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4 August 2016

Spectrum Resources
Independent Communications Authority of South Africa
Pinmill Farm Block A
164 Katherine Street
South Africa

Via email: spectrumresources@icasa.org.za

Dear Sir/Madam

RE: TELKOM'S ENQUIRY ON THE INVITATION TO APPLY FOR A RADIO FREQUENCY SPECTRUM LICENCE TO PROVIDE MOBILE BROADBAND WIRELESS ACCESS SERVICES USING THE COMPLIMENTARY BANDS 700 MHz, 800 MHz and 2.6 GHz

Please find herewith Telkom's memorandum of enquiries regarding the Invitation to Apply for a Radio Frequency Spectrum Licence to Provide Mobile Broadband Wireless Access Services for Urban and Rural Areas using the Complementary Bands 700MHz, 800 MHz and 2.6 GHz.

Yours Sincerely



Mr Siyabonga Mahlangu
Group Executive: Regulatory Affairs and Government Relations

MEMORANDUM OF ENQUIRIES

INTRODUCTION

- 1 On 15 July 2016, the Independent Communications Authority of South Africa (“the Authority” or “ICASA”) published the Invitation to Apply for a Radio Frequency Spectrum Licence to Provide Mobile Broadband Wireless Access Services for Urban and Rural Areas Using the Complimentary Bands, 700 MHz, 800 MHz and 2.6 GHz (“the ITA”).¹
- 2 The ITA calls on interested parties to submit enquiries on or before 4 August 2016. Telkom welcomes the invitation to present its enquiries to the Authority for its consideration. Telkom makes these enquiries in order to obtain clarifications from the Authority on the specific questions raised later in these submissions.
- 3 Telkom keeps an open mind and hopes that the Authority will clarify its queries. Telkom also hopes that the Authority will take into account the issues raised and will withdraw or postpone the ITA in order to address these issues. Telkom reserves its rights in the event that the issues it raises are not taken into account or accommodated by the Authority in the manner in which it eventually deals with the ITA.

¹ GN438 in *Government Gazette* No 40145 of 15 July 2016.

CONTEXT AND BACKGROUND

4 At the outset, Telkom records that it makes this submission to alert the Authority to its concerns about the legality of the ITA process in the light of the current regulatory framework and clear indications from the Ministry that a new direction in regard to spectrum licensing is needed. Before setting out its specific enquiries, Telkom restates some of the issues and principles that it proposes should guide the ITA process. These issues may be summarised as follows:

4.1 The starting point in developing an effective spectrum licencing framework is undertaking an in depth inquiry in terms of Chapter 10 of the Electronic Communication Act 36 of 2005 as amended ("the ECA") read with section 48 of the ICASA Act 13 of 2000 as amended ("the ICASA Act");

4.2 Such an inquiry will assist the Authority to ensure that the licencing framework is developed in a manner consistent with Government's constitutional obligations, to achieve its targets as set out in the 2013 SA Connect Policy, South Africa Connect, and other policies relevant to the issue of spectrum licensing. The identified aims being to increase universal broadband services and access by ensuring rural connectivity, offering consumers more choice, promoting investment and economic growth in the telecommunications sector and ensuring quality of service and affordability of mobile broadband services;

4.3 In its Information Memorandum of 2015, the Authority emphasised the need for the licensing of spectrum to reach the development goals set out in the 2013 SA Connect policy and the National Development Plan, which

promises 100% access to broadband at a cost of below 2.5% of average monthly income by the year 2020;

- 4.4 The remaining spectrum bands have to be licensed in a manner which promotes effective competition in the market. As it is, competition in the telecommunications market is constrained as initial capital investment is high and majority of the market share is distributed between two dominant mobile network operators. It is therefore crucial that spectrum licensing is conducted in a manner that enables the smaller operators to compete more effectively.
- 4.5 Telkom would like to reiterate that currently Telkom Mobile is the only Mobile Network Operator that does not have access to the sub-1 GHz frequency spectrum. Its current spectrum holdings offer less favourable propagation characteristics than those of other Mobile Network Operators;
- 4.6 As a result, Telkom Mobile has limited coverage, particularly in rural areas. Telkom would like the Authority to explain how it will facilitate Telkom's ability to compete effectively in a market where the likely outcome of the proposed auction process is one in which the dominance of the two larger players will be entrenched. Telkom, further requires an explanation as to whether the Authority has considered the effect of the proposed auction on the ability of smaller operators to meet the universal/rural areas requirements and whether such requirements should be linked to specific lots or to existing market shares in terms of coverage;

- 4.7 The Authority's Information Memorandum emphasises the importance of 700 MHz spectrum in shaping the future of broadband services in South Africa and achieving the SA Connect Broadband Policy goals by 2020;
- 4.8 Section 2 (b) of the Competition Act 89 of 1998 provides as one of its purposes "*to provide consumers with competitive prices and product choices*";
- 4.9 It is therefore important to ensure that the ITA will create a competitive market environment in order to provide consumers with product choices as required by the Competition Act. This requirement is mirrored in Section 2(f) of the ECA. Telkom submits that the ITA in its present form does not promote or guarantee consumer choice;
- 4.10 As alluded to earlier, it must be borne in mind that in South Africa the mobile telecommunications market is dominated by two large MNO's, i.e. Vodacom and MTN. If the ITA remains as it is structured, it is highly likely that this duopoly will be maintained and entrenched, thus undermining competition;
- 4.11 The spectrum auction will have a negative impact on competition. It will favour larger network operators, by allowing them to gain access to significant and additional spectrum at the expense of smaller operators who would not be able to compete effectively because of the disproportionate assignment of highly valuable spectrum.

SPECIFIC ENQUIRIES BY TELKOM

5 In the light of the above context, Telkom makes the following observations and enquiries:

5.1 High demand spectrum is a strategic national resource, the distribution of which dictates the mobile market structure and the competitive dynamics therein. Telkom wishes to enquire whether the Authority has assessed the potential impact that the ITA and the resulting spectrum distribution poses to competition in the mobile market.

5.2 Economic theory suggests that spectrum auctions achieve optimal outcomes in market scenarios where sufficient downstream competition exists. Has ICASA undertaken an economic study, as required in terms of Chapter 10 of the ECA, to confirm that sufficient downstream competition exists, or will exist as a result of the proposed licensing process, in the South African mobile market? Telkom deems that such a study is crucial in order to determine the applicability of the proposed spectrum auction in the South African context.

5.3 Other than auctions, has ICASA assessed the feasibility of other spectrum assignment methodologies? On what basis has ICASA adopted the spectrum auction methodology?

5.4 The Authority is requested to provide the motivation for the following ITA proposals, which differ significantly from the Information Memorandum that the Authority published on 11 September 2015: wireless wholesale open access concept abandoned; restructuring of spectrum packages; and removal of BBBEE criteria.

5.5 Telkom notes that the ITA differs in material respects from the Information Memorandum. Although Telkom and other interested parties were invited to and indeed commented on the Information Memorandum published on 11 September 2015, Telkom notes that the Authority has not finalised the said process as no Reasons Document was published prior to the issuing of the current ITA. Furthermore, Telkom and other interested parties have not been afforded an opportunity to comment on these material changes. Telkom therefore requests that the Authority explain how it decided to embark with the current ITA without any due feedback or apparent consideration of the comments provided in the 2015 Information Memorandum.

5.6 Accordingly, Telkom would like to take this opportunity to query the rationale for publishing the ITA in its present form. Telkom also seeks clarity on how the Minister's recent pronouncements on spectrum policy and potential litigation may affect the ITA process.

6 In what follows, we present queries on the following issues:

6.1 The Minister's litigation against the Authority and its effects on the ITA;

- 6.2 The relationship between the ITA and the forthcoming White Paper on National Integrated ICT Policy;
- 6.3 The relationship between the ITA and existing policies;
- 6.4 Inequality in the lots placed on auction;
- 6.5 The missing 2 x 5MHz in the 800 MHz International Mobile Telecommunications (“**IMT**”) band;
- 6.6 Uncertainty over Lot A;
- 6.7 Problems with the proposed auction model;
- 6.8 The onerous conditions to be attached to the spectrum licences;
- 6.9 The adverse competition effects of the auction process proposed by the ITA and the absence of a chapter 10 inquiry in terms of the ECA;
- 6.10 The Authority’s failure to follow existing prescribed regulations and ECA provisions;
- 6.11 Unavailability of the 700 MHz and 800 MHz spectrum;
- 6.12 Groups and Consortiums; and
- 6.13 Additional enquiries to specific sections of the ITA.

1. The Minister’s litigation against the Authority

Queries:

1.1 Is the Authority willing to withdraw or postpone the application process pending the outcome of the litigation to be launched by the Minister?

1.2 If the Authority is not willing to withdraw or postpone the application process, how will the Authority ensure that applicants do not suffer prejudice if the qualification, auction and / or licensing processes proceed, but the ITA is subsequently set aside by a court?

7 We note the media statement that the Minister of Telecommunications and Postal Services (“the Minister”) intends to launch litigation to review and set aside the ITA.

8 The ITA provides that the deadline for applications to bid on the spectrum lots is 3 October 2016. Telkom and other applicants face substantial risks if the ITA procedures continue in the shadow of this litigation.

8.1 The ITA calls for a detailed and carefully considered application. As a result, Telkom plans to commit significant time and resources in preparing its application documents.

8.2 Applicants are also required to pay a non-refundable application fee of R3 million.

8.3 In the event that a court ultimately reviews and sets aside the ITA, Telkom and other applicants would suffer irreparable prejudice.

9 As a result, Telkom seeks clarity on whether the Authority will consider withdrawing or postponing the application process pending the outcome of this litigation. If not, Telkom seeks assurances that applicants will be adequately protected if the ITA is ultimately set aside.

2. The ITA and the White Paper on National Integrated ICT Policy

Queries:

2.1 Why did the Authority elect to publish the ITA now, before the publication of the White Paper on National Integrated ICT Policy (“the White Paper”)?

2.2 Has the Authority consulted the Minister before publishing the ITA?

2.3 In the event that the White Paper on National Integrated ICT Policy is published in January 2017, will the Authority consider revising the ITA in light of this policy?

2.4 Does the Authority intend to postpone the qualification, auctioning, or licensing stages pending the publication of the White Paper?

10 According to media reports the Minister has indicated his intention to publish the White Paper in January 2017, or March 2017 at the very latest.

11 We note that the Authority is under an obligation to consider policies issued by the Minister in performing its functions:

11.1 Section 3(1) of the ECA gives the Minister the power to issue such policies. Section 3(1) provides, in relevant part, as follows:

“(1) The Minister may make policies on matters of national policy applicable to the ICT sector, consistent with the objects of this Act and of the related legislation in relation to -

- (a) the radio frequency spectrum;*
- (b) universal service and access policy;*
- (c) the Republic's obligations and undertakings under bilateral, multilateral or international treaties and conventions, including technical standards and frequency matters;*

- (d) *the application of new technologies pertaining to electronic communications services, broadcasting services and electronic communications network services;*
- (e) *guidelines for the determination by the Authority of licence fees and spectrum fees associated with the award of the licences contemplated in Chapter 3 and Chapter 5, including incentives that may apply to individual licences where the applicant makes binding commitments to construct electronic communications networks and provide electronic communications services in rural and under-served areas of the Republic;*
- (f) *the promotion of universal service and electronic communications services in under-served areas;*
- (g) *mechanisms to promote the participation of SMME's in the ICT sector;*
- ...
- (i) *any other policy which may be necessary for the application of this Act or the related legislation."*

11.2 Section 3(4) of the ECA provides as follows:

"(4) The Authority or the Agency, as the case may be, in exercising its powers and performing its duties in terms of this Act and the related legislation must consider policies made by the Minister in terms of subsection (1) and policy directions issued by the Minister in terms of subsection (2)."

12 The ITA states that the auctioning process will only begin in January 2017.

Furthermore, the ITA states that the Authority reserves the right to amend any of the timeframes specified in the ITA.²

13 As a result, it is likely that the processes contemplated in the ITA will still be under way at the time that the White Paper is published. The Authority will be obliged

² ITA, para 60.

to consider the White Paper in performing its functions and to amend or alter the ITA accordingly.

- 14 We therefore seek clarity on what impact the pending White Paper will have on the processes set out in the ITA and its content.

3. *The ITA departs from existing policies*

Queries:

3.1 Why has the Authority abandoned its previous commitment to creating a wholesale open access network?

3.2 Did the Authority give any consideration to the policy that spectrum auctions must be approached with caution?

3.3 If so, why did the Authority choose to use an auction model rather than a “*beauty contest*” model, or other available models?

3.4 Has the Authority considered the effects of initiating an ITA that is not aligned with 2013 SA Connect Policy or the 2015 Information Memorandum?

- 15 As noted above, section 3(4) of the ECA requires the Authority to consider policies and policy directions issued by the Minister in exercising its powers and performing its duties.

- 16 Telkom requests an explanation from the Authority for its departure from two central policy commitments:

16.1 First, a commitment to the development of a wholesale open access network; and

16.2 Second, a commitment to approaching market-based spectrum allocation processes with caution.

Open access wholesale network

17 A central feature of the 2013 SA Connect Policy is the goal of developing a national open access wholesale network. The forthcoming White Paper is expected to provide important details on how this open access wholesale network should be implemented.

18 The 2015 Information Memorandum acknowledged the importance of these policy goals:

18.1 The memorandum noted that the creation of an open access wholesale network is an important feature of the 2013 SA Connect Policy and that *“although a detailed roadmap ... has not been finalised, [an open access wholesale network] is expected to address structural constraints in the market and enhance service-based competition”*.³

18.2 Therefore, the Information Memorandum stated that one of the objectives of the current spectrum licensing process should be *“introducing a wholesale open access network”*.⁴

18.3 Furthermore, the Information Memorandum made it clear that the winner of Lot A would be required to provide wholesale open access on non-discriminatory, transparent, and reasonable terms.⁵

³ Information Memorandum, para 6.2.5.

⁴ Information Memorandum, para 3.

⁵ Information Memorandum, para 6.2.10.

19 By contrast, the ITA appears to have abandoned this commitment to an open access wholesale network.

19.1 This goal has been removed from the section setting out the objectives of the ITA.⁶

19.2 Lot A is no longer reserved for a wholesale open access network operator. The ITA merely states that Lot A will be "*awarded through a separate process*".⁷

19.3 The sole reference to open access is the requirement that successful bidders must provide open access to at least three MVNOs.⁸ However, there is no requirement that successful bidders must provide non-discriminatory open access to all other mobile network operators, as the SA Connect Policy requires.

20 The ITA is therefore a substantial and significant departure from the 2013 SA Connect Policy and the previous Information Memorandum of 2015.

Caution on the use of market-based spectrum licensing methodologies

21 The 2010 Spectrum Policy provides that market-based approaches to the awarding of spectrum have the potential to cause harm. Paragraph 8.2 of this policy states:

"At present it is not in the public interest for South Africa to adopt the international trend towards economic based spectrum management in

⁶ ITA, para 12.

⁷ ITA, para 24.

⁸ ITA, paras 50, 51

all cases, as this will adversely affect Small, Medium and Micro-size Enterprises (SMMEs) and prospective new entrants to the ICT sector"

- 22 The 2015 National Integrated ICT Policy Review Report, which will inform the White Paper, notes that auctions must be approached with caution.

*"Given that spectrum auctions can give government the best revenue for this public resource but could favour stakeholders with substantial resources and therefore not necessarily result in the greatest value, auctions should be considered with caution."*⁹

- 23 In light of these statements, the Authority is requested to explain why it elected to use the specific auction model, in preference to the "beauty contest" model or other available methods of allocating spectrum.

4. Inequality in the lots placed on auction

Queries

- 4.1 What is the rationale for the unequal distribution of spectrum between the lots?
- 4.2 What is the reason for changing the distribution of lots as set out in the Information Memorandum?
- 4.3 How did ICASA determine the value of the lots with respect to the reserve price?

- 24 The proposed lots are not equal in terms of the technical and commercial benefits they offer to prospective licensees. The result is that Lots C and D are far superior to the other lots.

- 24.1 Lot B may result in increased network deployment costs as the 2x5 MHz in the 700 MHz band and 2x5 MHz in the 800 MHz band requires two

⁹ 2015 ICT Review, Executive Summary, para 1.8.5 (d) (i), p 14.

separate remote radio units (RRUs). Moreover, Lot B is technically inefficient as the 2x5 MHz channels will not allow a licensee to reap the spectral efficiency benefits offered by LTE, which is the technology preferred by mobile network operators. Telkom notes that a licensee may opt to aggregate the 2x5 MHz in the 700 MHz and 800 MHz bands in order to form a 2x10 MHz carrier, however this undertaking will impose further costs on network deployment and limit the carrier aggregation options available to licensees in future.

24.2 Lot E has less spectrum than Lots B, C and D with 2x20 MHz capacity in total as opposed to 2x30 MHz that will be assigned in the other lots.

25 Lots C and D do not have the same disadvantages as Lots B and E. They also have an added advantage, as the spectrum in the 800 MHz band is likely to only become available prior to the 700 MHz band, due to the fact that the 800 MHz band contains fewer analogue television transmitters, which in theory permits expeditious digital migration. Moreover, the device and equipment ecosystem of the 800 MHz band is far more mature as compared to the 700 MHz band. Therefore, the 800 MHz licensee is far better positioned to benefit from the scale offered by the near global 800 MHz ecosystem.

26 Combining this unequal lot structure with an auction process in the current market will likely result in Vodacom and MTN obtaining the superior Lots C and D, for reasons we explain below. This will have significant negative impact on competition. Has the Authority considered the significant anti-competitive effects of entrenched dominance?

5. Missing 2 x 5MHz in the 800 MHz frequency band

Queries

5.1 Why is a 2 x 5MHz portion of the 800 MHz band omitted from the ITA?

5.2 What does the Authority intend to do with this missing 2 x 5MHz?

27 The Radio Frequency Spectrum Assignment Plan¹⁰ for the 800 MHz frequency band specifies that the 800 MHz band ranges from 791 – 821 MHz downlink paired with 821 – 862 MHz uplink.

28 The ITA however only encompasses 796 - 821 MHz / 837-862 MHz omitting a 2 x 5MHz portion of the 800 MHz band (791-795 MHz / 832 – 837MHz).

29 Omitting this 2 x 5MHz portion of the 800 MHz band will have deleterious consequences:

29.1 It causes uncertainty because it is not clear that the 2 x 5MHz involved will be made available later. This creates uncertainty regarding the pricing achieved for Lot B of the ITA. This uncertainty is aggravated by the industry awareness that Neotel has requested an 800 MHz assignment for the purposes of accommodating its CDMA – EVDO user base.

29.2 It reduces the efficient use of spectrum as prescribed in Section 2(e) of the ECA, because the 800 MHz band cannot be assigned in its entirety.

29.3 It has also contributed to the unequal and inefficient distribution of spectrum between the lots.

¹⁰ GG No. 38640 as amended by GG no. 38755 of 4th May 2015.

6. *Uncertainty over Lot A*

Queries

6.1 When will the spectrum in Lot A be assigned?

6.2 What procedure will be followed for assigning Lot A?

6.3 Does the Authority still intend to licence this spectrum to a wholesale open access network operator, as indicated in the Information Memorandum? If not, which operators will be eligible to apply for this spectrum?

30 Paragraph 22 of the ITA stipulates that Lot A is to be awarded through a separate process. However, the ITA provides no information about this process.¹¹ Specifically, no information is provided about when, how, and to whom the spectrum in Lot A will be awarded.

31 The Information Memorandum initially earmarked Lot A for a wholesale operator which will be subject to strict open access requirements. However, the ITA is entirely silent on this issue.

32 The uncertainty over the fate of Lot A prejudices Telkom and other smaller operators. Without clarity on the manner in which Lot A will be assigned, it will be difficult for these operators to decide whether and how to participate in the current auction.

7. *Impossible conditions attached to spectrum licences*

Queries

¹¹ There is no problem with the existence of a separate process, so long as the intentions regarding the assignment are clear.

7.1 Will the Authority be prepared to relax the conditions imposed on licensees to accommodate smaller operators?

7.2 Will the deadline to achieve universal coverage and minimum speeds be revised in light of the ongoing delays in completing the digital migration process?

7.3 How does the Authority intend to ensure that the MVNO obligation is achieved and what is the rationale for imposing the MVNO obligation?

7.4 What measures will the Authority put in place to ensure that there will be a sufficient pool of MVNOs available to make the open-access condition viable?

33 The ITA indicates that licensees will be subject to two onerous conditions:

33.1 First, they must achieve 100% national coverage with a minimum average uplink speed of 15Mbps/s and downlink speed of 30Mbps/s by 2020.

33.2 Second, they must provide open access to a minimum of three MVNOs that are at least 51% HDI-owned.

34 Paragraph 47 indicates a population coverage of 100% by 2020 which is impossible to achieve for Telkom Mobile and other smaller operators under the requirements as set out in the current ITA, especially when combined with the required average user throughput and the spectrum that has been included in Lots B and E. 100% population coverage would be an impractical target for Telkom and other smaller operators combined.

34.1 100% population coverage cannot be regarded as effectively achievable in instances when a country is characterised by a sparse population over a large geographic area, which is the case in South Africa. The impractical nature of the coverage obligations should be viewed in light of Singapore, which is a densely populated island with small geographic area. In

Singapore the coverage of the leading operator is considered to be near 100% rather than 100%.

34.2 In the UK, with a highly urbanised population but with significant rural mountainous areas, the highest coverage target is that of the mobile operator O2 (associated with its 800 MHz assignment) with a population coverage of 98%.

34.3 South Africa is far more challenging because of its topography. Although the problems of sparsely distributed populations and distances between communities in the Northern Cape are often cited as a barrier to universal mobile coverage, the topography in the Eastern Cape mountains and KwaZulu-Natal poses a greater challenge with farmers and communities located in valleys and other locations with radio shadow.

35 A 100% target may serve as an important political target but it cannot be used as a key performance indicator for licensees, who are subjected to substantial penalties.

36 Paragraphs 48 and 49 of the ITA stress that the coverage target is to be enforced. Since 100% coverage cannot be achieved, this brings uncertainty as to whether and how operators will be penalised for non-compliance.

37 Furthermore, imposed penalties will harm smaller operators disproportionately. Since Vodacom and MTN are better positioned to achieve roll out quickly in rural areas they are less likely to be penalised, if at all, than smaller operators that do

not have a substantial network of base stations or the spectrum that enables them to provided universal coverage in an economically efficient manner.

- 38 Has the Authority considered the fact that green field operators or operators with small footprints will require significantly more time to meet coverage obligations as compared to dominant/established MNOS that already have requisite infrastructure in place? As a result, the time-frame provided for the attainment of coverage obligations may deter or exclude smaller or greenfield operators from participating in the auction.
- 39 In respect of the MVNOs, it is uncertain whether there will be sufficient MVNOs with the required 51% HDI-ownership. In the event that there are insufficient MVNOs available, there is no clarity on whether and how the penalties will be effected.
- 40 In prescribing the obligation to host MVNOs, the Authority has created the untenable situation where compliance is dependent on the willingness of MVNOs to partner with licensees. Is this a deliberate move by the Authority and if so does the Authority consider it reasonable that a licensee may be penalised for non-compliance with an obligation over which it has no control?
- 41 In prescribing the MVNO hosting obligation the Authority is inadvertently supporting the hypothesis that the South African mobile market can sustain 12 MVNOs. On what basis has the Authority formed that view that the South African market can indeed sustain 4 MVNOs?

8. Problems with the auction model

Queries

8.1 Is the Authority prepared to revise the format and rules of the auction?

8.2 If so:

8.2.1 Is the Authority prepared to receive comments and suggestions from applicants on the auction process?

8.2.2 Is the Authority prepared to source specialised auctioning software for the purposes of managing the auction?

8.2.2 Is the Authority prepared to engage the services of auction experts to assist in redrafting the auction rules?

42 Telkom has serious concerns with the current auction format and rules. The two primary concerns are as follows:

42.1 First, it appears that the Authority plans a 'manual auction' as opposed to using electronic software. The use of a manual auction for such a large auction is very unusual, given the large sums of money at stake. Telkom recommends that, should the Authority insist on an auction process, the Authority obtain the appropriate software to manage this process.

42.2 Second, it appears that there are no proper rules to prevent parties driving prices up without any penalties. This could cause substantial prejudice to the bidders. There is no certainty as to how consecutive bids will work as indicated in paragraph 33 of the ITA.

43 Telkom has obtained an independent analysis of the ITA from an auction expert. If the Authority is open to further discussions about the auction format and rules, Telkom would be more than willing to share this detailed analysis.

9. Adverse competition effects of the ITA

Queries

9.1 What steps, if any, were taken to assess the potential competition effects of the proposed auction process?

9.2 How were these competition effects assessed in the absence of any chapter 10 inquiry having been undertaken?

9.3 Is the Authority prepared to revise the ITA to address the negative effects that the proposed auction process will have on competition?

9.4 If not, how does the Authority propose to prevent the adverse competition effects of the proposed auction process?

44 At present, the South African mobile network market is dominated by two large incumbents, Vodacom and MTN. If the proposed ITA proceeds as planned, this duopolistic market structure is likely to become even more entrenched over the long term.

45 In our comments on the Information Memorandum, Telkom stressed the need to design the auction process in a way that will promote competition:

“The final auction format and rules must be tailored to advance specific policy objectives such as rebalancing spectrum holdings; enhancing competition at the mobile network operator or mobile virtual network operator level; coordinated infrastructure investment; reducing the cost to communicate and lowering barriers to market entry.”

46 The ITA, in its present form, has done nothing to address these concerns. The auction process outlined in the ITA will have significant anti-competitive effects. These adverse effects flow from a combination of factors:

- 46.1 First, if not planned responsibly spectrum auctions will result in auctioned spectrum being awarded to those who value it most and have the means to outbid their competitors. If the auction process is not carefully designed, dominant players will entrench their dominance by taking the most valuable spectrum. This does not necessarily result in positive welfare effects for consumers or the economy as a whole.
- 46.2 Second, the dominance of Vodacom and MTN ensures that they will be able to outbid all competitors for the spectrum that they wish to obtain.
- 46.3 Finally, Lots C and D are far superior to the other lots, for reasons explained above. Vodacom and MTN will have the ability to out-bid all other competitors to obtain these lots. This will leave Telkom and other competitors to bid for the inferior spectrum packages.
- 47 Therefore, as the largest MNOs with the “deepest pockets”, it is likely that Vodacom and MTN will gain access to the most lucrative spectrum bands on auction.
- 48 As a consequence, Vodacom and MTN will be able to cement their dominance in the market, at the expense of competition and consumer choice. They will enjoy a significant “first-mover” advantage in respect of 4G mobile services for a number of reasons:
- 48.1 First, Vodacom and MTN will be able to use these superior spectrum packages to improve the capacity of their LTE services in high demand areas and expand LTE services to rural areas unconstrained by the need

to reserve spectrum for 2G. It must be stressed that mobile data is the key product moving forward and that the quality and price of mobile data will be the key determinant of customer choice between mobile network operators.

48.2 Second, MTN and Vodacom will also be able to maintain the quality of service for the users of devices that can only access 3G(+2G) or 2G alone.

48.3 Third, Vodacom in particular and MTN to a slightly lesser degree will be able to be able to entrench their first mover advantage in respect of 4G by by utilising the spectrum very quickly for the country as a whole and particularly in rural areas because they have a large number of base stations, as compared to the other competitors like Telkom Mobile who would be disadvantaged in the absence of network sharing obligations due to the time required to deploy a similar number of base stations to reach similar coverage.

49 Telkom Mobile and other applicants would be left to compete for the less favourable spectrum in Lots B and E and would be relatively disadvantaged in terms of competing effectively for either current or prospective LTE customers. Furthermore, the R3 billion envisaged for the reserve price can also not be absorbed by the smaller players which will constrain their ability to disrupt the market by putting downward pressure on prices.

50 Accordingly, it is likely that in the long term, MTN and Vodacom will be subject to weaker competition from rival mobile network operators than would have been

the case absent the ITA process. This will, in turn, result in reduced economic welfare and less consumer choice.

51 Telkom is concerned that the Authority has not considered these unintended and apparent anti-competitive effects in designing the auction process set out in the ITA.

52 To the extent that it has considered the competition effects of the auction, Telkom requests the Authority to explain how it has been able to form an accurate assessment of these effects without having performed a Chapter 10 inquiry.

53 Telkom notes that the Minister issued a policy directive in March 2016, requiring the Authority to prioritise the commencement and conclusion of an inquiry to ensure effective competition in broadband markets. Telkom requests the Authority to provide details of what action has been taken in this regard with reference to the ITA.

10. The Authority's failure to follow existing prescribed regulations and the ECA provisions

Queries

10.1 How is the Authority going to deal with the differences in the provisions of the ITA on the one hand and those prescribed in the ECA and the RFSR 2015?

10.2 What is the basis for deviating from the provisions of Regulations 6 and 7 of the RFSR 2015?

10.3 Why did the Authority exclude the provisions of Regulation 8 of the RFSR 2015 from the ITA?

10.4 Did the Authority consider that the adoption of 30% equity ownership requirement may lead to most, if not all of the incumbent operators being excluded from the process

and the potential impact that this exclusion will have on the envisaged auction process?

10.5 Why did the Authority include numerous procedures and criteria for radio frequency spectrum licences in instances where there is insufficient spectrum available in the ITA. Such procedures need to be prescribed, such as those in the provisions of Section 31(3) of the ECA?

10.6 Why did the Authority not impose the BBBEE prequalification requirement as prescribed in section 7 of the Radio Frequency Spectrum Regulations?

54 The ITA is said to have been issued in terms of Section 31(3)(a) of the ECA, read with regulations 6 and 7 of the RFSR 2015 (GG No 38641 dated 30 March 2015 as amended). Regulation 8 of the RFSR 2015 dealing with “Amendments of the Applications Pursuant to an ITA” is not mentioned in the current ITA.

55 It is not clear whether the ITA or the Regulations will prevail when there are differences and/or contradictions exist.

56 According to regulation 6, the extended application procedure applies where an ITA has been issued. Further, an application must be submitted in the format stipulated in Annexure E of the RFSR, 2015.

57 According to Regulation 6(2), the “prescribed application fee” must accompany the application. As per ECA, the regulations must prescribe the fee not the ITA. Application fees have been prescribed (see Annexure F of the RFSR 2015). These application fees however differ from those contained in the ITA.

58 According to sub-regulation 7(3)(d), an applicant shall be disqualified from the application if it has less than 30% equity ownership held by HDPs or is below a

level 4 contributor (BBBEE status) in terms of the Codes of Good Practice. In the ITA ICASA decided to deviate from their own prescribed regulations and stipulated only 30% equity ownership as the criteria to be met.

- 59 By adopting only 30% equity ownership as qualifying criteria, most if not all of the incumbent operators may be excluded from the application process. In such case the auction will most likely be a failure; participants and operators will incur great expenses and ICASA will most likely not achieve the desired broadband coverage targets.

11. Unavailability of Spectrum in the 700 MHz and 800 MHz Bands

Queries

11.1 Did the Authority consider the possibility that the spectrum in the 700Mhz and 800 MHz frequency bands will not be available for several years to come and the impact that this will have on operators achieving the coverage obligations?

11.2 How should applicants prepare the necessary business cases and prepare for the auctions without knowing if and when spectrum in the 700 MHz and 800 MHz frequency bands will become available for national use?

11.3 What date should be used by applicants for spectrum availability for planning purposes?

11.4 Can the Authority guarantee the availability of the spectrum on the date it envisages as referred to in 11.3 above?

- 60 The success of the proposed national broadband coverage obligation depends primarily on the availability of the sub 1 GHz frequency bands namely 700 MHz and 800 MHz frequency bands. It is common cause that this spectrum is currently not available due to the pending analogue to digital television migration process, which has been delayed for many years due to various reasons.

12. Groups and Consortiums

Queries

12.1 What does ICASA mean by “only one is allowed to partake in the process”? Does this mean that only one member must make the application on behalf of the consortium (submit the information as requested in section 12.4) or should the consortium still submit the information for each member but only one member designated to participate in the actual auction process?

12.2 If the consortium is assigned a spectrum licence, will such licence be assigned to the one member that participated in the auction or will it be assigned to the consortium, noting that the consortium does not have an ECNS licence?

12.3 What spectrum sharing rules will be allowed by the Authority in order for the consortium to use the spectrum assigned?

12.4 How will the 30% equity ownership criteria be applied in terms of the consortium? Must each member have a 30% equity ownership or should the members collectively have 30%? If so, how will this be calculated and be used by the Authority to see if the consortium qualifies?

12.5 What measures has the Authority put in place to ensure that consortiums do not merely serve as a front for operators that do not meet the pre-qualification requirements?

61 Under the ECA, a Radio Frequency Spectrum Licence must be held by a natural or juristic person. In the RFSR, the extended application procedure only refers to individuals or companies which would imply that a consortium that has not been established as a legal entity cannot apply. ICASA is requested to provide clarity on this issue and how it plans to deal with the apparent contradiction with existing legal and regulatory instruments.

13. Additional enquiries in relation to specific sections of the ITA

Section 1: Definitions

62 Rural – Telkom wishes to obtain clarity on the purpose and application of the rural definition. With regard to the purpose, licensees are required to provide 100 % coverage by 2020, where prioritisation of particular areas (rural or urban) is not required. Therefore, it is unclear as to why the Authority has introduced a definition which endeavours to draw a distinction between rural and urban. Telkom requests that the Authority clearly outline the motivation for defining rural areas.

Section 2: Overview

63 Paragraph 2 – The Authority highlights the need to prioritise rural and underserved areas. However, the proposed obligations adopt a blanket approach to coverage where both rural and urban areas are treated equally. In light of the need to prioritise rural and underserved areas, the Authority is requested to provide the rationale for the proposed coverage obligations. Moreover, the Authority is requested to provide the rationale for abandoning the coverage obligations prescribed in the 2015 Information Memorandum

64 Paragraph 5 – The Authority states that the publication of the ITA is geared towards the realisation of Governments roll-out targets in line with the 2013 SA Connect Policy. The 2020 targets set by the 2013 SA Connect Policy are shown in the table below:

Target	Penetration Measure	By 2020
Broadband access in Mbps user experience	% of population	90% at 5 Mbps 50% at 100 Mbps
Schools	% of schools	100% at 10 Mbps 80% at 100 Mbps
Health facilities	% of health facilities	100% at 10 Mbps 80% at 100 Mbps
Government facilities	% of Government Offices	100% at 10 Mbps

65 The ITA on the other hand prescribes the following coverage obligations:

65.1 A licensee must provide data services across the country with an average uplink of 15 Mbps and downlink user experience throughput of at least 30 Mbps to 100% of the population of South Africa by 2020.

- 66 It is evident that there is a mismatch between the roll-out targets of the ITA and the 2013 SA Connect Policy. Telkom requests that the Authority provide an explanation as to how the proposed coverage targets in the ITA align with the 2013 SA Connect Policy targets?

Section 3: Introduction

- 67 Paragraph 8 – The Authority is requested to provided further details regarding the model and assumptions used to generate the estimate that a minimum of 1011 MHz of IMT spectrum is required to achieve the 2013 SA Connect Policy targets.
- 68 Paragraph 8 - It is stated that that the assignment of 700 MHz, 800 MHz and 2600 MHz results in total IMT spectrum bandwidth of 816 MHz. According to the Authority's estimate that a minimum of 1011 MHz of IMT spectrum bandwidth will be required to meet the 2013 SA Connect Policy targets, which by 2020 require, inter alia, 90 % population coverage at 5 Mbps. The Authority has prescribed obligations of 15 Mbps uplink and 30 Mbps downlink for 100% of the population by 2020. In light of the difficulties in meeting the 2013 SA Connect Policy targets due to the IMT spectrum shortfall of 195 MHz and the fact that the ITA licence obligations are far more stringent as compared to 2013 SA Connect Policy targets, the Authority is requested to state their rationale for imposing the current coverage and throughput obligations? In particular, the Authority is requested to comment of the feasibility of achieving these coverage and throughput obligations by 2020 considering the non-availability of sub 1 GHz spectrum and overall shortfall of IMT spectrum.

Section 6: Policy Framework

- 69 Paragraph 18 – The targets stated by the Authority are not aligned with the actual targets prescribed in the 2013 SA Connect Policy. Telkom kindly requests the Authority provide justification for this deviation.
- 70 As per section 10.3.2 of the Spectrum Policy, the Minister is responsible for, amongst others, public protection and disaster relief (“PPDR”). The Authority is aware that the International Telecommunications Union’s World Radio Conference of 2015 decided that the frequency range 694-894 MHz (includes 700 MHz, 800 MHz and 850 MHz) should be used for PPDR services. Did the Authority consider the possible need for broadband PPDR services and consult with the Minister on this aspect?
- 71 It is important that bidders have detailed knowledge of the analogue television migration process/stages/time scales as planned by Sentech to see what spectrum (per Lot) will potentially be available where and when. This will have an impact on the business plans to be submitted and will differ between lots, which will also impact the value of each lot. The Authority is requested to provide details regarding the availability of 700 MHz and 800 MHz spectrum bands per lot.

Section 7: Spectrum to be awarded and Licence Conditions

- 72 Clarity with regard to the following must be provided in order for operators to undertake a valuation of the spectrum lots and to determine whether auction participation is required:
- 73 The intended purpose and date for the licencing of Lot A
- 74 The intended purpose and date for the licencing of the outstanding 2x5 MHz in the 800 MHz band.
- 75 Does the Authority plan to migrate Neotel out of their current IMT850 assignment in order to permit the licensing of the entire 2x30 MHz in the 800 MHz band as specified in the IMT800 RFSAP?
- 76 In paragraph 22.3, in relation to the 2.6 GHz band, it is indicated that 1x25 MHz is available for assignment although the frequency range indicated is only 1x20 MHz (also 1x20 MHz in the table); this must be clarified.
- 77 LTE assignments should be in increments of a preferred channel spacing of 20MHz. In order to benefit from spectral efficiencies in LTE, it is further recommended that assignments should not be less than 10MHz. Telkom proposes that the Authority consider adding 5 MHz in the 700 MHz band from Lot B to Lot A, for a combined package of 2x20 MHz in the 700 MHz band. Further, the unaccounted 2x5 MHz in the 800 MHz band should be packaged with the current 2x5 MHz in the 800 MHz band for a total of 2x10 MHz in Lot B in the 800 MHz band. This will be more efficient use of the available spectrum. Telkom seeks the Authority's views on this proposal.

- 78 Also, WBS is currently assigned 15 MHz (or 20 MHz as per erratum to the Radio Frequency Spectrum Assignment Plan) in the 2550-2565 MHz band (or 2550-2570 MHz), which falls within Lots D and E. According to the Assignment Plan, WBS had to migrate to the centre gap in the aforesaid band. The Authority is requested to confirm that WBS has indeed migrated from this band?
- 79 Telkom requests the Authority to validate the spectrum package diagrams as the data reflected therein is incorrect and misleading. To this extent, the spectrum blocks are not drawn to scale and, for the 800 MHz band, the unaccounted 2x5 MHz in the 800 MHz band has not be reflected.
- 80 The reserve price is regarded as high and an unnecessary barrier to small operators (see also Spectrum Policy, section 7.8). Telkom has also raised the issue that the Lots are not equal in value so the reserve price should not be the same. What methodology was used by the Authority for the calculation of the reserve price?
- 81 Paragraph 36 – the Authority is requested to define what is meant by “usage restrictions” as defined in European Conference of Postal and Telecommunications Administrations (“CEPT”) Report 53. The incorporation by reference of this CEPT Report is too broad and should be more specific. For example, this report deals with, amongst others, the use of the centre gap for SDL (which is not relevant to the ITA), PPDR applications in the band, Program Making and Special Events use in the band. The Authority is requested to clarify what the situation should be where the CEPT report differs from the Assignment

Plan (for example the maximum base station transmit power)? Which document should prevail in such instances?

82 Paragraph 38.2 – the European Commission (“EC”) Decision referenced speaks to the use of the 800 MHz band and the protection of Broadcasting Systems below 790 MHz. The said EC Decision applied before the 700 MHz band was made available for IMT; therefore, as Telkom understands the current situation, broadcasting systems below 694 MHz should be protected and not those below 790 MHz. The Authority is requested to provide clarity on this issue and how the EC decision will be applied in the South African context.

83 Paragraph 40 - the Authority is requested to clarify how the usage restrictions referred to are to be applied in the current context. The comments regarding paragraph 36, set out above, have reference in this regard.

Section 8: Obligations

Uplink and Throughput Obligations

84 In paragraphs 45 and 46, reference is made to the 2013 SA Connect Policy targets and OpenSignal’s State of LTE report of February 2016, respectively. It follows that the aforementioned were ostensibly considered when the obligations in the ITA of 15 Mbps uplink and 30 Mbps downlink to 100% of the population were proposed. Telkom requests that the Authority clarify how the ITA uplink and throughput obligations were derived based on the targets and measurements of the 2013 SA Connect Policy and the OpenSignal report, respectively,

- 85 Does the Authority envisage that coverage targets may be met solely using spectrum acquired via the ITA or is it possible to utilise alternative technologies such as satellite or existing network footprints to meet this obligation? If this is the case, how can other frequency bands and technologies be used achieve coverage obligations?
- 86 The 700/800 MHz and 2600 MHz frequency bands will not be permitted for use in the Astronomy Advantage Areas. How does the Authority plan on enforcing the 100% coverage obligation in light of the fact that MNOs are not permitted to deploy networks within the Karoo Astronomy Advantage Areas?
- 87 In paragraph 48, licensees are mandated to submit reports yet it is unclear as what reporting standard or methodology should be adhered to. Does the Authority plan on prescribing reporting standards to be used by all prospective licensees? If not, the Authority is requested to provide clarity on the reporting standard or methodology required.
- 88 In paragraph 49, it is stated that the Authority may commission audits to verify the results submitted by licensees. Does the Authority have a scientifically sound methodology in place for the monitoring of the Quality of Service and coverage of licensees? The Authority is requested to provide clarity on this aspect.

Section 11: General Rules

89 Telkom has directed the Authority to its queries as concerns groups and consortiums in the preceding sections of this document and the same queries apply to this section of the ITA.

90 Sanctions - the provisions in this regard are vague and pose a risk to smaller operators and new entrants. The Authority is requested to provide further details on what is considered a breach of the auction rules, the extent of any fines that may be imposed and the conditions under which a defaulting applicant may be permitted to continue in the auction process.

Section 12.2: Submission of applications

91 All applications must be in writing and contained in an envelope, to be deposited in the tender box at the Authority. However, noting the amount of the details to be submitted as part of the application, it may not be entirely practical to fit this in an envelope. The Authority is requested to provide clarity on the procedure to be followed should the aforementioned impracticality arise.

92 The ITA states that an auctioneer to be appointed by the Authority will receive applications; the Authority is requested to confirm that an auctioneer will in fact be appointed by 03 October 2016.

Section 12.4: Application content

- 93 The Authority is requested to confirm whether an applicant must complete only the application form in Appendix B or whether Annexure E of the RFSR 2015 should also be completed?
- 94 Will the Authority consider extending the time lines for submission of the application noting that it will be very difficult, if not impossible, for smaller operators (without existing national networks) to plan a near national network before 03 October 2016? This is further compounded by the fact that business cases must be developed for all lots that are of interest to an applicant.
- 95 Did the Authority consider the fact that smaller operators (effectively all operators other than Vodacom and MTN) do not currently have access to towers and other requisite facilities, or may not know if there is space available on existing towers and where these are located, such as may be required to achieve near national coverage? This has the effect that all such applicants will thus be unlikely to be able to submit a comprehensive business plan for national coverage by 3 October 2016 (it being noted that the ITA requires that business plans include details of new sites)?
- 96 The Authority is requested to clarify why a bank guarantee of only R100 million is required whereas the reserve price for any spectrum lot is R3 billion?

Section 12.6: Business Plan(s)

- 97 It is not clear what criteria will be used by the Authority in assessing the business plans submitted. Without detracting from the generality of this enquiry, the

Authority is requested to indicate what will be considered a “realistic assessment” and “sufficient allowance”?

- 98 The Authority is requested to indicate whether it possesses the necessary skills, capacity and experience to assess very complex business cases dealing with technical, operational and financial matters in detail and to make an objective assessment of same?
- 99 The Authority is requested to indicate whether it considered the possibility that there could be disputes regarding the outcome of this very subjective process? How and when will the Authority deal with such disputes?
- 100 The Authority is requested to clarify whether evaluation criteria will be as prescribed in the RFSR 2015 (specifically sub-regulation 7(2)(m)).

Section 12.7: Proof of financial capability

- 101 The Authority is requested to clarify what criteria will be used by the Authority that will provide it with the required “assurance” that an applicant’s business plan will be fully funded?

Section 12.8: Proof of technical capability

- 102 The Authority is requested to clarify what criteria will be used by the Authority that will provide it with the required “assurance” that an applicant has the

necessary technical, managerial and organisational capability to deploy the planned communication network?

- 103 The Authority is requested to clarify what is meant by “coverage obligations associated with the lot(s)”? This statement in the ITA appears to indicate that there may be different obligations associated with each lot but this contradicts other provisions in the ITA. The Authority is requested to clarify this issue.

Section 12.9: Bank guarantee

- 104 The question above regarding the amount of the bank guarantee when the reserve price for any lot is R3 billion is repeated here.

- 105 The ITA states that the Authority will draw down on the guarantee in order to cover penalties or compensation that accrue during the application stage. The Authority is requested to clarify what these penalties and compensation entail and how and when they may apply.

Section 12.10: Opening and initial review of applications

- 106 The ITA indicates that after the expiry of the deadline, the Authority will proceed to open all applications received. It is not clear precisely who will be responsible for this? Will the Authority appoint a Special Committee (as contemplated in section 17 of the ICASA Act) to deal with the applications and the assessment of the business cases submitted? The Authority is requested to clarify this aspect.

Section 12.11: Publication of list of applicants

107 Reference is made in the ITA to “Relevant Group” throughout section 12.11, but it is not clear what is meant by “Relevant Group”. The Authority is requested to clarify what this means.

108 The ITA indicates that applicants will be informed of the ownership structure of other applicants. It is not clear why this information will be provided to applicants and what should be done with this information or if and how this relates to the issue of “Relevant Group”? The Authority is requested to clarify this issue.

109 According to paragraph 97, the requested lot will be indicated on the web site. It is understood that an operator could be interested in more than one lot. The Authority is requested to clarify why (or if) only one lot will be indicated on the web site.

Section 12.12: Assessment of applications

110 As indicated elsewhere, the criteria to be used by the Authority in assessing the applications have not been specified and the Authority is requested to provide clarification in this regard.

Section 12.13: Announcement of applicants qualified as bidders

111 The ITA indicates that the Authority will discontinue the process if no applicants qualify. The Authority is requested to clarify what will occur in the situation where

there are less qualifying applicants than the number of lots available in the auction? Will the auction proceed in such a case?

Section 12.14: Amendments and correction of applications

112 It is not clear how this section relates to regulation 8 of the RFSR, 2015 and the Authority is requested to clarify whether the Authority will follow the prescribed regulations or whether the ITA will prevail?

Section 13.1: Bid Rounds

113 Paragraph 113 – this paragraph of the ITA indicates that a provisional winner who holds the standing high bid for a lot can change lots or in other words, that there is no provisional high bidder. This is unusual as without a provisional high bidder and the related obligation to purchase the lot as provisional high bidder there is no mechanism which prevents parties to drive prices up and leave the auction at very high price levels without any penalties and risks. The Authority is requested to clarify how this situation will be addressed.

114 The Authority is requested to clarify what paragraphs 116.1 and 190 mean. Specifically, the Authority is requested to clarify what is meant by a “tie-break”?

Section 13.3: Eligibility and Activity

115 As bidders can only bid for one lot, the entire Eligibility and Activity clauses provided in this section create possible confusion. The Authority is requested to

clarify whether this clause cannot be amended to reflect that a bidder who does not bid or places a No Bid loses further bid rights and is withdrawn from the auction?

Section 13.6: Submission of Bids

116 Paragraph 146.1 - It is very unusual that bidder related information is provided in an auction. Usually the identity of standing high bidders is not disclosed as it might promote anti-competitive bidding of other parties. To prevent this, the identity of standing high bidders should not be disclosed. The Authority is requested to clarify how this will be avoided?

Section 13.7: Information provided to Bidders

117 Paragraph 148 – this paragraph is to be read in conjunction with paragraphs 133, 144 and 163.2. a specific concerns arises if six parties participate in the auction and all waivers are placed. This will result in $6 \times 6 = 36$ rounds with waivers only. With a minimum round time of 60 minutes the wait for the waivers only is 36 hours. With rounds scheduled between 9am and 5pm this will mean that approximately 5 days will be spent in the bid room for waivers only. The Authority is requested to clarify how this will be addressed?

CONCLUSION

118 The spectrum that will be placed on auction represents the last significant licensing of spectrum with coverage capability that will arise for a long time. This

spectrum is a scarce and valuable resource, which must be licensed in a manner that is in the public interest.

119 It is therefore important that the processes contemplated in the ITA should not be rushed. Careful thought and consideration is required.

120 Telkom hopes that the Authority will respond to these queries. It is also hoped that the Authority will withdraw or postpone and revise the ITA in order to accommodate the issues raised. As emphasised above, Telkom reserves its rights in the event that the issues it raises herein are not duly taken into account or accommodated by the Authority.