Comments on
THE DRAFT " BITSTREAM AND SHARED/FULL LOOP ACCESS REGULATIONS"

Response to invitation to submit written representation on draft Regulations published by:

Independent Communications Authority of South Africa (ICASA)

(Gov. Gazette 36840, of 11 September 2013)

Submission prepared by Telkom SA SOC Limited

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Telkom SA SOC Limited, herein “Telkom”, welcomes the opportunity to provide written comments on the Draft "Bitstream And Shared/Full Loop" Regulations” published by the Independent Communications Authority of South Africa, “the Authority” on 11 September 2013.

This document is Telkom’s submission in response to the invitation to submit written representations on the proposed draft regulations (Government Gazette 36840 of 11 September 2013).

Telkom would welcome an opportunity to participate and make oral submissions, should the Authority decide to schedule public hearings as part of this regulatory consultation process.

EXECUTIVE SUMMARY

1. Introduction

Ensuring that all South Africans have access to affordable communications is a critical part of the country's national development objectives. Much progress has already been made towards these objectives - infrastructure investment has expanded the size and capacity of the networks in South Africa, prices have fallen and broadband penetration and usage have increased. But there is still a long way to go and Telkom, as the national fixed-line operator, has a key role to play in achieving these objectives. The draft Regulations need to be considered in this context - will they support or hinder the industry in achieving these national sector objectives?

Local Loop Unbundling (LLU) is a policy that was introduced in the mid-1990s in the US and in some European countries. The main fixed-line operators' copper networks in these countries reached close to 100% of homes and, at the time, were virtually the only means of accessing broadband. This period was long before either mobile broadband or Next Generation Networks were built so these fixed-line operators had a virtual monopoly on broadband access. LLU was a policy that was designed to address this competition problem.

The telecommunications landscape in South Africa in 2013 is completely different from America and Western Europe in the mid-1990s. Here there are many different networks competing to provide broadband services to both businesses and residential customers. Because there is no comparable competition problem in broadband access in South Africa, LLU is an inappropriate policy.

The ICT industry is one in which operators have to continually invest to access the latest technology and to be able to compete effectively. Telkom invests, on average, R5.2bn per year in capital expenditure and, in addition, spends over R200m per year on cable maintenance. We are also rolling out a Next Generation Network (NGN) to bring advanced, high-speed telecommunications services to South Africa. We are intending to invest over R10bn in this NGN over the next 2 to 3 years. LLU would directly threaten its financial viability. It would also undermine investment incentives for the entire industry. This comes at a time when South Africa is desperately in need of investment and economic growth.

LLU will also harm the large majority of South Africans who want to get access to affordable broadband. LLU will allow competitors to target and cherry-pick the most profitable fixed-line customers. The only South Africans who LLU is going to benefit are therefore businesses

and high-income households in urban areas with a fixed-line. This will happen at the expense of the middle and lower income households, particularly those in rural and peri-urban areas in South Africa. Telkom currently uses the revenue that it earns from its high-value, fixed-line customers to help fund the maintenance and upgrade of its national network. This revenue also helps keep Telkom's prices down. LLU will remove this revenue forcing Telkom to cut back on network investment and raise its prices.

In summary, LLU is a policy which will make it harder for the majority of South Africans to access broadband but which may benefit a small minority of customers in urban areas. LLU therefore does not promote affordable communications, address the digital divide or help with the modernization and growth of the South African economy.

In this submission, we outline our views on the introduction of LLU in the country from a legal, economic and technical perspective.

Regrettably, we believe that the Authority's approach in issuing these draft Regulations are not supported in law and we will explain our reasons for this position below.

Notwithstanding our views on its legality, we believe that the draft Regulations will in any event act counter to the national sector objectives in three different ways:

- It will reduce investment in infrastructure and potentially lead to job losses;
- It will harm the majority of South African telecoms users; and
- It is neither technically nor financially feasible to implement.

2. Legal/regulatory context

The draft Regulations are being presented under section 38 of the Electronic Communications Act 36 of 2005 ("the EC Act"), but despite this, also appear to take the form of a facilities-leasing regulation. In addition to other procedural and substantive reasons for the potential invalidity of these draft Regulations, the aforementioned approach is unsound in law, resulting in potentially legally invalid regulations on this basis alone.

Even if these draft Regulations could be characterised as facilities leasing regulations (and we submit that they cannot), the provisions in the EC Act dealing with facilities-leasing (namely Chapter 8 of the EC Act) only applies to facilities. Bitstream is a network service

which does not fall within the ambit of facilities leasing. We understand from the Authority's determinations from the 2011 consultation into LLU that the Authority holds the same view.

Any regulation on facilities leasing can furthermore only apply to products which Telkom (or any affected licensee for that matter) in fact provides. Such regulations cannot require Telkom to produce 'new' products. This applies to the introduction of shared or full loop access in the draft Regulations.

As a matter of law, the draft Regulations are therefore fundamentally flawed as it attempts to introduce the requirement to provide both LLU (which does not currently exist as a product), and bitstream which is not a facility. Further submissions on the legality of the draft Regulations are set out below.

Therefore, there is no proper legal basis in any section of the EC Act, either in Section 4, Chapter 7 on Interconnection or Chapter 8 on Facilities leasing, for the promulgation of these draft Regulations.

Notwithstanding this, for the sake of expediency, but subject to Telkom's reservations about the legality of the draft regulations and with full reservation of all of Telkom's rights in this respect, Telkom will presume the Authority is characterizing local loop unbundling as facilities leasing and address the Authority in these submissions from this viewpoint.

3. The proposed regulations will reduce investment

Telkom has invested, on average, R5.2bn per year for the last 10 years. This investment has been directed into network expansion, upgrades and broadband. In addition, Telkom spends, on average, over R200m per year on cable maintenance. We are currently in the middle of rolling out our NGN and are expecting to invest over R10bn over the next 2 to 3 years. The draft Regulations will directly threaten its financial viability.

This regulation does not only affect Telkom's investments. By allowing competing operators direct access to Telkom's network, it removes the incentives for them to invest in their own access networks. These draft regulations will also have a negative impact on investment through the regulatory uncertainty that they bring to the sector which increases the risk for all stakeholders.

3.1 Direct impact on investment

Telkom spends, on average, R5.2bn per year in capital expenditure. A major component of the current investment programme is the roll out of the NGN – we are expecting to spend over R10bn over the next 2 to 3 years. All these investment decisions are made with the legitimate expectation of earning a reasonable financial return. LLU would remove a significant part of this return – the value-added broadband services that it intends to sell to subscribers. The NGN business case would therefore be seriously at risk.

The draft LLU Regulations would also undermine the incentives for Telkom's competitors to invest. Firstly, if they are able to access Telkom's network, they do not need to invest in their own. Secondly, and without making any admissions on this point, the Authority has in effect brought these draft Regulations under Chapter 8 of the EC Act which applies to all operators. This approach will lead to other operators to reconsider their network infrastructure investment plans.

The impact of LLU on investment described here is not specific to South Africa. Evidence from other countries shows that LLU and other similar forms of access regulation have often not resulted in increased broadband penetration and have, in many cases, had a negative impact on network investment.

3.2 Indirect impact on investment

Investment and competition in the telecommunications market needs stable and transparent regulation. This is widely recognised around the world by investors, academics, policy-makers and regulators themselves.

The Authority's approach to LLU, as reflected in these draft Regulations, is not consistent with this:

- The draft Regulations appear to be applicable to all operators in the market. However, they would have the greatest impact on fixed-line networks, particularly Telkom's. They therefore penalise one operator in particular without any explanation or justification as to why this should be the case.

- It contradicts previous public commitments that the Authority has made not to introduce LLU without a regulatory impact assessment and market review to determine if LLU is necessary or prudent.

- The draft Regulations have been introduced at a time when Telkom and other operators are investing large amounts in network infrastructure.

The draft Regulations are also inconsistent with global regulatory practice in which LLU is only introduced as a targeted remedy within the framework of a market review. These draft Regulations have not been based on a finding that there is a market failure in South Africa and we do not think that one exists for which LLU is an appropriate remedy.

The negative impact of the draft Regulations would not only be on investment. It would also flow through to jobs as reduced investment in network infrastructure will mean fewer jobs in network roll-out and maintenance.

4. The draft Regulations will harm the majority of South Africans

When considering these draft Regulations, it is essential to consider who will be the potential winners and likely losers. The draft Regulations will benefit only the most profitable fixed-line telecoms subscribers, typically businesses and high-income households in urban areas. The benefits to these customers come at the expense of the rest of the rest of the population who will suffer from lower network investment and potentially higher prices for basic telecommunications services.

If LLU was introduced, competitors would select specific exchanges in which to put their equipment. They will inevitably focus on the small number of the most profitable exchanges which are all in urban areas. To the extent that LLU results in any benefits, these benefits will be felt only by high-value, fixed-line customers in urban areas.

Telkom, as the national fixed-line operator, has a network that covers the entire country, including many areas that are unprofitable to serve. Some of the individual services that Telkom provides, such as Payphones and Basic Voice Services, are also unprofitable. In practice, the revenue that Telkom generates from line rental charges as a whole, is insufficient to cover the cost of building and maintaining the access network. This gap between costs and revenues is referred to as the Access Line Deficit (ALD) and has been discussed on previous occasions.

The profits that Telkom makes from voice and data services are used to partially offset the losses that it makes on line rental. The introduction of LLU would remove a critical source of this revenue because competitors would target these customers while only paying Telkom

for the cost of the line. LLU is therefore likely to adversely affect the overall financial sustainability of its network. This problem affects the access network as a whole but will be particularly acute in the unprofitable rural areas of the country.

The result of this is that the introduction of LLU will make it harder for Telkom to finance the operation and maintenance of its national network. It will also put pressure on the business to raise its prices which will reduce the affordability of even its most basic services.

In other countries, eliminating the ALD has often been considered a pre-requisite for the introduction of LLU in order to avoid these negative financial impacts. In its previous public consultation process on LLU the Authority acknowledged that the ALD exists in South Africa and would need to be addressed if LLU is to be considered. We therefore would urge that this analysis to compare the costs and benefits of LLU is undertaken before any regulation is introduced.

In summary, any benefits that may arise from LLU, can only accrue to a very small segment of the country's subscriber base – fixed-line broadband customers in urban areas. However, the imposition of LLU would seriously undermine the financial viability of Telkom's network overall, particularly in the unprofitable exchanges areas, which are mainly located in peri-urban and rural areas. It would also put pressure on Telkom to raise its prices across the board which would reduce affordability for all South Africans.

5. LLU is technically not feasible

It would be a legal requirement that LLU, if implemented, should be both technically and financially feasible. In practice, Telkom's current network architecture makes LLU technically complex to implement and in certain cases technically not feasible as well. Technical and financial feasibility are not capable of independent assessment. They are, in fact, co-dependent litmus tests. To the extent that the cost in some cases to bring a product to market would be excessive, this would make LLU both technically and financially not feasible.

Further, it is incorrect to characterize LLU as the leasing of a facility. Instead a completely new set of products will need to be developed – requiring time and substantial financial resources. The work entailed in the product development process includes:

- a market study to determine where the demand for the unbundled products lies in order guide the allocation of resources;
- the development of a product specification inclusive of all business processes and service level requirements with respect to the ordering, maintenance and billing of the service;
- the procurement, installation and commissioning of all the network elements, support systems and databases that are necessary for the successful development and launch of LLU products;
- the preparation and possible expansion of exchange buildings, which were originally not built to accommodate LLU products; and
- The development of reference offers and agreements for the sale of LLU products.

The activities and capabilities highlighted here would require significant financial resources to develop and will take years to execute successfully. In our view, the time and financial resources would be better directed at enhancing investment in the network and assisting the Department of Communication to meet its goal of achieving universal broadband access for all by 2020.

1. INTRODUCTION

Ensuring that all South Africans have access to affordable communications is a critical part of the country's national development objectives. We strongly support the growth and development of the ICT sector in South Africa. In particular, we recognize the importance of supporting the national sector policy objectives of: Ensuring Universal Access; Lowering the Cost to Communicate; and Increasing Network Investment. This is consistent with the Authority's focus on affordability through its Cost to Communicate programme.

The country has made progress towards achieving these objectives:

- Substantial investment is being made in advanced broadband infrastructure across the country;
- Prices of electronic communications services, including broadband, have fallen dramatically, while at the same time speed and quality of service have improved, so that South Africans can increasingly enjoy affordable high-speed, high-quality broadband services; and
- The innovation and dynamism of the South African ICT industry has led to a number of new and innovative services being introduced to the country.

But there is still a long way to go and Telkom, as the national fixed-line operator, has a key role to play in achieving these objectives. The draft Regulations on LLU need to be considered in this context - will it support or hinder the industry in achieving these national sector objectives?

As a starting point, we believe that the Authority's approach in the current draft Regulations is not supported in the law, but this will be dealt with in more detail below. Even putting aside the legal issues, we consider that the draft Regulations would hinder the industry in achieving the sector objectives for three separate reasons:

- It will reduce investment in the sector by harming incentives to invest by both Telkom and its competitors;
- It will harm the poorest South African telecoms users by making it more difficult to finance the network as a whole and particularly in rural areas. To the extent that

LLU benefits any customers, they will be those located in high-income urban areas where LLU operators will focus.

- It is neither technically nor financially feasible to implement.

The remainder of this submission document is structured as follows:

- Section 2 explains why the draft Regulations are not valid in law;
- Section 3 details with how incentives to invest in the network infrastructure are impacted negatively both directly and indirectly;
- Section 4 explains the social impact of the draft Regulations;
- Section 5 details how these regulations are highly problematic, if not infeasible; and
- Section 6 contains our conclusions.

2. LEGAL CONSIDERATIONS AND CONCERNS

Having regard to Telkom's previous submissions on this issue and taking into account what Telkom will submit in addition thereto, we make the following key submissions:

- As will be explained below, the process by which the Authority has arrived at the position of issuing the draft Regulations is, with respect, flawed. As Telkom understands it, the process is based largely on an incorrect interpretation and /or application by the Authority of a Policy Decision issued by a past Minister of Communications;

- Notwithstanding the above, and even if the above is based on an incorrect assumption, the authority concluded the previous process of its investigations into LLU by issuing the Findings Note dated 30 November 2011 ("Findings Note"). In that Findings Note, the Authority undertook to embark on a number of processes before attempting to introduce LLU. The issuing of the Findings Note amounted to a statutory determination to which the Authority itself is bound. Issuing the draft Regulations now, without completing the processes committed to in the Findings Note, is irrational administrative conduct which will be subject to be set aside on review. Furthermore, in issuing the Findings Note, the Authority created a legitimate expectation, upon which Telkom can rely, that the Authority will complete the processes it committed to in the Findings Note.

- The Authority furthermore appears to have based the rationale for its entitlement to issue the draft Regulations on a misinterpretation of, amongst others, the applicable sub-sections of sections 43 and 44 of the EC Act, read with the definition of electronic communications facilities in the EC Act; and

- In addition to the above, the Authority is effectively embarking on a law making process which is beyond its powers on a proper interpretation of the EC Act, read with the Independent Communications Authority of South Africa Act 13 of 2000 ("the ICASA Act"), and the law relating to the creation of legislative instruments.

Although extensive legal arguments on certain of the above issues have been made in Telkom's submission on the Authority's framework for introducing LLU, these will be briefly set out again (and expanded upon as required) below. All of Telkom's rights arising from its previous submissions are however strictly reserved and nothing in this submission is to be seen as detracting from any of Telkom's positions on this matter to date.

In making these submissions, Telkom can only assume that the Authority has issued these draft Regulations as a continuation of the process it commenced in 2007. The aforesaid process ultimately ended in the Findings Note issued by the Authority in 2011.

These draft Regulations, however, add to the difficulties Telkom has with this issue in it they now appear to be founded in section 38 of the EC Act. Section 38 falls within Chapter 7 of the EC Act, dealing with interconnection, and it is not clear how this section or chapter of the EC Act confers any rights to the Authority to issue regulations of this nature. Furthermore, notwithstanding the reliance on section 38 in issuing the draft Regulations, the draft Regulations contain numerous references to sections 43 and 45 of the EC Act (thus dealing expressly with Chapter 8 issues, namely facilities leasing) and contain extensive references to electronic communications facilities leasing. Telkom thus submits that these regulations can only be understood in the context of an attempt to issue some form of facilities leasing regulation. Amongst other grounds, it is on this premise too that Telkom bases some of its concerns about the validity of the draft Regulations.

In summary of previous submissions by Telkom in the above regard, and in expansion of those submissions in light of the current basis for the issuance of the draft Regulations, Telkom sets out its key submissions under the headings below:

2.1. Procedural Issues

As stated above, Telkom can only assume that the Authority has issued these draft Regulations as a continuance of the process that ended in its Findings Note in November 2011. To this extent the process by which the Authority has arrived at the position of issuing the draft Regulations is, with respect, flawed. The process appears to be based largely on a legally unsound interpretation and / or application by the Authority of a policy decision contained in the Ministerial Policies and Policy Directions gazetted by the late Honourable Minister on 17 September 2007 under Government Gazette No. 30308 of 17 September 2007 (the “Ministerial Policy Decision”).

The above has the result that the Authority embarked on a law-making process which is beyond its powers on a proper interpretation of the Electronic Communications Act 36 of 2005 (the “EC Act”) and the law relating to the creation of legislative instruments. This issue is discussed further below, where it is further submitted that this is the situation regardless of whether the Ministerial Policy Decision was the cause of these draft Regulations or not.

2.1.1. The Authority's reliance on the Ministerial Policy Decision to initiate the LLU Process, as referred to in the Discussion Paper

The Authority undertook the previous public consultative process regarding LLU purely on the basis of the Ministerial Policy Decision. This was evident from several references made by the Authority to the Ministerial Policy in the Authority's LLU Framework - Discussion paper, published in Government Gazette No 34382, 22 June 2011 (the "Discussion Paper"). As we then argued, the Authority erroneously referred to the policy *decision* issued by the Minister of Communications on 17 September 2007 as a "policy *directive*."

The abovementioned policy decision does not, however amount to a policy direction issued and made by the Minister pursuant to section 3(2) of the EC Act. In this regard, it is important to note the distinction between the provisions of sections 3(1) and 3(2) of the EC Act.

Section 3(1) of the EC Act relates to policy decisions and states that the Minister "*may make policies on matter of national policy applicable to the ICT sector, consistent with the objects of the EC Act and of the related legislation in relation to various matters, including any other policy which may be necessary for the application of the EC Act or the related legislation."*

Section 3(2) of the EC Act deals with policy directions and stipulates that the Minister may, subject to subsections (3) and (5) of section 3(2), issue to the Authority policy directions consistent with the objects of the EC Act and of the related legislation in relation to, among other things, "*the undertaking of an inquiry in terms of section 4B of the ICASA Act on any matter within the Authority's jurisdiction and the submission of reports to the Minister in respect of such matter. There is therefore a clear distinction between policy decisions and policy directions."*

This distinction between policy decisions and policy directions was confirmed by the North Gauteng Division of the High Court of South Africa in the matter of Altech Autopage Cellular (Pty) Ltd v Chairperson of the Council of the Independent Communications Authority of South Africa and Others (20002/08) [2008] ZAGPHC 268, decided on 29 August 2008. Judge Davis stated that Section 3(1) of the EC Act refers to policy and Section 3(2) refers to policy directions. Furthermore, in terms of section 3(4) of the EC Act, the Authority is obliged in exercising its powers and performing its duties in terms of the EC Act and related legislation, to *"consider"* both the policies and ministerial policy directions.

This is further supported by the Ministerial Policy Decision and Policy Direction document of 17 September 2007. The Minister gazetted eight (8) policy directions and three (3) policy decisions. The policy decisions were general in nature, while the policy directions gave *guidance* to the Authority in relation to *both* manner in which the direction was to be given effect to *and* the source of the conferred power to which the Authority must rely upon in giving effect to the direction.

In summary, the Authority's reliance on a policy decision in order to derive procedural and substantive powers to initiate and undertake an administrative process (which would culminate in the unbundling of the local loop) is unsupported in law and presents a substantial risk that this process may be subject to review. In regard to these draft Regulations the situation may be exacerbated if there was no other valid ground for the decision by the Authority to now issue these regulations. This aspect is dealt with in more detail below.

2.1.2. The Authority's undertaking to conduct a section 4B enquiry, as referred to in the Discussion Paper

The 2011 Findings Note was the culmination of an inquiry conducted by the Authority in terms of section 4B(2) of the Independent Communications Authority of South Africa Act, Act 13 of 2000 (the "ICASA Act"). In terms of the aforesaid section the Authority must give notice of its intention to conduct an inquiry in the Government Gazette. Such notice must indicate the purpose of the enquiry and invite interested persons to submit written representations within 60 days from the date of publication.

The Authority gave notice of its intention to embark on a section 4B inquiry process on local loop unbundling in the Discussion Paper and stated that it relies only on section 4B(1)(a) of the ICASA Act in this regard. Section 4B(1)(a) stipulates that the Authority may conduct an inquiry into any matter with regard to the achievement of the object of the ICASA Act or the underlying statutes. Accordingly, Telkom understood the context within which the Authority had solicited written representations regarding the Discussion paper to be in terms of an inquiry being undertaken pursuant to section 4B of the ICASA Act.

Section 4C of the ICASA Act refers to an inquiry conducted in terms of section 4B and sets out in detail the manner in which such an inquiry ought to be conducted.

Section 4C(1) of the ICASA Act stipulates that a councilor presiding at a section 4B inquiry must determine the procedure at such inquiry. It seems reasonable to infer that the

procedure for the conduct of a section 4B inquiry must be determined prior to the initiation of such an inquiry. Such procedure would need to include the provision of adequate notice to all parties wishing to participate in the inquiry and such parties would need to be informed of the scope and ambit of such an inquiry.

Accordingly, the Authority had to conduct the section 4B inquiry in a manner that is consistent with the provisions of section 4C of the ICASA Act. The Authority could not commence with the section 4B inquiry without having set out the procedure which would govern the inquiry as contemplated in section 4C. The Authority could further not commence with the inquiry while disregarding the provisions of section 4C.

Regrettably, this is what the Authority in fact did when conducting the LLU inquiry. The Authority had not complied with the provisions of section 4C and Telkom submits that this presents a substantial risk that the ultimate outcome of such an inquiry may be subject to review.

In addition to what is set out above, the media briefing conducted by the Authority on 22 June 2011 broadly set out the underlying rationale for initiating the inquiry, but did not specifically refer to the initiation of a section 4B inquiry, nor did it set out the procedure for such an inquiry as contemplated in section 4C.

The first time that Telkom was informed of the Authority's intention to conduct the public hearings subsequent to receipt of written representations was at a one-on-one engagement convened on 30 August 2011. This is inconsistent with the requirements of section 4C(1) of the ICASA Act.

In light of the above, the Authority had not adequately discharged its statutory obligation set-out in section 4C(1) of the ICASA Act.

2.2. Irrational Administrative Action and Legitimate Expectation

Regardless of the above difficulties that the Authority faces with the process that culminated in the Findings Note, the Authority has now elected to issue these draft Regulations without having regard to its findings or first conducting the various processes that it committed itself to in the Findings Note. Such findings and processes include:

- That the Authority will take phased approach to the introduction of LLU;

- An undertaking by the Authority to engage with broader industry to consider an "Access Line Deficit Recovery Scheme";
- An undertaking by the Authority to engage with industry regarding a Bitstream product and various processes associated with such a product;
- A commitment by the Authority to conduct a Regulatory Impact Assessment ("RIA") on the costs and benefits of LLU; and
- A commitment by the Authority that it would, after the RIA, and depending on the outcome of the RIA, conduct a market review on the fixed-line local access market.

Notwithstanding the undertakings and findings issued by the Authority in the Findings Note, the Authority has elected to bypass all of the above and simply to issue the draft Regulations in their current form. This conduct is irrational and will be subject to a rationality review. This conduct is further subject to review on the grounds that Telkom acquired a legitimate expectation that the Authority would conduct itself as expressed in the Findings Note.

2.3. Misinterpretation of Chapter 8 of the EC ACT

It is to be noted at the outset that the previous attempt by the Authority to impose LLU, as envisaged in the 2011 Findings Note, appeared to be informed by the Authority's views expressed in the Discussion Document. However, as mentioned above, although the draft Regulations are now ostensibly issued under section 38, they still are clearly grounded in Chapter 8 of the EC Act (Electronic Communications Facilities Leasing) and the legal interpretations in this regard, as explained below, remain valid.

The Authority stated in the Discussion Document that "*Based on the obligation to lease electronic communications facilities, providing access to the local loop is already mandatory based on the obligation imposed under Section 43(1).*" However, it later states that "*Although the current regulations do not explicitly prescribe the manner in which such unbundling should take place, the right for an ECNS licensee to request access to unbundled facilities is enshrined through the definition of electronic communications facilities in the ECA and the requirement under Regulation 10(3) of the regulations.*"

The above statements were inconsistent and contradictory.

In addition to the above, and to the extent relevant to these draft Regulations, sections 43 and 44, contained in Chapter 8 of the EC Act, are not intended to give guidance on the

exercise of any substantive or procedural powers explicitly conferred upon the Authority to give effect to LLU. There are no subordinate legislative-making powers delegated to the Authority for purposes of giving effect to the unbundling of the local loop process. This is further discussed in paragraph 3 below.

It is in fact in light of the absence of clear, precise and unambiguous provisions in the primary legislation which explicitly gives treatment to the unbundling of the local loop that the Authority then sought to rely on the Ministerial Policy Decision as a means of substituting the absence of primary legislation.

For the sake of completeness, we discuss the obligations set out in sections 43 and 44 below.

2.3.1. Obligations set-out in section 43 and 44 of the EC Act

In terms of section 43(1) of the EC Act, "*Subject to section 44(5) and (6), an electronic communications network service licensee must, on request, lease electronic communications facilities to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of an electronic communications facilities leasing agreement entered into between the parties, unless such request is unreasonable.*"

In terms of section 44(3)(m) of the EC Act, matters which electronic communications facilities leasing regulations may address include, but are not limited to, the manner in which unbundled electronic communications facilities are to be made available. Accordingly, the obligation in section 43(1) pertains to all licensees in possession of the relevant licence granted and issued by the Authority pursuant to the EC Act, and the scope of the obligation pertains to leasing.

However, for section 44(3)(m) of the EC Act to find operation, it is a pre-requisite that the electronic communications facilities to which the obligation to unbundle in the manner contemplated in section 44(3)(m) of the EC Act apply are in fact electronic communications facilities in terms of the definition in section 1 of the EC Act. Where this is not the case, section 44(3)(m) of the EC Act does not apply. Telkom submits that the local loop is not an electronic communications facility as defined in section 1 of the EC Act.

It is further important to note that the obligation to lease is entirely different to an obligation to *unbundle*. It is incorrect to infer (at best even from section 44(3)(m) of the EC Act) that the regulations contemplated in section 44(1) of the EC Act impose an obligation to unbundle

electronic communications facilities which are subject to the mandatory leasing requirements of section 43(1) of the EC Act. Parliament had delegated to the Authority the powers to make regulations pursuant to section 44(1) of the EC Act, and in particular section 44(3)(m) of the EC Act, to ensure that those electronic communications facilities defined as such in section 1 of the EC Act ought to be capable of being leased or made available in an unbundled or disaggregated manner. This was to ensure that unreasonable tying or bundling of electronic communications facilities, which can in fact be leased by an electronic communications facilities seeker, does not occur. This interpretation is consistent with the provisions in section 8(d)(iii) of the Competition Act 89 of 1998 which prohibits anti-competitive bundling or tying.

Telkom submits that section 44(3)(m) of the EC Act does not create a general obligation to unbundle electronic communications facilities in the same manner that the unbundling of the local loop is understood to occur. Nor does the section create the power for the Authority to impose LLU.

A further difficulty that the Authority faces is that local loop is not defined as an electronic communications facility in terms of section 1 of the EC Act.

In the draft Regulations the Authority defines the local loop in the following manner:

> "…*a physical circuit connecting the electronic communications network termination point at the subscriber's premises to the main distribution frame or equivalent facility in an electronic communication network and/or … the physical twisted metallic pair circuit connecting the electronic communications network point at the subscriber's premises to a connection point at the edge of the provider's network or a specified intermediate network."*

This cannot change the fact that the obligation in section 43 of the EC Act to lease an electronic communications facility can only apply to that which is defined as such in section 1 of the EC Act.

An electronic communications facility is defined as follows in section 1 of the EC Act:

*—**"electronic communications facility"** includes but not limited to any—*

(a) wire;

(b) cable;

(c) antenna;

(d) mast;

(e) satellite transponder;

(f) circuit;

(g) cable landing station;

(h) international gateway;

(i) earth station; and

(j) radio apparatus or other thing,

which can be used for, or in connection with electronic communications,

including where applicable-

(i) collocation space;

(ii) monitoring equipment;

(iii) space on or within poles, ducts, cable trays, manholes, hand holds

and conduits; and

(iv) associated support systems, sub-systems and services, ancillary to such electronic communications facilities or otherwise necessary for controlling connectivity of the various electronic communications facilities for proper functionality, control, integration and utilisation of such electronic communications facilities."

The local loop is not included in the definition above. Additionally, there is a difference between the local loop in its integrated form and the local loop in an unbundled form. Thus, for example, where the Authority in its Discussion Paper stated that the local loop is already subject to mandatory leasing in terms of section 43(1) of the EC Act, it could only do so on the assumption that the local loop is already in an unbundled form and that a definition of an unbundled local loop already exists in section 1 of the EC Act, but this is not the position.

The fact that the Authority was seeking stakeholder input (as was requested in the Discussion Paper) as to whether its proposed approach to LLU through the implementation

of the facilities leasing regulations was reasonable, feasible and acceptable, is furthermore indicative that the Authority itself was uncertain as to whether LLU can in fact be implemented by means of the facilities leasing regulations. This would not have been necessary if the law explicitly provided for the implementation of LLU.

The Authority further stated in its Discussion Paper that local loop unbundling amounts to the following: *"the process whereby a licensee is obliged to provide access to the local loop at a wholesale price so that other licensees may access end-users".*

Telkom submits that, in the absence of Parliament having delegated to the Authority both the procedural and substantive powers setting out the manner in which an unbundling of the local loop process is to the undertaken, the Authority at best merely provided a description of the ultimate result of an unbundling of the local loop process, and not the technical and operational practicalities involved in unbundling. In fact, the Authority itself conceded to the absence of *any* legislative framework in the EC Act which sets-out both the *procedural* and *substantive powers* of giving effect to the local loop unbundling process in the Discussion Paper: "*in reality, in the absence of detailed regulatory rules regarding how such access [to the local loop] must be provided, licensees may not easily be able to exercise their rights to obtain access to the local loop."*

2.4. Parliamentary Delegation of Law-Making Powers to Administrative Bodies

From what is set out above it follows that the Authority does not currently, on an interpretation of the EC Act in its current form, have the ability to impose local loop unbundling in the manner contemplated in the draft Regulations.

This is supported by section 43 of the Constitution. Parliament derives its legislative authority from the aforesaid section 43. The ability conferred on Parliament to delegate the discharge of its legislative Authority may only be conferred in law and ideally by an Act of Parliament. This delegation function has been confirmed by the Constitutional Court.

The essence of the delegation function as explained by the Constitutional Court is that it is a function that must necessarily be fettered or constrained by Parliament to avoid the unfettered exercise of delegated legislative-making powers. Accordingly, when delegating this competency, by implication Parliament must *guide* the administrative body concerned with regards to the *manner*, *purpose* and *scope* of exercising its delegated legislative-making

powers. We will refer to this function as the “guidance principle.” The guidance principle has been recognised within South African law as an important cornerstone of the rule of law.

In further cases on the issue, our courts have explained that: *"…the delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power."*

All in all, the Constitutional Court jurisprudence reflects a consistent affirmation of the guidance principle as it applies to the exercise of discretionary powers delegated to administrative bodies or other functionaries by Parliament. In this regard, courts will set aside any administrative action which results in an administrative body attempting to exercise powers which it has either no authority to exercise (due to the scope of the delegation) or which it exercises without due regard to the guidance principle.

Further, it is the function of Parliament as the constitutional legislative authority to provide such guidance when delegating legislative-making powers to administrative bodies. Where such guidance is absent or where Parliament has not explicitly delegated powers to be exercised in accordance with such guidance, administrative bodies may not on their own accord attempt to afford themselves such powers.

Telkom thus submits that there is to date no suitable delegation to the Authority to impose local loop unbundling in the manner contemplated in the draft Regulations.

3. THE DRAFT REGULATION WILL REDUCE INVESTMENT IN THE SECTOR

The draft Regulations are likely to reduce investment in the sector. It removes competitors' incentives to invest in their own access network infrastructure since they will be able to free-ride on Telkom's. It also reduces Telkom's incentive to invest in its network because any benefits from such investment are immediately shared with its competitors.

These adverse effects are made worse by the way in which LLU regulation been dealt with. The lack of a proper consultation, market review or analysis of the costs and benefits is likely to create uncertainty in the market which will affect investment across the whole industry.

3.1. The negative impact of the draft Regulations on operators' incentives to invest

Over the last 5 years, South African operators have invested around 0.3% to 0.4% of GDP in their networks each year.[1] This investment has largely gone into network expansion and upgrades including a significant proportion that has been spent equipping the networks to provide broadband services. Telkom, itself, has invested an average of over R5bn per year for the last 20 years. Telkom is currently rolling out its NGN and intends to invest over R10bn over the next 2 to 3 years.

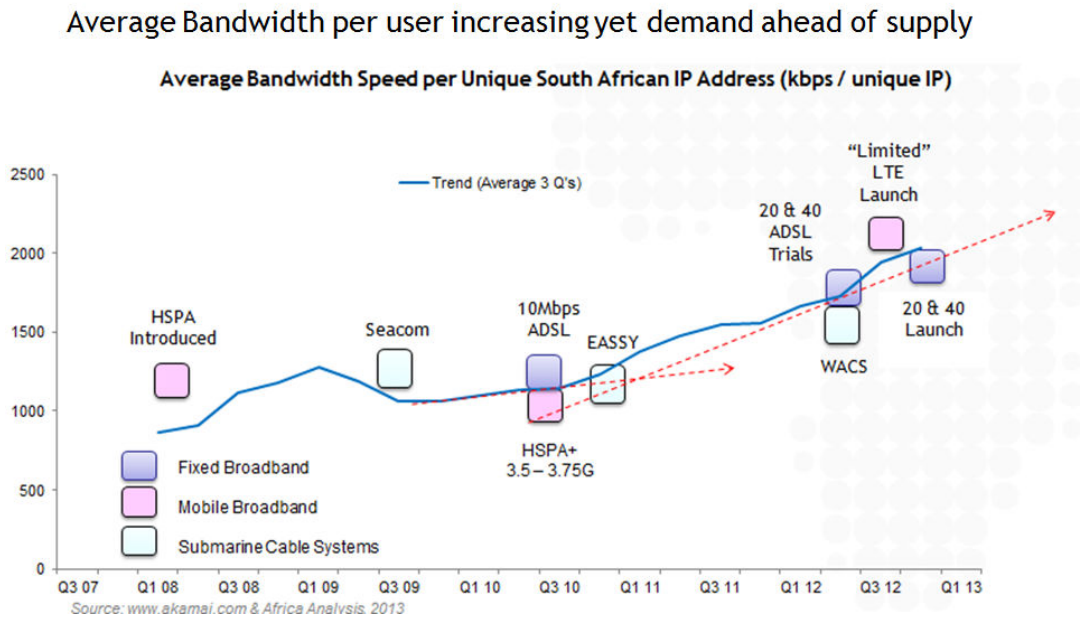
Any middle-income country that achieves high broadband penetration rates has a mix of different technologies. Investment into the telecommunications sector in South Africa has resulted in expanding networks and availability of services. South Africans now have a wide range of options for both voice and broadband access, including mobile, fixed wireless, copper-based DSL, fibre and satellite.

Telkom plays a critical role in the delivery of broadband throughout South Africa. We supply high quality broadband services to end-users and our national network is a critical part of the other operators' services as we provide many of the core network services that they use to carry traffic around the country.

The investment in new technologies has reduced the cost to communicate and improved the quality of services that customers receive. This is demonstrated by the increase in average data speeds experienced by consumers – both fixed and mobile – as shown in Figure 1.

[1] Economists Intelligence Unit

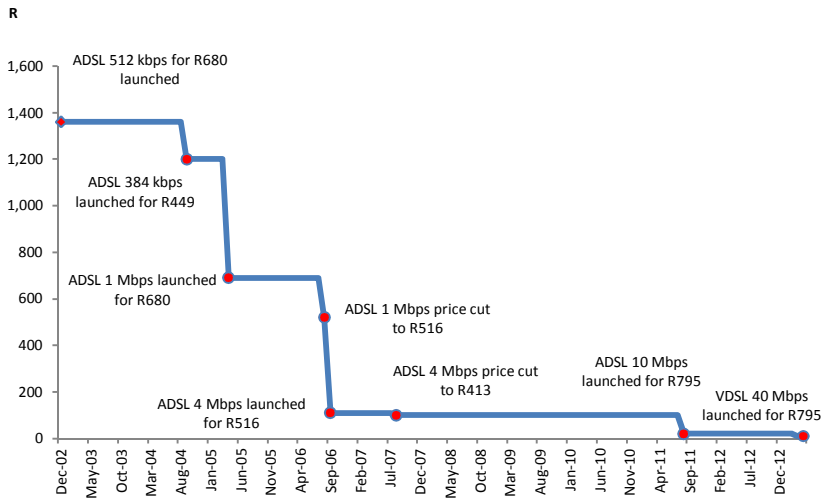
Figure 1 Average bandwidth



Source: Telkom

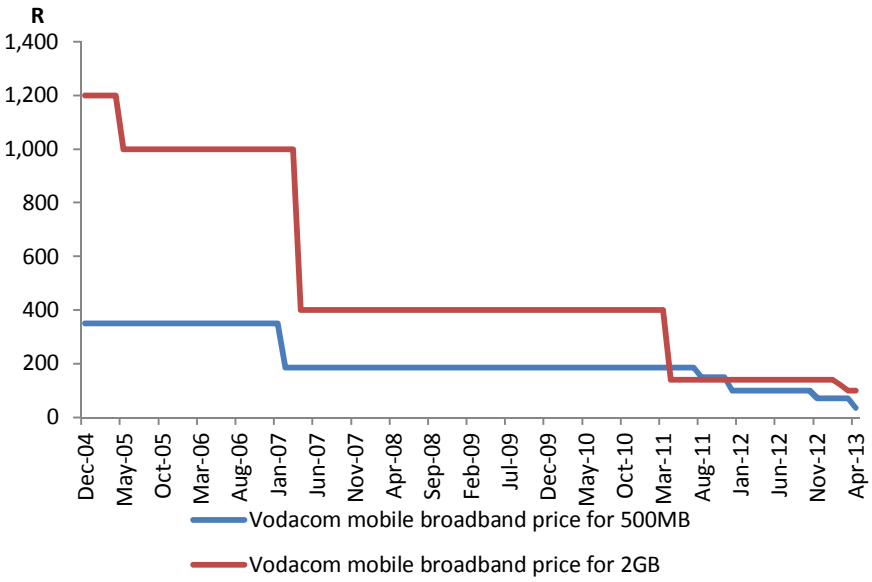
At the same time prices have been falling rapidly, while broadband speeds – both fixed and mobile – have been increasing, as shown below in Figure 2 and Figure 3.

Figure 2: Telkom SA ADSL price per Mbps



Source: MyBroadband

Figure 3: Vodacom mobile broadband price plans



Source: Moneyweb

This transformation of the communications landscape in South Africa is set to continue. There are currently at least 4 long distance different fibre-optic networks in South Africa in various stages of completion and mobile operators have plans to increase the availability of 4G services as soon as more spectrum is available to them. This will translate into rapid and

sustained growth in the retail broadband market, much of which will be in the mobile segment. However, despite this growth, it is clear that there is still a long way to go. Telecommunications, particularly broadband, remains unaffordable for many South Africans.

We therefore think that it is critical to consider whether, at a time when the industry is investing such huge amounts into the national telecommunications infrastructure, a policy which opens up networks to competitors will help or hinder the objective of affordable broadband for all. We believe that it will seriously undermine the incentives to invest in network infrastructure and will therefore ultimately set back efforts to ensure that all South Africans have access to affordable high-quality telecommunications.

3.2. The negative impact on investment arising from regulatory uncertainty

The ICT industry invests and competes in a highly regulated market. Regulatory decisions can have a major impact on all aspects of the industry including the returns that operators can expect to receive from their investments.

A pre-requisite for a well-functioning market is therefore stable and transparent regulation of the sector. Sudden changes in major aspects of the way in which the market works have a major negative impact on investment since, when operators are making their investment plans, they do not know whether or when the rules of the game are going to be changed in some fundamental way.

It is for this reason that regulatory frameworks around the world have evolved towards more stability, more transparency, more detailed consultation with stakeholders and a greater concern for the impact of regulatory changes on critical investment.

This view is widely recognised and accepted around the world. The European Commission, for example, recently recognised this, particularly in the context of investment in fibre-optic networks. Neelie Kroes[2], the Vice President of the European Commission, has recently commented that:

> *"Today's guidance to regulators just doesn't give businesses – old or new – the certainty they need to make investments. It's time to change."*
>
> *"The sector needs more certainty to help it invest and grow. I want citizens to start enjoying the benefits of faster, next generation broadband networks."*

[2] *Neelie Kroes, 30 August 2013*, accessible on http://europa.eu/rapid/press-release_MEMO-13-756_en.htm

Given the long pay-back times for investment in fast broadband (20-30 years) the Commission believes more predictable revenue streams for network owners and predictable prices for access seekers will spur investments in further high speed networks. Such incentives are necessary if the EU is to reach its targets to get fast broadband to all citizens and businesses by 2020.

"In the absence of public funding to support better broadband, it's vital that all companies have a stable and consistent system. That is how we can maximise investment and the infrastructure competition that encourages investment," [20]

This approach to regulation means that regulatory authorities around the world follow some standard practices as they formulate and implement regulatory decisions. These include:

- ensuring that all regulatory decisions are fully consistent with sector legislation and are within their powers;
- ensuring that regulatory decisions fit within a coherent overall sector policy and strategy and all contribute to furthering the sector objectives;
- ensuring that decisions are proportionate, appropriate and do not unduly penalise particular operators;
- ensuring that there is broad consultation on regulatory decisions and that the responses submitted during these consultations are fully taken into account; and
- ensuring that Regulatory Impact Assessments are undertaken to ensure that the full impact of decisions have been considered before they are taken.

Conversely, regulators should not make arbitrary decisions without a sound and rational basis in law, policy and regulatory best practice and they should not contradict themselves or reverse decisions or public statements without a clear and robust justification. The draft LLU Regulations, as currently presented, and the process that has been followed to date are not consistent with this.

Firstly, the issuing of these draft Regulations directly contradicts previous commitments that the Authority has made not to introduce LLU without a market review to determine if it is necessary.[3]

The Authority has not undertaken a regulatory impact assessment, despite having made public commitments to do so in the past.[4] It is therefore not possible to determine whether LLU is an appropriate regulatory measure to address any market concerns. This is particularly important as:

- there has been no policy justification given for the draft Regulations; and
- the draft Regulations could only positively affect a small minority of South African broadband users and will likely negatively affect others by diverting investment and competition away from them.

This potentially destabilising regulatory approach comes at a particularly critical time for the industry. Broadband, both fixed and mobile, is growing quickly and network technology is evolving very rapidly. All the stakeholders in the industry are investing large amounts in new technologies and competing to gain market share.

The draft Regulations are also disruptive because of the way in which it arbitrarily focuses on one particular segment of the industry. Although the Authority appears to have brought forward these regulations under sections 38 or 43 of the EC Act which have general applicability and the draft Regulations are, in theory, general in application, they would have the greatest impact on fixed-line networks, particularly Telkom's. They therefore penalise one operator in particular without any explanation or justification as to why this should be the case.

This focus on one particular operator in the context of a general obligation is both arbitrary and disproportionate. This type of decision can only be supported followed a detailed investigation into the way in which the market is functioning and a consideration of all of the regulatory options available to address it.

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[3] Finding 9 on ICASA's Finding Note on the ICASA Framework for Introducing Local Loop Unbundling, 30 November 2011

[4] Finding 8 on ICASA's Finding Note on the ICASA Framework for Introducing Local Loop Unbundling, 30 November 2011

3.3. The negative impacts of this type of regulation are recognized internationally

The likely negative impact of LLU on investment is not specific to South Africa. The impact of enforced facilities-sharing and infrastructure unbundling regulations on network investment has been recognized by academics and policy-makers internationally. In the US, for example, several studies have found that the LLU which was introduced in the 1996 Telecommunications Act resulted in a significant reduction in investment incentives.[5,6,7,8]

LLU has also adversely affected incentives to invest in new technologies and alternative access networks, particularly NGN. A requirement to lease access network facilities such as that contained in the draft Regulations unduly loads the investment risk onto one party – in this case Telkom. If the investment is commercially unsuccessful, Telkom would bear the entire cost. However, if the investment is commercially successful, competitors will be given access to services without assuming any risks or costs associated with development or testing.

This effect has been seen in other countries that have introduced LLU and similar facilities-sharing regulations. In the UK, for example, it is not clear that LLU has had a positive impact on broadband penetration. On the contrary, competition from an alternative technology (cable) which is not subject to regulation in the UK has had a positive impact on both penetration and quality.[9] This experience is consistent with what happened in the US where the number of DSL subscribers increased more rapidly and incumbent companies began to invest in fibre once LLU regulations were lifted.[10] The OECD notes in a recent study that the policy of LLU has been largely superseded by competition between networks.[11]

LLU was introduced in Europe from the mid-1990s onwards.[12] Similar to the US experience, the policy-makers' stated objective for this regulation was to *"[address] the problem of the lack of competition on the local network where incumbent operators continue to dominate*

[5] Pindyck (2007): *Mandatory unbundling and irreversible investment in telecom networks*. Journal of Network Economics
[6] Vareda, (2010*). Access regulation and the incumbent investment in quality-upgrades and in cost-reduction.* Telecommunications Policy
[7] Friederiszick, Grajek & Roller (2008). *Analyzing the relationship between regulation and investment in the telecom sector.* ESMI White Paper No. WP-108-01.
[8] Grajek and Roller (2012): *Regulation and Investment in Network Industries: Evidence from European Telecoms,* Journal of Law and Economics.
[9] Nardotto et al. (2012): *Unbundling the incumbent: Evidence from UK broadband* CEPR Discussion Paper No. 9194
[10] Hazlett (2006)
[11] OECD (2013), *Broadband Networks and Open Access*, OECD Digital Economy Papers, No. 218, OECD Publishing
[12] "Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop"

the market for voice telephony services and high-speed Internet access."[13] The start of LLU regulation in Europe predated the development of fibre access networks and the rules generally still only apply to copper loops.

Outside of these examples, LLU has been introduced in a few other high and middle-income countries. For example, Japan initially introduced LLU in 2000, but this policy was supplemented with subsidies, tax incentives and low interest rate loans for broadband operators. Singapore and Hong Kong introduced it in 2005 and 1995 respectively but mandatory local loop unbundling in Hong Kong was removed after 10 years in order to "*promote investment and consumer choice in high bandwidth customer access networks in telecommunications*".[14]

In middle and low income countries, LLU is rare. In Nigeria LLU was imposed on the incumbent operator however, *"due to the poor state of the infrastructure it is not used in practice. As such the NCC has focused on access to spectrum as a means to facilitating market provision of broadband."*[15] Of the other BRICs countries, only Brazil has mandated the introduction of LLU but this has not yet been implemented.

3.4. The negative impact of the draft Regulations on jobs

Job creation and employment support is a critical consideration in any regulatory decision. As we have stated in the past, we do not think that the implementation of LLU can be implemented without considering the impact on jobs. This was included in the Authority's LLU Framework[16] which looked at the potential implications for job creation and job retention and future investments in the industry.

The negative impact of the implementation of draft Regulations on investment is likely to translate through into jobs. Reduced investment in network infrastructure means fewer network planners, engineers, construction workers are employed.

Telkom is the single biggest employer in the ICT sector with 21 209 full-time employees. Some of Telkom's biggest competitors namely MTN (approximately 5 000 employees) and Vodacom (5 153 employees[17]) who would be beneficiaries of LLU do not contribute as much

[13] http://europa.eu/legislation_summaries/information_society/internet/l24108j_en.htm
[14] http://tel_archives.ofca.gov.hk/en/press_rel/2004/Jul_2004_r1.html

[15] https://www.itu.int/ITU-D/treg/publications/Competitionregulation.pdf

[16] Discussion paper Government Gazette No 34382, 22 June 2011

[17] Vodacom Group Annual Report, Year Ending 31 March 2013

as Telkom to employment in the country. Given the very high priority given to job creation and retention in South Africa, these factors cannot be ignored when the implementation of LLU is being considered.

4. THE DRAFT REGULATIONS WILL HARM THE POOREST AND MOST UNDERSERVED CUSTOMERS IN SOUTH AFRICA

The draft Regulations will have a negative impact on the poorest and most underserved customers in South Africa. This is for two reasons. Firstly, any benefits that do arise from LLU will accrue only to most profitable fixed-line subscribers. Secondly, LLU will reduce Telkom's ability to finance its network – particularly in the most unprofitable areas such as rural regions.

4.1. Any benefits that may arise from LLU will only accrue to the most profitable customers

Telkom is a national operator and it provides telecommunications services throughout the country, both directly to subscribers or indirectly through its wholesale services to other operators. The fixed-line broadband subscriber base is concentrated in urban areas. The flexibility of mobile networks and the lower fixed monthly charges mean that they are the primary means for accessing telecommunications services, including broadband, for the majority of South Africans, including low and middle income households. Telkom does have a critical role to play in delivering these services but this is indirectly through the core network services that it provides to the mobile operators.

Notwithstanding the reference to "radio frequency" in the definition of local loop, in effect the detail of the draft Regulations focuses exclusively on fixed access networks which, in practice, means primarily Telkom's network. To the extent that it brings any benefit to customers, these can only be among the segment of the population which currently has a fixed-line. However, in practice any possible benefit arising from LLU would be even more limited than that.

LLU operators would need to select specific exchanges in which to put their equipment and so would tend to focus on the most profitable exchanges which are all in urban areas. Any direct benefits that may arise from LLU through increased competition would therefore be felt only in these profitable urban exchange areas.

Within these areas, LLU competitors would target the most profitable fixed-line subscribers. These are typically business customers and the fixed-broadband residential subscribers.

LLU operators are less likely to target voice-only customers since they do not generate sufficient revenues to justify the cost of unbundling and customer acquisition.

To the extent that LLU generates any benefits, these benefits could only be felt by this small and highly unrepresentative higher income segment of the population. LLU would bring no benefit to the overwhelming majority of South Africans who currently do not have access to a fixed-line.

4.2. LLU would harm South Africans who are not fixed-line subscribers

The draft Regulations would have a serious negative impact on the financial viability of Telkom's network. Telkom currently has a highly unbalanced tariff structure. This means that the revenue that it generates from line rental is far below the costs of providing the lines. This situation of an ALD has been raised before with the Authority and the Authority committed in its Findings Note to *"as a first step … undertake a public consultation process to establish and Access Line Deficit Recovery Scheme*".

Historically, the losses that were made on the line rental were compensated for by the profits that were made on voice calls. This situation was common for fixed-line incumbent operators around the world prior to liberalization. However, the liberalization of both of the fixed and mobile market has driven down voice revenues, particularly from domestic consumers and put the financing of the ALD under pressure.

Telkom's revenues from fixed broadband and other data services have helped contribute to the financing of the ALD. However, in the consumer market, even the combined voice and broadband revenues fall short of the losses made on access line rentals.

LLU would directly undermine Telkom's financial position. LLU competitors would cherry-pick the most profitable broadband subscribers, thereby removing the additional revenues that Telkom uses to contribute to the ALD. The same process would take place in the Business market. This would seriously undermine Telkom's ability to finance the large losses that it makes on access lines. It is therefore contrary to the legal requirements contained in Sections 37(3) and 43(4) of the EC Act; and further objective 2(z) of the EC Act to "promote stability in the sector".

This situation is significantly worse in rural areas of the country. Currently, the majority of Telkom's exchange areas are unprofitable because the costs of operating the exchanges and the lines in that area are higher than the revenues that those customers generate. The negative financial impact of LLU would therefore particularly hit Telkom's rural networks. It

would make these loss-making parts of Telkom's business even more difficult to sustain financially. It is also important to note that, since customers in these rural areas generate lower revenues and are less likely to be broadband subscribers, they are less attractive to LLU competitors than those in urban areas. LLU competitors are required to invest in each exchange that they want to provide services in. Given the economics of providing services in rural areas, it is very unlikely that they are going to service customers there. These rural customers are therefore most likely to suffer because of the policy's impact on Telkom's ability to sustain the networks there and the fact that they will not receive any benefit that might potentially arise.

Further, the only option to replace the revenues that Telkom loses when LLU competitors target profitable urban subscribers is to raise prices across the board thereby reducing affordability for all.

Added to the cost of the lost revenues arising from LLU, the fixed-line operators will incur a significant cost to implement LLU. This is money that would be unavailable to spend on other purposes such as network upgrades or expansion.

The financial logic of LLU is therefore that it would take money out of Telkom's national network and put it to the benefit of a small proportion of the country's broadband users who are overwhelmingly located in the country's major urban centres.

This policy would seriously undermine Telkom's ability to finance its Universal Service Obligation and will make it even more difficult to maintain network and services in rural areas that are already unprofitable.

5. THE DRAFT REGULATIONS ARE TECHNICALLY NOT FEASIBLE

Without detracting from our position that the draft Regulations are legally invalid, and purely in an attempt to engage the Authority on certain of the specific provisions of the draft Regulations, we would like to make the following comments by way of observation.

The general framework of the draft Regulations, together with the proposed timelines for the implementation of certain aspects dealt with in them, results in the draft Regulations trivialising the technical effort entailed in implementing LLU. In their current form, the draft Regulations make the fundamental assumption that unbundled loops are readily available within the product portfolio of facilities providers, and that getting these services to the market will require no greater effort than the development of the relevant reference offers and making them available to facilities seekers. The definitions for “financial feasibility” and “technical feasibility” as proposed by the draft regulations (which we note appear to be misaligned with those found either in the facilities leasing or interconnection regulations) seem not to appreciate the technical complexity associated with the development of unbundled local loop products and the high capital expenditure required to design and build all forms of LLU products envisaged by the draft Regulations. In light of the above, we consider that the technical complexities of implementing LLU and the large upfront capital injection required to implement it mean that LLU is firstly technically not feasible to achieve within the 45 to 60 day time frames provided for in the facilities leasing regulations; and furthermore in some cases technically not feasible regardless of time.

Within the draft Regulations the Authority, without explicitly identifying such, implies that LLU consists of 3 types of products:

- Full Loop Access (fixed only)
- Shared Loop Access (fixed only)
- Bitstream Access (technology neutral)

Telkom notes that whereas there is only one conceivable product variety of Shared Loop Access, there are at least two product varieties of full loop access and a multitude of product varieties of Bitstream access. The regulations would have any and all of these products being available within 45 days of these regulations coming into force. We submit that such a requirement is technically not feasible to comply with under any circumstance. It is further impractical for Telkom to hypothesize every product variety conceivable under the regulations and respond accordingly. Hence we reserve our rights to furnish further reasons

for technical and/or financial infeasibility were access seekers to make a detailed request for a particular product.

We further submit that Shared Loop Access, as defined in the regulations, does not conform to the technical architecture of modern networks whereby the splitters are no longer on the MDF's, but instead now integrated into DSLAM's. Consequently this mode of LLU is technically not feasible from the outset.

In practice, the introduction of LLU in the manner contemplated in the draft Regulations will require the development of many business processes and systems; the installation of network equipment and databases; the upgrading of building sites; the alignment of procedures; the training of staff; the development of contracts and agreements; etc. All the aforementioned activities, which are essential for the successful implementation of LLU, will inherently harbour their own challenges that will affect the entire local loop unbundling eco-system.

The extensive work that would be required to bring unbundled local loop products to market would include:

- Product development and design;
- Loop preparation and pre-qualification;
- Installation of network equipment and preparation of exchange buildings;
- Upgrading of business and operational support systems;
- Training of staff; and
- Negotiation and development of agreements.

To the rational observer, it should be self-evident that LLU requires:

- Substantial work which, itself carries an opportunity cost to the company;
- Substantial investment which has the risk of not being recovered, putting the financial viability of the product at risk;
- Substantial development period which means that LLU cannot be delivered within a short or indeed predictable period of time.

6. CONCLUSIONS

Telkom again would like to thank the Authority for the opportunity to comment on these regulations. To surmise, we have raised the following key points:

- The gazetting of these regulations is procedurally fatally flawed. Further, on a proper interpretation of the applicable legislation, there is no basis in the current legislation for local loop unbundling in the form contemplated in the draft Regulations. This results in the Authority attempting to embark on a legislative making process beyond the powers available to it in law. These draft Regulations do not take cognisance of the Findings Note: this is administrative action by the Authority which is capable of being challenged on review. Notwithstanding the aforementioned, but with full reservation of our rights, we have engaged with the Authority on the draft Regulations on their merits as a matter of policy and with reference to their possible implications to industry and the country.

- LLU was introduced in developed countries, circa 2000 as an ex ante regulatory remedy to prevent abuses of dominance. In such countries not only was fixed-line teledensity very high per se, however neither 3G, LTE, WiMAX nor fiber-based network had been launched. Now in 2013 the South African telecommunications landscape has dramatically changed to the extent that copper is no longer the dominant access technology, markets have converged, and consequently LLU is obsolete as a regulatory policy.

- The economics of LLU indicate that it is only likely to be applicable in niche wealthy areas, of an already small teledenstiy of 7.5% LLU. Customers of operators will be cherry picked, and non-investing operators receive a “free ride” on the back of operators who take capital risk with private funding. The consequences of such are three fold:

    - Investing operators will have their business cases impaired. This is likely to lead to curtailed or delayed future investments – at a time when South Africa desperately needs capital investment to spur growth.

    - Consumers who have services in less affluent areas will see prices rise, as operators seek to compensate to the financial hit. LLU hence works against the stated objective of lowering the cost to communicate.

    - Consumers without coverage will not suddenly receive coverage, as by definition LLU does not increase teledensity; and in fact increased prices will likely achieve the opposite effect. Hence LLU is contrary to government policy on universal service.

- LLU is a very complex matter that would be mischaracterized as merely facilities leasing. It entails the development of complex products that require substantive time and funding. It is impossible to comply with any regulatory requirement to bring LLU to market within a matter of days. LLU products generally take 18-24 months to develop.

- Furthermore not all forms of LLU are technically possible, and with the modernization of networks through NGNs and the introduction of vectoring onto copper cables, LLU is becoming even less technically possible to implement.

Throughout the course of our response, Telkom has provided facts and figures to substantiate our points, and we trust the Authority will give due consideration to such in their deliberations on the way forward of local loop unbundling.

-END-