and Cell C has had no substantial effect on Vodacom and MTN pricing and ability to maintain their respective market shares.

58.4 The Competition Commission's analysis of the role of spectrum in determining the level of competition was extensive. In particular, it—

58.4.1 laid out the case for asymmetric spectrum policies that favoured the expansion of smaller operators;

58.4.2 noted the asymmetry in spectrum holdings in the sub-1GHz bands that inhibited expansion by Telkom; and

58.4.3 noted the distinction between spectrum assignment and spectrum use.

58.5 The Competition Commission also made a critical observation about the relative benefits of bringing forward spectrum licensing versus ensuring that spectrum licensing boosted competition to the two major players in the South African market, Vodacom and MTN. The Competition Commission noted that any cost reductions by virtue of licensing spectrum should be viewed in light of the evidence that market power, rather than underlying costs, appeared to be the major determinant of market prices in South Africa.

58.6 The point underlying these findings is that a well-designed spectrum auction that gives due weight to addressing competition asymmetries in the mobile sector might generate greater benefits to the broader South African society than might a more immediate spectrum auction that preserves the existing asymmetries.

58.7 The Competition Commission therefore recommended that the Authority should make use of its regulatory powers to assign high-demand spectrum to mobile communications service operators in a manner that would promote competition in the sector and lower the prices of mobile communication services, especially data services.

58.8 At the time that the Competition Commission published its report in December 2019, the Authority had already begun conducting what has been termed the "*Priority Markets Inquiry*". The objective of the Priority Market Inquiry is recorder as being to "identify markets and/or market segments in the electronic communications sector that are susceptible to ex-ante regulation, and should be prioritized for market reviews and potential regulation". Under the Priority Markets Inquiry, the Authority identified the markets to be prioritised for potential market reviews in terms of section 4B of the ICASA Act, read with section 67(4), of the ECA. Amongst these markets were the wholesale fixed access, upstream infrastructure and mobile services markets.

58.9 Under this process, the Authority initiated the mobile broadband services inquiry (**MBSI**) as the first priority market to be studied. It also issued the Information Memorandum in relation to the present ITAs.

58.10 Competition issues were and are a focus of the MBSI. This is understandable in the light that the Authority is mandated to promote competition in the industry. In the discussion document that the Authority published in relation to the MBSI, the Authority described the purpose of the MBSI as being to assess the state of competition and determine whether or not there are markets or market segments within the mobile broadband services value

chain which may warrant a regulation in a context of a market review in terms of section 67(4) of the ECA.

58.11 However, despite not completing the MBSI, the Authority has seen fit to issue the ITAs. The Decisions to do so were therefore taken before the outcome of the MBSI which has a material bearing on the way in which the ITAs can be used to promote competition. Having identified the markets the Authority, in terms of section 67(4) of the ECA must, following an inquiry, prescribe regulations defining the relevant markets or market segments and impose appropriate and sufficient procompetitive licence conditions on licensees where there is ineffective competition and if any licensee has significant market power in such markets or market segments. This is yet to be done.

58.12 In this fundamental respect, therefore, the Decisions were premature and ought to have awaited the outcome of the process designed to give the Authority greater insight into the market and a better understanding of how different auction designs might further promote or retard competition in the sector.

58.13 Telkom has retained the services of an economics consultancy firm, Berkeley Research Group (**BRG**). BRG has prepared a report in which it assesses the implications of the current ITAs on competition in the mobile sector. It also opines on the consequence of the Authority's approach to initiate the ITAs and the auction process without completing its MBSI. Many of the

points made above about the relevance of those processes have been informed by the BRG report. A copy of the full report is attached and marked "**FA4**". I will deal with the contents of BRG's report in more detail below.

58.14 I have been advised and respectfully submit that, as a matter of law, the Authority is obliged to have regard to and promote competition when it exercises its regulatory functions and duties. In the context of the Auction ITA and the WOAN ITA processes, the Authority is obliged to do so by virtue of the provisions of sections 2(d), (f), (m), (n) and 31(3)(a) and (c) of the ECA.

59 On the facts of the present case, the Authority has failed to have regard to and promote competition as contemplated above, amongst other things, because it has not yet concluded the MBSI which will enable it to do so.

60 On 11 February 2020, Telkom requested the Authority to investigate the implications of the spectrum arrangements between each of Vodacom and MTN with the smaller operators on the licensing of spectrum. On 10 June 2020, the Authority responded to Telkom and advised that the competition implications of these agreements will be done as part of the MBSI. During the public hearings on the MBSI, Telkom reiterated the need for an assessment of the implications of these spectrum arrangements to be done. However, the Authority is yet to do so.

61 Moreover, in a press statement of the second respondent to which I have referred, he was quoted to have said that "*this licensing process is not expected to solve the wholesale and retail competition concerns*". In para 32 of the Auction RoD, the first respondent reinforces this statement.

The basis for Telkom's review application

62 I am advised and submit that the Decisions constitute administrative action as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**). This is so because it is a decision taken by the Authority (an organ of state)[5] exercising a public power or performing a public function in terms of legislation (the ICASA Act and the ECA) which has the capacity to adversely affect the rights of persons and which has a direct, external legal effect on Telkom, current and potential electronic communications services market participants and other parties interested in participating in the bidding for high demand spectrum or to operate the WOAN.

63 The Decisions have the capacity to affect Telkom's rights materially and adversely because, amongst other things, the manner in which the Auction ITA and the WOAN ITA have been designed will result in a market structure in which the current duopoly (consisting of Vodacom and MTN) will be entrenched and Telkom will be prejudiced by not being able to compete effectively.

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[5] See section 239 of the Constitution.

64 Alternatively, if this court finds that the Decisions do not constitute administrative action, then the Authority was exercising a public power when it made the Decisions. The Decisions are therefore subject to the principle of legality established in terms of section 1(c) of the Constitution of the Republic of South Africa, 1996, including that they must be lawful, and procedurally and substantively rational.

65 Accordingly, and insofar as may be necessary, Telkom also relies on the principle of legality to review the Decisions.

Summary of the relief sought

66 As a result of the fact that the Decisions are unlawful and irrational, Telkom seeks:

66.1 to review and set aside the Decisions.

66.2 In addition, Telkom seeks mandatory orders against the Authority and the Minister directing them to ensure that the migration process for the vacation of the broadcasting transmitter and antennae from the 700 MHz 800MHz spectrum bands is completed by the time the Authority issues licences to parties who have successfully bid for any or all spectrum in those bands.

66.3 The mandatory orders are justifiable because the migration process has been delayed for an inordinate period of time. As far as I am aware, that process commenced as far back as in 2006

and there are no practical, technical or policy justifications for not completing that process before spectrum licenses for the relevant bands are issued by the Authority.

66.4 In addition, the Authority has made it clear that the licensees who ultimately succeed in procuring the relevant spectrum will be obliged to immediately assume and discharge the licence obligations described in the ITAs, upon the grant of those licences by the Authority.

66.5 These include costly coverage obligations which licensees will be required to immediately implement upon the grant of the spectrum licences.

66.6 There is no reason in logic or fairness why a licensee such as Telkom, if successful in the auction for assignment of the relevant spectrum in the 700MHz or 800MHz bands should incur costly expenditure without immediate access to the licensed spectrum nationally.

66.7 The Authority will also be implementing procedures to either share, surrender or cancel spectrum licences if the spectrum is not fully utilised after five years, dependent on the availability of spectrum on a national basis.

Grounds of review

67 Telkom contends that the Decisions are reviewable on the following grounds:

67.1 The Decisions are irrational;

67.2 The Authority failed to consider relevant considerations and considered irrelevant considerations;

67.3 The Decisions were a result of a mistake of fact;

67.4 The Decisions were a result of an unfair process; and

67.5 The processes in terms of which the Authority made the Decisions were also procedurally irrational.

68 I deal in greater detail below in this affidavit, with each of the grounds of review. My averments follow the scheme set out in the above table of contents. I do so, at this stage, without access to the record of proceedings. Once the Authority has produced the record of proceedings in terms of rule 53(1) of the Uniform Rules of Court, Telkom shall supplement this founding affidavit and amend its notice of motion, if required.

69 Before it launched these proceedings, Telkom urgently asked the Authority to furnish several documents and reasons for the Authority's decision to license high-demand spectrum as specified in the Auction ITA, and on the terms and conditions specified therein. A copy of Telkom's letter dated 12 October 2020 is attached and marked "**FA5**". In response to Telkom's letter dated 12 October 2020, the Authority dismissively advised Telkom that it will publish the reasons in due course. Furthermore, and despite knowing of the proximity of the date of submission of applications in terms of the Auction ITA, the Authority insisted

that, in terms of PAJA, it is entitled to deliver reasons within 90 days of the request.

70 The Authority did not immediately produce the documents and reasons sought. Instead, it invited Telkom to utilize the clarification process it devised in the ITAs to address specific written requests for clarifications. A copy of the Authority's response is attached and marked "**FA6**". The request for reasons should be distinguished from the questions for clarification. In the former, Telkom requested reasons to understand the basis for the formulation of the ITAs in the manner that they are. Whilst the latter is meant to clear up any ambiguity presented by the Auction ITA.

71 On 22 October 2020, Telkom submitted a written request for clarifications to the Authority.

72 The Authority responded to the request for clarifications on 11 November 2020. A copy of the Authority's response is attached and marked "**FA7**".

73 The Authority's response makes repeated reference to the "*reasons document*" which is alleged contain the justifications for certain of the Authority's decisions regarding the structure and design of the ITAs. However, the reasons document was not provided together with the response to the clarifications. Again, the Authority reiterated that it will publish the reasons document in due course.

74 In the light of this, Telkom again wrote to the Authority on 20 November 2020, this time through its attorneys – Werksmans – requesting that it urgently be provided with the reasons document. A copy of this letter is attached and marked "**FA8**". Again, the Authority did not produce the relevant reasons. As indicated above, the Authority gazetted its reasons in the RoDs and released them on 4 December 2020.

75 Telkom immediately considered the reasons set out in the RoDs to assess whether it addresses the concerns that it and other interested parties expressly raised. It also consulted with its legal advisors and experts on the contents of the RoDs. Regrettably those concerns remain unaddressed, and thus Telkom had no other option but to bring this application.

76 It is regrettable that the Authority provided the reasons documents so late in the day and so close to the closing date for applications for the Auction ITA. Had the reasons been supplied earlier, Telkom would have been in a position to launch these proceedings earlier. Instead, it has been left to wait since 2 October 2020 for reasons that have only recently been provided.

77 This delay means that Telkom will likely have no choice but to endeavour to put in an application to participate in the Auction ITA by 28 December 2020. This is despite not having had adequate opportunity to be properly advised on this important issue. Telkom has therefore had to seek to interdict the completion of the licensing process as contemplated in the ITAs to ensure that no further prejudice accrues until the lawfulness of the Authority's decisions is determined. Telkom will also seek a special allocation of this matter by

engaging the Deputy Judge President in order to ensure that a timetable for the future conduct of the matter be determined in order to ensure its swift resolution.

THE REGULATORY AND POLICY FRAMEWORK

78 The Authority is required, in terms of section 4 of the ICASA Act, to exercise the powers conferred upon it and to perform the duties imposed upon it by the ICASA Act, the ECA, the Broadcasting Act 4 of 1999 and the Postal Services Act 124 of 1998.

ICASA Act

79 Section 2 provides that duties imposed on the Authority includes to regulate electronic communications in the public interest.

80 In terms of section 4(3)(c), the Authority "*must control, plan, administer and manage the use and licensing of the radio frequency spectrum in accordance with bilateral agreements or international treaties entered into by the Republic*".

Electronic Communications Act 2005

81 The mandate of the Authority, in relation to competition in the market, is stipulated in section 2 of the ECA. In relevant part, section 2 provides:

> *"The primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to—*
>
> *. . .*
>
> *(c) promote the universal provision of electronic communications networks and electronic communications services and connectivity for all;*
>
> *(d) encourage investment, including strategic infrastructure investment, and innovation in the communications sector;*
>
> *(e) ensure efficient use of the radio frequency spectrum;*
>
> *(f) promote competition within the ICT sector;*
>
> *(g) promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services;*
>
> *. . .*
>
> *(m) ensure the provision of a variety of quality electronic communications services at reasonable prices;*
>
> *(n) promote the interests of consumers with regard to the price, quality and the variety of electronic communications services;"*

82 Section 30(1) of the ECA provides that the Authority "*controls, plans, administers and manages the use and licensing of the radio frequency spectrum except as provided for in section 34*".

83 Section 31(3) of the ECA states:

> *"The Authority may, taking into account the objects of the Act, prescribe procedures and criteria for—*
>
> *(a) radio frequency spectrum licences in instances where there is insufficient spectrum available to accommodate demand;*
>
> *(b) the amendment, transfer, transfer of control, renewal, suspension, cancellation and withdrawal of radio frequency spectrum licences; and*
>
> *(c) permission to assign, cede, share or in any way transfer a radio frequency spectrum licence, or assign, cede or transfer control of a radio frequency spectrum licence as contemplated in subsection (2A)."*

84 In terms of section 34(3) of the ECA,

> *"The Authority must assign radio frequencies consistent with the national radio frequency plan for the use of radio frequency spectrum by licence holders and other services that may be provided pursuant to a licence exemption."*

85 The Authority plays a complementary or concurrent function with Competition Commission of competition matters within the electronic communication industry (Chapter 10).

86 Section 67(4) of the ECA specifically provides that the Authority "*must*" prescribe regulations with a view of defining the relevant markets and market segments, as applicable, and with a view to imposing pro-competitive conditions upon licensees having significant market power.

87 In terms of section 67(11), the Authority may consult with the Competition Commission on any issue.

2015 Spectrum Regulations

88 The Authority's general regulation-making power is contained in section 4(1) of the ECA.

89 The Authority promulgated the Radio Frequency Spectrum Regulations, 2015 (*2015 Spectrum Regulations*) by General Notice 279 published in the Government Gazette of 30 March 2015.

90 Regulation 2(1)(a) says that the first purpose of the 2015 Spectrum Regulations is to establish the framework through which the Authority may allocate and assign radio frequency spectrum.

91 In terms of regulation 7(1), the Authority "*will at all times publish an ITA (invitation to apply) where a radio frequency spectrum licence will be awarded/granted on a competitive basis and where it determines that there is insufficient spectrum available to accommodate demand in terms of section 31(3)(a) of the [ECA]*".

92 Although the high-demand spectrum licensing process commenced in 2006, the relevant period for purposes hereof commenced in 2010.

The 2010 Frequency Spectrum Policy

93 In April 2010, the then Minister of Communications published a national frequency spectrum policy[6] (**2010 Policy**) according to the provisions of section 3(1) of the ECA.

94 The 2010 Policy stipulated, among other things, that:

94.1 management of the radio frequency spectrum is subject to Government authority and spectrum must be managed efficiently so as to be of greatest benefit to the entire population; (Clause 2.1.2)

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6 Policies and Policy Directions Drafted in terms of section 3(1) of the Electronic Communications Act 36 of 2005 (Government Notice No. 306 published in *Government Gazette* No. 33116 dated 16 April 2010).

94.2 spectrum management takes place within a regulatory framework comprised of policies, legislation, regulations and procedures; (Clause 2.1.7)

94.3 it is not in the public interest for South Africa to adopt the international trend towards economic based spectrum management in all cases as this will adversely affect Small, Medium and Micro-sized Enterprise (SMMEs) and prospective new entrants to the information and communication technology sector (ICT); (Clause 8.3)

94.4 the policy will be implemented through the development of a radio frequency spectrum strategy; (Clause 12.1)

94.5 the principles in the policy will be supplemented by policy directions issued by the Minister on specific issues from time to time. (Clause 12.2)

The National Broadband Policy

95 On 13 July 2010, the then Minister of Communications issued a National Broadband Policy[7] (**Broadband Policy**) focussing on increasing the accessibility, availability, affordability and usage of broadband services throughout South Africa. The Broadband Policy recognises that radio frequency spectrum is a scarce national resource and that the assignment of

[7] Policies and Policy Directions Drafted in terms of section 3(1) of the Electronic Communications Act 36 of 2005 (Government Notice No. 617 published in *Government Gazette* No. 33363 dated 13 July 2010).

same shall be guided by the developmental objectives in the public interest and further records that a broadband inter-governmental implementation committee incorporating all spheres of government will be established which, in facilitating the implementation of the Broadband Policy, through an implementation plan will ensure that short and long term targets are achieved. Amongst the short-term targets stated in the Broadband Policy are the following:

95.1 the Broadband Inter-Governmental Implementation Committee will be tasked to conduct a survey on the current status of Broadband in South Africa as well as the relevant market players in the industry; and

95.2 the Broadband Policy shall be reviewed from time to time as determined by the Minister of Communications.

96 On 14 December 2011, the erstwhile Minister published a statutory notice of her intention to issue policy directions to the Authority in terms of section 3(2) of the ECA for the exploitation of the 2600MHz radio frequency spectrum and the 800 MHz Digital Dividend Spectrum. In that notice, the then Minister invited interested parties to make representations on the contents of draft policy directions (**draft Policy Directions**) which accompanied the statutory notice. Amongst the draft Policy Directions was a direction to consider that the 800MHz as allocated by the World Radiocommunication Conference 2007 (WRC-07) for Mobile except aeronautical mobile including International Mobile Telecommunications (**IMT**) applications, is declared as the first phase of the digital dividend.

97 Although the draft Policy Directions were never finalised into binding policy directions, the draft demonstrates an intention to give effect to the 2010 Policy or, at least, to supplement its implementation through relevant policy directions issued in terms of the ECA. The stated objective of the draft Policy Directions was, amongst others, to '*[f]acilitate the introduction of new national and rural providers of electronic communications, including broadband'.*[8]

98 Furthermore, the Minister directed the Authority, amongst other things, to[9]:

98.1 'Facilitate the licensing of spectrum in 800MHz on a wholesale open access network, due to limited bandwidth in this band';

98.2 'Facilitate the licensing in 2.6 GHz to multiple operators, due to the amount of bandwidth available in this band. In this regard the Authority should ensure that a portion of this frequency band is set aside for new licensees'; and

98.3 'Ensure that auction would be considered only as a last resort, where necessary, in circumstances where there are competing applications who meet the stated policy objects'.

99 What may be gleaned from the draft Policy Directions is that the promotion of competition in the form of the introduction of new entrants and the set aside

[8] draft Policy Directions para 1.1.1.

[9] Ibid para 2 .

for a WOAN was part of the central considerations in the policy that was proposed to underpin the licensing of spectrum at the time.

100 On 15 December 2011, the Authority published the Draft Spectrum Assignment Plan for the combined licensing of the 800MHz and the 2.6GHz bands (**2011 Draft Assignment Plan**) and a draft ITA for frequency spectrum licences for the designated bands (**2011 Draft ITA**) (Government Gazette No 34872, Notice 912 dated 15 December 2015). In these two draft regulatory instruments, the Authority considered and sought to give effect to the draft Policy Directions. The 2010 Policy provided the foundation for the Authority's approach to the licensing of spectrum in the affected bands.[10]

101 At the time, the 2011 Draft Assignment Plan observed that:

> *"the [2010] policy strives to facilitate affordable, accessible and universal access to infrastructure to citizens, Businesses, communities and the three spheres of government and to stimulate the usage of broadband services to promote economic development and growth acting as an enabler for further social benefit."*[11]

102 The 2011 Draft Assignment Plan recorded that "*the mobile penetration [was] expected to be more than 104% in 2011"* and that it could be concluded from this that "*broadband services for all citizens*" in South Africa could be achieved mainly through mobile telecommunications technologies'.[12]

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[10] See para 4.1 of the Draft Assignment Plan.

[11] Ibid.

[12] Ibid para 4.5.

103 The Authority proposed to introduce the WOAN and a so-called "*managed spectrum park*" to encourage the sharing of spectrum.[13] The 2011 Draft Assignment Plan defined a WOAN as a sharing model where a licensed entity allows other entities to offer services on its network.[14] The WOAN does not offer retail services. A managed spectrum park refers to a 'a sharing model where a number of entities apply to participate in sharing a block of common spectrum on a self-managed basis and according to some regulations of agreed procedures'.[15]

104 The Authority also proposed that any entity that is licensed for both 800 MHz and 2.6GHz had to build an open access network.[16] It also proposed to reserve some of the unassigned spectrum to licensees who had no access to spectrum at all.[17] It is on this basis that the Authority proposed the 2011 Draft ITA for public comment.

105 In a nutshell, the 2011 Draft ITA proposed three packages combining 800MHz and 2.6GHz.[18] The first package was earmarked for a licensed entity that wished to operate a WOAN. The second and third packages were reserved for licensees who did not have high demand spectrum (**HDS**) in any of the designated bands. The designated bands were 900 MHz, 1800 MHz, 2100

[13] Ibid para 5.1.

[14] Ibid para 5.3.

[15] Ibid para 5.8.

[16] Ibid para 5.7.

[17] Ibid para 5.9.

[18] 2011 Draft ITA para 1.26.

MHz, and 2600 MHz. The Authority proposed to follow a comparative evaluation process to adjudicate the bids instead of an auction.

106 The 2011 Draft ITA was intended to promote the sharing of spectrum and the enablement of entities that did not have spectrum in any of the designated bands. If the unassigned HDS was licensed in the manner proposed in the 2011 Draft ITA and the 2011 Draft Assignment Plan, it is not inconceivable that it may have had an impact on the structure of the mobile market and its development.

107 The Authority invited interested parties to comment on the terms of the draft application for spectrum licences. The invitation was not finalised, and the Authority granted no spectrum licences in the designated frequency bands in terms of that draft.

108 Without any explanation, the Authority withdrew the 2011 draft ITA through a withdrawal notice published in Government Notice No. 894, *Government Gazette* 39179 of 8 September 2015.

109 During 2012, the Authority then commenced a process in terms of which it sought to review and update the National Radio Frequency Plan (**Frequency Plan**) to align it with the developments on spectrum frequency assignments internationally and domestically. The Frequency Plan sought to assign the 700 MHz and 800 MHz frequency bands to broadcasting and mobile services on a co-primary basis, and this has not yet been amended in accordance with the mandatory procedure prescribed in section 34 of the ECA.

110 Following a review process, the Authority sent the finalised Frequency Plan to the Minister of Communications for the Minister's approval. The Minister approved the Frequency Plan in terms of section 34(10) of the ECA. . The 2018 Frequency Plan also assigns the 700 MHz and 800 MHz frequency bands to broadcasting and mobile services on a co-primary basis, although broadcasting has been removed from the 'Typical Applications' column relating to the 700 MHz band. The relevant parts of the 2018 Frequency Plan are attached and marked "**FA9**".

111 On 27 October 2013 the then Director-General of the Department advised the chief executive officer of the Authority of a comprehensive review of the ICT policy initiated by the Minister pursuant to the National Development Plan (**NDP**). The DG's letter followed an injunction in the NDP that because a comprehensive review had not been done in 1996, there was need for a new policy framework to realise the vision of a connected society.[19] This led to a lengthy review of policies that govern the ICT sector and public consultations with interested parties. It led to the promulgation of the Integrated ICT Policy White Paper of 2016 (**the 2016 Policy**).

112 Notably, insofar as the licensing of the unassigned radio frequency spectrum is concerned, the NDP observes "*[s]pectrum policy should favour competition, but incumbents should not be excluded from gaining access to bands needed for expansion or to apply new technologies*".[20] Furthermore, the NDP states

[19] National Development Plan, at 191.

[20] Ibid 193.

that spectrum licences should be technology neutral so that they can be adapted to meet rapidly changing technological developments without high regulatory costs.[21]

113 The NDP is an overarching policy direction of government. It defines a desired destination and identifies the role different sectors of society must play in reaching that goal.

The SA Connect Policy

114 On 6 December 2013, the then Minister of Communications published the national broadband policy and associated strategy officially known as "*South Africa Connect: Creating Opportunities, Ensuring Inclusion: South Africa Broadband Policy*" (**SA Connect**) in Government Notice No. 953, *Government Gazette* No. 37119 of 6 December 2013. .

115 The SA Connect policy identifies constraints in the broadband market, including the lack of effective competition, which have to be removed. The SA Connect policy proposes to restructure the market, where necessary, and create an environment that is conducive to private and public investment and also improves the level of service-based competition.

116 The SA Connect policy was published to give expression to the national vision developed in the NDP. The primary feature of that vision is to create a

[21] Ibid.

widespread information communication system which will be broadly accessible, at affordable costs and quality that meet the expectations of citizens, to businesses in the private and public sector and institutions of government that provide public services.

The Green Paper

117 In January 2014, as part of the consultation process giving effect to the NDP, the then Minister of Communications published a Green Paper on an Integrated ICT Policy for the Republic of South Africa. The Green Paper was published as a comprehensive public consultative document on several national policy proposals described therein.

118 Interested parties made representations and comments on the Green Paper to the then Minister. The Minister also conducted a consultation process for further discussion of and comments on the Green Paper.

119 The Green Paper, observed that in many parts of the world, operators were being licensed with spectrum to enable them to deliver LTE.[22] However, that '[t]o use new spectrum in a way that is technically efficient, competitive, and of maximum consumer benefit, especially when it comes to LTE on the sought-after 800 and 700 MHz bands, no more than three operators tend to be granted the rights to use new bands to offer competitive services. This leaves some without the possibility of differentiating themselves with new services. Those

[22] Green Paper at 38.

who are excluded from the market in these situations are then forced to launch new technologies through shared networks'.[23]

120 By 2013, mobile telephony had achieved 136% penetration.[24] This evidence put beyond doubt that a majority of South Africans were dependent on the mobile sector for access to broadband services,[25] but it also showed that prices for mobile services were higher in South Africa than in other markets.

121 The Green Paper canvassed open access regimes that emphasise efficient use of infrastructure by promoting sharing models. It observed that '*[t]here is evidence that indicates that a predictable and technology neutral competitive environment premised on open access principles can deliver better results. Broadband Policy, advances arguments for open access principles that will enable competition at infrastructure and service levels while reducing infrastructure duplication and restrictive access to networks by competitors'.*[26] This laid the basis for the concept of the WOAN in the 2016 ICT Policy that the Minister eventually published in 2016.

122 One of the critical findings in the Green Paper that is relevant to this application is that:

> *'[n]otwithstanding attempts to improve competition, the South African communications market is one of the most concentrated in the world taking fourth position after Mexico, Norway and New Zealand'.*[27] *Insofar as the mobile sector is concerned, the Green*

[23] Ibid

[24] Ibid 39.

[25] Ibid.

[26] Ibid 42.

[27] Ibid 40-41.

> *Paper notes that '[w]hile the introduction of Cell C in 2002 was aimed at opening the mobile market, the operators who were established at the inception of the mobile market still dominate with significant market power'."*[28]

123 In tandem with the policy review process, the Authority published Radio Frequency Spectrum Regulations in March 2015, for purposes of, among others, providing for procedures and criteria for awarding radio frequency spectrum licences for competing applications or instances where there is insufficient spectrum available to accommodate demand.[29]

124 Regulation 7 provides that the Authority will publish an invitation to apply where a radio frequency spectrum licence will be granted on a competitive basis and where it determines that there is insufficient spectrum available to accommodate demand in terms of section 31(3)(a) of the ECA.

125 Regulation 7 provides an overview of the expected content of an invitation to apply such as the application fee, qualification criteria, conditions for the disqualification of an applicant from the application process, the selection process and the evaluation criteria. It also provides that an invitation to apply ought to provide the licensing method that the Authority will use.

126 Regulation 7 also provides a general framework for the future licensing of high demand spectrum without specifying the actual procedures and criteria as required.

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[28] Ibid.

[29] Government Gazette 38641, 30 March 2015.

The 2015 Information Memorandum

127 On 11 September 2015, the Authority issued an Information Memorandum (**2015 IM**).[30] The 2015 IM informed prospective applicants for radio spectrum licences about the process and criteria that the Authority would apply in the licencing process.

128 Included as one of the reasons why the Authority issued the 2015 IM was to enhance competition in the provision of broadband services and increase broadband coverage.

129 The 2015 IM also noted the market consolidation, which might reverse competition gains made since the introduction of the ECA, as one of the reasons for the significance of the need for a wireless open-access network.

130 Interested parties were invited to make submissions. Telkom's submissions, in relation to competition specific issues, were that:

130.1 The amount of spectrum allocated for the WOAN did not provide any real competitive advantage over the other spectrum lots in terms of throughput.

130.2 The Authority ought to undertake an inquiry in terms of chapter 10 of the ECA to ensure that the Authority understands the relevant

[30] Government Gazette 39203, 11 September 2015.

market and forecasted market developments before developing a high demand spectrum licensing framework.

130.3 The Authority ought, through the inquiry, to define the current relevant market or segments of the market – specifically identifying the operators and their respective market shares or powers within the market.

130.4 The Authority would thereafter formulate remedies to mitigate the perpetuation of the market structure.

130.5 The Authority, through the licensing framework, ought to seek to ensure that it creates a "*level playing field*" to ensure that competition within the mobile market is strengthened by the rebalancing of spectrum holdings, taking into account the operators' current access to spectrum, not just ownership.

131 According to the 2015 IM, the Authority intended to licence 700 MHz, 800 MHz, and 2.6 GHz in order to promote competition and increase broadband coverage.[31] Even during this process, the Authority did not elaborate how it intended to address the high levels of concentration and how it intended to use the licensing of spectrum to do this.

132 The Authority remarked in its discussion about the introduction of the WOAN that one of its objectives was "*to stimulate competition in the provision of broadband services whilst ensuring innovative, affordable and universally*

[31] 2015 IM at 6 para 2.5.

accessible at acceptable quality levels". To this end, the Authority proposed the licensing of a WOAN with spectrum being reserved for it in the 700 MHz band. In the 2015 IM, the Authority proposed to reserve 2 x 20 MHz in 700 MHz, this is notably lesser than it earlier intended in the 2011 ITA.

133 Unlike the 2011 process, the Authority proposed to licence the balance of the spectrum through an auction.[32] No explanation is offered for the departure from the 2011 thinking and a deviation from the 2010 Policy. The 2015 IM made no mention of the Green Paper or the policy review process that was underway at the time.

The draft 2016 ICT Policy

134 After considering the representations and comments on the January 2014 Green Paper, the Minister, through the support of the ministerial panel of experts, prepared a draft National Integrated ICT White Paper (**draft 2016 ICT Policy**). The draft 2016 Policy was submitted on 16 April 2016.

135 The Authority considered the draft 2016 ICT Policy and submitted written comments on the draft 2016 ICT Policy.

[32] Ibid 12-3.

136 The Minister finalised the draft 2016 ICT Policy. Thereafter, the draft 2016 ICT Policy was submitted to Cabinet for its consideration and approval.

137 On 4 March 2016, the Minister of Telecommunications and Postal Services issued a Policy Direction to the Authority (Government Notice Number 225, *Government Gazette* 39781). .

138 In this Policy Direction the Minister recorded, amongst others, that in order to realise the policy intent of Government as derived from the NDP and SA Connect to make broadband more affordable for end users, effective competition in broadband markets is necessary. The Minister then directed the Authority, in terms of section 3(2) of the ECA to prioritize the commencement and conclusion of an enquiry and the prescription of regulations as contemplated in section 67(4) of the ECA to ensure competition in broadband markets.

The 2016 Invitation to Apply

139 On 15 July 2016, whilst the Authority knew that the approval of the 2016 ICT Policy by the Minister and the cabinet was imminent, the Authority published an Invitation to Apply (**2016 ITA**) inviting interested parties to submit applications for radio frequency spectrum licences to provide mobile broadband wireless access services in different frequency bands, namely 700 MHz, 800 MHz and 2.6 GHz. . This act by the Authority is important because the 2016 ICT Policy proposed a radically different dispensation for the licensing of spectrum. It proposed that all of the unassigned HDS had to

be licensed to the WOAN. The Authority had also not begun any process to give effect to the policy direction of 4 March 2016.

140 The date by which interested parties were invited to submit their applications was 3 October 2016.

141 Notably, the Authority published the 2016 ITA before the adoption of the national policy by Cabinet pursuant to the draft 2016 Policy on the ICT sector, including the use and assignment of high demand frequency spectrum.

142 The interested parties made submissions which included comments and questions about the 2016 ITA.

143 In its submission in response to the 2016 ITA, after explaining that the mobile market was dominated by two large operators and how the duopolistic market structure was likely to become entrenched in the long term, Telkom raised the following competition-related issues:

143.1 Whether the Authority had assessed the potential impact of the 2016 ITA and the resulting spectrum distribution on competition in the mobile market; and

143.2 Whether the Authority had undertaken an economic study, as contemplated in chapter 10 of the ECA, to ensure that there exists sufficient downstream competition, or that such competition would result from the licencing process contemplated in the 2016 ITA.

144 On 8 August 2016 the Minister of Telecommunications and Postal Services launched an application seeking to set aside the Authority's decision to issue the 2016 ITA. The Minister of Telecommunications and Postal Services submitted that the implementation of a licensing process without a market review will further distort the ineffective competition in the broadband market by granting radio spectrum licences to incumbents who already enjoy market dominance. The North Gauteng High Court interdicted the ITA process pending a review of the decisions made by the Authority.

145 The controversy surrounding the ITA escaped judicial scrutiny because the Minister and the Authority settled their dispute out of court with the Authority withdrawing the ITA and the Minister withdrawing the review application.

The 2016 ICT Policy

146 On 28 September 2016, Cabinet approved the draft 2016 Policy. It was published on 3 October 2016 in Government Gazette 40325 Notice No. 1212 (**2016 ICT Policy**).

147 The 2016 ICT Policy became the official national policy on the ICT sector. The 2016 ICT policy provided that all available and unassigned spectrum must be licensed to the WOAN. The Minister would issue policy directives in terms of section 3(2) of the ECA, which would have to be taken into account in any invitation, consideration and granting of radio frequency spectrum licences in terms of chapter 5 of the ECA.

147.1 In terms of chapter 6 of the 2016 ICT Policy, competition is a relevant consideration in the implementation of policy in relation to the ICT sector. The 2016 ICT Policy demonstrates the impact of fair competition in the ICT sector and highlights the need for an integrated approach when considering operators' service offerings.

147.2 The Authority is responsible for defining and reviewing markets and the designing of relevant pro-competition remedies whenever it is necessary. The regulator has to draw expertise from the competition authorities and is obliged to consult with the competition authorities before concluding any guidelines, policies or rules in regard to market definition and designing pro-competition remedies.

147.3 The Authority is required to conduct market reviews and introduce pro-competitive measures to address and remedy unfair competition in the sector.

147.4 The objectives of the 2016 ICT Policy on competition-related issues include:

147.4.1 placing proportionate remedies that address the needs of users and promote innovation, investment, affordability and quality services;

147.4.2 facilitating competition and stopping anti-competitive practices to allow competitors access to users.

147.5 Chapter 9 of the 2016 ICT Policy sets out the open access policy, the spectrum policy and a policy framework. Chapter 9 stipulates the goals to include allowing for effective service-based competition and removing impediments to effective competition, and innovation in the provision of broadband services. Chapter 9 decries the licencing of spectrum through an auction. Chapter 9 expressly cautions than an auction may result in entrenching the skewed structure of the market.

147.6 The reformation of the market structure is listed as one of the outcomes of the policy set out in the 2016 ICT Policy.

147.7 The 2016 ICT Policy also provides for infrastructure sharing, which is expected to increase competition by granting more service providers access to electronic communications facilities.

148 In relation to the WOAN, the 2016 ICT Policy provides that, when issuing licences to the WOAN, the Authority should ensure competitive neutrality, which is that the issuing of licences "*does not result in anti-competitive outcomes; and potential dominance and control by any single entity should not be allowed*."

149 The 2016 ICT Policy recognises that access to mobile broadband spectrum is essential to accomplishing the goals of the NDP and the targets stipulated in the SA Connect policy.

150 In relation to the trading of spectrum, the 2016 ICT Policy provides that the trading of non-high demand spectrum is permissible; however, the trading of high-demand spectrum is impermissible. Specifically,

> *"Any unused high demand spectrum must be returned to the regulator. The trading of high demand spectrum would perpetuate the current market structure, which places inherent value in spectrum and its exclusive use. It would furthermore undermine the 'use it or lose it' principles, and the application of open access provisions to networks using high demand spectrum."*

151 The 2016 ICT policy also noted the ineffective competition within the mobile market – the market is highly concentrated.

152 The injunction in the 2016 ICT Policy that all high demand spectrum be licensed to the WOAN led to a series of engagements between the sector and the Minister. The sector sought to persuade the then Minister for Telecommunications and Postal Services to amend the policy to allow for a hybrid licensing regime where some of the spectrum may be licensed to be held by operators on an exclusive basis. The operators presented a set of proposals to the then Minister of Telecommunications and Postal Services which included an undertaking to purchase approximately 30% of the WOAN's capacity from the WOAN. The engagements between the Minister and the operators were never finalised and never resulted in any formal regulation or directive dealing with the subject matter.

153 The Minister then commissioned the Council for Science and Industrial Research ('**CSIR**') to investigate the amount of spectrum that the WOAN would

need. On the basis of the report from the CSIR, the Minister published an intention to amend the policy and issued draft policy directions for comment.

154 In 2018, there was a change of Ministers. The new Minister of Telecommunications and Postal Services consulted the ICT sector on how the high demand spectrum could be licensed in a manner that complied with the law. Telkom and numerous industry players and interested parties made written and verbal representations to the Minister. Notably, the public hearings in this regard focused on prejudice that the sector would suffer if all of the high demand spectrum was licensed to the WOAN.

155 After the 2019 national general elections and following her reappointment, the Minister amended the 2016 ICT Policy to allow for spectrum to be licensed to individual operators and to the WOAN. She also issued Policy Directions in respect of the licensing of high demand spectrum and the establishment of the WOAN.

156 I am advised that, by so doing, the Minister created an exception to the general rule that all spectrum had to be licensed to the WOAN. The 2016 ICT Policy remained the principal policy subject to this exception created by the Minister.

157 The 2016 ICT policy is the national policy governing the ICT sector that provides the framework under which high demand spectrum must be licensed.

The Authority's market inquiry

158 On 25 August 2017, the Authority published a notice in *Government Gazette* No. 40945 indicating its intention to conduct an inquiry in terms of section 4B(1)(a) of the ICASA Act. This is the inquiry contemplated in the Policy Direction of 4 March 2016.

159 The aim of the inquiry was to enable the Authority to identify broad markets or market segments in the ICT sector in which there is ineffective competition and that are susceptible to regulations, and to determine which of these markets should be prioritised for market reviews and regulation in terms of section 67(4) of the ECA.

160 The Authority sought to conduct the market inquiry in four phases:

160.1 First, the Authority would conduct a market study;

160.2 Second, the Authority would compile a discussion document – which was published on 16 February 2018;

160.3 Third, the Authority would conduct public hearings. The hearings were held on 7 June 2018; and

160.4 Finally, the Authority would issue a findings document – which was published on 17 August 2018.

161 The Authority found that the mobile wholesale market may be identified as including mobile network services, full mobile virtual network operators and national roaming. The Authority noted that not all full mobile network operators would be active in the provision of all wholesale mobile network services.

162 The Authority concluded that the mobile broadband market was a priority market – the Authority thus had to prioritise an investigation into the level of competition in that market, and that this market, together with the other markets identified, were so identified based on the screening measures applied, which considered the likelihood of competition concerns as well as materiality of the market to government policy objectives and consumers.

Withdrawal of 2016 ITA

163 On 26 September 2018, when the litigation around the 2016 ITA was part heard, the Minister of Telecommunications and Postal Services and the Authority agreed, pursuant to negotiations between them in this regard, to settle the litigation.

164 The Authority formally withdrew the 2016 ITA, and related notices, on 3 October 2018.

Ministerial policy directions on licensing of high demand spectrum

165 On 27 September 2018, the current Minister published draft policy directions to the Authority about the licencing of high-demand spectrum for public comment. This was published in *Government Gazette* 41935 Notice No. 1003.

166 Interested persons were invited to comment on the proposed policy by 8 November 2018. A copy of the draft policy directions is attached and marked "**FA10**".

167 Notably, the 2018 draft policy and policy direction required that high demand spectrum be assigned subject to chapters 8 (facilities leasing) and 10 (competition) of the ECA.

168 On 5 March 2019, the current Minister invited interested parties to make submissions on the definition of the spectrum licensing process. A copy of the invitation is attached and marked "**FA11**".

169 Telkom submitted its submissions on 11 March 2019. A copy of Telkom's submission is attached and marked "**FA12**".

170 The Minister issued a ministerial policy direction titled "*Policy on High Demand Spectrum And Policy Direction On The Licencing of A Wireless Open Access Network*" in the *Government Gazette* No 42597 of 26 July 2019 (**2019 Policy Directive**).

170.1 The Minister noted that the issues she took into consideration in issuing the 2019 Policy Directive included promoting competition within the ICT sector with emphasis on service-based competition through the WOAN and promoting the interests of consumers with regard to the price, quality and the variety of electronic communication services.

170.2 The Minister also noted that the current structure of the market and the number of operators that had access to spectrum had an adverse effect on competition in the market.

170.3 The 2019 Policy Directive supersedes the 2016 Policy to the extent that it differs in relation to the assignment of high demand spectrum.

170.4 The Minister further directed the Authority to investigate and report to the Minister on the spectrum requirements of 5G in bands lower than 6GHz and the millimetre wave bands currently under study at the 2019 World Radiocommunication Conference. The Authority's report was due within six months after the 2019 World Radio Communication Conference. The 2019 World Radio communication Conference ended in November 2019. The Authority did not consult the sector or public when it conducted the study. This was notwithstanding that, as stated in the policy direction, the study has serious implications for the licensing of spectrum that enables 5G. The proceeded to issue the ITAs

without further policy directions that the Minister undertook to issue after receipt of the report.

The Competition Commission's data services market inquiry (DSMI) report

171 Following a market inquiry on the data services market, the DSMI, initiated in August 2017, the Competition Commission published a report on 2 December 2019. In relation to spectrum assignment and facilities, the Competition Commission made the following findings:

171.1 The lack of competition in the mobile market appears to have a detrimental effect on consumers as it seems to be the most significant impediment to lower prices.

171.2 Addressing competition would provide a larger scope for a decline in pricing to consumers in the mobile market.

171.3 The assignment of spectrum can impact on the levels and extent of competition in the mobile market.

171.4 A larger assignment of spectrum to the two large operators will entrench the duopoly consisting of Vodacom and MTN. A symmetric assignment will lock the two large operators with market power into their current market shares – in a currently uncompetitive market structure. Whereas, an asymmetric assignment of spectrum to the smaller operators (with smaller market share) will level the playing field.

171.5 The entrenchment or locking in of the current uncompetitive market structure would perpetuate unnecessarily high-price outcomes in future, negatively affect consumers and only benefit the two large operators.

171.6 The spectrum assignment must be designed to achieve a pro-competitive outcome. The assignment of spectrum cannot simply be undertaken on the basis of revenue maximisation but must factor in how the assignment impacts the level of competition in the market.

171.7 In relation to the 2019 Policy Directive, the Competition Commission found that:

171.7.1 Any wireless open-access network licencee needs to be competitive.

171.7.2 Telkom's lack of sub 1GHz spectrum relative to its competitors creates a risk that competition may be weakened if Telkom is unable to compete for that band of spectrum effectively.

The 2019 Information Memorandum on the licensing of high demand spectrum

172 In November 2019, the Authority published an information memorandum on the licensing process for the International Mobile Telecommunications spectrum (**2019 IM**). The 2019 IM specifies how the Authority proposes to license the high-demand radio spectrum.

173 A copy of the 2019 IM is attached and marked “**FA13**”.

174 Interested parties were given an opportunity to respond to the provisions of the 2019 IM.

175 Telkom provided comments on the 2019 IM on 31 January 2020 and stated, among other things:

175.1 The Authority should consider the spectrum licensing process as an opportunity to promote competition in the market.

175.2 A process that results in the entrenchment of the prevailing duopoly will be detrimental to consumers.

175.3 The Authority has not indicated whether it conducted an investigation into the current market structure and the level of competition within the mobile market. The result is that the Authority has not assessed the effect that the spectrum assignment process will have on the market, including competition in the market.

175.4 The proposals contained in the 2019 IM will not address the enduring structural problems in the mobile market or strengthen competition. Instead, they will entrench the duopoly structure of the market. This is because:

175.4.1 The Authority failed to assess or evaluate the current state or structure of the market, including the levels of

competition and the current spectrum holdings (or access to spectrum, whether directly or indirectly through so-called roaming and infrastructure sharing arrangements) and their effect on competition.

175.4.2 The Authority failed to seek to rebalance the market to ensure that the market is more competitive.

175.4.3 The proposals in the 2019 IM indicate that the Authority failed to consider the primary objectives of the ECA, including promoting effective competition. The Authority's proposals in the 2019 IM favour the dominant operators and will further entrench their market position, thereby reducing competition in the market.

176 A copy of Telkom's submissions is attached and marked "**FA14**".

177 The Competition Commission also made submissions in response to the 2019 IM. The Commission informed the Authority that its previous submissions in response to the 2019 Policy Directive and the Commission's recommendations in respect of spectrum licensing in its DSMI report should be considered as part of the Commission's submission in respect of the 2019 IM.

178 The Commission also made the following key submissions in its response to the 2019 IM:

178.1 The Authority ought to consider the market structure and ensure that affordability is a key focus in the process for assigning spectrum as contemplated in the relevant national policy, including the SA Connect policy. Spectrum assignments can have a significant impact on competition in mobile markets, and therefore on prices and affordability.

178.2 Affordability may be accomplished by ensuring that the spectrum assignment process increases competition and therefore brings down prices.

178.3 The lot design in the 2019 IM favours larger operators with national networks. A potential implication of this design is that it could limit competition for some of the lots.

178.4 The Commission reiterated that spectrum assignment must be asymmetrical in favour of smaller operators. In determining spectrum caps, the Authority must take into account the current spectrum assignment across different frequencies and across licensees.

178.5 The assignment should not result in the decline of smaller operators' market share.

The 2020 Auction and WOAN ITAs

179 On 30 September 2020, the Authority announced that it would publish the 2020 ITAs, together with a reasons document, following their assessment of

the submissions that were made by interested parties in January 2020. In this announcement, the Chairperson of the Authority, among others, advised that the Authority has considered competition matters within this environment and did "*an assessment*" in particular pre and post the auction to inform the licensing process; that the main objective from the competition assessment is that the Authority, through the awarding of spectrum, is to ensure that the Authority expand the market; the Authority noted with concern the wholesale and retail competition issues in South Africa however this licensing process is not expected to solve the wholesale and retail competition concerns; the Authority is keenly aware of the need to prevent the spectrum award from worsening the competition concerns in mobile markets identified by the Authority through other processes; this will be done by imposing appropriate obligations and spectrum caps.

180 A copy of the Chairperson's press statement is attached and marked "**FA15**".

181 The Authority announced a "*competition assessment*" without any explanation why and how that assessment impacted on the chapter 10 inquiry which was being undertaken by the Authority at that time, which as I have indicated is still continuing. That announcement is an obscure but unlawful attempt by the Authority to assert compliance with its statutory and legal obligations. For the reasons I have set out above, I respectfully submit that this attempt is both unlawful and irrational, and does not absolve the Authority from compliance with its statutory and legal obligations.

182 As I set out above, the ITAs were published on 2 October 2020 in *Government Gazettes* No. 43767 and 43768 respectively.

183 In terms of the Auction ITA,

183.1 questions of clarity should be directed to the Authority within 14 days from 2 October 2020;

183.2 the closing date for the submission of applications is 28 December 2020;

183.3 the list of applicants will be published on 21 January 2021;

183.4 clarification queries have to be made by 2 February 2021;

183.5 the qualified applicants will be announced on 25 February 2021;

183.6 the auction for the spectrum is scheduled to begin on 24 March 2021; and

183.7 the licence period for spectrum assigned in the auction would be 20 years.

184 On 25 October 2020, the Authority published a tender for the appointment of service providers to execute and implement the Auction ITA. The deadline for bid submissions in response to the tender was 9 November 2020.

185 The ITAs provide for a process and period during which interested parties were entitled to submit their requests for clarification. The closing date for submission of requests for clarification was 22 October 2020. Telkom and

other interested parties submitted requests for clarification. Telkom's request for clarification is annexed hereto and marked "**FA16**".

186 The ITAs also provided for the time period by which the Authority would respond to the clarifications sought by interested parties. That date was 17 November 2020. I have already indicated that the Authority did release its clarification document on that date.

Summation of background facts

187 It is clear from the policies of the government set out above, including the SA Connect, the NDP and the 2016 and 2019 ICT Policies, that it is critical for the Authority to consider competition issues within the mobile market because the current structure of the market is ineffective.

188 The issuing and licencing of high demand spectrum must therefore not reinforce or further exacerbate the uncompetitive nature of the current market. Ideally, the Authority ought to seek to enable smaller operators to compete effectively, and at the very least smaller parties must not be prejudiced as a result of the issuing and licencing of high demand spectrum.

189 The reason for issuing high demand spectrum is founded on the grounds set out in the policy documents. And yet, as I set out in more detail below, the manner in which the Authority has structured and designed the ITAs, as well as its decision to issue them before the completion of the MBSI, are going to

result in severely negative effects in the market that are likely to endure for a considerable period.

PART B: INTERIM RELIEF

190 I am advised that Telkom is required to establish the following before the court can grant Telkom an interim interdict against the Authority:

190.1 Telkom has a *prima facie* right (which is not open to serious doubt);

190.2 a well-grounded apprehension of irreparable harm if the interim relief (Part B) is not granted and the ultimate relief (Part C) is eventually granted;

190.3 the balance of convenience favours granting the interim interdict; and

190.4 there exist no other satisfactory remedy for Telkom.

191 For the reasons I provide below, Telkom has fulfilled the requirements for this court to grant Telkom the interim interdict.

Telkom has a *prima facie* right

192 I submit that the grounds of review set out above amply demonstrate that Telkom has a prima facie right to have the impugned decision reviewed and set aside.

193 I do not repeat the grounds of review here.

Irreparable harm

194 Should the Authority be allowed to proceed in the interim with its licensing process contemplated in the ITAs, enormous prejudice will be suffered by Telkom, the successful bidders, the consumer, the fiscus and the national economy.

Adverse impact on Telkom

195 Telkom does not have sub 1GHz spectrum. The licensing process contemplated in the ITAs is the only opportunity available to it to secure sub 1GHz. The sub 1GHz is not fully commercially available. Telkom has been awarded sub 1GHz temporarily as part of the COVID-19 relief measures. It has experienced first-hand that the level of interference with broadcasters is high in certain localities to the point that it is impossible to deploy the spectrum.

196 Despite the unavailability of sub 1GHz spectrum, Telkom will have to pay for acquisition costs of no less than R1 billion (being the highest reserve price for a lot in sub 1GHz) immediately after the auction contemplated in the Auction ITA, if Telkom is successful. Telkom will incur this cost without certainty about when Telkom can expect to enjoy the full commercial benefits of this sub 1GHz spectrum.

197 Since 2008, the government has missed all deadlines for the analogue switch off to enable digital migration. Little credence can be given to the latest announcement of the switch off date of December 2021. What exacerbates

this uncertainty is that the performance agreement of the Minister places the switch off date as late as 2023. In the meantime, through the auction, the duopoly would have the opportunity to add to their current spectrum holdings, which is exacerbated by the access to spectrum that they currently enjoy through their arrangements with the smaller operators. This will improve their quality of service, speed, and the range of services that they can provide to their customers. Telkom will have the misfortune to commit a substantial amount of money on spectrum that it cannot fully monetize or use to improve its competitive position.

Impact on successful bidders

198 The successful bidders will be expected to pay for the spectrum immediately after the conclusion of the auction. Based on the reserved prices stated in the Auction ITA, the amounts involved are likely to be substantial.

199 Furthermore, once the spectrum is awarded to the successful bidders, they will need to exploit it without delay to ensure that they get a reasonable return from it. This means that they will need to purchase associated network equipment and electronics to enable them to emit and receive a signal on the particular frequencies. This, in turn, means long term contractual commitments to Original Equipment Manufacturers (**OEMS**) in the form of purchase orders for equipment and electronics. Successful bidders will also sign site leases and build new or upgrade existing sites, deploy antenna and

electronics at these sites at great expense and sell services to consumers, which could include long term contracts. If the interim relief is not granted, but the court finds in Telkom's favour in the ordinary course, it will have to consider substantial prejudice to the successful bidders as a result of the purchase and deployment of network equipment to broadcast the spectrum. The impact on consumers who signed contracts must also be considered.

Impact on all bidders

200 Spectrum auctions are highly specialised. Preparations for the auction are intense and involve significant expenditure in the preparation of bids. Technical experts and specialist auctioneers are enlisted to assist in the preparation of the bids. If the temporary interdict is not granted but the review application in Part C is ultimately upheld, the process will have to start afresh and the bidders will, in addition to having wasted significant sums and resources with little prospect of recovering those losses, have to incur further costs of preparing for the auction at a later stage.

Adverse impact on the public interest

201 In terms of section 2(f) of the ECA, the Authority regulates the ICT sector in the public interest including the promotion of competition. As has been cogently canvassed in the BRG report, the licensing of spectrum, following the current design of the ITAs and under the circumstances described in this affidavit, will impede, instead of promote, competition in this sector. It will entrench the duopolistic structure of the market possibly for an extended period. Inevitably, this will affect the ability of challenger operators such as

Telkom to compete against the duopoly (consisting of Vodacom and MTN), resulting in poorer outcomes to consumers, as the past has shown.

202 Even if Telkom secures assignment in the sub 1GHz, its deployment of this spectrum will be severely hampered by the non-availability of this spectrum on a national basis, with varying degrees of adverse impact in specific areas.

203 Telkom is also restricted by the spectrum caps from obtaining enough spectrum in the 2.6 GHz and 3.5GHz to be able to compete effectively in 5G. If the licensing process is allowed to continue, it will significantly constrain Telkom's ability to compete in the delivery and provision of 5G services. On the other hand, the duopoly of MTN and Vodacom has already begun sampling business cases for 5G aided by their spectrum arrangements with the smaller operators. They will be unfairly enabled to leverage their current dominance to entrench their first mover advantage in the provision of 5G. In essence, the licensing of 3.5 GHz in the current design will likely have the effect of entrenching the dominance of the duopoly in the 5G world.

Impact on the fiscus

204 If the court does not grant Telkom the interim relief but sets aside the ITAs in ordinary course, it will prejudice the fiscus. There lawful basis for the payment of acquisition fees for the spectrum will no longer exist. The successful bidders will be entitled to a refund from the fiscus. This will negatively affect the efforts by the National Treasury to reduce the budget deficit and to increase revenue

collection. A refund may also mean reprioritization of certain necessary government spending.

Impact on the economy

205 The award of spectrum with a possibility that it may be set aside by the court in due course will cause uncertainty in the sector. This uncertainty may cause delays in investment decisions relating to the upgrading of networks to accommodate the new spectrum. This particularly impacts on South Africa's gross fixed capital formation. The capital investment that is expected to result from the rollout of spectrum will be stalled. The successful bidders may be hesitant to spend to improve their networks to accommodate the new spectrum if a possibility exists that the award of the spectrum may be set aside by the court in due course.

Impact on stable and predictable regulation

206 The ITAs exclude spectrum as one of the remedies available to the Authority when it finalises the MBSI. If, at a later stage, the court sets aside the ITAs but the MBSI has been concluded, this will question the validity of the MBSI. This will contribute to uncertainty in the regulatory environment which discourages investments.

207 If the court eventually reviews and sets aside the ITAs after the spectrum has been awarded, this may require that the auction be done anew. This will perpetuate the uncertainty over the release of spectrum.

208 It will be difficult for Telkom and other interested and affected parties to reverse the consequences of the unlawful licensing process. The process is likely to attract protracted litigation. If the successful bidders elect to deploy the new spectrum, they will be able to offer superior speeds, quality of service, and more differentiation. In other words, they will entrench their dominance to the prejudice of Telkom. By the time the dispute is finally determined, the advantages they would have gained will be irrevisible and not easily quantifiable. The same applies to the prejudice that Telkom stand to suffer during that period. In the absence of a temporary order, nothing in law stops the successful bidders from deploying their spectrum to their best commercial advantage.

209 The amendment of the terms and conditions of spectrum licenses obtained through the auction will have to follow strict regulatory processes and may be challenged; revoking spectrum licences or even reducing the amount of spectrum licenced through the auction will be extremely difficult and probably challenged.

Balance of convenience

210 I cannot conceive of any material prejudice of comparable nature which the Authority might suffer in the event the licensing process is interdicted in the interim.

211 The errors I have identified in the ITAs are remediable by the Authority. The process to remedy the issues does not entail or result in any prejudice to the Authority and the mobile network operators.

212 However, if the issues are not resolved, the issues will result in long lasting harm to the market structure of the mobile market.

213 The only prejudice that the Authority might suffer is that the licensing process described in the ITAs may be delayed until the relief sought in Part C is determined. That delay does not outweigh the prejudice I have explained in the preceding section of this affidavit. It is not necessary to insist on the auctioning and licencing process going ahead with the risk that it may be reviewed and set aside in the future.

214 The balance of convenience supports the granting of the interim interdict.

No alternative remedy

215 Telkom has written to the Authority seeking to engage the Authority about most of the issues upon which the review is premised. The efforts began before the Authority decided to issue the ITAs and has continued even after the Authority made the decision. The Authority has not been engaging and has not taken the submission by Telkom into account.

216 As a result, Telkom has no option but to approach this court for appropriate relief.

217 Telkom does not have any other recourse or avenue to realise the relief it seeks in the review. The interdict is the only manner in which to ensure that the ITA process is not concluded and Telkom does not suffer material harm for the duration of the licence period for the high demand spectrum.

218 For the reasons set out above, I submit that there is a basis for this court to grant Telkom an interim interdict against the Authority pending the determination of Part C.

URGENCY

219 The determination of this application is urgent.

220 In relation to Part A, this court should direct that the substituted service in the form contemplated in the notice of motion suffices for purposes of ensuring that any party with an interest in the proceedings is notified of the proceedings. This form of services achieves substantive compliance with Rule 4 of the Uniform Rules of Court.

221 In relation to Part B, the interim interdict should be granted urgently because of the pending auction process currently scheduled to take place in March 2021. In the light of the prejudice I have explained above, it would be necessary for this court to interdict the finalisation of the licensing processes contemplated in the ITAs.

222 In relation to Part C, I consider that in the light of the fact that the licensing process contemplated in the ITAs will occur in phases, the more advanced the

process is the more difficult it will be for the court to intervene. It is therefore necessary that this application is determined expeditiously. Spectrum is an important resource.

222.1 Spectrum is a key input for providing mobile services. A spectrum licence issued to a licensee by the Authority allows the deployment of a mobile voice and data network. In addition to the spectrum however, a substantial amount of capital, access to radio sites for the deployment of base stations, and deployment of associated network equipment is required to build a full-fled national mobile network. Ideally a mobile network must cover all populated areas to enable the provision of national services.

222.2 Absent a national network, a licensee must arrange expensive roaming agreements with other licensees that have a national network. Spectrum is therefore an essential input to provide mobile voice and data services, although additional resources are required to monetise the licenced spectrum.

222.3 To provide national voice and data services, a licensee requires access to several frequency bands for both coverage and capacity. As new technologies are introduced, i.e. 3G, 4G or 5G, additional frequency bands are required. Where possible, existing frequency bands are refarmed by replacing older technologies with newer technologies (e.g. replacing 2G with 3G or 4G and eventually also 5G). More spectrum being licenced to a licensee results in fewer base stations being required, which leads to cost savings

222.4 As I have explained above, the process for the assignment of spectrum has to be finalised expeditiously. It is encouraging that the Authority has sought to complete the process. However, the licensing process must be lawful. And upon the determination of this application, the Authority will rectify the legal shortcomings of the two ITAs and hopefully conduct the process in a manner that is consistent with and upholds the Authority's objectives as stipulated in the applicable legislation and policies.

223 Telkom has unsuccessfully sought to engage the Authority in order to avoid this litigation.

224 Telkom could not, however, without knowing and understanding the Authority's reasons for publishing the ITAs, proceed to launch this application.

225 Telkom was and could not have been able to institute the present application for the relief sought in Part B before the closing date for the submissions of the expression of interest by interested parties before 28 December 2020 because:

225.1 In the Auction ITA the Authority indicated that interested parties will be afforded an opportunity to direct written requests clarifications or concerns they may have on the ITAs 22 October 2020.

225.2 Thereafter, the Authority would respond in writing to those requests for clarification or concerns raised by 11 November 2020.

As I have already indicated, Telkom and other interested parties did request clarifications and raised its concerns about the ITAs and the Authority responded thereto on 11 November 2020.

226 On 22 November 2020, the Authority published responses to questions of clarity raised in respect of the ITAs for high-demand spectrum and licenses to operate the WOAN. In its written response, the Authority undertook to provide its reasons for decision document to explain why it embarked upon the auction process referred to in the ITAs. The reasons documents (RoDs) were released on 4 December 2020. In the RoD for the Auction ITA, the Authority also explained why it designed the lot system and allocated different ranges of spectrum in each lot for bidding purposes.

227 After thorough consideration of the above documents, Telkom concluded that the Authority has not properly addressed its concerns.

228 Telkom thereafter took advice from its economics experts and legal representatives. Based on the advice received Telkom resolved launch the present proceedings. It engaged the services of counsel and has been consulting with them in the two weeks period to urgently finalise its papers as soon as possible, to ensure that the papers are filed within the shortest practicable time after the release of the RoDs.

229 I submit that Telkom acted as reasonably as it was possible for it to launch the present proceedings in that:

229.1 As early as October 2020, it called upon the Authority to provide to it all documents and reasons that were relevant to the ITAs so that it could consider its position, and if so advised to seek appropriate relief in challenging the ITA processes. I have already referenced Telkom's letter of 12 October 2020 and the Authority's response thereto.

229.2 In the light of the Authority's response, Telkom could not therefore immediately institute legal proceedings against the Authority before the clarification process had been completed and the RoD released. Had it approached the Court before the completion of the clarification process and release of the RoD by the Authority, Telkom would have been criticized (correctly so, I venture to suggest) that it acted precipitously and prematurely.

230 I appreciate that interested parties who may wish to participate in the auction process would probably find themselves in an invidious position, given the fact that the Part B relief sought by Telkom would not be considered and determined before the closing date for the submission of the expressions of interest and payment of the application fee which is non-refundable. Telkom, too, finds itself in that difficult position.

231 I however submit that that difficulty is not cause by and cannot be attributed to Telkom. It is the consequence of the manner in which the Authority designed and elected to implement the ITA processes, and delayed the release of the

RoD close to the date for the submission of the expressions of interest and payment of non-refundable application fees.

232 Any financial prejudice which such interested parties may suffer will be temporary and would be redressed upon the re-initiation of a fresh lawful auction process, in the event the current auction process is interdicted and ultimately reviewed. In that event, this Court may issue directions that the application fees already paid should be refunded, if the Authority's decision is ultimately reviewed, or that interested parties who have already paid application fees and wish to partake in a freshly initiated auction process should not pay any additional fees upon commencement of the new auction process, if the current process is reviewed and set aside.

233 The RoDs were published on 4 December 2020, Telkom acted expediently to ensure that the application was launched prior to the date for the filing of applications in response to the ITAs on 28 December 2020 (for the Auction ITA) and 30 March 2021 (for the WOAN ITA).

234 Telkom acted with all reasonable haste to prepare this application. It was launched within 12 days of the RoDs being published.

235 Therefore, it is imperative that this application be heard and determined as soon as possible before the licensing processes contemplated in the ITAs commence and the Authority makes any decisions about the licensing and awarding of the IMT spectrum.

236 The time periods set out in the notice of motion have been crafted to allow the respondents (and any interested parties) a fair opportunity to file answering papers.

237 To the extent necessary, Telkom will seek condonation for the shortened time period within which these proceedings will be heard.

PART C: THE GROUNDS OF REVIEW

238 Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. I am advised and submit that this constitutional right is given effect to by PAJA.

239 PAJA sets out the requirements for lawful, reasonable and procedurally fair administrative action, gives effect to the right to written reasons and provides for the grounds on which administrative action can be judicially reviewed and set aside.

240 As I set out above, I am advised and submit that the Authority's Decisions constitute administrative action as defined in PAJA. The Authority's Decisions are reviewable in terms of section 6(1) of the PAJA if one or more of the grounds of review codified in section 6(2) are present.

241 Even if PAJA were for any reason not to apply, I am advised further that the Decisions are subject to the principle of legality established in terms of section 1(c) of the Constitution, including that the Authority's Decisions had to be lawful and procedurally and substantively rational. This is because the

Authority's Decisions involve the exercise of public power. As such, in this application the applicant relies upon both PAJA and the principle of legality.

242 At this stage, Telkom submits that the Authority's Decisions are reviewable on at least the following grounds:

242.1 The Authority's Decisions are irrational;

242.2 The Authority failed to consider relevant considerations and considered irrelevant considerations;

242.3 The Authority's Decisions were a result of a mistake of fact;

242.4 The Authority's Decisions were a result of an unfair process; and

242.5 The processes in terms of which the Authority made the Decisions were also procedurally irrational.

243 I expand on the grounds of review in further detail under the headings that follow.

First ground of review: the Authority's Decisions are irrational

244 The ITAs are irrational for several reasons.

Prematurity

245 First, the Authority is currently conducting the MBSI. The inquiry is meant to define the Authority's view on market structure, competition issues and

remedies available to the Authority to ensure effective and sustainable competition in the mobile market.

246 I point out in this regard that several interested parties sought clarity from the Authority on how and on what basis it could proceed with the ITAs process in the midst of an uncertain policy position and before the completion of the MBSI. The Auction RoD confirms that:

246.1 Liquid Telecoms raised that issue as is recorded on page 18, paragraph 17 of the RoD;

246.2 Telkom called for the Authority to conduct an impact assessment of the spectrum arrangements, as appears on page 91. paragraph 19 of the RoD;

246.3 Telkom repeated its contention that the 700MHz and 800MHz should not be licensed under the current ITAs (page 33, paragraph 78 of the RoD);

246.4 The South African Communications Forum indicated that the conclusion of the digital migration from the 700HMz and 800MHz frequencies "*has a critical impact on the timeframes for the rollout, especially on the WOAN.*" (see – page 33, paragraph 77 of the RoD).

247 The authority's response to the above concerns did not deal with them at all. For instance, in regard to the impact of the licensing of the 700MHz and 800HMz when these frequencies are not yet available for use by successful

bidders, the Authority claimed that the answer to those concerns is the extension of the radio frequency licences that would be issued to successful bidders from 15 years to a period of 20 years and the successful bidder would have to approach the Authority to amend its services licences in terms of section 11 of the ECA to align the period of the spectrum licences, once issued, with period of the services licences. (see page 34, paragraph 81 of the RoD).

248 I submit that the response does not deal with and simply fails to resolve the admitted problem on a rational and reasonable basis. It merely perpetuates the problem, and leaves it up to the licensees to resolve the irrationality. This is simply impermissible.

249 Moreover, the proposed solution does not resolve the manifest unlawfulness and illegality which I have set out above.

250 The MBSI has not been concluded. Issuing the ITAs before the completion of this inquiry is irrational because any submissions made about the dynamics or market structure of the broadband services market would not have been taken into account in the formulation of the auction for high demand spectrum. In light of the MBSI not being finalised, and based on the "*competition assessment*" that the Authority conducted and belatedly informed interested parties on, the competition aspects of the spectrum licencing process have not been considered to the same extent as they would have been in a fully-fledged market inquiry into the state of competition in the broadband services market.

251 In addition, I deal below with the impact of spectrum agreements and their related arrangements on the spectrum caps.

252 However, the Auction RoD makes it clear (at page 37 thereof) that "*the intention of the auction is to reveal the true value of the spectrum (including the IMT3500), hence the spectrum will ultimately be assigned to the I-ECNS Licensees who value it most*".

253 This stated intention will undermine the purpose of the pro-competitive interventions which the Competition Commission recommended, especially especially given that the spectrum arrangements result in the duopolists having access to more spectrum that has been licensed to them which which further entrenches their market power.

254 Telkom expressly requested the Authority to deal with the anti-competitive effects of the spectrum arrangements before the auction process contemplated in the ITA. The Authority informed Telkom that the assessment of the impact of the spectrum arrangement deals would be done as part of the MBSI.

255 On 11 February 2020, Telkom's chief executive officer addressed a letter to the second respondent in which he specifically asked the Authority to deal with the spectrum arrangements because of their anti-competitive effect in the market and implications on the spectrum sought to be auctioned in terms of the Auction ITA.

256 On 19 February 2020, the Authority, in writing, in response to Telkom's 11 February 2020 letter stated:

> *"the Authority advises that it has only been notified of the roaming agreements entered between MTN and Cell C; and Vodacom and Liquid. As you are aware, there is no legislative or regulatory requirement for the Authority to approve roaming agreements, however, the Authority has resolved to assess the regulatory impact of the said transactions and is in communication with all parties in this regard."*

257 A copy of this letter is attached and marked "**FA17**".

258 In a subsequent letter dated 10 June 2020, the Authority, again responding to Telkom's letter of 11 February 2020, declined to undertake the investigation requested by Telkom. Instead, the Authority expressed the view that the anti-competitive effects of the spectrum arrangements will be assessed during the chapter 10 inquiry, i.e. – "*the Market Inquiry into Mobile Broadband Services which is currently underway*".

259 I submit that the above facts illustrate the irrationality of the Authority's Decisions to proceed with the auction process, as it shows that whatever the "*competition assessment*" the Authority claims to have made, it materially ignores the critical elements of the anti-competitive considerations which the Competition Commission identified and Telkom brought to its attention.

260 The irrationality is also manifest from the fact that, in addition to other issues affecting competition in this market, the assessment of the anti-competitive effects of the spectrum arrangements is something which has not yet been concluded, and yet an auction process whose intention is to identify those who

have the necessary funds to bid for the highest price is fast approaching its closing date.

261 Given the fact that the MBSI process is not yet completed, this important opportunity has not been utilised and, as a result, the auction for the ITAs has been designed in a way that does not take into account the considerable advantage that these spectrum arrangements give to Vodacom and MTN.

262 The Authority ought not to have pre-empted the MBSI. By publishing the ITAs without first considering the findings of the MBSI, the Authority has acted irrationally because it has failed to wait for a key process, the outcome of which would have had a material bearing on the structure and design of the ITAs.

263 Finally, the digital migration process has not been concluded. There therefore is uncertainty of digital migration and the consequent unavailability of sub 1GHz for full commercial exploitation on national basis.

264 For the above reasons, I submit that the Decisions fall to be reviewed and set aside in terms of section 6(2)(e)(iii) of PAJA because the Authority took account of irrelevant considerations and ignored relevant considerations when it took and implemented the ITAs.

The effects of spectrum arrangements

265 As BRG sets out in detail in its attached report, the Authority has elected to opt for a "*spectrum cap*" model in the ITAs, without taking into account any

access that current operators, who will most certainly bid in the auction, may already have to spectrum through the spectrum arrangements.

266 The Auction ITA targets symmetric spectrum holdings. It does so by setting a maximum cap for each bidder's spectrum holding. However, the model ignores the evidence that the two dominant incumbent operators, Vodacom and MTN, are able to utilise other operators' networks (and effectively their spectrum) through spectrum arrangements to meet their capacity needs. As BRG explains, these caps may be significantly asymmetric if they fail to account for the evidence of the existing spectrum arrangements that the main players, Vodacom and MTN, have with other operators.

267 These spectrum arrangements give Vodacom and MTN effective access to substantially more spectrum than their licensed holdings would suggest. By failing to take account of these deals in its auction design, the Authority risks further entrenching Vodacom and MTN's structural advantages over challenger networks.

268 Although infrastructure sharing deals are common in the mobile industry, national roaming generally allows smaller operators, often late entrants, to increase their coverage and compete on a more even footing while they expand their own networks. As BRG explains, this type of arrangement is generally thought of as pro-competitive because, in a market in which the first-mover operators have national networks of their own, sufficient national coverage is an essential requirement for entrants in order to offer a credible proposition to customers. In South Africa, for example, Telkom currently roams

on the Vodacom network mainly in areas in which it does not have mobile network infrastructure of its own. Vodacom, however, does not have any access to Telkom's spectrum or network as part of this roaming agreement.

269 Recently, however, another type of network sharing arrangement has emerged in South Africa in which Vodacom and MTN roam on networks that are (on paper at least) operated by smaller rivals. I am advised that this kind of sharing arrangement is unusual. Unlike traditional spectrum arrangements which are intended to expand entrants' coverage, these deals are designed to boost the largest networks' capacity. BRG identifies four such sharing deals in their attached report:

269.1 Vodacom – Rain (4G); 1800/2600 MHz;

269.2 Vodacom – Liquid Telecom (5G); 3500 MHz;

269.3 MTN – Cell C (4G); 900, 1800, 2100 MHz; and

269.4 MTN – Liquid Telecom (4G) 1800 MHz.

270 In the case of the Vodacom – Rain deal, Rain has expressly stated that wholesale roaming is now its core business and has described itself as a "*performance layer*" for Vodacom. According to Rain's chief executive officer:

> *"The biggest portion of our business is our wholesale roaming services. We are a performance layer for Vodacom - It's where we get the majority of our revenue"*

271 A copy of the media article in which this was reported is attached and marked "**FA18**".

272 Vodacom's chief executive officer has explained the purpose of the spectrum arrangements in various forums as follows:

> *"What we are doing today is that we are adding as much capacity to a site as possible, and when we run out, we either use the Rain network or build a new site."*
>
> *"That is how we are trying to cope with the volumes, and that is why we did the deal with Rain - frankly put, we needed access to some spectrum."*
>
> *"Let's be frank, why are we using Rain spectrum? The reason we are roaming on the Rain network is because we don't have capacity, so we need more capacity"*
>
> *"One of the realities we face as operators in South Africa is that we have had to use roaming arrangement to be able to keep up the capacity demand that is required.*
>
> *"We have made no secret of the fact that because we are capex constrained and [R]ain had capacity, we bought capacity from them through a roaming arrangement"*

273 A copy of the media article in which this was reported is attached and marked "**FA19**".

274 The upshot of these spectrum arrangements is that they provide an opportunity for Vodacom and MTN to offload a significant amount of traffic through their partners' networks. This additional capacity which Vodacom and MTN have thus acquired needs to be considered and factored into the design of the spectrum auction. Vodacom and MTN's ubiquitous networks have given them critical and unique leverage in being able to negotiate such capacity-offloading deals, something that smaller operators cannot replicate.

275 The effect of these spectrum arrangements that Vodacom and MTN's respective capacity and spectrum needs appear to be at least partially met by reliance on other networks (and thus their underlying spectrum). As the

question of spectrum holdings is fundamentally about meeting operators' capacity needs, if some operators are able to meet part of their capacity needs in other ways (for example by relying on their rivals' spectrum), this should have been factored into the design of spectrum caps (both auction-specific caps and aggregate caps).

276 This has not, however, been done in the ITAs. The Authority's failure to consider existing spectrum arrangements in its design of the spectrum caps is irrational because it allows the dominant players to further entrench their position in the market and to obtain an enduring advantage over the smaller players.

277 Telkom has launched proceedings at the Competition Tribunal relating to one of these spectrum arrangements and the Authority has been cited as a party therein. The Authority has, in those proceedings filed a notice to abide.

278 In the light of the above, I submit that the Decisions fall to be reviewed and set aside in terms of section the following sections of PAJA:

278.1 Section 6(2)(e)(iii) of PAJA because the Authority took account of irrelevant considerations and ignored relevant considerations when it decided to publish the Auction ITA; and

278.2 Section (6(2)(f)(ii)(cc) and (dd) PAJA because the Decision to publish the Auction ITA is not rationally connected to the Authority's stated objective of ensuring effective competitive in the market.

The five-player market

279 The stated aim of the WOAN ITA is to establish a five-player market, consisting of four wholesale national operators plus the WOAN.

280 The reasons provided by the Authority are not in line with the true nature or current structure of the market. In the light of the current structure of the market, the Authority's decision to design the auction around five national wholesale operators might result in a significant distortion of competition and a significant misassignment of spectrum.

281 In the RoD for the WOAN ITA, the Authority states that there are currently four Wholesale National Operators in South Africa, namely Vodacom, MTN, Cell C and Telkom.

282 However, I submit that this is no-longer the case. Cell C concluded an agreement with MTN in terms of which Cell C would shut down its radio network (**RAN**) and transfer all its network traffic to MTN's network as part of a broader roaming deal. This was done in August 2020, which is before the WOAN ITA was published in October 2020 and the WOAN RoD was published in December 2020.

283 The result of Cell C's decision has implications on whether Cell C will remain a mobile network operator or will be a mobile virtual network operator. The consequences of the understanding of the nature of Cell C's operations has

implications for the objective of establishing or promoting a five-player market as contemplated in the WOAN ITA.

284 There is no evidence that the Authority considered Cell C's future status in its analysis of the current Wholesale National Operators market, and the effect that will have on the tenability of the five-player market contemplated in the WOAN ITA. This was a relevant consideration and the Authority's failure to consider it renders the Authority's decision to publish the WOAN ITA as currently structured reviewable.

285 In the event that the Authority considers Cell C's future status in the MBSI, the Authority may realise that the objectives of the WOAN ITA are irrational because the basis upon which they were founded has changed. This is a reason for the Authority to complete the MBSI before it decided to publish the WOAN ITA. The Authority took the decision to publish the WOAN ITA prematurely, and did not take into account the agreement concluded between Cell C and MTN in August 2020.

286 As BRG explains in its report, based on international precedent, the likelihood of there being five players competing effectively and sustainably is very low. Instead, new entrants will not last and are likely to cede their spectrum to one of the dominant mobile network operators with the resulting effect of further entrenching their market power.

287 Without a reason to justify the option for a five player-market to accomplish the purported objectives, the Decision to publish the WOAN ITA is reviewable in

terms of section (6(2)(f)(ii)(cc) and (dd) PAJA because the Decision to publish the WOAN ITA is not rationally connected to the Authority's stated objective of promoting effective competitive in the market.

Digital Migration

288 The Authority has issued the ITAs now, despite the fact that the broadcasting digital migration process has not been completed. As I highlighted above, this has a significant impact on the usability and availability of the 700MHz and 800MHz bands of high demand spectrum. The Authority was premature to issue the ITAs without there being any certainty about the migration process and when that process would be completed.

289 This decision is, as I have said, *ultra vires*, and should be reviewed and set aside in terms of section 6(2)(a)(i) of PAJA, and also based on the principle of legality.

290 In the event the Decisions to proceed with the ITAs is not reviewed on the above grounds, I have already indicated that the Authority and the Minister should be directed to ensure that the 700MHz and 800Mhz are available and usable by the time the spectrum licences are issued after the completion of the auction process. For reasons advanced elsewhere in this affidavit, I submit that such and order is just and equitable, in the light of the licence obligations which flow from the licensing of the spectrum in these bandwidths.

291 The Decision to publish the IMT ITA is reviewable in terms of section 6(2)(b) of PAJA because a mandatory process that ought to have been undertaken in terms of section 30 and 31 of the ECA was not conducted by the Authority. This decision is, as I have said, also *ultra vires*, and should be reviewed and set aside in terms of section 6(2)(a)(i) of PAJA, and also based on the principle of legality.

Inadequate spectrum assigned to the WOAN

292 The Authority has not properly considered the spectrum assigned that will make the WOAN viable.

293 In the WOAN RoD, the Authority indicated that the 80MHz was chosen as this is the amount of spectrum currently licensed to the incumbents. However, there is no quantitative assessment to support this decision.

294 The Authority's reasons for establishing the WOAN was to have the WOAN compete as one of the five national wholesalers that the Authority seeks to facilitate through this auction. However, in terms of the WOAN ITA, the Authority decided to set aside 80 MHz of spectrum of the WOAN, split across the 700 MHz, 2600 MHz, and 3500 MHz bands. The WOAN will not be permitted to bid in the licensing process contemplated in the Auction ITA.

295 I submit that limiting the WOAN to 80 MHz will place the WOAN at a significant competitive disadvantage given that other licensees will be able to increase

their holdings to 184 MHz or close to that level (and not considering the spectrum arrangements).

296 I submit that the Authority seems to have failed to consider—

296.1 whether the WOAN should have also been granted the current level of caps stipulated in the Auction ITA;

296.2 whether 80MHz would suffice for the WOAN, when other national wholesalers might have far more spectrum, and whether it was realistic to expect the WOAN to play a critical pro-competitive role in an era of increasing data demand if its spectrum holdings only matched the historic spectrum holdings of Vodacom and MTN (initially based on voice and sms);

296.3 whether if the WOAN were now to step in as the fourth national wholesaler rather than adding a layer of competition on top of four other national wholesalers, the WOAN might benefit from preferential site access;

296.4 whether the MVNO access commitments on other operators make sense in light of the increased criticality of the WOAN; and

296.5 whether some form of pre-commitment by other operators would benefit the WOAN (over and above the offtake requirements that the Authority discusses in the ITA).

297 This failure renders the decision irrational because the stated purpose for the WOAN will not be achieved with the Authority only assigning 80MHz to the WOAN whilst the other operators, with which it is to compete, have access to 184MHz.

Second ground of review: the Authority failed to consider relevant considerations

298 The Authority has a statutory duty to also consider the issue of competition in order to promote the objects of the ECA before a decision is taken.

299 Spectrum is a scarce resource and access to spectrum is a critical constraint in the mobile telecommunication sector.

300 In an affidavit filed in litigation about the 2016 ITA, the Authority stated the purpose for releasing high demand spectrum as being to "*achieve policy objectives, including those set out in amongst others the National Broadband Policy – SA Connect*". (paragraph 26 of the affidavit)

301 A copy of the answering affidavit is attached and marked "**FA20**".

302 Before the Authority published the 2016 ITA, the Authority commissioned reports from experts to advise on the effects of issuing high demand spectrum on competition.

303 The first report on the economic aspects of the spectrum auction was prepared by Acacia Economics dated 2 September 2016.

303.1 One of the issues the Authority sought an opinion on was "*whether the ITA's auction based approach is likely to assist, promote and enhance competition in the ICT sector*".

303.2 The report records that the caps for which the 2016 ITA provided were meant to "*ensure that the largest incumbents (MTN and Vodacom) cannot benefit substantially more than other operators from the auction, even if they have deeper pockets*". (Acacia report paragraph 75)

303.3 In relation to the issues about whether the spectrum auction contemplated in the 2016 ITA would entrench Vodacom and MTN's market power, the response was as follows:

> *"The auction design, package design, spectrum cap and the fact that ICASA will not proceed with the sale of the lots if not all Lots are sold ensure that this is not the case"* (Acacia report paragraph 103 Table 4)

304 A copy of relevant parts of the 2 September 2016 Acacia Economics report is attached and marked "**FA21**". The full report may be made available to the court should the court deem it necessary to consider the entire report.

305 The other report was a report from Aetha and it is dated 3 September 2014. In this report, too, the objectives for issuing high demand spectrum are listed as including facilitating competition in the downstream market following the auction.

306 In relation to spectrum caps, the Aetha report makes a number of proposals for the manner in which the caps can be implemented, which include:

306.1 imposing a cap on spectrum acquired in the auction or all spectrum holdings (existing holding and acquired spectrum); or

306.2 imposing a cap on low frequencies only or all frequencies.

307 A copy of the Aetha report is attached and marked "**FA22**". Only the relevant part of the Aetha report are attached. The full report may be made available to the court should the court deem it necessary to consider the entire report.

308 It is clear from these reports and Competition Commission's report, that competition considerations are critical to the issuing and licencing of high-demand spectrum. The Authority's purported competition analysis, which was included in the RoD does not comply with the obligations for a chapter 10 inquiry.

309 Here, too, I respectfully submit that the Decisions are also subject to review in terms of section 6(2)(e)(iii) of PAJA.

Third ground of review: non-compliance with mandatory provision of the empowering legislation

310 In the 2016 ICT Policy and 2019 Policy Directive, the Minister specifically directs as follows:

> *"The Authority is directed to investigate and report to the Minister on the spectrum requirements of 5G in bands lower than 6 GHz and*

> *the millimetre wave (mmW) bands currently under study at the 2019 World Radiocommunication Conference (WRC-19). The report should be provided to the Minister within six months after the WRC-19. The investigation should cover the affected bands, the required ecosystem to support 5G in these bands, and the implications of the licensing of these bands on competition and the current structure of the mobile market. To this extent, the licensing of the 5G candidate bands will be informed by the outcome of the aforementioned investigation and report from the Authority. The Minister will thereafter, issue a separate policy direction on the 5G candidate bands."*

311 The Authority failed to consider and adhere to the above policy directive and proceeded to include, in the IM, the 3500 MHz band without investigating and reporting on the spectrum requirements of 5G bands lower than 6 GHz and the mmWave bands considered by WRC-19, which report was supposed to inform the licensing of the 5G candidate bands. The Minister has also not issued a separate policy direction on 5G candidate bands.

312 The Authority does not even address the investigation and report in the Auction RoD dealing with “Consideration of the July 2019 Policy and Policy Directive”.

313 In response to Telkom's enquiry on the inclusion of the IMT2300 and IMT3500 the Authority states the following in the Auction RoD:

> *"The Authority has noted the spectrum bands included on the Policy. During the development of the Information Memorandum with consideration to Policy, the Authority had decided to include the spectrum bands IMT2300 and IMT3500 for consultation. The reason being that these two spectrum bands are already identified bands for IMT by the ITU. Furthermore, the Radio Frequency Spectrum Assignment Plans for these spectrum bands are in place and effective which makes the bands ready to be licensed.*
>
> *However, the Authority has resolved that the IMT2300 band will be licensed in future, taking into consideration the feasibility study to be conducted in accordance with the Radio Frequency Spectrum*

Assignment Plan for the frequency band IMT2300 published in the Government Gazette Number 38755 (Notice 392 of 2015)."

314 Section 3(4) of the ECA requires of the Authority, in exercising its powers and performing its duties to consider policies made by the Minister.

315 The Authority has accordingly failed to comply with a mandatory and material procedure or condition prescribed by an empowering provision. The Authority's decision is reviewable in terms of section 6(2)(b) of PAJA.

Fourth ground of review: procedural rationality and fairness

316 The Authority failed to afford interested and affected parties an opportunity to make submissions on the design and the relevant criteria for the licences of high demand spectrum in terms of the ITAs.

317 As I have set out above, the issue of the ITAs constitutes administrative action and therefore ought to have been preceded by some opportunity for interested parties to comment on its design. No such opportunity was given to Telkom and other interested parties, despite Telkom having asked the Authority to ensure that this opportunity was provided to it. A copy of the relevant correspondence in this regard is attached and marked "**FA23**".

318 The Authority has also seemingly failed to adhere to its own processes.

Fifth ground of review: legitimate expectation

319 On 15 December 2011, the Authority published a draft ITA for the assignment of radio frequency spectrum in the 800MHz and 2.6 GHz bands for public comment.

320 The Authority failed to issue a draft of the Auction ITA or the WOAN ITA for public comment.

321 The Authority's prior conduct has given rise to a legitimate expectation on the part of Telkom, and other interested parties, that it would be afforded an opportunity to make representations on the criteria for assignment of high demand spectrum.

322 Telkom had a legitimate expectation that it would be afforded an opportunity to make submissions in relation to the ITAs as was the case previously. The legitimate expectation is further evidenced by the referral of the various "*preliminary findings*" of the Authority following the response to the IM.

Conclusion on the grounds of review

323 A number of Telkom's grounds of review are capable of fuller elaboration or confirmation once the Authority provides the record of and reasons for its decision. Despite this, I am advised that, based on what I set out above, the Decisions are unlawful, irrational and procedurally unfair. They should, accordingly, be set aside.

CONCLUSION

324 For the reasons set out above, I conclude that Telkom has made out a case for the relief sought in the notice of motion for urgent relief to:

324.1 ensure this application is brought to the attention of all potentially interested parties; and

324.2 interdict the completion of the licensing processes contemplated in the ITAs.

325 Telkom has also made out a case for a review in Part C of the Decisions .

WHEREFORE Telkom prays for an order in terms of the notice of motion to which this affidavit is attached.

_____
SIYABONGA MAHLANGU

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at _____ on this the ____day of **DECEMBER** 2020, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

_____
COMMISSIONER OF OATHS
Full names:
Address:
Capacity: