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Portfolio Committee on Telecommunications and Postal Services
P.O Box 15
Cape Town

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

Dear Madam

CELL C SUBMISSION TO THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL (B31-2018) ISSUED FOR PUBLIC COMMENTS

1. We refer to the public notice inviting stakeholders to submit written comments with respect to the tabled Electronic Communications Amendment Bill.
2. Cell C's submission regarding the above is attached to this letter. This submission is in four sections:
   a) Response to the issues EC Amendment Bill;
   b) Annexure A: Cell C supports the 2018 bill in these areas
   c) Annexure B: Issues of concern in the draft EC amendment bill (B31-2018)
   d) Annexure C: Cell C's response to the policy directive of the licensing of unassigned high demand spectrum including the Expert Report compiled by Analysis Mayson on spectrum licensing of high demand spectrum referenced as annexure A.
3. We look forward to engaging with you on these matters.

Yours faithfully

Mr Themba Phiri
Executive Head: Regulatory

CELL C's RESPONSE TO SECOND SET OF PROPOSED AMENDMENTS TO THE ELECTRONIC COMMUNICATIONS ACT, 2005

Executive Summary

A. Cell C Limited (Cell C) has a vested interest in the proposed amendments to the Electronic Communications Act, 2005, as it is a licensee providing electronic communications services over its network, using radio frequency spectrum, and this is the sector law governing licensees' deployment of telecommunications infrastructure, and use of spectrum.

B. Cell C operates in a market dominated by three much larger licensees, which has been the case since Cell C commenced operating, and it has had limited regulatory support during this period. As a result, the market in which Cell C operates is not adequately competitive and it has not been able to grow market share.

C. A market which is not competitive is often characterised by high prices, a lack of innovation, limited coverage (in which rural areas are avoided as being less profitable), and is as a result, unattractive to investors. In other words, a lack of competition has a negative effect on the cost to communicate, the ability of new entrants to enter the market successfully, the accessibility of services in rural areas, and investment.

D. The ICT Sector Policy White Paper, 2016 (read with the National Broadband Policy, 2013) are intended to establish a new framework for the electronic communications sector. In this new framework, national policy envisages a market in which innovation and competition will thrive, open access to network infrastructure will enable service-based competition on non-discriminatory terms, and services will be accessible and affordable.

E. Primary law should take its lead from national policy.

F. In Cell C's view, the proposed amendments will not in many cases, follow national policy goals and objectives or give effect to them, and in some cases, they are not legally sound and may have unintended consequences.

G. This submission identifies some examples of these issues and makes recommendations for Parliament's consideration.

1. Introduction to this submission

1.1 Cell C Limited (Cell C) is a mobile network operator, which was licensed six years after the licensing of MTN Pty Ltd (MTN) and Vodacom Pty Ltd (Vodacom). Today these two operators hold between them nearly 80% of the total share of market revenue and subscribers, while Cell C has been able to grow its share of market to only 12% in over 16 years. This is not a reflection of the way in which Cell C has operated, but rather a damning reflection of the way in which the market in which it operates has been regulated inadequately, with a lack of regulation designed to improve the competitive playing field for challenger operators.

1.2 Cell C is familiar with and has commented on the ICT Sector Policy White Paper, 2016 (the Sector Policy), which is one of the national policies published by the Minister of Telecommunications and Postal Services (the Minister) as part of the review of the sector's legislative framework. The Sector Policy contains as its core values and principles which are intended to guide the development of the Policy itself and the implementation of the new framework, the following[1]:

- Any interventions must be necessary to meet clearly defined public interest objectives
- Any interventions must be proportionate, consistent and evidence-based and determined through public consultation
- The policy maker and regulator must consider the least intrusive mechanism to achieve the defined public interest goal/s and will consider, where appropriate, alternative models such as co-regulation and/or self-regulation
- The socio-economic and regulatory impacts of any action will be assessed and considered before imposing regulations, rules and/or conditions
- The policy maker and regulator will act fairly and ensure regulatory parity in defining markets and deciding on interventions

[1] Section 2.2 of the Sector Policy.

- The regulator must perform regulatory activities and functions in line with policy. When taking decisions, the regulator must function without undue external influences and carry out its decision-making functions independently.

1.3 In our review of the amendments to the Electronic Communications Act, 2005 (ECA) proposed by the Minister as Bill 31-2018 (the 2018 Bill), Cell C has highlighted areas as examples of where the 2018 Bill fails to meet these core values and principles in that the Bill:

a) fails to address them at all, or
b) addresses them in a manner which is not in line with national policy (and/or will not achieve its aims), or
c) addresses them in a manner that could be legally flawed.

1.4 First, we deal with the policy and legislative framework in which the 2018 Bill has been drafted. We then consider the legality of the amendments proposed. Finally, we consider the issues that the Minister has not addressed or has not adequately addressed in terms of national policy goals.

1.5 Cell C is supportive of the 2018 Bill in all of those areas set out in **Annexure A**.

2 Policy and legislative framework

2.1 Parliament is the legislative authority of South Africa and has the power to make laws for the country, in accordance with the Constitution. It consists in the National Assembly and National Council of Provinces. Parliament also functions through Portfolio Committees which include the Portfolio Committee on Communications. Parliament must facilitate participation by the public in its processes, such as this one.

2.2 The Minister is a member of the Executive branch of government, empowered to develop and implement policy, direct and co-ordinate the work of the government departments, prepare and initiate legislation, implement legislation, and perform other functions as called for by the Constitution or legislation. The Minister has prepared the 2018 Bill which forms part of his role.

2.3 All Ministers are accountable to the National Assembly for their actions and for those of their departments, and they must act according to government policy. The Department of Telecommunications and Postal Services (DTPS) has passed two policies in the last 4 years, both dealing with investment in infrastructure, the need to promote and support competition, and the need to make communications services accessible across the country, and affordable.

2.4 In the past 10 years the telecommunications sector has undergone two amendments to the primary sector law, the ECA, and two national policies have been passed in relation to the sector – the National Broadband Policy, 2013 (or SA Connect), and the Sector Policy. These national policies purport to give effect to a third national policy, namely the National Development Plan (the NDP), which was finalised in 2011. The NDP itself provided for the creation of certain strategic infrastructure projects to promote and support the development of critical infrastructure in South Africa. Among the SIPs was SIP15, which relates to telecommunications.

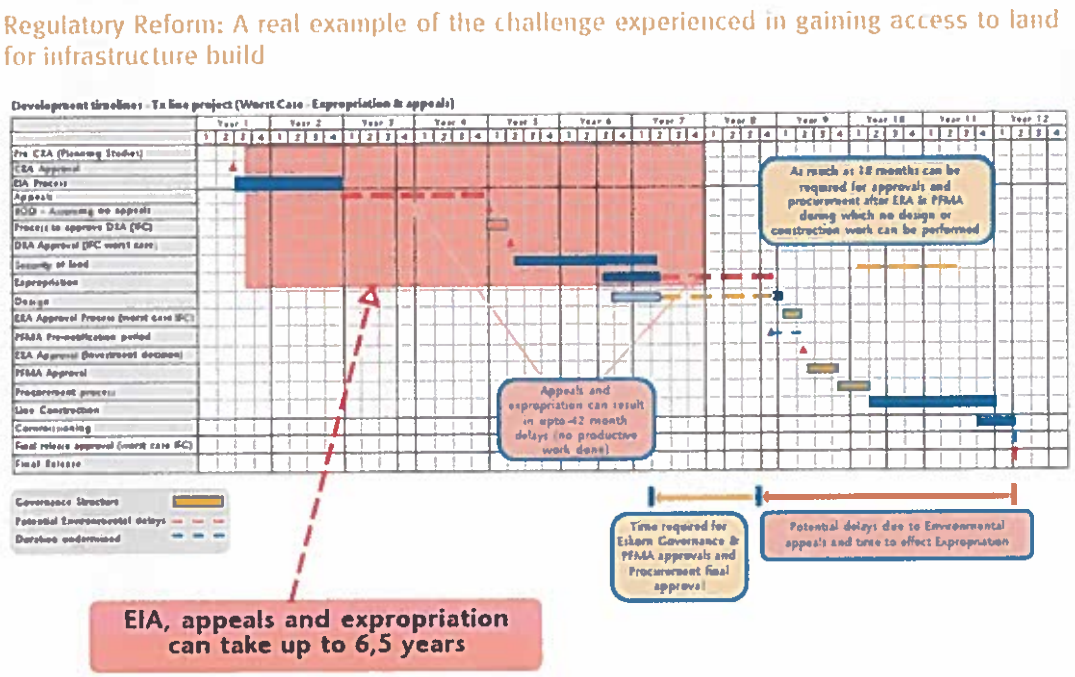
2.5 The Presidential Infrastructure Co-ordination Committee (PICC) was formed in 2012 to co-ordinate the implementation of the SIPs including SIP15, following publication of the NDP. On the creation of the PICC, the spokesperson for this body said, "*Cabinet established the PICC, to:*

- *coordinate, integrate and accelerate implementation*
- *develop a single common National Infrastructure Plan that will be monitored and centrally driven*
- *identify who is responsible and hold them to account*
- *develop a 20-year planning framework beyond one administration to avoid a stop-start pattern to the infrastructure roll-out*"

2.6 In President Ramaphosa's State of the Nation address in 2018, he said "*<u>Infrastructure investment</u> <u>is key</u> to our efforts to grow the economy, create jobs, empower small businesses and provide services to our people.*"

2.7 This echoes the words of former President Zuma, who said in 2012, in a report on the creation of the PICC, "*Infrastructure investment is a key priority of both the National Development Plan and the New Growth Path. We are transforming the economy, directing national growth and driving job creation by implementing a long-term government-led infrastructure investment programme. In the process, we are leveraging the investment and participation of business, labour and civil society.*"

2.8 Pursuant to the creation of the SIPs, government identified one of the key problems with the rollout of strategic infrastructure as the multiplicity and complexity of processes to deal with access to land, in particular, but also for other authorisations needed by licensees for construction and development of networks and services to take place. In a report by the PICC in 2012, the delays were illustrated in the form of a diagram:



Source: A Summary of the South African National Infrastructure Plan, p29

2.9 As a result, a new piece of legislation was passed by Parliament in 2014, called the Infrastructure Development Act, Act No. 23 of 2014 (IDA). The Economic Development Department or EDD describes the purpose of the IDA in this way,

"The Infrastructure Development Act codifies into law the PICC and the National Infrastructure Plan as key mechanisms to co-ordinate and drive infrastructure development in South Africa. The Act is intended to speed up and improve the delivery and implementation of social and economic infrastructure and to maximise the developmental impact... It sets time-frames for the approval of regulatory decisions affecting the implementation of infrastructure projects. Instead of sequential approval processes, it provides for processes to run concurrently, wherever possible. This ensures that the state works to a common deadline and that this time-frame provides for public consultation processes."

2.10 Thus, Parliament had already taken steps to implement national policy including the NDP and problems experienced by SIPs and industry players, by passing the IDA. Several years have passed since the introduction of this law in 2014, and two policies have been prepared by the Minister (SA Connect and the Sector Policy). The SIPs, PICC and Economic Development Department are intended to oversee the implementation of national policy on a uniform basis. However, a multitude of by-laws, regulations and guidelines have been passed by municipalities in relation to the access to and use of land, and infrastructure development, and the problems that are illustrated in the diagram set out in paragraph 3.8 above still remain – and are in fact worse than they were when the diagram above was prepared in 2012.

2.11 Access to scarce resources such as land and spectrum are widely acknowledged to be enablers of and necessary for competition in telecommunications markets. This is because these scarce resources are vital for the rollout of wireless network infrastructure (with spectrum being an essential component of network infrastructure for mobile or wireless licensees), enabling the connection of subscribers, growth of services, growth in subscriber numbers, and accordingly revenue growth. In turn, revenue enables further investment in innovation and services, and in 2018, revenue also enables the provision of high-quality and high-speed broadband services and the reduction in unit costs for services (especially mobile data).

2.12 Competition drives down prices for consumers and hence is good for the economy. It is also a policy goal for the South African Government and for ICASA.

3 Will the 2018 Bill implement policy goals, and is the Bill legally sound?

3.1 On 17 November 2017, the Minister published a draft Amendment[2] to the Electronic Communications Act, 2005, and sought comments on this draft from the public (the 2017 Bill). The consultation closed in January 2018. The key objects of the proposed amendments in the 2017 Bill were, among other things, to:

a) align it with the Sector Policy;
b) lower the cost of communications;
c) reduce infrastructure duplication;
d) encourage service-based competition through the creation of a wireless open access network licensee;
e) provide a new framework for rapid deployment [of infrastructure];
f) provide for allocation of spectrum on an open access basis; and
g) provide for a market review to ensure effective competition.

3.2 The Minister received 43 written submissions on the 2017 Bill. The affected stakeholders were invited to make oral submissions in March 2018, and 30 presentations were made.

3.3 Despite this significant number of both written and oral submissions, the changes made to the ECA in the most recent set of proposed amendments to it in the 2018 Bill which was introduced into Parliament on 31 August 2018 and formally tabled on 13 September 2018, do not differ in material respects from the changes made in the 2017 Bill, although many improvements in drafting have been made and are appreciated.

3.4 Passing the 2018 Bill in this form is likely to simply perpetuate the lack of movement, indeed the stagnation, that has characterised infrastructure

[2] *Gazette* 41261 dated 17 November 2017.

development in particular but also investment and competition in this important sector for the last two decades, despite the numerous policy and legislative interventions described in the previous section.

3.5 Cell C made numerous detailed submissions on the 2017 Bill, some of which have been considered and changes made, so we will not traverse all of those submissions again. However, in **Annexure B** we set out several issues of concern and examples of how the policy and legislative framework (including the core values and principles of the Sector Policy) under the headings:

3.5.1 Blurring the lines between (i) Ministerial oversight and policy-making, and (ii) regulatory independence and implementation;

3.5.2 Practical issues with the proposal do not reflect policy goals;

3.5.3 Including unnecessary and complex descriptions that repeat and confuse existing concepts; and

3.5.4 Ignoring or exceeding national mandates.

3.6 In the next section we set out the areas in which the 2018 Bill has not addressed important policy goals adequately or at all.

4 Policy goals not dealt with adequately or at all in the 2018 Bill

4.1 Policy goals in relation to spectrum and the WOAN

a) There was much discussion following publication of the Sector Policy regarding the possible reservation of spectrum to a wholesale open access network licensee (WOAN), pursuant to a licensing process still to take place. The purpose of the licensing of this new entity is primarily to:
   - Increase opportunities for SMMEs to enter the market
   - Increase empowerment in the sector
   - Provide for service-based competition and reduce the infrastructure burden on the environment

b) Amendments made in the 2018 Bill have suggested that a majority of or all high demand spectrum may be reserved for the WOAN. The Minister has, in keeping with the wording of the 2018 Bill, published a draft policy direction to ICASA to investigate the possible licensing methodologies for a WOAN and how much spectrum it might be expected to need in order to serve an estimated 20% of the market[3], using the results of a report commissioned by the Minister from CSIR.

c) In response to the draft policy direction, Cell C has made extensive submissions supported by Analysys Mason's expert analysis of the CSIR report. Among other observations on the CSIR report, Cell C with Analysys Mason, has noted the following issues with the translation of national policy into the legislation:

   1. **Government policy is for the WOAN to provide service-based competition.** For the WOAN to be competitive in the market that is currently dominated by MTN and Vodacom (which together hold an 80% market share), the WOAN will require more high demand spectrum than the amount that is assumed in the CSIR Report to be

[3] *Gazette* 41935 of 27 September 2018

required to capture a 20% market share. The more spectrum the WOAN has the more capacity it will be able to generate, and the more capacity can be taken off by existing licensees. This in turn will provide the WOAN with a revenue stream from a very much earlier date (assuming it can gain access to licensees' facilities on reasonable terms). **This will support the entry of a new licensee, which may consist of SMMEs and empowered entities, and increase its ability to compete with existing licensees; at the same time a successful WOAN with a larger amount of spectrum will become a necessary part of national infrastructure and reduce environmental impact by being sharing its network capacity between multiple retail parties and existing MNOs.** Analysys Mason has produced a model to illustrate the spectrum requirements for the WOAN at different market share levels. The report on this is included in our comments on the policy direction, a copy of which is attached to this submission as **Annexure C.**

2. Since **government policy is to ensure rural coverage**, the WOAN could be allocated a larger proportion of lower band frequency, leaving some of the high band spectrum for existing operators whose networks are predominantly urban and peri-urban. In this way government will achieve this policy goal as well. Primary law can require ICASA to consider that to achieve rural coverage, low frequency spectrum will be required, whilst high frequency spectrum is likely to be required for urban coverage. In addition, the ECA could indicate (only) that the award of any spectrum to a new entrant and/or the WOAN should ensure that it is able to compete in both the rural and urban markets, or only in the rural market, as determined by the Minister since this is not currently addressed. Sections 19A and 31E are too detailed for a primary law.

3. Another important **policy goal is that of promoting and fostering competition**. Auctioning high demand spectrum in unequal packages, even with a reservation for the WOAN, is likely to result in

the perpetuation of the currently skewed market structure. Since MTN and Vodacom have far deeper pockets than Cell C and Telkom Mobile, it is likely that, in the absence of adequate pro-competitiive measures in the design of the award, the larger operators will then be able to outbid the smaller operators and take more spectrum. Unless the policy direction reflects this possible outcome and proposes effective assignment conditions which support the smaller operators to gain a sufficient share of spectrum (through spectrum caps or assignment rules), the goals of increasing competition that are included in Sector Policy, will not be achieved. Primary law should make it clear that any award process must first and foremost consider how best to promote competition and ensure that any new entrant (or smaller player) is able to enter and compete sustainably in the market. Nothing more is required in primary law.

4. In order to **promote competition** whilst adhering to the principles of the Sector Policy, instead of including licence obligations in primary legislation, obligations that the Policy suggests are to be imposed on licensees that receive high demand spectrum (such as open access, rural coverage, and capacity offtake agreements) could be considered to form part of the suite of remedies to be imposed on dominant licensees after a market review by ICASA has revealed a market failure. Including these as potential remedies in section 67, to be considered by ICASA, could have the benefit of dominant licensees who take up capacity from the WOAN contributing to its revenue stream whilst freeing up their own capacity to take on more traffic, thus reducing their overheads and benefitting consumers with rapid deployment of new services at cheaper prices.

4.2 Competition-specific policy goals

a) The 2018 Bill contains several amendments to section 67, which deals with ICASA's duties and powers in relation to market reviews and the review of competition in the sector more generally. Because this forms such a

significant part of the Sector Policy goals, core values and principles, we have also indicated in this section how the instruments to be used by ICASA could be improved in the 2018 Bill (but have not been addressed by the proposed amendments alone).

b) The concurrent jurisdiction over competition matters in the electronic communications industry[4] between ICASA and the Competition Commission which is provided for in the current ECA and the Competition Act has proven to be ineffective in dealing with anti-competitive conduct in the industry, particularly by the dominant operators:

   a. The Competition Act enables the Competition Commission to investigate complaints about anti-competitive conduct in the industry, but this complaint investigation process can be very protracted, and it has proven to be inadequate to deal with conduct by the dominant operators, which is hampering competition. For example, in 2013 Cell C laid a complaint against MTN and Vodacom about their practice of charging different rates for on network calls, and off network calls, a practice which Cell C regards as responsible for maintaining these operators' dominant positions in the relevant market/s. After almost 4 years the Commission determined that there was cause for concern but that it should be investigated by ICASA – which has never done so.

   b. Section 67 of the current does not make it clear that ICASA has the power to investigate complaints about anti-competitive conduct in the industry and make orders in order to prevent this kind of conduct. However, far as Cell C is aware, complaints about anti-competitive conduct have been lodged with ICASA's Complaints and Compliance Committee in terms of the ICASA Act (section 17C), on the basis that anti-competitive conduct is contrary to one of the objectives of the ECA, which is to promote competition.[5] The lack of any explicit power

[4] As provided for in section 67(9) of the ECA.
[5] Section 2(e).

to investigate such complaints and the lack of a clear list of anti-competitive practices (like that set out in sections 4, 5, 7 and 8 of the Competition Act), has made hindered ICASA's ability to investigate complaints about anti-competitive conduct in the sector and prohibit and/or punish such conduct. For example, Cell C complained to ICASA that Vodacom's acquisition of Rain's spectrum was likely to have substantial negative effects on competition in the industry. After a cursory review, which appeared to involve no more than some basic technical tests, ICASA concluded (incorrectly in Cell C's considered view) that these arrangements did not constitute an unlawful use of spectrum. As a result, ICASA has not taken any action in relation to these arrangements, which have had, and will continue to have, a substantial negative effect on competition in the sector. The Competition Commission also investigated these arrangements and concluded that they did not give rise to a notifiable merger. As a result, Rain and Vodacom have implemented these arrangements without any regulatory oversight at all, and prior to any assessment being done of their impact on competition. We submit that:

i. The ECA should be amended to make it clear that ICASA is obliged to investigate complaints about anti-competitive conduct in the industry; to refer to the anticompetitive practices set out in the Competition Act; and to set time limits for investigations by ICASA; <u>or alternatively</u>

ii. The ECA should be amended to make it clear that only the Competition Commission has the power to investigate complaints about anti-competitive conduct and to refer such complaints for adjudication by the Competition Tribunal.

c. ICASA is required by section 67(1) of the ECA to prescribe regulations for the imposition of pro-competitive licence conditions where there is ineffective competition. However, despite having these powers to impose pro-competitive *ex ante* regulations since 2005, ICASA has only exercised them in one relevant market,

namely, in relation to the wholesale market for call termination. This has meant that no pro-competitive regulations have been imposed on licensees with significant market power in various other markets in which there is plainly ineffective competition. Instead, ICASA has embarked on a lengthy inquiry to identify markets that may require regulation, which only concluded in August 2018. It identified 3 broad markets for prioritization for market review, but as far as we are aware, these market reviews have not yet commenced, and we have no indication from ICASA when these reviews are likely to be conducted, or how long they might take – prioritisation without an immediate market inquiry following this process will be of little use;

d. Experience to date indicates that the *ex ante* ICASA regulatory process envisaged by section 67 is cumbersome and can be very time consuming. An amendment to the Act is required to:
    i. Allow licensees who are concerned about anti-competitive conduct in any relevant market to trigger an inquiry; and
    ii. Require the Competition Commission to define the relevant markets and assess the nature and level of competition in them, as required by section 67, since it is the specialist competition regulator with the skills and resources to perform this task; and
    iii. Set reasonable time periods for the conduct of the Inquiry by ICASA and the passing of pro-competitive regulations in terms of section 67.

e. The Act should place an obligation on ICASA to consider the impact on competition of any regulation which it proposes to put in place. Ideally, the Commission should be required to perform this assessment and provide a report to ICASA and ICASA should be required to consider this report prior to making any regulations.

f. Although the Competition Commission and ICASA have concluded a Memorandum of Understanding ("**MOU**") in order to facilitate effective co-

ordination between them in the exercise of the powers each of them have over competition matters, this MOU does not (and indeed cannot in law) allow for these regulators to decide which of them is best placed to deal with anti-competitive conduct in the industry. As a result, there is duplication of effort and a waste of resources. For example, both the Competition Commission and ICASA are currently investigating mobile data pricing. The amendments to the ECA could usefully address the roles of each party as indicated above.

Alternatively Cell C suggests that the proposed amendments be limited to those pertaining to competition, the wholesale open access network, and the allocation of spectrum only, and take full advantage and require that ICASA also take advantage of the existing frameworks of policies and laws (including the IDA) in addressing other concerns.

20 November 2018

ANNEXURE A: CELL C SUPPORTS THE 2018 BILL IN THESE AREAS

Amendments	Section or Chapter
Definition of 'B-BBEE ICT Sector Code'	Section 1
Definition of 'broadband', subject to our comments on the Minister determining this and the frequency of the determination	
Definition of 'Competition Commission'	
Definition of 'National Consumer Commission'	
Definition of 'persons with disabilities'	
Definitions of each of 'radio frequency spectrum refarming' (subject to our reservations about the requirement in section 31D), 'radio frequency spectrum sharing', and 'radio frequency spectrum trading' including 'spectrum trading'	
Definition of 'SA Connect'	
Definition of 'SADC' and 'SADC Roaming decisions', subject to our comments on Chapter 7A	
Definition of 'sector-specific agencies', read with our comments on the administration of spectrum-related matters in sections 34 and 34A	
Definition of 'SIP', read with our comments on sections 20 and 20K(2)	
Definitions of 'wireless open access network service' and 'wireless open access service licensee', read with our comments on section 19A	
All amendments	Section 2
All amendments	Section 3(1)(e)
All amendments except for section 3(2)(bA), see our comments on section 31A in this regard	Section 3(2)

Amendments	Section or Chapter
All amendments	Section 4(1)(d)
All amendments	Section 5
All amendments to section 8 except for subsection (6)	Section 8
All amendments	Section 9
All amendments	Section 10
All amendments	Section 13
All amendments except for those in subsections (4) and (5)(b)	Section 19A
All amendments	Section 20
Amendments to include only section 20A(1); 20C(a), (b) and (g), 20(2), 20(3)(b) and (c); 20D; section 20E(1) and (3); 20G; 20H(1) and (2); 20I; and 20K(1) and (2)	Sections 20A-H
All amendments	Section 24
All amendments except to subsection (8)	Section 25
All amendments	Section 28
All amendments except for section 29B(d) and (e) in respect of which Cell C has reservations as set out in our comments on sections 34 and 34A	Sections 29A and B
All amendments except for the amendments to section 30(2)(a), (d) and (i)	Section 30
All amendments except for (4)(f) in relation to spectrum refarming and except for the reference in sections 31(8) and (9) to section 31A	Section 31
All amendments except that these amendments should be made to Chapter 3 and not Chapter 5	Section 31A

Amendments	Section or Chapter
All provisions	Sections 31B and 31C
Section 31D(5) only	Section 31D
Section 31E(1)(b); section 31E(4)(a) and (b); and section 31E(7) only	Section 31E
Section 34(6)(g); section 34(7A); section 34(8A) and section 34(16) only	Section 34
Section 34A subject to our reservations on the activities of a new committee (and our comments on section 34)	Section 34A
All amendments	Section 34B
All amendments	Section 36(2)(e)
Only sections 43(5), (6), (7) and (7A) (but note our comments on the use of the term "wholesale open access")	Section 43
All amendments except for reference to "deemed entities"; subsections 44(3)(b), (d), (e), (f), (h), (l), (q), (r) and (s); and subsection (3A) (but note our comments on the use of the term "wholesale open access")	Section 44
All amendments (but note our comments on the use of the term "wholesale open access")	Section 45
All amendments (but note our comments on the use of the term "wholesale open access")	Section 46
Section 47(2) only	Section 47
Sections 67(3C), (4), (4B), (4C), (7), (8) and (13) and section 67A only	Section 67, 67A
All amendments except section 69(1A)	Section 69
All amendments	Section 69A
All amendments	Section 74

Amendments	Section or Chapter
All amendments	Section 79C
All amendments	Section 82
All amendments	Section 88
All amendments	Section 94
All amendments	Section 95

ANNEXURE B: ISSUES OF CONCERN IN THE ECA AMENDMENT BILL

The draft blurs the lines between the roles of (i) Ministerial oversight and policy-making, and (ii) regulatory independence and implementation			
Section 13.4.1.3 of the Sector Policy states that "Government is committed to ensuring independent administration and regulation of ICTs".			
Issue arising	**Why is this a problem?**	**Commentary**	**Recommendation**
Definition of "broadband" in the Bill: this refers to both speed and quality, both of which are to be determined every 2 years by the Minister, on the recommendation of ICASA.	One of the key principles of regulation is that the roles of Minister and regulatory authority should be separate, and the regulatory authority should operate independently of the Minister. This is echoed in the introductory sections of the ICASA Act, 2000, which state, "*The Authority is independent and subject only to the Constitution and the law, and must be impartial and perform its functions without fear, favour or prejudice*".[6]	As a sector expert, the regulatory authority should determine the appropriate speed and quality of services, not the Minister. SA Connect already suggests "targets" for speed and quality. What is required is that the regulatory authority implement these.	The Sector Policy should be given effect to and the definition of "broadband" should not refer to any determination by the Minister. Remove reference to the Minister in this definition. The Minister could, without amending the ECA, issue a policy direction to ICASA to recommend that ICASA revise existing targets for broadband speed and quality in accordance with national policy i.e. SA Connect
The amendment proposed to section 4 states: '(1A) (a) Despite section 3(4), any regulations prescribed by the Authority on radio frequency spectrum and radio frequency spectrum fees must be in	Not only does this section trespass on the scope of rights most often reserved to regulatory authorities in general, but it also accords the Minister more powers than would be	The Minister will have to develop competencies his office does not currently have in relation to spectrum management. This makes no sense when a fully-staffed and funded regulatory authority exists for	The Minister's duties in relation to international liaison and co-operation in spectrum matters is crucial as is the Minister's role as custodian of this scarce resource, but both are already acknowledged in the ECA so

[6] Section 3(3) of the ICASA Act.

The draft blurs the lines between the roles of (i) Ministerial oversight and policy-making, and (ii) regulatory independence and implementation			
Section 13.4.1.3 of the Sector Policy states that "Government is committed to ensuring independent administration and regulation of ICTs".			
Issue arising	**Why is this a problem?**	**Commentary**	**Recommendation**
accordance with the policies and policy directions issued by the Minister in terms of section 3(1)(e) and 3(2)(d). (b) The Authority must amend any regulations on existing radio frequency spectrum and radio frequency spectrum fees which are in force when the Minister issues a policy direction in terms of section 3(2)(d), within six months after the Minister issues such policy direction."	usual in relation to spectrum administration. The wording ignores the independence accorded to regulatory authorities by requiring ICASA to implement policy directions and policy on spectrum-related matters. Contrast this wording with the wording of new section 8(4A) which clearly states that ICASA is to "review" and "assess" situations in order to determine steps to be taken to achieve national policy goals. This amendment is in line with the Sector Policy, but the amendment to section 4(1A) is not.	this purpose, since this has been the role of ICASA since 2005. The Sector Policy envisages that the new legislative framework would clarify the roles of each of the Minister and ICASA, and at section 9.2.5.1, it states specifically that "...the currently overlapping roles and responsibilities of the Ministry and regulator in relation to the management of the spectrum resource will be addressed through a new clear framework". This amendment is not in line with the provisions of 13.4.1.3 of the Sector Policy or the provisions of bullet one of that section, on p158.	these amendments should be omitted.
New section 31D requires spectrum re-farming to be approved by ICASA. ICASA is however, limited to approving spectrum re-farming by having to consider if it will have a negative impact on competition, and in addition, must impose universal service and access conditions on	These limitations are inexplicable particularly in an environment where spectrum licensing is still an open issue after nearly 10 years, and when the Sector Policy itself only states (at section 9.2.5.3, p84) that refarming should be transparent and should not be used to reduce licence	These matters are in any event best dealt with by the regulator through consultation with the industry, ensuring that policies are applied consistently across all spectrum bands used by a particular category of spectrum use (e.g. within the mobile sector).	Remove section 31D, or alternatively amend it to advise ICASA to review the practise of refarming and ensure that this is reported to it when it takes place and that it is not used in the manner outlined in the Sector Policy, but no approval should be

The draft blurs the lines between the roles of (i) Ministerial oversight and policy-making, and (ii) regulatory independence and implementation			
Section 13.4.1.3 of the Sector Policy states that "Government is committed to ensuring independent administration and regulation of ICTs".			
Issue arising	**Why is this a problem?**	**Commentary**	**Recommendation**
licensees that have re-farmed spectrum, as well as charging spectrum fees "commensurate with other assigned spectrum in similar bands".	fees, or entrench existing rights or associated market power, or as a loophole to avoid obligations that similar spectrum attracts. a) International experience suggests that mobile licences should be technology and service-neutral, as evidenced by various published reports, such as by the mobile industry association, the GSM Association in its report 'Best practice in spectrum licence renewals'[7]. b) Re-farming is patently a valuable exercise in a technology-neutral environment, in order to ensure use in the most optimal manner for the most appropriate services.	Furthermore, it is international best practise to ensure that as much spectrum as possible can be made available for commercial use to ensure the best return on the resource for government and that the benefit of spectrum use flows into the economy through service provision to consumers.	required. This should be an oversight matter, not a prohibition.
Section 34 has been amended so as to give the Minister more powers in relation to spectrum planning and in particular, use of spectrum by	The wording of this section results in the Minister taking over some of the principle functions of the national regulatory authority. Whilst we recognise that spectrum is a scarce	International best practice should be followed when co-ordinating between government and commercial use i.e. decisions need to be transparent and government	ICASA's functions in relation to spectrum should be retained, save that the proposed inter-governmental spectrum body could be created to co-ordinate spectrum

[7] https://www.gsma.com/spectrum/wp-content/uploads/2015/01/Best-Practice-in-Spectrum-Licence-Renewals.-Jan2015.pdf

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government, and the inclusion of a new section 34A also has this effect.	national resource, the regulatory authority is best-placed to determine what uses of spectrum may be appropriate (taking into consideration the Minister's role at the international co-ordination level).	should see to ensure as much spectrum is released from state to commercial use as possible, via market processes for assignment of commercial spectrum. The Sector Policy at 9.2.5.5 states, in relation to spectrum for security services and safety of life services, and also spectrum for scientific research, that the *public interest* should be a primary concern. In addition, section 13.3. of the Sector Policy provides that "The NDP emphasises the important role that public entities can play in fulfilling policy goals and constitutional obligations, but cautions that such institutions should be established only if objectives cannot be met by either Government and/or the private sector." Furthermore, the Sector Policy provides that an MOU should be concluded by the Minister, ICASA and sector-specific agencies to enable "*the regulator* to play its monitoring and enforcement role while avoiding bureaucracy and	use between government and non-Government ("civil") uses of spectrum. The primary law could propose incentives to encourage efficient use of spectrum by all users, both public and civil e.g. requiring government departments pay licence fees for the spectrum they hold. ICASA should have responsibility for determining the spectrum strategy for high demand spectrum, including in particular the assessment of competition issues to ensure that the strategy is in keeping with national policy, and this should be made clear in the ECA, provided that ICASA is required to take into account the Policy objectives particularly in relation to the WOAN. Restate section 34 and section 34A.

The draft blurs the lines between the roles of (i) Ministerial oversight and policy-making, and (ii) regulatory independence and implementation			
Section 13.4.1.3 of the Sector Policy states that "Government is committed to ensuring independent administration and regulation of ICTs".			
Issue arising	**Why is this a problem?**	**Commentary**	**Recommendation**
		improving administrative efficiency by enabling end users to register with sector-specific agencies through a simple process". Section 34(7) of the ECA already provides for the need to consultation to take place between ICASA and the Minister. Therefore, regulation of commercial spectrum should be in the hands of an independent communications regulator. It is vital to ensure that the goals of the Sector Policy are achieved without trampling on the independence of the regulator, which this section risks doing by transferring functions regarding spectrum allocation to government or a new entity that is state-controlled.	

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Definition of "broadband" in the Bill: this refers to both speed and quality, both of which are to be determined every 2 years by the Minister, on the recommendation of ICASA.	Making such a determination every 2 years ignores two things, (i) the fact that rolling out infrastructure will take time, and (ii) making such a determination will take the better part of 2 years because the Minister should consult not only with ICASA but with stakeholders. In the case of (i), this is time that licensees do not have if they cannot easily and efficiently gain access to land. It is not the role of primary legislation to transfer powers that vest in a regulatory authority to the Minister (see also section 9.1.2, 9.1.3, 9.1.5 and the last bullet at the top of p70 which confirms that the regulator will set network and population coverage targets that align with the targets set out in SA Connect.)	The Sector Policy does not envisage a role for the Minister in relation to determining broadband speed. An amendment to this section should have been made to remove the reference to the Minister determining broadband speeds altogether.	Speeds already exist in any event in SA Connect, which can be cross-referenced or a policy direction can be issued to ICASA (which does not require any amendment to the ECA at all) to review the targets set in SA Connect.
The amendment proposed to section 4 states: '(1A) (a) Despite section 3(4), any regulations prescribed by the Authority on radio frequency spectrum and radio frequency	The Sector Policy states at section 9.2.1.1 that "there are two primary challenges in relation to the institutional framework for spectrum management: lack of clarity	Policy and policy directions have been intended to set out a high level, vision and goals for a sector, not to give detailed instructions to ICASA – this is not how our legislative and	Remove this amendment and return to the previous wording.

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spectrum fees must be in accordance with the policies and policy directions issued by the Minister in terms of section 3(1)(e) and 3(2)(d).	regarding the roles of government and the regulator and a need for greater co-ordination between the regulator and sector-specific agencies, and between the regulator and licensees…The duplication in the planning and allocation roles and an unclear framework with respect to the issuing of policy directions, has resulted in confusion in the sector…"	executive arms of government are intended to operate. Under the same section, subsection (c) provides that the Minister is responsible for "issuing policies and making policy directions in relation to radio frequency spectrum". In the next section, under (a), ICASA is responsible for "implementing this and any other spectrum policies and policy directions issued by the Minister". This does not require compliance in the sense that ICASA's implementation of high level policy goals should be "in accordance with" those directions. ICASA is a sector-specific regulator and should be afforded the room to implement policy and policy directions in an operational environment.	
The Minister requires ICASA to do certain things in relation to SADC roaming regulations", and international roaming, in new Chapter 7A	The Minister purports to have the power to issue policy directions to ICASA in relation to international roaming, but international roaming is a consensual commercial	The existing provisions of the ICASA Act and ECA already oblige ICASA to have regard to international treaties and the Minister is already	Omit this section

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Issue arising	**Why is this a problem?**	**Commentary**	**Recommendation**
	arrangement with other operations in other jurisdictions.	empowered to liaise with international bodies The Sector Policy does not contain any mention of SADC or international roaming having to be regulated by ICASA, nor is this envisaged to be one of the Minister's powers or one of the goals, objectives or visions for the Sector Policy as a whole or any part of it. Chapter 8 deals with international matters but this Chapter is not given effect to in the Bill.	
The rapid deployment of communications networks is an *obligation* under the Bill in new section 20C(b) and elsewhere in this Chapter, whereas the intention of the existing Chapter 4 of the ECA is merely to *facilitate deployment* of networks where necessary rather than to impose an obligation in this regard.	Chapter 4 of the current ECA already recognises that licensees experience a number of delays and difficulties in navigating the different authorisation and permit requirements of different municipalities and other public sector entities, such as Eskom, and to enable them to overcome these delays and difficulties. As is internationally the case, network licensees are given rights to access land to build networks in order to	Open access is a concept that has been in play for many years – put forward both by the World Bank and IFC even in the early days of the EASSy cable consortium. These very difficulties of barriers to entry and the need to encourage service-based competition were anticipated in the NDP, implemented through the creation of the PICC and SIP15, in the IDA. Strategic infrastructure projects such as telecommunications are already provided for in a national	Omit new section 20C Open access principles such as those espoused in section 9.1.5 can simply be referenced in a policy direction that could require ICASA to review existing regulations to ensure that they are in line with Sector Policy and to make changes where required.

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Issue arising	**Why is this a problem?**	**Commentary**	**Recommendation**
	make communications available to citizens, in primary law. Obligations on licensees regarding rollout and coverage are then imposed on licensees in regulations or licence conditions because these may have to change over time to reflect operational and economic realities or needs – but it is easier to amend licence conditions and regulations than to amend laws, which is why secondary legislation is more appropriate for these sorts of details.	law which includes a schedule for the time it should take for approvals for entry onto and use of public and private land. This is because national government recognised that it is telecommunications operators business to provide services over networks – they will not otherwise be able to provide services and earn revenues. National government acknowledged that licensees require assistance in obtaining necessary permits. This is echoed in Chapter 4 of the existing ECA. Although nothing appears to have happened since 2014 other than a restatement of intent in relation to infrastructure development by the current President, it would seem to be more appropriate to breathe life into existing structures under existing laws such as the IDA, than to employ yet more resources in duplicating and complicating an existing set of laws, or to impose obligations on licensees when what is needed is facilitation.	

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		It is therefore difficult to understand why so many complex and unnecessary amendments have been made to Chapter 4 and specifically why there is a new section 20, and why section 20 contemplates the creation of yet more quangos (the Rapid Deployment Steering Committee and National Co-Ordination Centre) at vast expense. It would be preferable to follow the Sector Policy goals set out in sections 9.1.2 and 9.1.3 which to a significant and probably sufficient extent, are already addressed in Chapters 7 and 8 of the ECA as it stands, and in the Facilities-Leasing and Interconnection Regulations published by ICASA which refer to transparency, access, and non-discrimination. The real problem is enforcement and implementation of the existing law. Substantial amendments to the law of the kind envisaged in the 2018 Bill are not likely to have the result of reducing market barriers because	

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		the open access obligations also apply to new entrants, such as the WOAN.	
Section 20K(2) contains provisions that are unworkable, e.g. "(a) Reasonable access fees may be charged in cases where more intrusive electronic communications networks or facilities, such as masts, are erected on property. (b) In such cases, any access fee must be reasonable in proportion to the disadvantage suffered and must not enrich the landowner or exploit the electronic communications network service licensee. (3) In the case of any dispute on access fees, the reasonableness of the access fees must be determined by the Authority on an expedited basis. (4) A landholder is entitled to reasonable compensation agreed to between the landholder and the electronic communications network service licensee, for … loss or damage, whether permanent or temporary, caused by an electronic	Without a schedule of rates created by an independent entity for various categories, for example, for space by square metres or urban or otherwise defined types of land and equipment, there can be no certainty, transparency or even a benchmark for "reasonable". The Sector Policy suggests that cost-based or regulated pricing is required but it also states in section 9.1.5.3, p68, that "the Minister will require the regulator to develop regulations on cost-based pricing following the adoption of this White Paper". The ECA does no such thing It is well known that gouging takes place in some cases by municipalities, and that an easy way to thwart access by licensees is simply to demand extraordinary taxes on access.	The drafting of these sections has not taken account of the practical problems facing licensees attempting to comply with national policy goals of rapid deployment without a properly co-ordinated, transparent and consistent process being in place; whilst being subject to obligations to achieve national coverage. The goals of Sector Policy are set out in section 9.1.2 and are focused on increasing network coverage and *enabling* rapid deployment – not mandating it. Having to comply with obligations when rolling out infrastructure that requires enormous investment which is exacerbated by the cost of gaining access, municipal delays and compliance with current (unaligned) procedures, has a negative effect on a licensees' attempt to operate in a cost-effective manner so as to keep	Remove this section as it does not give effect to the Sector Policy. The Minister need only implement the existing ECA, for example, under section 21, the Minister should meet with his counterparts in other departments and formulate an approach that can be implemented through the SIPs and PICC under the IDA – all of which already exist and have mandates which the proposed amendments unnecessarily repeat.

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Issue arising	**Why is this a problem?**	**Commentary**	**Recommendation**
communications network service licensee entering and inspecting land, or installing, deploying or maintaining electronic communications networks or facilities. (5) In the case of any dispute on compensation, the reasonableness of the compensation must be determined by the Authority on an expedited basis. (6) An electronic communications network service licensee may not continue to deploy electronic communications networks and facilities while awaiting the resolution of the dispute by the Authority."	Referring disputes to ICASA is, with respect, a fruitless exercise under the current ICASA Act regime. Not only is the dispute resolution procedure usually referred to the Complaints and Compliance Committee whose members sit only on a temporary basis and which is not always composed of the same people, but those people seldom have expertise or insight of the sort required to determine a dispute of this nature. The delays experienced in this process are in any event, so lengthy that would-be complainants are often dissuaded from lodging any.	the cost of communication as low as possible. The ramifications of the provisions in this section have simply not been thought through. In addition, section 13.4.1.3 requires ICASA to carry out regulatory impact assessments in relation to decisions, which this section does not give allow for. Creating more committees is to oversee deployment is not the answer when there are already SIPs and the PICC (secretariats and steering committees) and processes and procedures provided for under the IDA. These committees have no real powers to do anything but monitor, so they do not have a valuable role.	
Sections 19A requires ICASA to license a WOAN on specific terms and conditions.	The primary law should not deal in too much detail with the mechanisms for the licensing of the WOAN because ICASA is the entity to consider commercial and regulatory best practise.	The Minister is responsible for policy and policy directions in relation to the use of spectrum. However, a policy direction may not involve the licensing of a new entity, under section 3(3) of the ECA, and under section 13.4, p154, of the Sector	The Minister should not be directing nor does the Sector Policy support the directing of the licensing of an applicant for networks or spectrum, by the Minister. This is contrary to the specific provisions of section 9.1.6 of the Sector Policy.

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Issue arising	**Why is this a problem?**	**Commentary**	**Recommendation**
	The primary law should not contain the policy direction either, since the policy direction flows from national policy, such as the Sector Policy and not the primary law.	Policy, which states "The *regulator* will be responsible for assignment and licensing in line with government policy and the NRFP that has been developed by the Ministry." The Sector Policy states that a WOAN will be a public-private sector-owned and managed consortium and consist of entities that are "interested in participating". The amendments contemplated in this section direct the creation of a WOAN along very specific lines which may deter potential investors. Each existing licensee should be assigned similar amounts of high demand spectrum in the relevant bands, to the extent possible, failing which concentration of spectrum might occur, to the detriment of sustainable competition, which will not be possible in the market without smaller operators having access to sufficient spectrum to enable them to be competitive. The Sector Policy specifically states in section 9.1.6 that "No	The creation of a WOAN could be achieved by a policy direction flowing from the Sector Policy, without having to amend national law and entrenching such detailed provisions in this regard. The current changes are not all in line with the vision for the sector in relation to wholesale open access.

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Issue arising	**Why is this a problem?**	**Commentary**	**Recommendation**
		amendments to existing legislation are envisaged to support the wireless open access framework and the Wireless OAN should be licensed as soon as possible after the coming into force of this policy. The time frames for this will be determined by the Minister in consultation with the regulator and other stakeholders". No such consultation has taken place – see our comments on the Policy Direction, attached in Annexure C. It is also unclear why there are so many detailed amendments to Chapters 3 and 5 in relation to the creation and licensing of a WOAN.	
Section 31E requires ICASA to impose licence obligations on the WOAN and licensees who are awarded high demand spectrum under a radio frequency spectrum licence	It is not appropriate (nor is it legal under section 3(3) of the ECA, for the Minister to determine licence conditions.	Imposing licence conditions on a new entrant which limit its ability to compete with existing licensees and obliging them to make services available from commencement at regulated prices, may well dissuade any potential investor from entering the market – which would fly in the face of the Sector Policy objectives at 9.1.3.	Remove section 31E(1) and (3), amend (4) to refer to the ECNS licence instead of the radio frequency licence (see argument above), (5), (6), and (8) all of which trample on the independence of ICASA and run counter to established policy and principle where licensing is concerned (see argument above).

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Issue arising	**Why is this a problem?**	**Commentary**	**Recommendation**
		Section 9.1.3 of the Sector Policy also requires that open high demand spectrum be available for use by all licensed operators.	
Definitions in section 1, of "general open access principles" and "wholesale open access": "general open access principles" means providing wholesale open access on terms that are effective, transparent and non-discriminatory.	The Sector Policy at section 9.1.5 defines the principles of open access as "openness, transparency, equal access and non-discrimination, sharing and non-duplication, efficiency, standardisation and reasonableness". These terms and concepts already exist in competition law, notionally in section 67 of the ECA, and in the regulation of access to facilities in Chapter 8 of the existing ECA, read with the existing Facilities Leasing Regulations, 2010. Duplicating them confuses many concepts and the proper regulation of access to facilities.	Including definitions that then become obligations under the ECA in sections 19A and in the new sections following section 20 is an unnecessary complication in the existing environment which simply needs to be better regulated. The existing environment already caters for the policy goals, and has done so for over a decade since the ECA was passed. All of the changes to Chapter 8 to turn facilities-leasing into "open access" are out of step with international best practise, and indicate a likely misunderstanding of the two concepts, one of which is a regulatory concept (ex ante) and the other is a remedy under competition	Amend Chapter 8 to include reference to "open access" as an additional requirement, which can be defined to underscore the existing regulatory requirements and remove reference to "deemed entities" particularly in section 44. Also remove subsections 44(3)(d) to (f), (h), (l), (q), (r) and (s) which are matters that fall to be dealt with by competition law or alternatively in section 67 only, as remedies following a market inquiry and conclusion of market failure.

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Issue arising	**Why is this a problem?**	**Commentary**	**Recommendation**
		law for a market failure or a constraint on dominance (ex post).	
The definition in section 1 of "wholesale open access" is the sale, lease or otherwise making available a service or network "on a wholesale basis on general open access principles, and, to the extent applicable, the additional wholesale open access principles provided in sections 19A(4)(b), 20H(2)(a)(ii) and 43(1A) and (1B)".	This confuses the definitions of service provision (already defined in section 1 as "electronic communications service") and an existing regulatory framework for facilities-leasing which already requires licensees to provide access to facilities on effective, transparent and non-discriminatory terms. This definition also omits the necessary term "reasonable".	It is not best practise in drafting to define a term with reference to at least 4 other sections when it is itself supposed to be the definition. In addition the complexity of the definition is unnecessary because a framework already exists for facilities-leasing and access. The changes confuse important concepts that have been part of the regulatory landscape for decades, and should continue to be part of that landscape until policy goals are achieved. Adding in new definitions are likely to result in disputes about whether open access is required or has been granted because so much is dependant on the definition of terms within these definitions. The 2018 Bill requires ICASA to further define concepts that already form part of this definition, in section 44(3)(b).	Remove the definition and remove the new section 20H(2) and section 44(3)(b). As indicated above, the principles of open access can simply be included in addition to the existing provisions of Chapter 8, and competition-specific matters should be dealt with (if at all), in section 67. See comments above on the sections of the 2018 Bill that are cross-referenced in this definition.

Practical issues with the proposals or the proposals do not reflect policy goals			
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Issue arising	**Why is this a problem?**	**Commentary**	**Recommendation**
Definition of "high demand spectrum": the 2018 Bill proposes that this mean (a) the demand for access to the radio frequency spectrum resource exceeds supply; or (b) radio frequency spectrum is fully assigned, as determined by the Minister responsible for Telecommunications and Postal Services, by notice in the Gazette, after consultation with the Authority.	There are several flaws with this, which Cell C pointed out to the Minister in the consultation on the 2017 Bill. a) In some cases, spectrum for services will be fully assigned in one band, but there will be other similar, less congested, bands ('substitutes') available for other interested parties to apply to use. b) It would be uncommon to consider all spectrum used by fixed links as 'high demand'. c) In practice, there will be some (relatively few) bands used by fixed links that might be considered as congested but there are several tools that regulators can use to relieve this spectrum congestion d) Some of the identified IMT bands are more attractive for use than others, so it is likely that some IMT bands might be considered as 'high demand' in the sense that market demand will exceed supply. This could apply in the IMT bands below	The definition of high demand spectrum is best determined by the regulator in consultation with the market (i.e. spectrum users), rather than being at the discretion of the Minister. ICASA is already empowered to fulfil this function. Furthermore and importantly, section 9.2.5.4 of the Sector Policy provides that "all IMT spectrum, which is essentially mobile broadband spectrum, meets the first criteria for 'high demand spectrum' as demand for the resource exceeds supply" and the Sector Policy goes on to define the high demand bands as including but not limited to the 700MHz, 800MHz and 2600MHz bands and other bands identified for use by IMT systems at WRC-15. The Policy then provides that "the Minister, in consultation with the regulator, may determine other spectrum as high-demand spectrum, from time to time." The amendments in the 2018 Bill	Cell C does not see a need to define this term differently from the way in which it is already dealt with in the ECA and the existing Radio Frequency Spectrum Regulations, 2015, but if there is any change to be made by the 2018 Bill, it should be limited to the definition of 'high demand spectrum' included in Sector Policy.

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Issue arising	**Why is this a problem?**	**Commentary**	**Recommendation**
	1GHz for example, where there is less bandwidth available and hence a higher scarcity.	particularly the inclusion of this definition, is unnecessary or should simply restate what the Policy has already determined.	
New section 31A(1) states that "In addition to any universal access and universal service obligations contemplated in section 8(2)(g), the Authority must impose universal access and universal service obligations on existing and new radio frequency spectrum licensees, determined by the Authority".	This is set in opposition to the provisions of section 31A(2) which requires that all universal service and access obligations be approved by the Minister, and is confusing when read with the provisions of existing section 82(3) which requires the Agency (not ICASA) to determine definitions of universal service and access. Furthermore ICASA has conceded that it is wrong in law to impose universal access and service conditions on any licence other than an individual electronic communications network service (ECNS) licence. Section 8(2)(g) applies only to individual licences of this type, under Chapter 3. Chapter 5 deals with the licensing of radio frequency spectrum as radio	Either the draftsman has misunderstood the nature of a universal service and access obligation, or the nature and purpose of an ECNS as opposed to an RF licence. In either case, the Minister is barred from any involvement in licensing under section 3(3) which has not been amended by the 2018 Bill, perhaps in error. The provisions of section 31A are also confusing when read with other proposed amendments to the ECA and existing provisions of the ECA. Imposing universal service and access obligations on a new entrant is at odds with the Sector Policy goals of removing barriers to entry for new entrants, and also at odds with the provisions of the Sector Policy at 13.4.2 which envisages a	Remove this section.

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Issue arising	**Why is this a problem?**	**Commentary**	**Recommendation**
	frequency spectrum licences (RF licences). The ECNS and RF licences are two entirely separate licences, and a licensee may have an individual ECNS licence without having a radio spectrum licence, however a licensee may not have an RF licence unless that licensee also has an ECNS licence. Since an ECNS licence is required to deploy, construct and operate infrastructure, it is nonsensical to apply universal service and access conditions to an RF licence which only entitles the holder to use spectrum.	change in the way universal service and access will be addressed. A new framework (the Digital DF) is to be created. Until such time as this has been created, the 2018 Bill should not address matters related to universal service in any way that might compromise or pre-empt the transfer of matters to ICASA, or the collection and/or use of funds for universal service and access.	
The 2018 Bill introduces 2 concepts which fall outside the ambit of regulation in our view – the references to SADC roaming regulations", and the new section on international roaming.	Including these concepts in primary law would tend to entrench concepts and policies when these might change in circumstances where the changes are not in the control of the Minister at all. There is no reference in the Sector Policy to these matters at all. It is unclear why they have been	SADC is a regional body established by consensus, its pronouncements are the result of negotiation between regulatory authorities and fall outside the scope of this law. SADC roaming is similar to international roaming and must be driven by the "principle of reciprocity". The current regime in the Bill will quite possibly require that the South African licensees	The section should be removed from the Bill.

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Issue arising	**Why is this a problem?**	**Commentary**	**Recommendation**
	included without a consultation on the need and desirability of including them in primary law.	subsidize operators in the individual SADC country, and these unfavourable terms may result in dire unintended consequences. In practise, reciprocity is not possible because of the differences in each country in underlying costs, traffic volumes, ARPUs and even foreign exchange regulations and limitations	