
GENERAL NOTICES • ALGEMENE KENNISGEWINGS

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

GENERAL NOTICE 716 OF 2021



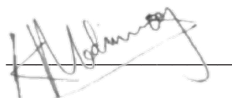
REASONS DOCUMENT FOR THE INVITATION TO APPLY

ICASA - Confidential

1. On 02 October 2020, the Independent Communications Authority of South Africa ("the Authority") published the Invitation to Apply on the licensing process for International Mobile Telecommunications ("IMT") in respect of the provision of the mobile broadband wireless access services for urban and rural areas using complementary bands IMT700, IMT800, IMT2600 and IMT3500 published in the Government Gazette 43768 ("ITA").
2. On 28 December 2020, the Authority received six (06) applications responding to the ITA. Whilst in the process of considering the applications received, on 08 March 2021, the Authority was interdicted by Telkom and e.tv from proceeding with the spectrum auction process.
3. On 22 December 2020, Telkom instituted litigation proceedings against ICASA and 12 others in which it sought substituted service (Part A), an order to interdict ICASA from assessing or adjudicating any applications received by it pursuant to the Invitation to Apply (Part B) and an order to review and set-aside ICASA's decision to publish the ITAs (Part C) ("Telkom Litigation").
4. On 09 March 2021, MTN filed a court application against the Authority's ITA. In the main, MTN's submission is that certain aspects of the Auction ITA are legally flawed, *inter alia*, the provisions relating to the classification of Tier 1 and Tier 2 operators and the inclusion of an Opt-In Scheme ("MTN Application").
5. Subsequently, on 23 March 2021, Vodacom submitted its counter application to have the Court confirm the correct interpretation of the Opt-In Scheme. Vodacom also submitted that it would abide in the relief sought by MTN on the Operator Categorization.
6. Pursuant to settlement negotiations amongst the litigants in the Telkom Application, on 15 September 2021, the Court granted an order, amongst other things, reviewing and setting aside the ITA and referring the matter

back to ICASA for consideration. This led to the withdrawal of the application filed by MTN.

7. In light of the Court Order, the Authority published the first Information Memorandum ("IM") on 01 October 2021 in Government Gazette No. 45255 for public comment by interested parties. The closing date for written inputs was 1 November 2021 at 12h00 and was subsequently changed to 2 November 2021 at 12h00 by publication in a Government Gazette of the said notice.
8. The Authority had received ten (10) written submissions within the deadline of the closing date and time. The Authority analysed the submissions and formulated the second IM which was published for public consultation on the 16 November 2021 in the Government Gazette No. 45496. The Authority also published the reasons document on the same day in the Government Gazette No. 45497.
9. The Authority received seventeen (17) written representations to the second IM within the stipulated deadline and has analysed the submissions and formulated the Invitation to Apply.



DR KEABETSWE MODIMOENG

CHAIRPERSON

ICASA

DATE: 09/12/2021

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1 ACRONYMS

ECA	Electronic Communications Act No. 36 of 2005
ICASA	The Independent Communications Authority of South Africa
ECNS	Electronic Communication Network Services
WOAN	Wireless Open Access Network
MBSI	Mobile Broadband Services Inquiry
PAJA	Promotion of Administrative Justice Act 3 of 2000

2 INTRODUCTION

- 2.1. The Authority has considered the written representations and provides an analysis and positions and reasons for the decisions provided with the ITA.

3. PRELIMINARY ISSUES

- 3.1. e.tv recommends that the Authority should take into consideration its court application against the Minister of DCDT which suggests that this licensing process should not proceed before the court matter is concluded. It further submits that it reserves its rights.
- 3.2. Various stakeholders submitted that their original submissions on previous ITA and First Information Memorandum ("First IM") must be considered and must be read as if incorporated therein (e.tv and SABC).
- 3.3. Vodacom is concerned that the Authority did not properly engage with it on its response to first IM.

Position and Reasons:

- 3.4. With regard to the pending court proceedings, the Authority does not view this as the appropriate forum to address these matters. The Authority believes that these issues fall outside the scope of this current consultation process and will be properly ventilated in court.
- 3.5. The Authority has considered the submissions and revised the IM having taken into account the representations made, further the Authority has indicated in the reasons document to the first IM why it could not accept some of the recommendations made.
- 3.6. To the extent that the licensees are specific regarding the information in their presentation to the first IM which were not considered, the Authority has considered those inputs in formulating the ITA.
- 3.7. e.tv's submission to the first IM was received after the closing time, the Authority advised e.tv accordingly.

- 3.8. The consultation process, the conditions as well as the timelines are contained in the first IM. The Authority shall maintain these as published.

4. WOAN

- 4.1. SMME chambers has enquired about Authority's rationale for suspending the licensing of the WOAN despite the Policy Directive which envisions that the WOAN process and the IMT Auction should run simultaneously.
- 4.2. Sonke Telecoms clearly states that they don't intend on participating in the IMT Auction process and were more so interested in participating in the WOAN. They have also raised concerns around the Authority's decision to suspend the WOAN process contrary to what the Policy and Policy directive has outlined.
- 4.3. The Institute for Technology and Networks Economics (ITNE) submit that it has a serious concern that a state-directed WOAN operating with objectives other than long-run commercial viability might not contribute to a more competitive market. While it has been envisaged that the policy-based WOAN could be privately-owned, it is far from clear where investment would come from, unless it is backed by government-underwritten financial and/or other incentives.
- 4.4. ITNE submit that the WOAN may undermine existing competitive interactions and lead to a less-competitive industry and poorer long-run outcomes for South African consumers. Cemented WOAN arrangements could, and this could be a deterrent to market entry for an entirely new operator.
- 4.5. ITNE submit that the WOAN design appears to serve little other purpose than to provide Telkom with a possibly cheaper roaming option than its current arrangement with Vodacom. This is an object that could be achieved through ICASA regulating national roaming rates – something already recommended in the recent Competition Commission review. However, this option requires considerable caution, as mandatory national roaming is highly deleterious to investment (dynamic efficiency). Nonetheless, a lower-risk non-structural option can be introduced more quickly and likely will have less distorting impact than the WOAN as currently proposed.

Position and Reasons:

- 4.6. The Authority is of the view that the consultation processes in relation to the licensing of IMT spectrum are underway and progressing well. In this regard, the Authority resolved not to publish the envisaged WOAN consultation document on 19 November 2021 as previously communicated.
- 4.7. In the intervening period, the Authority will engage other international jurisdictions to draw lessons from their experiences on the licensing of a typical WOAN.
- 4.8. Based on the outcomes of further engagements and subsequent analysis of the model thereof, coupled with the findings from the IMT spectrum consultation processes (where applicable), the Authority will publish a notice advising of the process to be followed in respect of the licensing of the WOAN by no later than March 2022.
- 4.9. The Authority remains committed to ensuring transparency in its process of issuing the Individual Electronic Communications Network Service (I-ECNS) and Radio Frequency Spectrum licences for the purpose of operating a WOAN.
- 4.10. The Authority further confirms that there will still be radio frequency spectrum set aside for the WOAN even as the auction is taking place, and the Authority is of the view that the licensing of the WOAN will indeed bring much needed structural reform to the mobile voice and data services markets.

5. OBJECTIVES

- 5.1. SMME Chamber acknowledges the objectives at paragraph 3.1 of the second IM on the promotion of small enterprises. The chamber is, however, concerned on how the Authority will fulfil the objective stated in 3.1 when the WOAN process has been suspended.
- 5.2. SMME Chamber further submit that the auction won't promote competition it only favours the existing players. The Chamber would like to know how the Authority will structure its ITA to allow SMME's to gain access to infrastructure and compete at a retail level.
- 5.3. Vodacom states that the Authority's auction design will discriminate against Tier 1 operators. It is Vodacom's view that the proposed auction design would likely undermine ICASA's own objectives, namely the efficient use of spectrum, the universal provision of electronic networks and services, and the promotion of consumer interests, specifically:
 - 5.3.1. The efficient use of spectrum should be considered throughout the auction and not only when considering the pre-qualification criteria and spectrum-sharing provisions;
 - 5.3.2. Due to the outside-in obligation placed on tier 1 operators, valuable spectrum will go unused in urban areas, conversely, valuable spectrum will go unused in the rural areas due to the 80% coverage obligation on non-tier 1 operators;
 - 5.3.3. Universal provision of electronics networks and services could be undermined by the 80% coverage obligation placed on non-tier 1 operators and there is also a risk of the coverage block remaining unsold, given the high cost of achieving 99.8% coverage;
 - 5.3.4. Vodacom also states that the Authority "will not maximise the consumer benefits from the assigned spectrum if competition is distorted, spectrum is not used efficiently, and the universal provision of electronics networks and services is undermined. "

Position and Reasons:

- 5.4. The Authority demonstrated on the second IM as to how the Authority aims to meet its objectives. SMME Chamber in their submission did not indicate how the Authority's proposal to meet the objectives is problematic or unattainable. The second IM proposed the open access obligations and spectrum sharing provision to assist SMMEs to gain access to infrastructure and spectrum should they not participate in the auction.
- 5.5. The Authority's intention is not to discriminate against Tier 1 operators. The MBSI Report found Tier 1 operators to be dominant in the Retail, Wholesale Site Infrastructure Access and Wholesale National Roaming for coverage purposes. The interventions proposed by the Authority are aimed at addressing these market issues.
- 5.6. With regards to the Authority's objectives being undermined by the Auction design, the Authority believes that the measures it has put in place strike an appropriate balance between the objectives. Specifically in relation to the efficient use of spectrum, the Authority believes that this objective will be achieved through:
 - 5.6.1. spectrum sharing which will oblige operators to share the spectrum where it is not used;
 - 5.6.2. pre-qualification criteria which will ensure that only operators who value the spectrum will be licensed;
 - 5.6.3. The societal benefits of spectrum will be experienced by the population in the underserved areas through the outside-in obligation attached to spectrum in the IMT700 and IMT800 bands. This obligation has a time limit which accommodates the commercial interests of operators who will be subject thereto. Provided that an operator fulfils this obligation within the prescribed time period, they will not be restricted from rolling out services in other areas;
 - 5.6.4. The 80% coverage obligation is only imposed on Tier 2 operators who currently cover less than 80% of the population and is

aimed at expanding their coverage towards the realisation of universal access objectives without compromising their ability compete effectively;

- 5.6.5. Vodacom for example, reports to its shareholders that it covers 99.9% with its 3G network¹. Similarly, MTN reports that it covers 99% of the population on 3G². Taking into consideration the coverage target met by Tier 1 operators, the obligation attached to the coverage lot (i.e. 99.8% of the population) can be achieved in a commercially feasible manner within the prescribed timelines. The Authority has deliberately offered a contiguous 2x10 MHz coverage lot and has incentivised bidders by availing this spectrum at a substantially discounted reserve price. In any event, for Tier 1 operators, the coverage obligation attached to 2x5 MHz lot is 97% as opposed the 99.8% of the coverage lot.

¹ <https://www.vodacom.com/pdf/investor/annual-results/2021/presentation.pdf>

² https://www.mtn.com/wp-content/uploads/2021/06/MTN-IAR-2020-Interactive_HR.pdf

6. LEGAL FRAMEWORK

Legal status of the ITA (published as Government Notice 535 of 2020 in Government Gazette No. 43768 of 2 October 2020) and the reasons document

- 6.1. SACF submits that the Authority is not interpreting the court order correctly. It understands the court order to mean that the 2020 ITA has been withdrawn and therefore no longer exists, and it is for this reason that the Authority is advised to start the licensing process from the start. The documents consulted on the first IM, including the competition assessment should also be treated the same as the 2020 ITA. SACF further adds that the arguments that were part of the legal process cannot be considered to form part of the licence consultation.
- 6.2. Telkom is of the view that the approach adopted by the Authority may be flawed in law and has the potential to derail the licensing process because some of the decisions that are repeated complaints that Telkom raised with regard to the licensing process that has since been set aside.
- 6.3. According to Telkom, the Authority has disregarded submissions made by Telkom, particularly, the submissions made by Telkom in response to the economic and competition considerations that should underpin the licensing of high demand spectrum. Furthermore, Telkom states that the Authority failed to provide reasons why it has rejected or intends to reject Telkom's contentions. Telkom also states that the Authority has not refuted the economic analysis written submissions prepared by Berkeley Research Group. Telkom argues that ICASA is duty bound to take the submissions made into consideration and the disregard of Telkom's submission and that of its advisors taints the validity of the purported consultation and is irregular.
- 6.4. Telkom is of the view that there are notable instances in the second IM where ICASA disregards Ministerial Policy Directions, for example, those in respect of the amount of spectrum that has been reserved for the WOAN. According to Telkom, if the departure from the Policy Directions is not for sound reasons, this will adversely impact the validity of the

present licensing process. Thus, for Telkom, even if the Policy Directions are not binding on ICASA, they may not simply be disregarded. ICASA is required by law to consider these directions seriously and only depart from them when there is good cause to do so. Telkom concludes that if the Authority persists with its disregard of the Ministerial Policy Directions, it will also affect the validity of the decision to earmark the remainder of the spectrum for the Auction. Telkom views the court order as the starting point as it states clearly what is reviewed and set aside is the "...decision to publish the composite invitation to apply." Telkom's interpretation is that it would make a nuisance of the court order to suggest, as the Authority does, that the order merely invalidated the publication of the document. Telkom argues that the Authority is duty bound to consider the "matter", being the issue of the assignment of spectrum, including the need to publish a draft ITA, which is the only document that sets out the process and criteria required by the Authority. This, according to Telkom, is clearly an issue that goes to the substance informing an ITA rather than its mere publishing.

- 6.5. Telkom notes that ICASA's interpretation of the order seems to suggest that what was invalidated was the formal act of publishing rather than the substance of the decision that Telkom and other parties sought to challenge. In Telkom's view, it is clear that by remitting the matter back for consideration, the court was ordering ICASA to consider the grounds and issues upon which the review was based. This, for Telkom, includes a new process that takes into account all the issues raised by Telkom and other parties that challenged the decision by the Authority. Telkom states in this regard that it make no sense to merely re-publish the impugned ITA, *albeit*, slightly amended, together with the same documentation and/or reasons that formed part of the previous decision that has been reviewed and set aside. Telkom thus argues that ICASA must consider all the issues raised in the review as it is the substantive matters that constitute the impugned decisions that was reviewed and set aside. Having obtained senior counsel's advice, Telkom contends that the Authority's insistence is mistaken and will constitute a material

error of law which will render the process reviewable in terms of section 6(2)(d) of PAJA.

Publication of a Draft ITA

- 6.6. SACF disagrees with the Authority's argument that it cannot publish a draft ITA. This is a good practice and precedent which the Authority has set. SACF submits that this precedent is demonstrated by the process during 2010/2011 wherein the Authority published the draft ITA despite being withdrawn afterwards, and that the Authority on its first IM indicated in Annexure B that it will publish the consultation document in respect of the Draft ITA for the I-ECNS and Radio Frequency Spectrum Licences for the purpose of the operating a WOAN.
- 6.7. Cell C submits that:
- 6.7.1. Its concerning that the Authority intends publishing a consultation document of the draft amended composite ITA for I-ECNS and Radio Frequency Spectrum Licences for the purpose of operating a WOAN on 19 November 2021, but it is unable to do so on an amended ITA for IMT spectrum.
 - 6.7.2. A new draft ITA must be published thereafter for written comments to avoid any ambiguity, unintended consequences, and further delays.
 - 6.7.3. It would be useful for ICASA to publish an explanatory note with a reasons document with the amended ITA in its draft form thus providing transparency and certainty to interested parties and to the public who intend providing written comments to the draft ITA.
- 6.8. MTN submits that:
- 6.8.1. the publication of the Second IM is welcomed, although they remain of the view that the Authority should publish the ITA for comment in order to enhance the transparency of the ITA process.

- 6.8.2. the Authority must be mindful of its obligations under PAJA and should take care in ensuring that, in its attempts to expedite the licensing process, it does not compromise the process.
- 6.8.3. the publication of a Second IM as opposed to a draft ITA may not be sufficient to remedy the concern around surprises appearing in the final ITA.

Consideration of the ECA

- 6.9. Vodacom reiterates the provisions of the ECA when assigning spectrum in that the Authority must consider Black Economic Empowerment, the development of SMMEs, and to ensure the efficient use of spectrum.

Timetable for consultation

- 6.10. With regards to the timeline for consultation, the SACF has stated that:
 - 6.10.1. It is concerned about the highly truncated timelines which are compromising the licensing process. The truncated timelines are limiting the Authority in considering the written representations which are submitted on complex issues, and also for the public to comment on the published IMs.
 - 6.10.2. Only 10 submissions were considered against the first IM, whereas others were not considered due to them being submitted after the confusion of the closing date for comments. Furthermore, it is difficult to conceive how the Authority considered the complex submissions thoroughly and the economic reports which were part of the submissions were not considered and were rather ignored. This leads to a risk of an administrative challenge.
 - 6.10.3. The first IM was published for 21 days and the Authority took 9 days to consider the submission. Whereas the second IM was published for 9 days and the Authority is to take 7 days to consider the comments, analyse, review, submit for Council decision and publish the ITA. The Authority is urged to strike a

balance between proceeding with speed and caution and propose that the Authority should conduct a legal audit and a proper risk assessment before publishing the ITA. The timelines for consultation are in line with Section 3(4) of PAJA and do not promote efficient process.

- 6.10.4. The first IM published on 01 October 2021 with the deadline of 1 November 2021 at 12h00 and extended to 02 November 2021 was flawed and prejudicial process which resulted in reject submissions of its members. The Authority rejected the condonation since the submissions were going to add value to the process. The process is deemed unfair since the Authority did not create awareness by publishing the media statement like a norm. The extension was published on the Government Gazette on 29 October 2021, which became available only on the 02 November 2021.
- 6.11. Cell C notes that the timelines for the Key Activities as contained in paragraph 12 of the First IM as part of the outline of the process that ICASA intends to embark may be unachievable. Cell C recommends that the timeline requires review and the inclusion of some form of flexibility.
- 6.12. According to Telkom:
- 6.12.1. the Authority is conducting the licensing process in an unduly hasty manner. There is no reason for ICASA not to set aside sufficient time for it to consult adequately with affected parties, to enable interested parties to comment meaningfully and to consider those comments fully and appropriately.
- 6.12.2. For proper consultation, the Authority must provide the consulted parties sufficient time to enable them to give useful advice to the Authority and for the Authority to be afforded sufficient time to consider the advice. Sufficient, according to Telkom, is enough time to synthesise the advice and meet its statutory duty to licence spectrum in the public interest.
- 6.12.3. The truncated process also does not provide interested and affected parties adequate time within which to meaningfully

participate in the process without potentially suffering any prejudice. Further, the truncated timelines have required potential bidders to consider complex competition, legal, technical, and commercial issues and to commit to issues in a short space of time.

- 6.12.4. The contents of the first IM, second IM and Reasons Document, when read together, suggest that ICASA is only going through the motions and not engaging in genuine consultation as contemplated in PAJA and developed in case law.
- 6.12.5. Paul Hjul submits that operators were not afforded sufficient time to scrutinise and comment on the IM by 30 November 2021. Further, this is irrational and in violation of PAJA.

Auction as the chosen method of licensing

- 6.13. Telkom raises that there will be further delays if the Authority pursues licensing of IMT spectrum via auction method, considering that Authority attempted twice since 2016 to licence the high demand spectrum, mainly through the auction process. Telkom is of the view that the complexity and uncertainty with respect to the auction approach may contribute to further delays; and
- 6.14. Further, Telkom argues that the COVID-19 era has changed the communications landscape in South Africa and consequential increased in data traffic on MNOs networks. Furthermore, Telkom submits that the situation will persist in a post-Covid-19 era. Therefore, Telkom avoidance of delays, proposes 2-stage (i.e. Administrative and Auction) process wherein immediate spectrum requirements by constrained MNOs are addressed and the remainder of the spectrum, including additional bands is auctioned.
- 6.15. Telkom rebuts the reasons (section 4.27. of Reasons Document) provided by the Authority in support of the decision it has opted for the auction process as contemplated in the 2021 IM as follows:

- 6.15.1. The Authority has not responded to delay issues as a result of auction approach raised and avoidance thereof nor recognise or dispel any of the arguments made by Telkom;
- 6.15.2. Regarding the reason advanced by the Authority that auction discovers the market value of the spectrum, Telkom argues that knowing the value of the spectrum is not a prerequisite for making optimal spectrum management decision. Telkom states that the Authority has not provided any reasons as to why knowing the spectrum value would assist the Authority in carrying out its mandate.
- 6.15.3. Telkom agrees that the demand for IMT spectrum is high, however, this does not imply that an auction method must be used nor does the Authority argue why this is the case;
- 6.15.4. Telkom states that the reason advanced by the Authority that the auction results in spectrum assignment to the licensee that values spectrum the most might be true in an unrestricted auction. However, with spectrum set-aside for the WOAN, Opt-in scheme and spectrum caps for the other operators as proposed by the Authority, the outcome of the auction will be contrary to the Authority's objective. The objective of the Authority in this regard will be achieved if spectrum were to be acquired by the three major operators and not by smaller operators, including the WOAN. The assertion by the Authority that spectrum will be efficiently used is flawed; and
- 6.15.5. Telkom states that the reason advanced by the Authority that that the auction is the best approach to avoid bias and to ensure transparency might be true in an unrestricted auction. However, Telkom argues that in an auction with restrictions, there will be less transparency. Further, the Authority is mandated to ensure the most efficient use of the spectrum. Therefore, the Authority should carry out its mandate with transparency, the Authority should provide a supporting foundation to such mandate by demonstrating how an auction under the constraints as proposed

can quickly, efficiently and optimally distribute the spectrum given the prior history of attempted auctions and the current uncertainties.

Position and Reasons:

Legal Status of the ITA and Reasons Document

- 6.16. ICASA as the regulatory Authority is empowered by the ECA and Radio Frequency Spectrum Regulations to licence spectrum in line with the prescribed legislative framework.
- 6.17. Regulation 7(1) of the Radio Frequency Spectrum Regulations provides, *inter alia*, that the Authority must publish an ITA where a radio frequency spectrum licence will be awarded / granted on a competitive basis and where it determines that there is insufficient spectrum available to accommodate demand in terms of Section 31(3)(a) of the ECA and further prescribes the content of the ITA.
- 6.18. The formulation of the ITA is thus the first regulatory step that the Authority takes when licencing radio frequency spectrum as the document itself outlines the decisions that have been taken by the Authority on how spectrum will be licenced. The ITA's capture the administrative decision which has been taken by the Authority. In other words, the ITA's capture "the entire matter which is the high-demand spectrum licencing process"³.
- 6.19. The formulation and approval/decision making process related to spectrum licencing is thus done prior to publication of the ITA and consist of various decisions and considerations made by the Authority which include, but are not limited to,:
- 6.19.1. The subject of the ITA;
 - 6.19.2. The place for the submission of the application;

³ Telkom submission terminology used.

- 6.19.3. The application fee,
 - 6.19.4. Any qualification criteria that are applicable;
 - 6.19.5. The terms and conditions relating to the application;
 - 6.19.6. The proposed licence terms and conditions;
 - 6.19.7. The procedures for submission of the application;
 - 6.19.8. The deadline for the submission of the application;
 - 6.19.9. Conditions and procedures for the amendment of an application;
 - 6.19.10. Conditions and procedures for the submission of supplementary information;
 - 6.19.11. Conditions for the disqualification of an applicant from the application process;
 - 6.19.12. The selection process;
 - 6.19.13. The evaluation criteria;
 - 6.19.14. The licensing method the Authority will use, including any of the following:
 - 6.19.14.1. Auction rules;
 - 6.19.14.2. Beauty contest rules; or
 - 6.19.14.3. Any other licensing mechanism deemed appropriate by the Authority.
 - 6.19.15. Any other information or requirements as the Authority may deem necessary.
- 6.20. The ITA's once formulated are approved by the ICASA council and consist of the decisions taken in licencing spectrum.
- 6.21. The publication of the ITA's are thus the procedural step taken by the Authority after formulation and approving an ITA, in compliance with regulation 7(1) of Radio Frequency Spectrum Regulations which now formally informs and invites licensees to apply for spectrum licences.

- 6.22. The court order dated 15 September 2021 did not make any pronouncements on the validity of the decisions taken by the Authority in licencing spectrum. The ITA's being the documents that contain these decisions. The court merely declared the publication of the document invalid and remitted the licencing process back to the Authority.
- 6.23. The Authority is thus currently in the process of licencing spectrum which process was rightfully remitted to them by the court. It is in the process of reconsidering its decisions captured in the ITA's currently approved by their council and shall publish their decision in line with regulation 7(1) of Radio Frequency Spectrum Regulations once the consultation process has been completed.
- 6.24. The Authority thus considers the discussion related to the validity of the ITA's currently approved by the ICASA council as well as the discussion related to how to refer to ITA's which will be published on 10 December 2021 as premature.

Publication of the Draft ITA:

- 6.25. There is no legislative or regulatory obligation on the Authority to publish a draft ITA for public comment. However, the Authority published the second IM to give stakeholders a final opportunity to make inputs on the preliminary provisions that will be contained in the ITA.
- 6.26. An IM communicates the administrative action which ICASA wishes to take when licencing the radio frequency spectrum and calls for comments in line with section 4(3) of PAJA.
- 6.27. The ITA is the document that captures the final administrative action which has been taken and approved by the ICASA council after consultation and can therefore not be consulted upon.
- 6.28. On 15 December 2011 the Authority published a notice inviting comments regarding the Draft Spectrum Assignment Plan for the combined licencing of the 800 MHz and 2.6 GHz Bands and a draft ITA

on the combined licensing of 800 MHz and 2.6 GHz bands for broadband wireless access services. This was done in terms of section 31(3) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) ("the Act") read with Regulation 7 of the Radio Frequency Spectrum Regulations 2011, published in Government Gazette No. 34172, Notice 184 of 2011 ("the regulations").

- 6.29. On 30 March 2015 the Authority repealed the Radio Frequency Spectrum Regulations, 2011 (in its entirety) published in Government Gazette Number 34172 of 2011, through the publication of the Radio Frequency Spectrum Regulations 2015 in Government Gazette Number 38641 (Notice 279 of 2015).
- 6.30. Further, on 30 March 2015, the Authority published the Final Radio Frequency Spectrum Assignment Plan for IMT in Government Gazette Number 38640 (Notices 270 to 278 of 2015). These Radio Frequency Spectrum Assignment Plans (RFSAP) supersedes any previous spectrum assignment arrangements for the same spectrum location.
- 6.31. The draft ITA, which formed part of the consultation process for the development of the Draft Spectrum Assignment Plan for the combined licensing of the 800 MHz and 2.6 GHz Bands and on the now repealed Radio Frequency Spectrum Regulations 2011, was withdrawn through the publication of the Notice in the Government Gazette was never implemented. The draft ITA referred to cannot serve as precedence.

Consideration of the ECA

- 6.32. Vodacom's view that the Authority should consider the provisions of the ECA when allocating spectrum is a reiteration of the provisions of the ECA. The Authority is aligned and has designed this process in accordance with the provisions of the ECA.

Timelines for Consultation:

- 6.33. The administrative decision and procedure being considered by the Authority to licence spectrum was first published for public comment in

an IM - volume 653, of the Government Gazette of 1 November 2019 number 42820, as notice 597 of 2019.

- 6.34. At that time all stakeholders were given until 31 January 2020 to submit their written representations with the licencing process only expected to commence in March 2021.
- 6.35. The licencing process was then interdicted by the courts until 15 September 2021 where a court order was agreed upon which remitted the licencing process back to the Authority, therefore allowing the Authority to continue with its spectrum licencing process.
- 6.36. The court process itself also served as a form of further engagement between stakeholders as all papers filed in court expressed views on the spectrum licencing process which the Authority has also considered.
- 6.37. In addition to the above and in line with section 4(3) of the PAJA, a IM communicating the Authority's intension to licence spectrum and the process was published on 01 October 2021 allowing the public to submit their written representations within thirty (30) working days which included a workshop that familiarised the public with the proposed processed.
- 6.38. An additional fifteen (15) days for consultation have also been provided for further engagement with the public on the administrative decision which the Authority wishes to take with a second IM which was published on 16 November 2021 accompanied by a Reasons Document.
- 6.39. The Authority reiterated the timelines for this licensing process at the workshop, including changing the closing date for the public representations on the first IM to 02 November 2021 due to 01 November 2021 being a public holiday.
- 6.40. Out of the seventeen (17) submissions only two (2) written submissions complained about the set timelines. Most of the SACF members submitted their written submission within the prescribed timelines.
- 6.41. The Authority is thus of the view that it has sufficiently complied with Section 4(3) of PAJA.

Auction as the chosen method of licensing

- 6.42. The Authority's position on the chosen method of licensing, as outlined in the Reasons Document to the second IM, remains the same.
- 6.43. The Authority believes it has satisfactorily demonstrated the basis upon which it has opted for an auction. These reasons are restated hereunder:
- 6.43.1. The Radio Frequency Spectrum Plans, 2015 for IMT700, IMT800, IMT2600 and IMT3500 dictate that these bands must be licensed through an issuance of the ITA, whereas Regulation 7 of the Radio Frequency Spectrum Regulations, 2015 provides the procedure that the Authority must apply when licensing the spectrum that is insufficient to meet demand or where an ITA is published.
- 6.43.2. Regulation (7)(2)(n), outlines the method that the Authority can use in licensing the spectrum. The three methods proposed include the Auction rules, Beauty Contest and any other licensing mechanism deemed appropriate by the Authority. The Authority has opted to use the Auction as means of licensing process because:
- 6.43.2.1. The demand for this spectrum is high – both in terms of the possible number of licensees that may compete for the spectrum and the increased number of bandwidths required by each licensee.
- 6.43.2.2. The Auction discovers the market value of spectrum and ensures that the spectrum will be assigned to the licensee that most values it thus committing resources to use spectrum efficiently.
- 6.43.2.3. Globally, an auction is recognised as the best practice for licensing spectrum in an inclusive, transparent and fair manner without creating doubt of biasness.
- 6.44. The Authority does not agree that the spectrum set-aside and opt-in round will inhibit or compromise objectives which the licensing process

aims to achieve through the Auction. The spectrum set-aside for the WOAN is not part of Auction process, and furthermore the opt-in round is part of the auction design to achieve the specific objective of promoting competition by introducing two additional wholesale national operators that are credible and able to compete.

- 6.45. In relation to the discovery of the spectrum value, the Authority, through a fair process, aims for the market to reveal the value of the spectrum and to ensure that the spectrum falls in the hands of the operators who value it most to the extent that it can be concluded that the assigned spectrum is going to be used efficiently.
- 6.46. In relation to the COVID-19 situation, the Authority has decided to hold a hybrid auction wherein the opt-in round will be done manually, and the main auction will be conducted online.
- 6.47. The Authority has never delayed the auction process in any form, the Authority has provided clear timelines as to how the licensing process is to be seen to conclusion. Regulation 7(2)(n) suggests the clear process the Authority ought to follow in licensing the IMT spectrum. The administration process cannot be efficient, fair and transparent taking into consideration high demand to access this spectrum. The Authority calls for public to participate in manner in which it does not inhibit the finalisation of this process for the betterment of the economy and progressing South Africa.

7. COMPETITION MATTERS

Incorporation of the MBSI and DSMI findings

- 7.1. Vodacom submitted that:
- 7.1.1. The Authority published Draft Regulations as part of the MBSI which are aimed at tackling any competition issues identified in that process. There is accordingly no justification for the auction design to be shaped to provide significant support to non-tier 1 operators or to impose onerous obligations on Tier 1 operators.
 - 7.1.2. The market review process is the most appropriate measure of dealing with any matters related to competition. Any remedies imposed in a market review are re-evaluated every 3-5 years, furthermore this is important because, as observed in South Africa, there is dynamism with respect to competition in mobile markets and evolution in mobile markets. As opposed to spectrum licenses where the license is valid for 20 years.
- 7.2. MTN submits that both the MBSI and the DSMI reports are outdated, highly contested and do not consider the current market dynamics.
- 7.3. MTN submits that if the Authority does not deal with the evidence and submissions provided, it is opening itself up for administrative law challenges, threatening to delay the ITA process yet again. In effect, the Authority has not taken relevant empirical evidence into consideration but bases its findings on outdated empirical evidence. MTN's RBB report suggest that it is comparable to Telkom in term of its position on the Mobile Market, and it submits that it has lost market dominance as from 2019.

Market Design, Structure and Developments

- 7.4. Vodacom states that:
- 7.4.1. Telkom should not be viewed as a smaller operator that requires significant support, Telkom has recorded sustained growth in the mobile market without having access to low frequency spectrum.

- 7.4.2. Furthermore, because of Telkom's roaming agreements with the Tier 1 operators, it stands to gain indirectly through the 99.8 % and 97% population coverage obligation.
- 7.4.3. It is unclear why the Authority would design an auction that would enable Telkom to acquire more low frequency spectrum than it requires to be credible.
- 7.4.4. Telkom argues that the Authority did not engage with the evidence under market structure and spectrum design. It submits that the Authority is attempting to achieve a market structure with at least four mobile operators (four national wholesalers and other entities that might or might not rise to meet the definition of a national wholesaler) and the WOAN. The Authority has thus, limited spectrum availability and defined spectrum caps on this basis.
- 7.4.5. It further submits that the Authority acknowledges the numerous submissions that highlight how international evidence demonstrates that this at-least-5 player market is unlikely to be viable.
- 7.4.6. Therefore, it accuses the Authority of brushing evidence aside by saying that each country can consider its own unique circumstances in prescribing the number of national wholesale operators. It also accuses the Authority of failing to identify the "unique circumstances" in South Africa that it believes might sustain an at-least-5 player market.
- 7.5. MTN is of the view that the Authority has not properly considered all the issues raised by mobile operators in response to the first IM, an example being that the Authority failed to consider the RBB Economics report which was attached to MTN's submissions on the first IM in support of MTN's submission and submissions by MTN and other stakeholders which indicate that South Africa will not be able to support a 4+1 operator market.

Spectrum constraints

- 7.6. MTN submitted that both MTN and Vodacom have invested significantly in their networks in order to compensate for spectrum constraints. While MTN agrees that it is important that spectrum be allocated in a way that preserves competition, international experience dictates that this should be achieved through the efficient allocation of spectrum to a limited number of sustainable and efficient operators.

Tier 1 and Tier 2 Operators

- 7.7. Vodacom submitted that it is not unusual for some regulators to provide support to new/late entrant operators in an auction, however it is of the view that the level of support proposed by the Authority is completely out-of-line with international precedent, especially at this stage of the maturity of the mobile market. Furthermore:
- 7.7.1. Non-tier 1 operators will gain significantly because they will be able to acquire a large amount of valuable spectrum during the opt-in round at low costs which are below market value;
 - 7.7.2. Non-tier 1 operators will face coverage obligations that will be very easy to achieve at minimal cost; and
 - 7.7.3. In contrast, Tier 1 operators will face onerous coverage obligations including the 99.8% population coverage with 5Mbps throughput in Lot 9, the other Tier 1 operator will face a 97% population coverage and the outside-in coverage obligation.
- 7.8. MTN submits that the methodology in defining Tier 1 operators is unknown and the use of 45% in a region is based on a narrow geography which inhibits MTN from bidding in the opt in round. The MBSI is outdated and, contrary to its findings, MTN may not be dominant in any regions. MTN thus disputes the findings in the MBSI.

Roaming Agreements

- 7.9. Telkom submits that the Authority fails to provide sound reasoning for its preferred policies and it is difficult to reconcile with its conclusions with respect to the agreement between Vodacom and Rain.
- 7.10. Whilst the Authority's position contained in the MBSI Findings Document reiterates its view that these deals are pro-competitive, and should not be treated as spectrum sharing, its submission to the Competition Commission states that it considers aspects of the arrangements between Vodacom and Rain, namely Inter-operator Carrier Aggregation (IOCA) as amounting to "spectrum sharing which will be dealt with in terms of the Authority processes."
- 7.11. They further submit that if Vodacom and Rain are sharing spectrum, then the relevant spectrum is clearly accretive to Vodacom's officially licensed spectrum holdings. Therefore, this underlines the need for a much more thorough and robust examination of the other sharing deals.
- 7.12. Paul Hjul submits that the Authority fails to consider the implications of the agreements between incumbent network operators, as a result the Authority has presented a wholly flawed assessment of the competition landscape. Further, that the Authority is operating with irrelevant considerations while ignoring relevant considerations.

Minimum Spectrum Holding for a credible player

- 7.13. Vodacom disagrees with Telkom's alternate MSP proposal as contained in its submission on the first IM. Vodacom lists the following reasons for disagreeing with Telkom:
- 7.13.1. Telkom's rationale of achieving parity with MTN and Vodacom in the sub-1GHz bands post auction is misleading because both operators have legacy subscribers whom they service with the said spectrum, whereas Telkom is a later entrant with legacy subscribers and can thus channel its spectrum holdings on more advanced technologies and can further use its roaming arrangements to serve their legacy subscribers;

- 7.13.2. The amount of spectrum exceeds what operators require in order to be credible;
- 7.13.3. Telkom has excluded key bands in the bands which are above the 1GHz bands; and
- 7.13.4. Three MSP's could reduce competition in relation to bidding which will reduce the prices below market value.
- 7.14. According to MTN, it is not clear why there is a need to have MSP 1 and MSP 2. The two MSPs offered in the Opt-in round could be mapped on MSP 1 given that this is the MSP that required least overall spectrum to achieve wholesale credibility.

Status of Cell C

- 7.15. Telkom argues that the Authority did not engage with the arguments they presented. They submit that the Authority unsubstantiated premises to justify its policy and justify Cell C's status as a national wholesaler on the premise that Cell C has access to a RAN and on the same footing as vertically integrated infrastructure-based operators (as distinct from MVNOs).
- 7.16. Telkom argues that Cell C's self-professed status as a major buyer of wholesale inputs from Vodacom and MTN would put it on a fundamentally different footing from these two operators: a firm relying on its principal rivals for access to key inputs such as all its RAN cannot meaningfully be regarded as a national wholesaler. They further argue that Cell C cannot pose the same competitive constraint to these rivals as a firm that is able to self-supply these inputs.
- 7.17. Telkom also submits that the Authority never engages with the point that Cell C's spectrum is a legacy asset, and that its continued possession of such spectrum may be the principal reason that it has been able to arrive at its current network leasing deal with MTN under which MTN has access to Cell C's spectrum.

Position and Reasons:**Incorporation of the MBSI and DSMI findings:**

- 7.18. The MBSI findings, which were published in March 2021, found that despite market developments, there are still competition issues in the mobile market.
- 7.19. The Authority has taken all stakeholders input into consideration in formulating the second IM. However, the Authority has, through its own independent consultative processes, arrived at findings which the Authority deems valid and have informed the interventions proposed by the Authority.
- 7.20. In the Findings Document the Authority acknowledged that spectrum is an input and may have an impact on wholesale and retail services. Further, the Findings Document states that "any regulatory considerations in relation to spectrum, including remedies, are considered in the Authority's invitation to apply process, and will be assessed in terms of the Radio Frequency Spectrum Regulations and related regulations, rather than as part of this inquiry".
- 7.21. The licensing process is responding to the current market structure. The 5-year licence obligations are intended to address the competition issues as provided in the MBSI findings.

Market Design, Structure and Developments

- 7.22. As stated in the Reasons Document to the second IM, Telkom had considerable spectrum holding but they didn't have any coverage spectrum or sub 1GHz spectrum to be able to provide services in rural areas. This accordingly warrants Telkom being categorised as Tier 2.
- 7.23. The Authority does not agree with Telkom's assertion that it did not fully engage with evidence it provided on market design and market structure.
- 7.24. The Authority has always argued that that the list of countries that Telkom provides to support their contention, that five is not a

reasonable number of competitors, are the ones in which consolidation has primarily occurred as a result of mergers and not as a result of auction design specifically aimed at reducing the number of competitors. Furthermore, fixed lines have been rolled out to only a small proportion of customers in South Africa, and so broadband customers in South Africa rely to a large extent on being connected via wireless technologies, which means a higher number of operators may be supported in South Africa compared to other markets where consolidation has taken place.

- 7.25. Where the South African market is unable to sustain the current group of operators, the operators would either be shut down or be sold. However, what would be inappropriate is for the Authority to purposefully structure its auction in a manner that would serve to reduce the number of competitors in the market. The coverage obligation of 80% to the Tier2 operators does not preclude them from rolling out on the underserved areas. However, obligation aims to support the Tier2 operators to gain traction so that in the future the Tier 2 operators can rollout in the underserved areas. To the extent that the spectrum will not be used in certain areas, it will then be shared.
- 7.26. The WOAN is introduced having considered the policy direction with the clear understanding of the risk associated with it. However, the Authority will put in place mitigating factors against possible inefficient use of the radio frequency spectrum through its licensing process.
- 7.27. The auction design does not force five operators to exist. For example, the Authority does not require that spectrum be only assigned if there are five operators. However, it does provide sufficient spectrum for existing operators to purchase should they choose to. Orchestrating market outcomes as suggested by Telkom (for example, removing spectrum from Cell C which is a going concern and temporarily allocating it to Telkom as suggested) is not aligned with promotion of competition in the market.

7.28. Finally, if Cell C were to exit the market, its spectrum would be reassigned at that point. At that stage the Authority would assess the market and see how best to assign it given the dynamics at that point.

Spectrum Constraints:

7.29. The Authority is of the view that the auction design addresses spectrum constraints of all the players in the market.

Definitions of Tier 1 and Tier 2:

7.30. The issues of Tier 1 and Tier 2 operators have been revised in accordance with the findings in MBSI.

7.31. The Opt-in rounds do not only serve to avail spectrum to Tier 2 operators but also to I-ECNS licensees who do not have any spectrum at all.

7.32. The Opt-in round will be conducted by way of a competitive process where bidding will commence at set reserve prices. While the process is aimed at supporting Tier 2 and other sub-national operators, this will ensure that the spectrum is not undervalued.

7.33. Tier 2 and sub-national operators are necessarily subject to less onerous coverage obligations so as to ensure that they remain credible players in the market.

Roaming Agreements:

7.34. The Authority maintains that it has sufficiently addressed this issue. Its view on the issue is that national roaming has historically been used in South Africa by new entrants and smaller operators to augment their coverage and capacity while they built out a network.

7.35. However, in the last few years incumbent operators MTN and Vodacom have also signed a series of agreements allowing them to roam on the networks of other operators. The agreements in question include that between Vodacom/Rain, Vodacom/Liquid Telecom, MTN/Cell C and

MTN/Liquid. This has largely been to augment capacity due to spectrum constraints.

- 7.36. The question from an economic perspective is whether this should count towards their spectrum holdings for the purposes of the auction.
- 7.37. It can be noted that this is an unusual situation from the perspective of economic regulation. However, the agreements are ultimately a form of network sharing.
- 7.38. Network sharing has both positive and negative economic impacts. On the one hand they allow for optimisation of scarce resources, limits duplication (and as a result can reduce costs and prices) and often assist in entry thereby increasing consumer choice. However, it can lead to a decline in infrastructure competition, as well as competition for coverage or quality. Historically spectrum holdings accessed as part of a roaming agreement would not be considered to be part of the spectrum holding of a company.
- 7.39. Moreover, if we are to look at it strictly in terms of competition there are competing effects.
- 7.40. On one hand (as Telkom argues) it gives incumbent access to a competitive advantage in terms of capacity. This is especially so for MTN in the lower frequencies as it has access to the remainder of Cell C's capacity for roaming and for Vodacom in the 3.5GHz and up range which is suitable for latest technologies. However, at present it can be argued that this in itself is not particularly problematic for competition, given Telkom's extensive spectrum holdings in the mid bands, and the fact that Telkom, Cell C and Rain all utilise Vodacom and MTN for national roaming.
- 7.41. On a forward-looking basis, there may be arguments that together with holdings that can be attained in the auction this may lead to MTN having an advantage in terms of access to capacity in the sub-1GHz and mid bands and Vodacom also having a strong advantage in terms of capacity in the 3.5GHz band. We have simulated the effects and found that while there is symmetry under the current and most assumptions on purchase, there is an asymmetry that develops if we assume that the

full spectrum capacity of those that have signed roaming agreements accrues to the dominant operator. This is particularly evident if we split the 3.5GHz spectrum assigned, given that Vodacom has reached agreements over 3.5GHz spectrum. However, in this scenario we still find that if we look at the mid-level bands together none of the operators breach the spectrum cap which is aligned with the benchmark of Ofcom at about 37%.

- 7.42. Furthermore, it would be too simplistic to consider the agreements only in this light.
- 7.43. Firstly, they help in efficient utilisation of spectrum. It should be noted that these agreements are (i) often not exclusive (ii) do not provide complete access but only provide for access on the remainder of capacity once the needs of the spectrum owner are fulfilled. As such, they in fact make a more efficient use of scarce spectrum. It should be noted that for this reason it would be incorrect to aggregate the spectrum of the smaller operators in consideration of capacity of the dominant operators.
- 7.44. Secondly, they have had a real impact on competition in the market in South Africa in terms of enhancing access to facilities, to national roaming at better terms and in dealing with minimising capital expenditure for operators that are constrained while allowing them to compete. These agreements have allowed for smaller operators such as Cell C and Rain to leverage their spectrum advantage to negotiate favourable sharing agreements. This includes Rain's facilities leasing agreement and Cell C negotiating a managed services agreement. This has had the effect of creating increased services competition in South Africa by maintaining Cell C as a competitor while allowing Rain to expand its offerings. In addition, Telkom and other operators may access additional spectrum via similar agreements with the WOAN in the future.
- 7.45. This is essential to consider in the context of these agreements as it expands the range of competitive options for consumers. As such, while

the agreements do have an effect on competition in mobile markets, this needs to be viewed holistically and weighed up.

Minimum Spectrum holdings for a Credible Operator:

7.46. The Authority has decided it will retain the MSP's as provided in the second IM and the ITA. The opt-in round rules suggest that there will be one winner from MSP 1 and one winner from MSP 2 in the IMT700 and IMT800 bands respectively. The Authority is of the view that this is an efficient way of assigning spectrum through an opt-in round to achieve its objectives.

Status of Cell C:

7.47. The Authority argues that Telkom's submission on Cell C's status is not borne out of facts on the ground. Cell C has decided to sign a services agreement with MTN and decommission their radio access network. Under this agreement, Cell C will still control, operate, and manage its core network. It will build, control, and operate billing, charging, provisioning, policy control, etc.

7.48. As such, Cell C cannot be classed as an MVNO as it still has control of its spectrum and core network. Cell C has further indicated that it would participate in the spectrum auction.

7.49. From a competition perspective, while Cell C may be exiting infrastructure competition and outsourcing the building and maintenance of a RAN network, it would still be competing on services. As such, they should still be considered a competitor within the South African retail market.

7.50. It should be noted that the auction design does not assign spectrum to Cell C. It has simply designed an auction which Cell C or other competitors can bid for based on the assumption that there should not be less competitors in the market than there are at present. This means that Cell C could (and has indicated that it intends to) purchase spectrum and use it to compete. Alternatively, there is still the potential for sub-national operators such as RAIN and Liquid to purchase the

spectrum to increase their offering and build out to become a national wholesaler.

- 7.51. The alternative would have been to design an auction which allows the other three incumbents (Vodacom, Telkom and MTN) a higher spectrum cap (for example, allowing each 25% of the market rather than 20%). This is arguably less pro-competitive than lowering their spectrum cap and allowing for other operators to purchase that spectrum instead.
- 7.52. Finally, Cell C has stated its intention to continue as an MNO. It currently has national subscribers, offers various wholesale services to MVNOs and is still a going concern *albeit* one that is financially constrained. Cell C at present has not decommissioned all its RAN and is undertaking a process which could potentially change should its business change. However, it is still competing for services and retail customers as well as for MVNO wholesale business.

8. SPECTRUM FOR THE AWARD

Inclusion of the IMT2300:

- 8.1. SACF submits that in the spirit of promoting competition that the Authority should include the IMT2300 on this licensing process. SACF understands that the Authority has excluded this band due to the RFSAP which suggested that the feasibility study has to be conducted for the band to be licensed. However, SACF suggest that it is not necessary for the feasibility study since the Telkom has indicated in its recent application to amend its spectrum licence that it had migrated its fixed wireless links out of the band therefore the band is limited to IMT only.
- 8.2. CIVH seeks clarity as to why the Authority has excluded the currently unassigned spectrum in the IMT 2300 MHz for consideration in the ITA and WOAN processes. CIVH strongly recommends that the Authority concludes the feasibility study mentioned above, delays the consideration of the Telkom application until it has concluded that feasibility study, and takes all submissions into account made in response to the Telkom application. It is their view that in doing so, the Authority will find it can conclusively include the available 1 x 40 MHz of ITA 2300 MHz spectrum for licensing in the ITA and WOAN processes.
- 8.3. MTN proposes that IMT2300 should be set aside for WOAN, so the full 116MHz IMT3500 spectrum be available and be awarded in the Auction.
- 8.4. Vodacom notes that in its 2020 ITA, the Authority stated that it would not auction this band as part of this auction as it first needed to conduct a feasibility study to consider the migration of fixed services out of this band and to amend the relevant licenses that do not conform to IMT services. Vodacom is also concerned that Telkom has applied for licence amendment which if successful will result in Telkom having a monopoly in the IMT 2300 band for which there is 5G ecosystem developing. Vodacom suggests that the 2360-2400MHz spectrum should be licenced in this process through Auction.

Inclusion of the IMT700 and IMT800:

- 8.5. SACF supports the inclusion of the IMT700 and IMT800 on this licensing process whether the digital migration is complete or not because it is critical for licensees and the WOAN to efficiently rollout infrastructure. However, SACF is of the view that the digital migration will not be completed by end of March 2022.
- 8.6. SABC submits that it has been participating in various consultation processes of the Authority but never received a response. SABC submitted that it is committed to the analogue switch off process and they have switched off Free State and Northern Cape Provinces working together with DCDDT and other partners. SABC further submits that IMT700 and IMT800 are currently used for broadcasting services and can be only used after the analogue switch-off. The use of these bands should not cause harmful interference to SABC services which are provided to the public and the use should be timed with the analogue switch off.
- 8.7. Cell C notes that there is some uncertainty over the timelines of the digital migration process, many of which may be beyond the control of the Authority, a clear framework for determining the amount to be paid (and other associated terms and conditions) is a clear pre-requisite to being able to sanction bids for spectrum licences in these bands.
- 8.8. Furthermore, Cell C recommends that payment for 700 MHz and 800 MHz spectrum be delayed until after the spectrum becomes fully usable (nationally) by the new licensees, and that the final payment amount be reduced pro-rata from the winning bid amount in the auction in accordance with the remaining licence term at the date of first full usability.
- 8.9. Cell C seek clarity on the licence duration for the 700 MHz and 800 MHz spectrum. Paragraph 7 of the Second IM states that: "a Licence is valid for twenty (20) years from the date of issue taking into consideration the residual analogue and digital television broadcasting service migration below 694 MHz band timescales in South Africa."

- 8.10. Cell C is unclear as to the meaning of this statement, and in particular whether the licence duration is in fact 20 years from the date of issue or 20 years from the conclusion of the digital migration process. Cell C recommends a licence of 20 years from the date of issue, with payment terms adjusted as suggested above in the event of a delay in the conclusion of the digital migration process.
- 8.11. e.tv remains concerned about the digital migration process which the Minister embarked on, and which sets an unattainable deadline by which digital migration must have been completed and analogue "switch off" will take place. This date of March 2022 has been set without the Minister (or the Authority) having engaged in any meaningful form of public consultation in relation to whether or not the date which the Minister has unilaterally determined for the switch off date is realistic or achievable given the requirements of public consultation and the need to ensure that the technical requirements are all in place.
- 8.12. There are a number of reasons why it will simply not be possible for digital migration and the switch off date to take place by the arbitrarily determined March 2022 date. As such, free-to-air broadcasters cannot be removed from the IMT700 and IMT 800 bands until such time as proper consultation has taken place with all affected television broadcasters to ensure that digital migration is effected fairly and does not result in millions of indigent South Africans being without access to free to air television.
- 8.13. e.tv notes that the Authority has not provided any information how the conditions of use in the RFSAP IMT 2015 will minimise the radio frequency interference. Interference has already been experienced during the National State of Disaster while the telcos have made use of the emergency spectrum. Moreover, in making a decision, account needs to be taken of the current Radio Frequency Plan and any contractual obligations which may exist between Sentech and free-to-air broadcasters.
- 8.14. Again, the Authority has not provided any information as to how television broadcasters and prospective winners are meant to ensure

there is no interference. In fact, as set out above, interference is inevitable and will impact broadcasters more than the telco's occupying these bands. The ECA places the responsibility on the Authority to prescribe regulations governing the coordination of spectrum use.

- 8.15. The Authority is mandated to enforce the objects of the ECA and must, *inter alia*, promote the universal provision of electronic communications networks and electronic communications services and connectivity for all; encourage investment and innovation in the communications sector; and ensure the efficient use of the radio frequency spectrum. As such, any use of the spectrum needs to consider and allow for changes in technology which will impact the future of free-to-air broadcasting in South Africa. The fact of the matter is that the future of broadcasting may not be realised on DTT but other developing technologies such as 5G. This needs to be investigated and understood. Moreover, provision ought to be made for existing broadcasters to maintain some of their current spectrum in the 700 to 800 MHz bands, enable them to compete with telco's in the provision of OTT services such as video on demand. After all, with digital migration, these free-to-air broadcasters will have less frequency and will have been deprived of spectrum previously available to them. The Authority has an interest in ensuring that free-to-air broadcasters can continue competing with telcos and the dominant subscription broadcaster thereby ensuring their continued survival. Their role in society is essential and cannot be replaced. It is, amongst others, the only source of free news available to a vast majority of the population.
- 8.16. To fully to assess how spectrum should be allocated the Authority should investigate and understand the absolute use and effectiveness of spectrum in the 5G world and assess whether broadcasters should have access to a portion of the 700 MHz spectrum and coexist with telecommunication companies using these spectrum bands. It is the opportunity created by technological advancements that requires a reconsideration of the most efficient use of spectrum in South Africa for the years to come which will permit for technological advancements and

changes. The Authority should not turn a blind eye to these technological changes in an ever-changing environment.

- 8.17. It is not clear from the IM how the Authority intends to deal with the IMT700 and IMT800 bands and whether they will form part of the auction at all. This is a critical issue which all stakeholders should be consulted on prior to the issuing of the second IM and the final ITA. Should the Authority continue to auction the IMT 700 and IMT 800 bands whilst the digital migration process is not finalised, it is unclear when telecommunications companies will be allocated the spectrum and when they may commence using it.
- 8.18. MTN supports the inclusion of IMT700 and IMT800. The Authority needs to share or publish information of areas where the analogue transmitters have been switched off.
- 8.19. MTN also notes that the definition of the proportional payment is not clearly defined. Will the proportional payment, for example, result in lower Reserve Prices for the Lots available in the IMT700 and IMT800 bands? Will these proportional considerations be communicated to bidders prior to them bidding on the bands and/or Lots? These details need to be clarified so that potential applicants can consider the valuation of the bands and / or Lots affected.
- 8.20. MTN submits that, taking into consideration the unavailability of IMT 700 and IMT 800, the Authority need to adjust the coverage obligations.
- 8.21. Telkom submits that it is the Authority's responsibility to quantify, by way of maps, how much spectrum is usable/ unusable in each lot in the IMT700 and IMT800 bands. Further, that access to the information is necessary for operators to derive accurate roll-out plans, which feed into their spectrum valuations.
- 8.22. Regarding payment discounts, Telkom submits that bidders need full knowledge of physical availability and payment discounts before the auction. This will allow bidders to adequately prepare for the auction and minimise the risk of overbidding or underbidding (financial and strategic harm). Telkom is also of the view that bidders should know the availability of each lot per year of the licence. Telkom asserts that

the Authority should include a formula indicating how the discount per lot will be calculated both for up-front payment and Administrative Incentive Pricing. Telkom takes a position that no auction payments for the Digital Dividend spectrum should be made until these bands have been completely cleared nationally.

- 8.22.1. Telkom also suggests that the Authority considers clawback in case the Authority's projected discount is found to be too optimistic during the licence period.

IMT2600 and IMT 3500:

8.23. MTN states that:

- 8.23.1. It disagrees with the statement that says, "there is sufficient spectrum in the IMT3500 band to ensure that all national wholesale operators can bid for it". The annual report on the current status of 5G in South Africa recommends a minimum contiguous assignment per operator of 80-100MHz. There needs to be alignment between the Authority's annual report and Second IM.
- 8.23.2. In order to ensure a cost-effective deployment of 5G, the Authority should consider releasing all the IMT 3500 spectrum available for licensing in this ITA while issues relating to the WOAN are still being clarified.
- 8.23.3. Telkom submits that IM is silent as compared to the 2019 IM regarding the in-band migration of Rain's assignments in the IMT2600 band since location of Rain's assignment affects the auctionable spectrum range, also taking into consideration the 10 MHz channelisation plan in the band; and
- 8.23.4. That Telkom primarily objects to the inclusion of the 2 MHz and 4 MHz in the main auction unless Telkom and Liquid are given first right of refusal. Further, considering the risk of major operators acquiring the 2 MHz and 4 MHz in the action and consequential technical inefficiency and anti-competitive behaviour.

- 8.24. Liquid Telecoms has noted that the IMT3500 range won't be available in the Opt-in round and it requires to be considered to participate in the Opt-in round in respect of Lot 33 to make up their 54 MHz to 60 MHz of the spectrum in the IMT3500.
- 8.25. The accommodation of this submission would fall outside of the existing minimum spectrum portfolio (MSP) structure for the Opt-in round but Liquid Telecom is of the view that ICASA has rational and lawful grounds to exercise a discretion to include Lot 33 in the Opt-in Round and allow Liquid to participate therein.

Spectrum Set Aside for the WOAN:

- 8.26. CIVH believes the spectrum set aside for WOAN is inconsistent with the policy stipulations and is still not deemed to be sufficient for the WOAN to be a viable entity. They also question why the Authority did not follow the recommendations from the CSIR report on the amount of spectrum for WOAN.
- 8.27. The Authority has proposed that a total of only 80 MHz be set aside for the WOAN in the second IM. According to CIVH this is far less than in the policy, where a minimum total of 115 MHz was prescribed. The second IM therefore proposed 35 MHz (or ~30%) less spectrum be set aside for the WOAN than the amount prescribed in the policy.
- 8.28. The SMME Chamber states that the IMT Spectrum Auction will further increase the gap on spectrum capacity between the players who have spectrum and those who do not have.
- 8.29. The SMME Chamber submit that its members have done calculations and their findings is that the two largest operators in South Africa have approximately 38 MHz of spectrum. Post the auction process, it is estimated that each operator will be licensed for a potential additional 67 MHz resulting in each of the largest operators having approximately 105 MHz of spectrum or more.
- 8.30. The SMME Chamber submit that to achieve effective competition and to level the playing field and to ensure the industry has access to competitively priced capacity, the Chamber submit that the WOAN must

be allocated, at minimum, an equal amount of capacity as one of the MNO's i.e. they give an example and states that if the largest accrual of current and auctioned is 105MHz, the WOAN should be allocated nothing less than this amount of High demand spectrum. It should also have access to other spectrum at no less favourable terms to what will be allocated.

8.31. MTN proposes the following in respect of the WOAN:

8.31.1. Spectrum in IMT2300 must be set aside for the WOAN to avail the full 116MHz IMT3500 for this ITA; and

8.31.2. The IMT 2300 and IMT2600 are likely to be refarmed for 4G to 5G allowing the WOAN to offer 5G services in future.

8.32. Telkom is of the view that if the WOAN is still maintained in the policy, the Authority should determine and set aside sufficient spectrum for it to discharge its policy mandate. Telkom states that the Authority has reserved amount of spectrum for the WOAN that is less than that proposed by the CSIR without justifying such decision. Further, that the Authority has not provided evidence nor benchmark studies in determining the spectrum requirements for WOAN.

8.33. Telkom submits that the Authority only notes, but does not rebut, the critique that facilitating the entry of a WOAN, but setting aside a relatively limited quantity (relative to what Vodacom and MTN will be able to acquire) of spectrum for the WOAN risks both an unsuccessful WOAN and the very spectrum stranding that the Authority expresses concerns over.

8.34. They further submit that the Authority does not address, at least not at any reasonable length, the issue of the WOAN's potentially delayed access to sub-1GHz spectrum or their proposal that the WOAN be the exclusive supplier of access to MVNOs for some period of time.

Spectrum Valuation:

8.35. SACF notes that the second IM seeks to impose additional licence obligations, which includes coverage and social obligations. It submits

that these obligations should not be viewed separately from the reserve price and must be considered in determining the reserve prices.

- 8.36. Cell C acknowledges the explanation of the rationale given by the Authority on the reserve price choices, it is Cell C's view that the reserve prices were based on analysis of valuation and international benchmarks conducted prior to the COVID-19 pandemic and resulting economic downturn. Cell C requests that the Authority re-considers whether, in light of these developments, a reduction in the previously published reserve prices is now appropriate.
- 8.37. SMME Chamber submit that the discounted reserved prices are way too high and that only existing MNO's will participate on the auction and that act as a barrier to entry for all SMMES.
- 8.38. Telkom notes that on page 132 of the Reasons Document, some outputs of the Authority's cost avoidance model are illustrated in Figure 12 therein. In relation to the cost avoidance model, Telkom states:
- 8.38.1. The spectrum licence duration is 20 years; however, the Authority has illustrated avoided cost modelling for years 1-10 only. Notwithstanding that the latter years have a lower time and value of money this is more than compensated for by the fact that traffic is growing and is forecast to continue to grow exponentially. It would appear the Authority may have underestimated the traffic on the network in year 20, and overestimated the costs savings as a result, which would lead to the Authority having calculated a higher reserve price than it ought.
- 8.38.2. It is not clear what the starting spectrum holdings of the assumed operator is. To model an operator with only 1 or 2 lots is incorrect. A cost avoidance model requires a baseline and the savings are the incremental difference between that baseline and a set of scenarios.
- 8.38.3. By modelling only 1 or 2 lots, the Authority has lopped off a large set of permutations. Valuation is nonlinear i.e. the value of three

lots is not the same as 1 lot + 2 lots. Each lot permutation needs to be individually modelled.

- 8.38.4. It is not evident what coverage and geo-type is being modelled. Telkom cannot confirm that obligations associated with the respective spectrum bands have actually been modelled. If not, the model is likely to overestimate costs savings, leading to inflated reserve prices.
- 8.38.5. According to Telkom, the reserve price values contained in Table 3 of the Reasons Document (page 131), have results that look incorrect because the 700 MHz = 800 MHz and similarly 2.6 GHz = 3.5 GHz. Telkom considers this as incorrect because:
- 8.38.5.1. The lower 700 MHz has a greater coverage capability than 800 MHz, however, even if one presumes the same coverage, then the marked difference in practical availability of 700 MHz *vis-à-vis* 800 MHz is significant.
- 8.38.5.2. 2.6 GHz certainly has superior coverage and indoor propagation characteristics compared to 3.5 GHz and is more valuable as a result.
- 8.38.5.3. If one compares the ratio of 2.6 GHz compared to 800 MHz, it is approximately 1:2, which by international benchmarking is incorrect. The expected range is 1:5 to 1:7.
- 8.39. Telkom states that in the Authority's Reasons Document, the Authority claims that discounts have been applied to various bands, whereas in fact an arbitrary 44.4% mark-up seems to have been added. This is after the higher prices were chosen in step 1 of the valuation process.
- 8.40. In Telkom's view, the adjustments made to the figures have all the characteristics of an engineered desired result, particularly in the ratio between the bands, which Telkom had earlier observed appeared to be an error in the first set of calculations. According to Telkom, not only are such adjustments not justified by the Authority in many instances, but this approach is not aligned with any international methodology Telkom is aware of. While Telkom admits that there should certainly be scope

for some discretion in the setting of reserve prices, this should, be limited to easy to remember rounded numbers.

- 8.41. Telkom recommends that the Authority recalculate the reserve prices without making adjustments, so as to arrive at a more scientifically based reserve price. Telkom would expect the Authority to be transparent in the steps and assumptions used to derive the final answer, consulting the industry along the way.

Position and Reasons:

Inclusion of the IMT2300

- 8.42. The Authority notes the proposal to include the IMT2300 on this process. However, IMT2300 band is not available for licensing in this process. The RFSAP for the IMT2300 band is subjected to the feasibility study which is not yet concluded.

Inclusion of the IMT700 and IMT800

- 8.43. The Authority notes that the Minister has committed to complete the digital migration process by 31 March 2022⁴. The Authority will include the IMT700 and IMT800 bands in the licensing process. However, should this deadline not be met, the Authority will continue to auction the IMT700, IMT800, IMT2600 and IMT3500 bands but the Authority will consider the proportional payments on the IMT700 and IMT800 based on the availability of these two bands.
- 8.44. The consultation in this respect resulted in the review and publication of the National Radio Frequency Plan 2013, in Government Gazette 36336 (Notice 354 of 2013, National Radio Frequency Plan, in Government Gazette 41650 (Notice 266 of 2018) in terms of section 34 of the ECA.

⁴ <https://www.gov.za/speeches/minister-khumbudzo-ntshavheni-broadcast-digital-migration-and-analogue-switch-5-oct-2021>

- 8.45. The review was aimed at identifying all the necessary frequency changes which have taken place to ensure alignment with international and national developments.
- 8.46. Further, the review took into consideration the Regional Agreement of Geneva 2006 for the planning of the digital terrestrial broadcasting service in parts of Regions 1 and 3, in the frequency bands 174-230 MHz and 470-862 MHz, whereby the International Telecommunications Union proclaimed the "end of the transition period to digital broadcasting set forth by the GE06 Agreement" through Administrative Circular CR/375 of 19 December 2014 which was set as 17 June 2015 by the ITU Regional Conference of 2006.
- 8.47. Furthermore, the review took into consideration the fact that all Broadcasting Analogue entries in the ITU Master International Frequency Register (MIFR) in the Frequency Band 47 to 862 MHz were deleted in accordance with the provisions number 12.7 of the Geneva 2006 (GE-06) Plan and therefore **are not protected**.
- 8.48. The review therefore, considering the end of the Transitional arrangements, observed the interim transitional arrangement in the Frequencies Band 694 to 862 MHz, given the prescripts of World Radiocommunications Conference 2015, Resolution 760 (WRC-15) regarding the Allocation of the Frequency Band 694 to 960 MHz to the Mobile and its identification to International Mobile Telecommunications (IMT).
- 8.49. The review of the National Radio Frequency Plan is an implementation of an International Treaty entered into by South Africa, in terms of Sections 34(1)(a) read with section 34(2) of the ECA.
- 8.50. Further, the Authority consulted on the development of the Frequency Migration Regulations and Plan 2013, published in Government Gazette 36334 (Notices 352 and 353 of 2013) and the Frequency Migration Plan 2013, published in Government Gazette 42337 (Notices 166 of 2019) in terms of section 34(16) of the ECA.
- 8.51. The Radio Frequency Spectrum Assignment Plans for IMT, published in Government Gazette 38640 (Notices 270, 271, 272, 273 and 274 of

2015), provides in regulation 5.8, that the "criteria and guidelines for interference mitigation are described in Appendix D".

- 8.52. Further, the Radio Frequency Spectrum Assignment Plans for International Mobile Telecommunications (IMT): Notice regarding the erratum to the Final Radio Frequency Spectrum Assignment Plan published in Government Gazette Number 38755 (Notices 388, 389 and 390 of 2015) provides for the transitional arrangement with the addition of paragraph 9.3.
- 8.53. Furthermore, the National Radio Frequency Plan, in Government Gazette 41650 (Notice 266 of 2018) through National Foot Note 8A, provides for Transitional Arrangements.
- 8.54. In addition, The National Radio Frequency Plan took into consideration the fact that all Broadcasting Analogue entries in the ITU Master International Frequency Register (MIFR) in the Frequency Band 47 to 862 MHz were deleted in 2014 in accordance with the provisions number 12.7 of the Geneva 2006 (GE-06) Plan and therefore are not protected and cannot claim any protection from the Mobile Radiocommunications Services Identified for International Mobile Telecommunications.
- 8.55. The Authority assigns IMT in accordance with the allocation made in the latest edition of the National Frequency Plan, approved by the Minister. The assignment of Spectrum is aligned to the Spectrum Regulatory Framework in accordance with the ECA. The assignment of spectrum is made on a Technology and Service neutral basis in terms of section 2(b) of the ECA in order to encourage Mobile Operators to "Refarm" their spectrum assignments in order to keep pace with Technology Generations.
- 8.56. Given the provisions of the Geneva 2006 (GE-06) Agreement read with Resolution 760 of the World Radiocommunications Conference 2015, 'Broadcasting Services' allocation is limited to the frequency band 470 to 694 MHz. It therefore stands to reason that Broadcasting Services cannot co-exist with Mobile Service in the same frequency band and therefore cannot compete.

- 8.57. Further, the Fifth Generation of Networks (5G) are those Technologies that have been certified by the ITU-R, having met the Standard requirements of the IMT2020 as detailed in ITU-R Recommendation ITU-R M.2083 and is contained in ITU-R M.2150 "detailed specifications of the terrestrial radio interfaces of International Mobile Telecommunications-2020 (IMT-2020)". The provisions of this recommendations are limited to Mobile Radiocommunications and excludes Broadcasting Radiocommunications Services.
- 8.58. The Authority confirms that the ITU-R M.2150 contains three proponents who qualified to provide the 5G technology and those only contain mobile applications.
- 8.59. The Authority shall award the Spectrum Licences to the highest bidders upon winning the Spectrum in the Auction on a national basis. The Authority shall, as a license condition, provide that the licensees shall plan the deployment of its network, taking into consideration any Digital Terrestrial Television Broadcasting Services still remaining, in the frequency band 694 to 862 MHz, until these are systematically migrated to below 694 MHz in accordance with the Radio Frequency Spectrum Assignment Plan published in Government Gazette Number 43341 (Notice 284 of 2020).
- 8.60. The Authority suggests that the operators in planning for the auction, must assume the availability of the IMT700 and IMT800. Before the auction commences, the Authority will avail the status of the coverage maps on the IMT700 and IMT800 in collaboration with the DCDT. The formula for proportional payment for the spectrum fees is as follows:

Proportionate Auction Fee = Auction Fee per 2 x 5 MHz BW x
% of population coverage on available IMT700 or IMT800

Proportionate Auction Fee = Auction Fee per 2 x 10 MHz BW x
% of population coverage on available IMT800

Proportionate Annual Spectrum Fee = Annual Spectrum Fee⁵ x
% of population coverage on available IMT700 or IMT800

- 8.61. Both the proportional auction fee and annual spectrum fee will be adjusted as the analogue television switch-off process progresses.

IMT2600 and IMT3500

- 8.62. The rules of the Auction do not preclude 2 MHz and 4 MHz on the IMT3500 to be acquired competitively. The Authority is of the view that it is unlikely for other operators, except Liquid Telecoms and Telkom, not be interested in the 2 MHz and 4 MHz on the IMT3500 due to the fact that the odd bandwidth may not be usable and against the wastage of the activity points.
- 8.63. The Authority envisages to ensure that all the operators who will acquire Lots in the IMT2600 will have access to contiguous spectrum during the assignment stage.
- 8.64. The WOAN also requires the spectrum in the IMT3500 in order for it to be viable and credible by ensuring that the operators can acquire capacity from the WOAN as per 30% offtake obligation.

Spectrum Valuation

- 8.65. In setting the reserve prices for all the Lots, the Authority has determined the reserves prices using the avoided cost model based on the Tier 2 operators and further discounted the reserve prices to ensure that they are fair and will enable more accurate price discovery of spectrum through the auction. International benchmarking was also conducted to verify the veracity of the two models. The Authority has rounded up the reserve prices to the nearest rand.
- 8.66. Regarding the 44.4% (i.e., premium), the Authority's reserve prices as provided in the ITA, is after applying a premium to the discounted

⁵ This will be calculated as per the Radio Frequency Spectrum Fee Regulations, 2010 (as amended).

reserve prices. The premium was applied to guard against the risks of setting low reserve prices to deter frivolous bidding but without setting too high reserve prices which may derail the auction and discourage marginal players with smaller budgets. The Authority is of the considered view that the set reserve prices provide an opportunity for a price discovery of the spectrum bands to be acquired through the auction.

9. OPT-IN LOTS

Opt-In Round/Auction

- 9.1. Cell C requests that the Authority sets out in detail the prescribed framework for the Opt-in auction round, including how this phase of the IMT spectrum auction will work, for example, how much spectrum is each potential Opt-in bidder entitled to win, how would the bidding take place, how are winners going to be determined etc.? Furthermore, provide detailed worked examples for this and the subsequent phase(s) of the IMT spectrum auction.
- 9.2. Cell C requests the Authority to explain the reasoning for the choices of spectrum bands associated with each MSPs and requests that the Authority provide such reasons and the opportunity for bidders to comment, since there are differences between different lots within each band, and certainly between bands and bidders may have different preferences in this regard.
- 9.3. Reverence Telecom would like to know whether the opt-in prices will be determined by the general reserve prices, or will it be determined by other variables and if so, the Authority must demonstrate how the variables would enable Reverence Telecom to plan and budget correctly.
- 9.4. MTN, maintains its initial position that the MSP can be achieved by only considering MSP 1 which is a more efficient way of achieving the objectives. MTN accordingly recommends the removal of MSP 2.
- 9.5. Telkom submits that the Authority doesn't calculate, based on the current spectrum holdings of each operator, the amount of spectrum each operator is eligible to bid for in the opt-in round. Further, Telkom submits its own calculations based on each operator's current spectrum holding as illustrated on page 54 of Telkom's submission and requests the Authority to confirm Telkom's and other operator's eligibility in respect of the spectrum in the opt-in round. Furthermore, the upfront confirmation of the operators' eligibility by the Authority will assist the operators in preparing for auction, including assessing the competition dynamics by Telkom in particular, that will inform Telkom's bid decisions

at the execution time. The latter will result in Telkom mitigating the risk of making incorrect bidding decisions.

9.6. Vodacom seeks clarity on the perceived contradiction between paragraph 6.3 and 6.4 of the second IM. The second IM states that:

9.6.1. Paragraph 6.3 – “Bidders qualified to participate in the Opt-in round are those who do not meet the spectrum requirement for both portfolio 1 and 2, as provided in Table 1....”

9.6.2. Paragraph 6.4 – “A qualified bidder to participate in the Opt-in Auction in respect of any particular category of one of the MSPs, may ...”

9.7. According to Vodacom, it is unclear from these contradictions what the qualification criteria for the opt-in round are. It’s unclear whether an operator that meets the requirements for one MSP, but not the other MSP, would be eligible for participating in the opt-in round comparing bids with different top-up requirements.

9.8. Vodacom seeks clarity on how ICASA will compare the bids across operators when they are bidding for different amounts of spectrum in the opt-in round.

9.9. Vodacom further seeks clarity on the use of the term “as close as possible” in the following paragraph:

*“Provided there is demand, the Opt-in round will result in two bidders ending up with MSPs as close as possible to the two MSPs set out in the Table 1 as the principles set out above allow.”
[Emphasis added]*

9.10. Does it mean that the spectrum holdings have to be above the MSP, or could it be below the MSP?

9.11. Vodacom seeks clarity on whether the Opt-in Auction is a single or multiple bidding rounds due to the contradiction in the following paragraph:

"The Opt-in Auction consists of a single bidding round..."⁷³

A qualified bidder to participate in the Opt-in Auction in respect of any particular category of one of the MSPs, may bid for such lots on offer in that category and will, if acquired by that bidder, eliminate that bidder to bid for additional Lots in the Opt-in round..."⁷⁴

- 9.12. Vodacom believes the paragraph is incorrect as the two winning bidders in the opt-in round do not necessarily need to be sub-national wholesale players.
- 9.13. SACF submits that it questions the determination of the Minimum Spectrum Portfolio as a competitive measure taking into account the spectrum holdings of the operators. SACF submits that taking into account the spectrum holdings together with the market share and operator growth, the Authority may be giving some licensees an unfair advantage as results of being mistaken for a smaller operator or a new entrant to whom pro-competitive remedies should legitimately apply.
- 9.14. Further SACF submits that the Authority should be concerned about MSP 2 which appears to give some licensees an unfair advantage over others because of the current spectrum assignment and urges the Authority to relook the eligibility criteria for MSP 2.

Opt-in Lots

- 9.15. SACF submits that the Authority must publish the outcome of the Opt-in round and it should not be discretionary.
- 9.16. MTN welcomes the exclusion of IMT 3500 in the opt-in round.
- 9.17. Vodacom expressed its disappointment on the Authority's decision to maintain the Opt-in round because it provides excessive support to Tier 2 operators. Of particular concern to Vodacom is that the proposals in the second IM makes it possible for Telkom to acquire 2 x 15 MHz of 800MHz spectrum despite Authority's own admission (2020 ITA) that 2x10MHz is sufficient for Telkom to be credible. Vodacom reckons that the proposed opt-in round will result in 2 x 25MHz of sub-1GHz spectrum being sold during the opt-in round as opposed to 2 x 15 MHz envisaged in 2020 ITA and first IM. This will result in Tier 1 operators

paying artificial inflated prices for sub-1GHz spectrum and having to accept onerous coverage obligations to access the sub-1GHz spectrum.

9.18. Vodacom proposes that:

9.18.1. The Authority should reduce the amount of sub-1GHz spectrum available in the opt-in round to a total of 2 x 15 MHz of 800MHz spectrum across both MSP 1 and MSP 2. This should enable, for example, Telkom or Rain to acquire 2 x 10 MHz of low frequency spectrum, and Cell-C to acquire 2 x 5 MHz of low frequency spectrum, if the Authority considered that this was necessary for Cell-C to be credible. This action will be consistent with the Authority's conclusion in the Reasons Document that "2 x 10MHz of spectrum would be optimum for the wholesaler's credibility".

9.18.2. By reducing the amount of sub-1GHz spectrum available in the opt-in round, 2 x 35MHz would be available for the main auction, leading to a more efficient allocation of the valuable low frequency spectrum by enabling more of the spectrum to be allocated.

9.19. Telkom notes that in the second IM Portfolio 1 and Portfolio 2 are more restricted in terms of proposed opt-in lots in the IMT700 and IMT800 bands. Further, that the Authority in paragraph 7.10 of the Reasons Document hasn't explained its reason behind the restriction imposed on opt-in lots in the IMT700 and IMT800 bands.

9.20. Telkom is of the view that the above-mentioned restriction has severe implications on bidding preparation to strategically understand the various permutations and to turn-around a strategy. In addition to the above, Telkom asserts that the truncated auction process will have an impact in its preparations for the auction.

9.21. Notwithstanding the above-mentioned restriction, Telkom appreciates the merit in the Authority splitting the sub-1GHz opt-in lots between IMT700 and IMT800 bands so not to "block-out" either of the bands for Tier-1 operators in the main auction. However, Telkom raises the following concerns with respect to the manner in which the Authority

has tied the IMT700 and IMT800 bands to respective above 1 GHz band (IMT2600 band):

- 9.21.1. the allocations appear to be engineered with certain Tier-2 operators in mind, specifically, it would appear that MSP 2 is aimed at Liquid Telecoms as there is an extra 2x5 MHz allowance in the <1GHz, which would take into account Liquids unique 2x5 MHz in 850 MHz band.
- 9.22. Regarding the 2 x 15 MHz opt-in lot in the IMT800 band, Telkom is of the view that if either Telkom or Rain were to acquire 2x15 MHz in the opt-in round, there will be a 2x5 MHz lot in the IMT800 remaining in the main auction. Therefore, there is a risk of the remaining 2 x 5 MHz lot in the IMT800 band not being assigned in the main auction taking into account the sub-1GHz spectrum cap. Considering the above, Telkom is of the view that it would be inefficient for Telkom and Rain to consider the 2 x 15 MHz opt-in lot in the IMT800 band.
- 9.23. Telkom is of the view that even if either Telkom or Rain were to acquire the remaining 2 x 5 MHz IMT800 lot in the main action resulting in either Telkom or Rain acquiring total of 40 MHz in the IMT800 band, the acquired 40 MHz might be higher than that required by Telkom in the sub-1 GHz. Consequently, Telkom bidding for capacity spectrum in the IMT2600 or IMT3500 will be limited considering its 45 MHz spectrum cap limit. In light of the above, Telkom is of the view that the proposed opt-in structure will cause harm to Telkom.
- 9.24. Telkom proposes the following as measures by the Authority to address Telkom's concerns raised above:
 - 9.24.1. Reduction of the 2 x 15 MHz lot in MSP 2 to 2 x 10 MHz; and
 - 9.24.2. Enabling bidding for a sub-set of a Portfolio. Consequently, revising the rule in section 6.4 which prohibits bidders from bidding for sub-set of a portfolio (the Authority might require to compare bids for 2 x 10 MHz vs 2 x 15 MHz lots); or
 - 9.24.3. Alternatively, the Authority introduce Portfolio 3.

- 9.24.4. Telkom has provided details of the proposal in respect of the 3 MSPs as illustrated on page 53 of the Telkom's submission.

Position and Reasons

Opt-in round

- 9.25. The Authority had included the rules relating to the opt-in round in the second IM, and has further provided the amended rules in the ITA having considered the latest written representations.
- 9.26. The only operators who presently have enough spectrum to be considered a credible player are Vodacom and MTN. The opt-in process will serve to level the playing field and ensure that all successful bidders have a minimum amount of spectrum to allow them to compete effectively. To allow the auction to proceed without first remedying this situation would compromise the Authority's objectives to promote competition. The Authority is thus proposing that the opt-in rounds be included in the licensing process.
- 9.27. As provided above, the Authority has decided to amend the rules pertaining to the opt-in round having considered various submissions and make the rules simpler to the extent that the Authority is to achieve the objective of the opt-in round with only one MSP. The opt-in round rules suggest there will at most two winners meeting the MSP and with the IMT700 and IMT800 available. The Authority is of the view that this is an efficient way of assigning spectrum through an opt-in round to achieve its objectives.
- 9.28. The Authority will publish the outcome of all the opt-in rounds.
- 9.29. The Authority cannot commit upfront as to which applicants will participate in this licensing process, which applicants will be prequalified and what are their current spectrum holdings to be eligible to qualify for the opt-in round. The Authority will indicate which applicants have been qualified to bid for spectrum and further the rules of the opt-in round will be demonstrated during the bid seminar and mock-auction.

9.30. Operators that will be participating on the opt-in round, their spectrum holding may result in the exact spectrum in either MSP 1 or MSP 2 if they do not have the spectrum at all. However, the operators who have the spectrum holding may top up either on the spectrum below or above 1-GHz which may result in not exactly MSP 1 or MSP 2 in the table therefore, the use of as "close as possible". For example, if Telkom in the opt-in round, can only acquire spectrum below 1-GHz in the MSP 1 their spectrum holding will not necessary match MSP 1 exactly.

9.31. The Opt-in round is a single bidding round that will result in one bidder acquiring additional spectrum to meet MSP 1 and the second bidder acquiring spectrum to meet MSP 2. However, during the bidding the operators are eligible to submit bids to one or both as the opt-in round rules suggest.

Opt-in Lots

9.32. Taking into consideration the submission in relation to the Opt-in lots and opt-round, particularly the issues related to the MSP 2, the Authority has amended the second IM in the ITA as follows:

9.32.1. The Authority has removed the MSP 2 and is left only with MSP 1 taking into consideration that the objectives for the opt-in round can be met with the MSP as provided in the table below:

		IMT Spectrum Sub-1 GHz	IMT Spectrum Above 1 GHz
Minimum Portfolio	Spectrum	2 x 10 MHz	60 MHz

9.33. Provided there is demand, the Opt-in Round will result in two bidders ending up with MSP as close as possible to the MSP set out in Table 1 as the principles set out above allow. The Authority has decided to set aside two Lots of 2x5 MHz on both IMT700 and IMT800 and two Lots of IMT2600. In an event that there is an I-ECNS licensee(s) without spectrum holding, the Authority will increase the spectrum set aside to

six Lots on IMT2600. This will ensure that adequate spectrum in the IMT700 and IMT800 will remain for the main auction since the submission suggested that there is a need that only a minimum spectrum availed in the opt-round to spare for the main auction.

Opt-in Round Rules

- 9.34. After the bidding round closes, the Authority will proceed to determine the winning bids and their associated prices based on the bids submitted during the Opt-in Round. There can be at most two winning bids.
- 9.35. The Authority will rank all bids received for MSP from highest to lowest for IMT700, IMT800 and IMT2600. To this extent, the two highest winning bidders will be based on the highest bids to meet the MSP as provided in the table above.
- 9.36. To ensure that the Lots from both the IMT700 and IMT800 spectrum are split between the two opt-in successful bidders, the Authority has included the second elimination relating to sub-1 GHz in the ITA, as follows:
- 9.36.1. the two successful bidders will end up with the MSP wherein one will acquire the spectrum on the IMT700 and the other in the IMT800.
- 9.36.2. the Authority will next rank all bids received on the IMT700 and IMT800 to establish the highest winning bidders on both bands, respectively.
- 9.36.3. In case there is one highest bidder on the MSP for both IMT700 and IMT800, the highest bidder will be afforded the opportunity to choose the Lots in a preferred band. The second highest bidder will acquire the Lots in a spectrum band which was not chosen by the highest bidder.

10. SPECTRUM CAPS

Overall Spectrum Cap

10.1. According to CIVH the calculation outlined by the Authority in section 6.4 of the second IM is incorrect for the following reasons:

10.1.1. 975 MHz (of the total possible 985 MHz, due to the current guard bands in the IMT 900 and 1800 bands) and not 935 MHz of high-demand spectrum would have been assigned at the auction stage and the spectrum set-aside for the WOAN. Please see the breakdown provided in the table below:

	700 FDD	800 FDD	900 FDD	1800 FDD	1900 TDD	2100 TDD	2100 FDD	2300 TDD	2600 TDD	3500 TDD	Total
Telkom				24	20		30	60		28	162
Liquid				24						56	80
Vodacom			22	24		5	30				81
MTN			22	24		10	30				86
Cell C			22	24			30				76
RAIN				24					20		44
Assigned	0	0	66	144	20	15	120	60	20	84	529
Unassigned	60	60	4	6	0	0	0	40	170	116	456
Total IMT	60	60	70	150	20	15	120	100	190	200	985

10.2. CIVH further states that in order to deliver the Authority's intended outcome of 5 "credible" national wholesale operators, a 20% each share of total assigned spectrum (975 MHz) would then yield a total of 195 MHz of spectrum each. A minimum of 195 MHz total spectrum should therefore be set as the overall spectrum cap and set aside for the WOAN as well.

10.3. MTN supports the exclusion of roaming agreements as part of the calculation for spectrum caps. However, suggests that the Authority needs to take a forward-looking view when setting spectrum caps to the extent that the 3600-3800 MHz band should be included since it is deployed alongside IMT 3500 for mass market 5G application throughout the WOAN.

10.4. Liquid Telecoms supports the spectrum caps proposed in the second IM.

- 10.5. Vodacom suggests that if the Authority decides to keep these spectrum caps, and notwithstanding Vodacom's position that Rain's 3.7GHz spectrum should be included in the existing spectrum holding calculation, they recommend that the second IM be amended to align with the Reasons Document as follows:
- 10.5.1. "Sub-1GHz safeguard cap of 2 x 21 MHz (including existing sub-1GHz IMT spectrum holdings).
 - 10.5.2. An overall spectrum cap of 187MHz (including existing assigned IMT spectrum holdings)".
- 10.6. Telkom submits that the Authority explains that 187 MHz spectrum cap is calculated as 20% of total post-auction IMT spectrum of 935 MHz. However, the Authority never explained how it arrived at the 935 MHz, although it is assumed that it was calculated by excluding the 80 MHz assigned to Rain in the 3.7 GHz band from the initial total spectrum.
- 10.7. Telkom proposes that the Authority should include full details in the Final IM as follows:
- 10.7.1. Current spectrum holdings per operator;
 - 10.7.2. Headroom per operator in relation to the spectrum caps; and
 - 10.7.3. Opt-in lot qualification in relation to Minimum Spectrum Portfolios.
- 10.8. Telkom submits that the sharing deals have a direct impact on the design of spectrum caps and the Authority has not fully addressed this issue. Telkom dismisses the view held by the Authority that even if the sharing deals were accounted for, Vodacom and MTN would not have an undue spectrum advantage when considering the number of subscribers, they support.
- 10.9. Telkom argues that this view ignores the actual utilisation of the network and ignores the enormous capital investment advantage that Vodacom and MTN already enjoy.

- 10.10. Telkom further submits that Telkom's network is busier than MTN's and comparably busy to Vodacom's in terms of data flows relative to spectrum holdings.
- 10.11. Therefore, the Authority's proposed symmetrical cap of 187 MHz per operator will leave Vodacom and MTN with much more headroom than Telkom relative to the data needs of their subscribers. This will be substantially complemented by their advantages in terms of RAN sites.
- 10.12. In addition, Telkom submits that the Authority has not addressed the fact that there will remain a competitive asymmetry between the incumbents, Vodacom and MTN, and other operators until the sub-1GHz is fully available.
- 10.13. Vodacom and MTN will be able to acquire incremental sub-1GHz spectrum and large amounts of additional mid band "capacity spectrum" (approximately 80 MHz), while Telkom would have to make hard trade-offs between acquiring its full quota of sub-1GHz spectrum (i.e., as much as Vodacom and MTN, which would be 40 MHz; and then only on a potentially delayed basis) and acquiring additional capacity spectrum (which would be only 5 MHz if Telkom maximised its sub-1 GHz holdings).
- 10.14. Telkom also submits that the exclusion (from the cap calculation) of 80 MHz of 3.7 GHz spectrum licensed to Rain will end up allowing Rain a great deal of leeway to acquire additional spectrum. The danger is that Rain's motivation to acquire such spectrum is to share or on-sell it to Vodacom or MTN.

Broadband Fixed Wireless Access Spectrum

- 10.15. CIVH submits to the Authority that it should consider including the spectrum assigned for the Broadband Fixed Wireless Access (BFWA) services in the bands 3600-3800 MHz, in calculating spectrum caps.
- 10.16. CIVH also seeks clarity on whether the 24.25 GHz – 27.5 GHz and 27.5 GHz – 29.5 GHz bands held by licensees will be considered in calculating the spectrum caps.

10.17.MTN submits that the Authority's refusal to include the 80MHz assigned to RAIN as part of the calculation of spectrum caps would reduce the total bandwidth assigned which leaves 105MHz of spectrum unaccounted for.

10.18.Vodacom is of the view that:

10.18.1. Rain's 3.7GHz spectrum should be included in the calculation of the overall spectrum caps if it participates in the opt-in round.

10.18.2. If the Authority does not include 3.7GHz in the spectrum caps, then it should provide a clear indication in the ITA as to how it intends to treat the spectrum caps if certain bands (e.g. the 3.7GHz) are converted to IMT services in the future.

10.18.3. The Authority needs to:

10.18.3.1. Specify the caps that it will apply until a further open, fair and competitive IMT assignment process is run when reallocating bands.

10.18.3.2. Clearly indicate the process it will follow to migrate legacy services out of newly allocated IMT bands.

10.18.3.3. Provide clear guidance on the timeline for migration of legacy services out of IMT bands, such that legacy service operators don't hoard the band, through practices such as growing their legacy customer base in anticipation of IMT license conversion.

10.19.Telkom submits that the Authority has rejected Telkom's response to the first IM wherein it argued that Rain's 80 MHz of 3.7 GHz spectrum should be included in the spectrum holdings for purposes of the auction.

10.20.Further, Telkom argues that there is a high probability that the 3.7 GHz band will receive even more recognition by countries as an IMT band following the ITU's World Radiocommunication Conference in 2023 (WRC-23) where the band will be considered for a primary mobile allocation. Furthermore, that the Authority's 5G Report to the Minister recognises 3.7 GHz band as IMT-2020, hence creating an expectation

that the band will receive a formal classification to IMT at some point in the future in South Africa.

10.21. Telkom is of the view that should the Authority during the next 20 years recognise the 3.7 GHz band as IMT2020, Rain will be in violation of the 187 MHz spectrum cap. Further, that it will not be possible for the Authority to take correctives steps at that stage to remedy the matter. Therefore, the proposed remedy by the Authority is irrational and 3.7 GHz spectrum holdings should be included for purposes of auction.

10.22. Telkom does not agree or support the 5 credible market players as proposed by the Authority. Telkom is of the view that the spectrum caps should be calculated based on 3-player or 4-player market.

Position and Reasons

Overall View on Spectrum Caps

10.23. The Authority reiterates that it has designed the auction with pro-competitive outcomes in mind. In particular, it is focused on limiting the amount of sub 1GHz spectrum available to large operators when providing overall caps.

10.24. For example, a Tier 1 players existing spectrum holdings, site dominance and dominance in retail markets are likely to be sufficient for it to be a credible national wholesaler into the future, even if it wins no additional spectrum (particularly sub-1GHz low frequency spectrum) in the auction.

10.25. Whilst the Authority considers the outcome of Tier 1 players not winning further capacity at the auction unlikely, it is possible that Tier 1 National Wholesale Operators winning a large percentage of further sub 1 GHz spectrum at the auction would likely limit the future credibility of the Tier 2 players and a forthcoming WOAN, particularly if the Tier 2 operators wins no sub-1GHz spectrum. It is then appropriate to impose the sub-1GHz spectrum cap of no more than 2 x 21MHz.

10.26. As such conditions that result in an asymmetric allocation of sub-1GHz spectrum (the valuable spectrum that Telkom currently does not have access to) has been explicitly built into the spectrum auction design. For example, there are bundles of spectrum which Vodacom and MTN are not allowed to bid for. It also proposes an overall cap so that each operator is limited in the overall spectrum allocation.

10.27. Secondly, Telkom's understanding of asymmetry differs from that typically used in the design of these auctions. While auctions such as that in the UK by Ofcom have caps in place to prevent significant asymmetry in which one or two dominant operators has far more spectrum than competitors, Telkom appears to want to be treated differently with asymmetry in the opposite direction, namely for itself to be allowed to have a larger spectrum assignment than other operators including small operators such as Liquid and Rain.

10.28. Evidence from economic research suggests that while massively asymmetric spectrum is an issue, competition can occur despite some spectrum imbalances. As such, regulators typically approach competition through set-asides of spectrum for new entrants (as The Authority has done for the WOAN), and limitations on the amount of spectrum that incumbent operators (which Telkom could be classified as given its current spectrum holdings and market share) can purchase. In this instance the Authority has tailored this to Telkom's needs by specifically accounting for the fact that they require sub 1GHz spectrum.

10.29. The Authority is not in the position to provide information about the spectrum requirements that they may have acquired in the main auction relating to the 2020 ITA since the Authority was interdicted from considering the applications.

Broadband Fixed Wireless Access Spectrum

10.30. The Authority only considers the IMT Spectrum holdings currently assigned and to be assigned through this process adding up to 935 MHz, which is used to calculate the spectrum caps excluding bands identified for IMT in millimetre wave bands.

- 10.31. The IMT2020/5G report to the Minister dealt with the bands that were identified for IMT at the World Radiocommunications Conference, 2019. The 3600 – 3800 MHz is currently under study at the ITU towards WRC 2023 for allocation to the Mobile Service on a primary basis. The Authority is of the view that there is no guarantee that this band will be allocated to the Mobile Services.
- 10.32. The Authority acknowledges the possibility that bands such as the 3600 – 3800 MHz band could be identified for IMT by future ITU WRCs. Should the 3600 – 3800 MHz band be allocated to the Mobile Service and identified for IMT, the Authority will undertake a process to assess the spectrum assignments in the band to ensure that the spectrum cap is not exceeded by all licensees.
- 10.33. The Authority will thus not consider the 3600 – 3800 MHz band in calculating the spectrum caps in this licensing process. The calculation of the Spectrum Cap (i.e., 187 MHz) includes all IMT Spectrum holdings of all the licensees plus the IMT spectrum available for licensing in this process and spectrum set-aside of the WOAN and divided by the five (5) credible national wholesale operators that the Authority intends to achieve.

11. OBLIGATIONS

Outside-in Approach

- 11.1. SACF submits that the outside-in approach is an impractical approach as it fails to recognise that the operators who have been assigned spectrum temporarily need to recover their rollout investments and that operators will no longer be able to provide services in urban and metropolitan areas.
- 11.2. Vodacom states that "the outside-in obligation (i.e., the requirement to cover rural areas before being able to deploy the newly acquired 700MHz/800MHz spectrum in urban areas) further increases the costs for Tier 1 operators. Furthermore, as Non-Tier 1 operators do not face this obligation, they would be able to roll-out this spectrum in urban areas sooner and obtain an unjustified competitive advantage relative to Tier 1 operators.

Coverage Obligations

- 11.3. MTN proposes that the Authority publish the parameters that it will use to measure coverage.
- 11.4. MTN submits that coverage lot 9 is unreasonable to the extent that no operator could justify the reserve price discount applied on it and urges the Authority to reduce the obligations attached to lot 9 so as to make it more attractive to bidders.
- 11.5. According to Vodacom the coverage obligations for Tier 1 operators are far more onerous than coverage obligations of Tier 2 operators. According to the 2nd IM Tier 2 operators who acquire spectrum through the Auction will have to meet 80% population coverage requirement. Vodacom sees this obligation as already achieved or very easy to achieve as Tier 2 operators are currently very close or have already achieved this target. In contrast Tier 1 operators are required to achieve 97% population coverage (99.8% population coverage in case of coverage lot) which Vodacom feels is unfair as it will add significant additional costs as compared to Tier 2 operators.

11.6. Vodacom proposes that:

- 11.6.1. All operators who acquire low frequency spectrum should face a 99% population coverage obligation (with 5Mbps). This obligation should be achieved by Tier 1 operators within five (5) years after the digital migration process has been completed. In contrast Tier 2 operators should be given a longer period after the digital migration process has been completed to meet this obligation.
- 11.6.2. The 99.8% population coverage for the coverage lot (Lot 9) obligation is excessive and should therefore be reviewed and designed in the following manner:
 - 11.6.2.1. Two 2 x 10MHz sub-1GHz lots should be created, with a 99% population coverage obligation to be achieved within five (5) years from the time the spectrum is fully available nationally, with a 5Mbps single-user throughput at the edge of cells (as defined in the 2020 ITA). These lots should be in the 700MHz band to facilitate more efficient sharing of the obligation;
 - 11.6.2.2. Any operator securing sub-1GHz spectrum in the auction other than these two lots, should face an initial coverage obligation at 80% of population (with also the 5Mbps single-user throughput obligation) to be achieved within five (5) years from the time the spectrum is fully available nationally. This should increase over a period of another three (3) years to 99% of the population, recognising the lower level of initial coverage of the operators likely to acquire these blocks, but also recognising the need for coverage to customers of all operators.
 - 11.6.2.3. The reserve price for the early-delivery (5 years from national availability) 99% coverage blocks should be set at an appropriate discount to the other blocks, reflecting the incremental cost of achieving the 99% coverage obligation much earlier.

11.6.2.4. All operators obtaining low frequency spectrum should be allowed to achieve coverage obligations through shared roll-out, including spectrum sharing and geographical split, as this will facilitate the speed of roll-out and reduce the costs.

11.6.2.5. The additional 0.8% coverage at 5 Mbps should be achieved by the consideration of a USAF that could be delivered by all operators winning low frequency spectrum.

11.6.3. If the Authority maintains a separate Coverage Lot, there should be:

11.6.3.1. an appropriate discount on the reserve price when compared to other Lots; and

11.6.3.2. 8 eligibility points (instead of 4) otherwise it will be difficult for operators to switch away from this Lot.

11.7. Vodacom's view is that sub-national wholesalers should also face coverage obligations if they acquire spectrum in the main round. Vodacom is of the view that if they don't face coverage obligations there is a risk of inefficient use of spectrum, as the frequencies allocated to sub-national wholesalers may go unused in large parts of the country. Vodacom further added that the Authority has wrongly defined sub-national wholesalers.

11.8. Vodacom submits that the wording "any other" and "any further" on paragraph 11.2.2.1 of the second IM is confusing, as it appears to assume that the Coverage Lot will be acquired by a Tier 1 operator, which contradicts the Authority's position that the Coverage Lot is available to both Tier 1 and 2 operators. Vodacom assumes that the Authority means that all Tier 1 operators who do not acquire the Coverage Lot, but who acquire sub-1GHz spectrum, will be subject to the obligation.

11.9. Vodacom assumes that the Authority means that all Tier 1 operators who acquire sub-1GHz spectrum will be subject to the outside-in approach and suggest the following changes in revision to Paragraph 11.2.2.1 of the second IM:

"Any other All Tier-1 players who do not win the Coverage Lot, but wins ANY further sub-1GHz spectrum, would be obliged to expand coverage at a minimum 97% of the population. Also, the outside-in approach applies to all Tier 1 players, to achieve 92% across all Batch 2 and Batch 3 underserved areas first for the 2x10MHz Coverage Lot across all local and metropolitan municipalities in South Africa within 5 years of issuance of the license"⁵⁷

11.10. On paragraph 11.2.2.3, Vodacom submits that the paragraph is confusing as it implies that there are multiple Coverage Lots (with a 99.8% coverage obligation). Vodacom assumes that the Authority means that both Tier 1 and Tier 2 operators will get the opportunity to bid for the Coverage Lot (i.e., Lot 9). Assuming that Vodacom's understanding is correct, they recommend that the second IM be amended to align with the Reasons Document as follows:

"Tier 1 and Tier 2 Both Tier 1 and Tier 2 operators will have the opportunity to acquire the be required to have one 2x10MHz (on IMT800) Coverage Lot carrying a coverage obligation of ..."⁵⁸

11.11. Telkom states that the Authority has not defined the coverage lot in both the first and second IMs as compared to the 2020 ITA. Further, the industry understood Lot 9 in the IMT800 band as the coverage lot. Therefore, Telkom requests clarity as to how both Tier 1 and Tier 2 will be required to have one 2 x 10 coverage lot in the IMT800 band.

11.12. Telkom argues that it is not practical for any Tier 2 operator than Tier 1 operator to meet the coverage lot obligation.

11.13. Telkom is of the view that Rain is a national wholesale operator based on Telkom's RAN analysis for operators as illustrated on page 64 of the Telkom's submission. Thus, Telkom suggests the coverage obligations should apply to Rain.

Throughput Obligation

11.14. Cell C is of the view that 5Mbit/s cell edge throughput obligation applies "for all national wholesalers who are awarded radio frequency spectrum licenses on spectrum band(s) IMT700 and/or IMT800 within five (5)

years of licence issue". Cell C also understands that no throughput or coverage obligation would apply until five (5) years after the digital migration process has completed. Cell C thus requests the Authority to confirm that this understanding is correct.

11.15.MTN is concerned that the throughput obligation does not take into account the digital migration process.

11.16.Vodacom suggests that the reference to "(i.e. IMT2600, and IMT3500)" is superfluous and risks confusion and recommend that it be deleted on the throughput obligation.

Effective date of the obligations on IMT700 and IMT800:

11.17.It is Cell C's interpretation that if an operator purchases spectrum in only the 2.6 GHz and /or 3.5 GHz bands (and not in the 700 MHz or 800 MHz bands), then no throughput obligation would apply to any spectrum acquired or previously held. Cell C requests the Authority to please confirm that this interpretation is correct.

11.18.Telkom states that there is an apparent contradiction between the effective date of measuring compliance by the Authority in respect of IMT700/IMT800 and the 5-year obligation period. Telkom requires clarity as to whether the Authority meant to say that "the 5-year period shall commence at the date the digital migration process is complete". If so, Telkom proposes that text be clearly indicated as the "5-year compliance period will only commence once the digital migration is completed".

11.19.Telkom submits that if the interpretation of effective date of the compliance period is contrary to the above, then it would not be practical for Telkom to comply with the obligations, citing typical equipment lead times and capital constraints amongst other challenges.

11.20.Therefore, Telkom proposes that the obligations "come into effect from the greater of 5 years after licence issue or 5-years after the completion of the Digital Migration Process".

11.21. Vodacom agrees with the Authority's Reasons Document that the reasonable effective date for compliance with the obligations on IMT700 and IMT800 is from the date the digital migration process is completed. Given this, Vodacom recommends that the second IM be amended to align with the Reasons Document by replacing 'within 5 years of issue of radio frequency spectrum licence' with 'from the date the digital migration process is completed'.

Open Access Obligation for the Industry

11.22. SACF understands that the WOAN is introduced to create a Wholesale Open Access Network that can drive service-based competition and that other licensees are to buy wholesale capacity from the WOAN. It is thus odd for the MVNO obligation to be imposed to the licensees which should be imposed to the WOAN. The Authority is advised to conduct an in-depth review to assess the critical success factors of the MVNOs.

11.23. CIVH recommends that the Authority prescribes the following related to the reference offers:

- 11.23.1. That the pricing includes a reasonable markup on cost, which can be substantiated, and which will still enable competition at the retail level (and a proposal in this regard ought to be made in the application to participate in the auction alternatively in negotiations with the Authority after the auction, as part of the consideration of winning bidders and licensing).
- 11.23.2. That the site owner is prevented from reserving space/capabilities/capacity for themselves for the future, as a mechanism to deny access to any seeker who intends to deploy a service in the shorter term.
- 11.23.3. That the reference offer is not only limited to traditional passive facilities-leasing, but is also required to be extended to other more advanced open-access managed network services such as Multi Operator Radio Access Network ("MORAN") and Multi Operator Core Network ("MOCN") and which are already widely deployed in the South African market today.

- 11.24.MTN submits that it is already selling capacity to MVNO's. However, MVNOs need to have their own base stations and charging capabilities or use the services of a Mobile Virtual Network Enabler ("MVNE") to enable their services.
- 11.25.Liquid Telecoms has previously raised queries with the Authority designed to elicit further information regarding this obligation, with particular reference to:
- 11.25.1. The intended definition of the term MVNO: this is an extremely broad term which covers a continuum of business models ranging from "branded resellers" to "full MVNOs".
- 11.25.2. A branded reseller rebrands SIM cards and sells voice and data on the back of a wholesale volume deal entered into with the host MNO. The strength of the branded reseller is its brand and distribution network: it obtains electronic communications services from the host MNO and resells these without it having a radio network or its own numbering resources. A local example of a branded reseller is Red Bull Mobile.
- 11.25.3. A full MVNO has its own core network and home location register (HLR) as well as its own numbering range. A local example is Lyca Mobile.
- 11.25.4. Liquid Telecoms requests clarity on whether the Authority has a specific form of MVNO in mind. If not, Liquid Telecoms requests the Authority to clarify whether successful applicants at the auction that attract this obligation have a substantial degree of flexibility in how they meet it.
- 11.25.5. The treatment of changes of equity in MVNO partners:
- 11.25.5.1. Will the Authority apply a "once-empowered-always-empowered" approach as is applied to mining licences? The equity ownership of an MVNO partner post agreement is not a matter under control of the host MNO.
- 11.25.5.2. Where the MVNO partner is a licensee, Liquid Telecoms notes that the requirement that the MVNO partner be

51% owned by Historically Disadvantaged Persons (HDPs) exceeds the requirement set out in the Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDGs) and the application of the ICT Sector Code, 2021 ("the Control and Ownership Regulations 2021") that licensees have a minimum 30% equity ownership by HDPs.

Social Obligations for the Industry

11.26.SACF: The zero-rating of website obligation was introduced under COVID-19 regulations, and for the Authority to impose this obligation without understanding the costs of rollout would be negligent and unfairly burden to licensees, and it is not feasible to zero rate an unlimited number of URLs and the Authority needs to limit this. There has been report of data tunnelling through the zero rating of websites. SACF submit that this obligation be removed.

11.27.MTN is aligned in this regard but goes further to propose that the following protection measures form part of the social obligations to protect licensees (and legitimate users) from abuse and fraud:

- 11.27.1. Only static IP address can be zero rated;
- 11.27.2. No cloud-based URLs;
- 11.27.3. No URLs that make use of dynamic IPs;
- 11.27.4. The implementation of a daily fair use cap of 150mb per user (legitimate usage seldom exceeds 100mb per day);
- 11.27.5. 1 GB monthly fair use cap to be implemented for the use of Open Time and Disaster Management URLs;
- 11.27.6. Suspension of URLs that show high levels of Data Tunnelling and abuse.

11.28.MTN also proposes that a process must be agreed with the Authority as to the approval process of which URL's are legitimate for zero rating purposes.

11.29. The Minister is of the view that HDS should benefit the poor in rural and township areas. The Ministry accordingly proposes that mobile operators be subject to obligations to connect public service institutions as follows:

11.29.1. All public schools: 18 520;

11.29.2. Government clinics: 3967;

11.29.3. All government hospitals: 1764;

11.29.4. All unconnected police stations: 567;

11.29.5. All traditional authority offices (tribal offices): 8241.

11.30. The Minister recommends that this proposal should be subject to a 36-month implementation period without the option to pay a penalty. The DCDT should coordinate and finalise the implementation with mobile operators and the Authority should oversee compliance on an annual basis.

11.31. Further to the above, mobile operators have demonstrated that their priorities relate to maximising profit and not facilitate universal access. Deliberate mechanisms would be required to facilitate affordable access to affordable data. The Ministry accordingly proposes that mobile operators will be subject to further obligations aimed at facilitating affordable data prices as follows:

11.31.1. 100GB to the home by 2028 at half of today's price; when 100GB is deemed the minimum consumption of every household;

11.31.2. Packages for students at minimum bundle of 5GB by 2023 at half the price currently prescribed by the Competition Commission; and

11.31.3. Packages for SMMEs at a minimum 10GB by 2023 at half the price currently prescribed by the Competition Commission.

11.32. Liquid Telecoms is questioning why social obligations don't apply to them, but in future is willing to commit in meeting obligations wherever they are providing the service.

11.33. Vodacom states that the obligation to zero- rate during COVID has been subject to large scale abuse and that the measures to mitigate abuse are costly. Vodacom gave examples of other countries who zero rate without being obliged to do so and suggests that the Authority follows suit.

Empowerment and Transformation provision for the industry

11.34. SACF submit that it is plausible to introduce an aggressive approach to transformation. However, the achieving Level 1 within 12 months may be unachievable and be a barrier for other entities that the Authority aims to attract to participate in this process.

11.35. SACF recommends the inclusion of procurement targets but without negating the Authority's proposal for the progression of compliance with the B-BBEE codes. The recommendation considers that the many black-owned companies that are able to supply operators with various services thus becoming a feeder mechanism for more graduated and capital-intensive empowerment.

11.36. The B-BBEE ICT Sector Council is concerned that:

11.36.1. the requirement for licensees to reach a level 1 contributor (B-BBEE status) and maintain such status for the period of the licence is impractical; and

11.36.2. the timeline to attain the level 1 is likely to result in initiatives that amount to fronting or circumvention.

11.37. The B-BBEE ICT Sector Council has proposed that the Authority adopt a phased approach to the attainment of level 1 taking into consideration any effects of amendments that affect B-BBEE status.

11.38. The SMME chamber submits that it acknowledges the objectives of section 3 of the IM and it further states that section 13.2 of the IM provides that a licensee should meet the Level 1 contributor (B-BBEE status). The SMME chamber submit that they would like to know the specific criteria that will be used to enable the IMT spectrum Auction Applicant to meet the objectives. They further submit that an applicant can meet level 1 contributor status without the need to fulfil the 30%

ownership held by HDG, and the Authority must publish how the requirement will be measured and the consequences of not complying with the requirement.

11.39. Liquid Telecoms supports the proposed provision but seeks clarity from the Authority on the application of the "once-empowered always-empowered" rule in this context.

11.40. MTN proposes that an improvement plan be required from the licensee to achieve Level 1 within a reasonable time. The B-BBEE Codes contemplates gradual progression over time, given its B-BBEE rating matrix. The B-BBEE Codes are meant to address the existing transformational gaps thus the need to be relevant to the prevailing conditions, resulting in the continuous evolvement of the regulatory landscape. Case in point is what we understand to be the imminent gazetting of the draft Amended ICT Sector Code, 2020 for public comments by the Minister of Trade, Industry and Competition as well as the recent Companies Amendment Bill, 2021 and Employment Equity Amendment Bill, 2021 which is aimed to be fully enacted by March 2022.

11.41. Vodacom submitted that:

11.41.1. It supports the promotion of B-BBEE but is of the view that B-BBEE requirements set out in the second IM are unreasonable.

11.41.2. It is concerned that the Authority requires licensees to reach a level 1 status within 12 months of attaining the licence. Vodacom states that this is not practical because a level 1 status is the highest that can be achieved.

11.42. Vodacom suggests that the B-BBEE requirements should remain at 30%.

11.43. The Authority has failed to address the problem relating to the language used in Regulation 7(3) of the Radio Frequency Spectrum Regulations as a result of the Authority trying to facilitate eligibility of incumbents to acquire spectrum in the IMT bands.

30% Offtake:

- 11.44. CIVH strongly recommends that the Authority aligns the offtake period to 10 years in both the IM and WOAN ITA's. The longer offtake period of 10 years will further help ensure viability of the WOAN and the Authority is requested to reconsider its position on this point.
- 11.45. Liquid Telecoms has previously raised specific queries to facilitate its understanding of the proposed incentives to the WOAN to be imposed as licence terms and conditions on successful applicants at auction.
- 11.46. Liquid Telecoms submits that the imposition of these obligations as part of this process is premature.
- 11.47. In its prior submissions Liquid Telecoms has objected to these proposed obligations on the basis that it is not possible for applicants to determine what they are being asked to commit to. This remains the case and it is to be hoped that this issue will become clearer through the reconsideration of the WOAN licensing process.
- 11.48. Liquid Telecoms submits that the nature and content of obligations to be imposed on successful applicants and which are intended to act as incentives for the WOAN should be revisited when the Authority is preparing to issue an ITA for the WOAN IECNS and spectrum licences.
- 11.49. Telkom states that mobile operators seldom quote Mbps to users (although a minimum commitment is sometimes used in flat-rate commercial pricing). Instead, the global convention is to measure capacity in some unit of Bytes consumed e.g. GB per user, or PB over all the users. At the wholesale commercial level operators do not conclude agreements in Mbps, however as per the retail level, wholesale agreements are structured in terms of GB consumed, and the WOAN uptake agreements should be no different in this regard.
- 11.50. Telkom asserts that in the absence of a model that will forecast the WOAN capacity in PB for all users, it would be practically difficult to give effect to a 30% WOAN obligation. Therefore, the Telkom requests the Authority to clarify how the obligation would be practically enforced.

11.51. MTN has indicated that the definition of “national capacity” is vague and requires refinement as it should align to the throughput obligations methodology to define capacity at cell edge and should not be theoretical. Alternatively, the Authority should be more specific and state that the definition should be a throughput measure in megabits per second at the cell edge with 30% cell load (or CSIR recommended) capacity.

11.52. Cell C seeks clarity on how the 30% of the WOAN’s total capacity will be calculated taking into consideration that the WOAN will constantly expand its network overtime. Cell C therefore asks how the Authority proposes that compliance with this obligation will be measured and how regularly the mobile operators will be required to revise the amount of capacity they purchase from the WOAN.

11.53. Furthermore, Cell C asks whether the 30% of capacity is to be measured nationally or on a site-by-site basis. Cell C gives the example that, if the WOAN operates 10 sites, then will licensees of IMT spectrum be (collectively) required to procure at least 30% of capacity from each site or just 30% of the total capacity, which could for example consist of all of the capacity at 3 sites and none of the capacity at the other 7 sites.

Position and Reasons

Outside-in Approach

11.54. The COVID-19 regulations were aimed at easing congestions during the pandemic and for operators who currently have network infrastructure to increase their bandwidths. This licensing process aims to ensure that all citizens are connected with reasonable prescribed speeds. The Authority took into consideration the targets that the Tier 1 operators have reached and does not see the outside-in approach as unreasonable.

Coverage Obligations

- 11.55. The Authority will measure the coverage obligations using international best practice and the current standards used by the Authority, which may be incorporated into the licence conditions and terms of the applicants who acquire spectrum.
- 11.56. The 80% coverage obligation is only imposed on Tier 2 operators who currently cover less than 80% of the population and is aimed at expanding their coverage towards the realisation of universal access objectives without compromising their ability to compete effectively.
- 11.57. The Authority understands from the MBSI Findings that Vodacom and MTN covers about 99% of the population on 2G, 3G and 4G. Taking into consideration the coverage target met by Tier 1 operators, the obligation attached to the coverage lot (i.e., 99.8% of the population) can be achieved in a commercially feasible manner within the prescribed timelines. The Authority has deliberately offered a contiguous 2 x 10 MHz coverage Lot and has incentivised bidders by availing this spectrum at a substantially discounted reserve price. In any event, for Tier 1 operators, the coverage obligation attached to 2 x 5 MHz lot is 97% as opposed to the 99.8% of the coverage lot.
- 11.58. The Authority is of the view that Tier 1 or Tier 2 operators that acquire the coverage lot (Lot 9) will have the same obligation to achieve 99.8% coverage.
- 11.59. In terms of Telkom's RAN analysis, there is no evidence to prove that Rain's virtual RAN amounts to population coverage of LTE of above 50%.

Throughput Coverage Obligations

- 11.60. The throughput obligation of 5Mbps on the IMT700 and IMT800 bands will be measured within five (5) years from when the digital migration process is completed.

11.61. The Authority referred to IMT2600 and IMT3500 on the throughput obligation to support the coverage bands to achieve the throughput obligation.

Effective Date of the Obligations on IMT700 And IMT800:

11.62. It is reasonable to require compliance against obligations related to the IMT700 and IMT800 spectrum bands within five (5) years from when the digital migration process is completed. This position will be aligned in the ITA.

Open Access Obligation for the Industry

11.63. Prospective applicants that have been categorised as Tier-1 will:

11.64. Produce a reference offer for site access to be offered to any licensee requesting site access and guidelines, including pricing, timeframes and policies for reserving space on masts. Should the Authority determine, at a later time, that these interventions are not sufficient to enable the efficient operation of this market, the Authority will intervene as appropriate.

11.65. The reference offer set out by the applicant in terms of the above paragraph shall become licence conditions for licences to the two Tier-1 operators issued in this auction process.

11.66. A Licensee assigned spectrum through the auction process will be required to provide open access to MVNOs which must have 51% ownership held by persons from Historically Disadvantaged Persons. MVNO is a wireless communications services provider that does not own the wireless network infrastructure over which the MVNO provides services to its customers.

11.67. This provision shall become a licence condition for licences issued in this auction process. The Licensee assigned spectrum through the auction process shall be required to submit to the Authority within a period of between 3 – 6 months the business plans to ensure that the MVNOs are sustainable for the period of three (3) years.

11.68. These interventions are intended to balance the objectives in the ECA to promote competition within the ICT sector (section 2(f) of the ECA), take the electronic communication needs of the public into account (section 2(y) of the ECA) and promote stability in the ICT sector (section 2(z) of the ECA) on the one hand while refraining from undue interference in the commercial activities of licensees on the other. These interventions balance these objectives in a proportionate manner for the following reasons:

11.68.1. These are the proposed minimum interventions necessary, together with the spectrum caps and floors provided for in this document, to resolve the competition concerns.

11.68.2. The licensees will be able to propose how the interventions can be achieved in the least intrusive manner with the least possible interference in their commercial activities.

11.69. The Authority is of the view that this obligation is important as it will enable the growth of the MVNO market and increase competition at a retail level until the WOAN is fully operational.

Social Obligations for the Industry

11.70. The Authority will consult with the successful bidders and relevant stakeholders to ensure that the zero-rating social obligation is implemented without illegitimate use of URL's during the licensing stage.

11.71. The Authority has decided in support of the SA Connect Policy that mobile operators that obtain spectrum through this process be subjected to obligations to connect public service institutions as follows:

11.71.1. public schools: 18 520;

11.71.2. Government clinics: 3967;

11.71.3. Government hospitals: 1764;

11.71.4. Unconnected police stations: 567;

11.71.5. Traditional authority offices (tribal offices): 8241.

11.72. The connectivity obligation should be implemented within 36 months from the date of the issuance of the radio frequency spectrum licences and the connectivity targets will be shared amongst successful bidders. The Authority will coordinate with the relevant stakeholders to finalise the implementation with mobile operators and the Authority should oversee compliance on an annual basis.

11.73. The SIP 15 considers that the private sector will invest in ICT infrastructure for urban and corporate networks, and government will co-invest for township and rural access, as well as for e-government, school and health connectivity. More recently, SIP 35 envisages rolling out SA Connect Phase 1B⁶.

11.74. The DCDT will coordinate and finalise the implementation with mobile operators and the Authority should oversee compliance on an annual basis.

Empowerment and Transformation Provision for the Industry

11.75. The Authority notes the proposed amendments to the B-BBEE codes and the phased implementation to reach the required level 1 contributor status. The B-BBEE Council did not make proposals as to what the phased approach entails.

11.76. The Authority aligns itself with the following empowerment obligations which are intended to promote B-BBEE, in addition to what is already prescribed in terms of regulation 7 of the Radio Frequency Spectrum Regulations, 2015:

- 11.76.1. a licensee would have to, within 36 months of the promulgation of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDG) and the Application of the ICT Sector Code, 2021 (HDI Regulations), reach a minimum of Level 4 contributor (B-BBEE status) in terms of the Codes of Good Practice, applicable to the ICT Sector, published in terms of

⁶ See: https://www.gov.za/sites/default/files/gcis_document/202007/43547gon812.pdf

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section 9 (1) of the B-BBEE Act and maintain such status for the period of the licence in line with regulation 4(4) of the HDI Regulations.

- 11.76.2. this empowerment provision would be imposed together with the prescribed prequalification criteria as outlined in regulation 7 (3)(d) of the Radio Frequency Spectrum Regulations, 2015 as amended.

30% offtake obligations

11.77. The Authority is of the view that the practicality of the WOAN is addressed by the inclusion of the incentives to the WOAN, wherein the applicants that are to be assigned the radio frequency spectrum through the auction process shall procure a minimum of 30% national capacity from the WOAN collectively as soon as the WOAN is operational for a period of five (5) years.

11.78. Further, the determination of what constitutes national capacity will be decided as commercial arrangements depending on the requirements and needs of the respective operators.

11.79. The 30% national capacity to be procured from the WOAN will be shared proportionally to the amount of the spectrum acquired from the Auction amongst the successful licensees.

11.80. The 30% national capacity uptake in the WOAN will be imposed on all successful applicants as licence terms and conditions in accordance with regulation 7(e) of the Radio Frequency Spectrum Regulations, 2015 as amended.

Exclusion of Tier 2 Operators from the Coverage Lot

11.81. The Authority is of the view that both Tier 1 and Tier 2 operators may acquire the coverage lot provided that they meet the spectrum cap for sub-1GHz spectrum. This will be provided for in the final ITA.

12. SPECTRUM SHARING

- 12.1. SACF submit that spectrum sharing should be premised on licensees having full access to the spectrum assignment and being fully available for use.
- 12.2. The Authority received the following submissions from the Association of Progressive Communications (APC) in respect of spectrum sharing:
- 12.2.1. APC encourages and recommends the Authority to adopt a “use-it-or-share-it” provision for IMT Spectrum licenses that will be issued through the ITA. According to APC, the inclusion of the “use-it-or-share-it” provision will increase digital inclusion by unlocking innovation in service delivery in underserved regions by WISPs and community networks in South Africa.
- 12.2.2. APC adds that spectrum licenses for mobile services are typically national in scope. However, the business models of national mobile operators are naturally oriented towards investment in infrastructure in more densely populated urban areas where the customer base is larger and income levels are higher. The result is that the spectrum in many rural areas lies unused, even though assigned to an operator.
- 12.2.3. APC provided an example of Cell C, which has been reported that they have switched off their networks in some provinces, leaving a large amount of spectrum assigned and unused. APC provided evidence where regulators in parts of the world (such as the USA, Germany, Canada, and United Kingdom) have unlocked access to spectrum in areas where operators have no strategic interest.
- 12.3. MTN has indicated that:
- 12.3.1. It supports spectrum sharing based on commercial negotiation and request that ‘fully utilised’ be defined.
- 12.3.2. MTN proposes that the Authority amend the wording in 11.6.2.1 to 11.6.2.3 below as follows:

“11.6.2.1 to share unused spectrum in all areas to ECNS licensees who may, *inter alia*, combine licensed spectrum in any innovative combinations in order to address local and rural connectivity in some municipalities including by entrepreneurial SMMEs;

11.6.2.2 to surrender the radio frequency spectrum licence or portion of the unused assigned spectrum in accordance with Radio Frequency Spectrum Regulations, 2015; and
11.6.2.3 the Authority has the power to cancel the issued radio frequency spectrum licence in accordance with the Radio Frequency Spectrum Regulations, 2015.”

- 12.4. Vodacom states that it does not want to share spectrum and wants the Authority to allow exclusive use of spectrum.
- 12.5. Vodacom states that the requirement to share spectrum will result in opportunistic operators identifying areas where spectrum is not being used and insist on spectrum sharing. Further, Vodacom states that spectrum sharing should be voluntary.
- 12.6. Telkom submits that it does not support spectrum sharing as proposed in the IM. However, Telkom proposes that the Authority differentiate between ‘encourage spectrum sharing for efficient use’ and ‘for rollout of networks’ rather focusing on compliance of licence conditions. Further, that acquiring national licence goes with an option for network built in areas beyond their initiation coverage for years 5-20 (i.e. up to the period of licence). Therefore, it would be irrational for the Authority to expect the licensee to surrender the spectrum licence.

Position and Reasons

Spectrum Sharing:

- 12.7. The Authority recognises the need for the radio frequency spectrum to be shared with ECNS licensees in areas that spectrum is not utilised to

stimulate competition, promote SMMEs and cooperatives, and ensure that the radio frequency spectrum is used efficiently in accordance with section 2 (f), (p) and (e) of the ECA, respectively. The Authority is aligned with the views of use it or share it and has accordingly included the spectrum sharing obligation in the second IM.

- 12.8. The spectrum has to be used efficiently, and where spectrum is not used, including the IMT700 and IMT800, it should be shared.

13. LICENSE DURATION

- 13.1. MTN requests clarity whether the duration of the licence will be extended beyond the 20 years as a consequence of the delays occasioned in completing the digital migration.

Position and Reasons

- 13.2. The Authority has already included 5 years within the 20 years licence period to provided leeway for the delays associated with the broadcasting digital migration.

14. QUALIFICATION STAGE

Assessment of Applications

- 14.1. Telkom submits that the assessment of applications in terms of criteria set out in regulation 6(2) of the Radio Frequency Spectrum Regulations, 2015 is not entirely relevant to auction, given that the Authority has set out the disqualification criteria. Further, the assessment criteria is relevant to the administrative process (e.g. Beauty Contest).
- 14.2. Telkom states the Authority should only solicit information which is necessary to ascertaining the status of operators to determine pre-qualification.
- 14.3. Telkom is of the view that operators who do not own and fully operate their RAN (including Virtual RAN) should be disqualified from the auction process since they do not have any networks and are not operating under their ECNS licence. Therefore, such operators are not entitled to access to spectrum. Telkom states that the disqualification should be extended to all new entrants in the opt-in round that might acquire spectrum for the purposes of sub-letting to or sharing with Tier 1 operators in particular.
- 14.4. In light of the above, Telkom proposes that the Authority includes questions in the qualification criteria pertaining to the technical aspects of ownership and operation of the RAN to ascertain that there is no spectrum sharing, sub-letting occurring without the Authority's approval.
- 14.5. Telkom also proposes that the Authority perform operator solvency checks for bidders to ensure that winning bidders would be able to construct the networks and efficiently use the spectrum.

Position and Reasons

- 14.6. The Authority is of the view that any I-ECNS licensee can participate in this licensing process provided that they comply with the criteria set out in the ITA to the extent that it is in accordance with the Radio Frequency Spectrum Regulations, 2015.

15. BANK GUARANTEE

- 15.1. Vodacom proposes that the proposed deposit of R10m appears to be insufficient to secure that all bidders are able to meet the cost of their bids. Vodacom further suggests that additional deposits may be called for.

Position and Reasons

- 15.2. The Authority wishes to attract as many licensees to the Auction in a fair, transparent and inclusive manner. The Authority has included a provision in the ITA requiring increases in the bank guarantee during the Auction Stage when necessary. The amount and the deadline for submission of the additional guarantees will be communicated to each Bidder.

16. AUCTION STAGE

- 16.1. SACF welcomes the hybrid auction methodology as it allows teams to bid from different locations. However, the Authority should provide the mitigation strategies that would apply in the event of technical challenges during the actual auction.
- 16.2. Cell C notes that Authority intends to conduct the Main Auction using an online system. However, no specific reference is made as to whether the Opt-in round of the auction will also be conducted online. Paragraph 15.2.4 of the Second IM states that "the Authority will prepare a bid form for each eligible Bidder to fill out and return to the Authority during the Opt-in Round", implying that it may be a paper-based format held in a centralised location. Could ICASA please clarify the location and nature of the Opt-in round?
- 16.3. MTN states that:
- 16.3.1. Paragraph 15.1.4 of the second IM sets out a frequency assignment. Since the bids in the main auction are for specific Lots, the Authority is requested to explain why an assignment stage is necessary. Furthermore, would main auction bidders select blocks prior to MSP Opt-In Round bidders or *vice versa*?

- 16.3.2. It is critical to obtain clarity as to how the Assignment stage will be organised to allow bidders to obtain approval for their bidding strategies.
- 16.4. Vodacom welcomes the Authority's proposal in relation to holding the auction online and standard Internet browsers, Vodacom suggests that in case of a bid team emergency, the Authority should consider a temporary halt to the auction. Finally, Vodacom further suggests alternative bid placement methods.
- 16.5. Vodacom advises that all bidders must be able to observe a log of their own access attempts to the system, and that the round times (and breaks between rounds) should be sufficient to allow bidders to switch between their main bidding systems and any back-up systems.
- 16.6. Vodacom seeks clarity in the auction rules for the main stage of the auction, in particular the decision that set percentage increments will be applied for new bids, rather than allowing bidders just to name any price above the current standing high bid which could lead to very slow progress.
- 16.7. Vodacom maintains its concerns that there is complete lack of clarity in how the frequency assignment stage of the auction is supposed to work. They further suggest that the Authority utilizes a single round of sealed bids with a second price rule which would represent international best practice.

Position and Reasons

- 16.8. The ITA includes the exceptional circumstances provisions to deal with challenges that may be encountered during the auction.
- 16.9. The Authority intends to conduct the opt-in round in person whereas the main auction will be conducted using an online system. The Authority will prepare a bid form for each eligible bidder to fill out a form and return to the Authority for the opt-in round whereas the electronic forms for the main auction, with the required security will have to be completed.

16.10. The Authority has made provision for the assignment stage to ensure that winning bidders will be given an opportunity to pick contiguous blocks frequency assignments consistent with the spectrum they have won in the two phases. This will ensure the effective and efficient use of the radio frequency spectrum.

16.11. Further information about the procedure will be provided to qualified bidders before the auction and during the bid Seminar and mock auction. The rules of the can only be established once qualified bidders and the winning Lots have been confirmed. There may not be a need for the Assignment Round depending.

17. ELIGIBILITY AND ACTIVITY

17.1. MTN requests for the Authority to clarify the following:

"Paragraph 15.5.3 (b) states: "...will lose eligibility if it does not place at least one new bid;" and "For the avoidance of doubt, a bidder that submits a waiver is not permitted to also submit new bids at the same time." This seems contradictory. Paragraph 15.6.5 states: "When a Waiver is used, the Bidder retains the same level of Eligibility for the next Round as it had in the current Round"."

17.2. MTN further alleges an error in relation to the activity points on lot 9, which has only 4 activity points though it concerns 2x10MHz of spectrum

Position and Reasons:

17.3. The Authority notes that when a bidder moves to the next round, and places a waiver instead of bidding, the bidder retains eligibility in the current round and can be carried into the next round. The Authority intends to conduct a bid seminar and mock auction with the qualified bidders prior to the commencement of the auction stages.

18. LICENSING STAGE

18.1. MTN has made the following submissions in respect of the payment of the Auction fee:

18.1.1. The Authority should consider offering a deferred payment arrangement which allows successful bidders to pay auction fees over a period of five years. This proposal is aimed at encouraging auction participation as well as ensuring that smaller operators are not placed in financial distress and are able to invest in their networks

18.1.2. As regards the lots acquired from the IMT 700 and IMT 800, the Authority is requested clarify the proportionate payment. Furthermore, the requirement for payment to be made within thirty (30) working days after the public announcement of the award, should not be applied and a proposed calculation for payment schedule is proposed.

Position and Reasons

18.2. The Authority suggests that the operators, in planning for the auction, must assume the availability of the IMT700 and IMT800. Before the auction commences, the Authority will avail the status of the most recent coverage maps on the IMT700 and IMT800 in collaboration with the DCDT. The formula for proportional payment for the spectrum fees is as follows:

18.2.1. $\text{Proportionate Auction Fee} = \text{Auction Fee per } 2 \times 5 \text{ MHz BW} \times \% \text{ of population coverage on available IMT700 or IMT800}$

18.2.2. $\text{Proportionate Auction Fee} = \text{Auction Fee per } 2 \times 10 \text{ MHz BW} \times \% \text{ of population coverage on available IMT800}$

18.2.3. $\text{Proportionate Annual Spectrum Fee} = \text{Annual Spectrum Fee [1]} \times \% \text{ of population coverage on available IMT700 or IMT800}$

18.3. Both the proportional auction fee and annual spectrum fee will be adjusted as the analogue television switch-off process progresses.

19. INDEPENDENT AUDITOR

19.1. Cell C seeks clarity on paragraph 15.14.2 of the second IM where the Authority states that “the auditor will be permitted access to all the activities of each Bidder”. Could the Authority please clarify the meaning of this statement? For example, does it refer to bidding activity (i.e. data able to be obtained from the online bidding platform), or to some other meaning of the word “activity”?

Position and Reasons

19.2. The entire auction proceedings will be recorded and audited by a duly appointed independent auditor or auditors. This includes the bid submissions and the results of the Auction including online proceedings.