SACF Comments on The Draft Electronic Communications Amendment Bill – B 2018

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SACF COMMENTS ON THE DRAFT ELECTRONIC COMMUNICATIONS AMENDMENT BILL

INTRODUCTION

1. The SACF is an industry association that represents a diverse group of members that participate throughout the ICT value chain and are therefore in a unique position, to bring considerable insights through the experience of our members – small and large across the ICT value chain. As such we believe that we are able to advance principles that will contribute to moving the debate forward to assist in revising the Bill towards creating an enabling environment.

2. The SACF supports the objectives of the Bill which includes promoting transformation, lowering the cost of communications and increasing competition. The SACF however also wishes to highlight areas of concern, as set out in this submission to ultimately ensure that these objectives would be achieved.

3. The SACF would like to participate in oral hearings.

PROCESS

4. It is of concern to the SACF that two parallel processes on substantially the same issues are being run almost in parallel, viz. the policy direction on the licensing of high demand spectrum and the Amendments to the ECA Amendment Bill.

5. We are further concerned by the relatively short-period provided for commentary and hearings on the Bill particularly given the significant impact of the Bill.

6. A key concern is that given the impact of the Bill that the Department has not conducted a comprehensive Regulatory Impact Assessment (RIA), we are of that this is a significant step that has been omitted and should be conducted ahead of the progression of the Bill.

REGULATORY IMPACT ASSESSMENT (RIA)

7. We welcome the consultative process that the DPTS has embarked on with the publication of a prior version of the Bill and opportunity for commentary. The Department of Telecommunications and Postal Services (DTPS) published a version of the Amendment Bill for comment in November 2017 and held a two-day workshop to discuss stakeholder commentary on the Bill. We note that the current version appears to include comments made by stakeholders. However, we are of the view that this does not negate the need for a Regulatory Impact Assessment which in our view is essential and is international best practice.

IMPOSITION OF ADDITIONAL OBLIGATIONS ON ICASA

8. We note that the Bill imposes several new obligations on ICASA, without providing a framework for the funding these additional obligations. There have been numerous discussions and processes to discuss the underfunding of the regulator which has included discussions on a new funding model, which have never been concluded. Best practice and the assessment of the regulator includes a review of the funding model, none of this has been addressed nor is it clear how these will be addressed particularly in light of the additional obligations imposed on ICASA.

9. We understand that there are other interdependent Bills that will be tabled during this Parliament, one of which will impact the operations of the Regulator. As the ECA Amendment seeks to impose numerous new obligations on ICASA, in the absence of additional funding mechanisms, it would have been useful for stakeholders to have sight of them simultaneously to enable wholistic commentary.

10. The Bill requires ICASA to define all relevant markets within 12 months of the ECA Amendment Act coming into effect. ICASA must then conduct market reviews in each of these markets starting with markets with the greatest impact

on consumer pricing and quality of services. Market definitions must be reviewed at least every 3 years.

11. The provisions in the Bill imposes a significant obligation on ICASA, and again raises the question of resources – human and funding to carry out these additional obligations.

12. Further to that, an accurate market definition is a key element of a market review, accordingly, is it necessary to define all markets in advance. Depending on the lag between the initial market definition and the market review, the market is likely to have to be redefined. Accordingly, is this a necessary obligation?

TRANSFORMATION

13. The SACF has a long history of promoting the inclusion of Black people in the ICT sector and continues to support the meaningful inclusion of Black people across the sector. We note that the Amendment Bill continues to use the terms Historically Disadvantaged Groups (HDGs) rather than moving towards the use of the term Black people. The Broad-Based Black Economic Empowerment (B-BBEE) legislative framework is based on Black people.

14. The consequence of the use of two measures, viz. Black people and Historically Disadvantaged Groups is that it increases the cost of compliance. Increasing input costs, ultimately increases the cost to the end user.

15. SACF members comply with BBBEEE ICT Codes and continue to strive to progressively increase their levels of compliance with the Codes through the requirement for parallel measurement.

16. This is further exacerbated by the absence of the definition of Historically Disadvantaged Groups (HDGs) in the draft Bill and the ECA. We therefore propose that, the Amendment Bill adopt an approach where existing licensees may hold HDI ownership without prejudice, however, all licence amendments, transfers, renewals and new licences would be subject to BBBEE instead of HDI.

We are of the view that this aligns to the BBBEE ICT Code.

CHANGING REGULATORY ENVIRONMENT

17. Until the early nineties, the Minister or political head was responsible for setting policy, making regulations and being the operator of the state monopoly – a practice that was noted globally. Prices were not necessarily lower, service was less than ideal, and services were not ubiquitous. During the 90s because of global best practice most countries including South Africa embarked on processes which culminated in the separation of powers. The political head was responsible for policy, independent regulators were created, and the incumbent monopolist became an independent operator. Competition was introduced. Although, in South Africa, the State continues to hold a stake in more than one licensee and the Ministry of Telecommunications and Postal Services is the shareholder representative in Telkom and Broadband Infraco as examples.

18. The purpose for the separation of powers was that the political heads would determine policy which is underpinned or aligned to a specific political agenda. The need for an independent regulator with the ability to independently consider and accept or reject policy directions, is to maintain fairness. However, this is not absolute as regulation does not operate outside of overall national policy and legislative framework. Once the overarching policy has been set, the execution of regulations and licensing ought to be done independently and objectively.

19. This situation is already complicated in South Africa as the Minister currently sets policy and is also the Government shareholder representative in the largest fixed line operator which until less than a decade ago held 50% of the shares in the largest mobile operator.

20. The independent and converged regulator already reports to two-line ministries – administratively to one and interfaces in terms of policy with the

other (or is intended to). The Regulator reports to Parliament through a line ministry and receives its budget from the line Ministry. The Regulator has consistently remained underfunded and has a less than perfect track record.

21. Despite this, in recent years the Regulator has been gaining traction and has demonstrated improved performance against its annual plans. Although, whether the regulator has a chosen the most impactful projects for its allotted financial resources may be the subject of debate.

22. Notwithstanding the imperfections of the Regulator, the Bill seeks to marginalise the Regulator through the stripping away of its powers and reduces it to an implementation agency. Political heads are expressly excluded from licensing decisions and the Bill currently seeks to further empower the political head while marginalising the regulator. The purpose of the separation of powers is to create markets that are impervious to political tides.

23. We note that the separation of the regulator is underpinned by the apparent slow pace of regulatory intervention. It is important to note that the regulator's powers are confined to that which is bestowed upon it in law. During the political dawn in South Africa there were three sector-specific regulators that had oversight of the following sectors – broadcasting, telecommunications and postal services.

24. Since 2000 there was a process of integration of the three regulators into one. The process of integration functionally, administratively and culturally has been complex and difficult which may have been reflected in its delivery. We note that the Authority's delivery over the past three years has been more than 70% against its business plan which is a significant improvement. The turnaround times of applications have improved as it has demonstrated its teeth and independence. These are key contributors to a strong and investment friendly environment. However, there is much more for the regulator to do. Therefore, we support the notion of strengthening the Regulator and increasing funding to a hybrid – self-funded model.

25. The Bill imposes several new obligations on the Regulator while separating the functions of the regulator. The consequence of the separation of the regulators, is likely to impede delivery as result of the split at a time when a faster regulatory pace is required.

26. A separate and independent regulator enhances government's accountability. "Such independence increases the perceived neutrality and insulation from political or operational pressures. This perception of independence is particularly important where government retains ownership of the PTO."[1]

27. We note that the Bill strengthens the powers of the Minister while marginalising the powers of the Regulator, for example, it is unclear why the Minister would want to approve universal service obligations that are attached to licences. However, it may be necessary for the Minister to periodically direct universal service obligations to achieve a specific national priority, which the Minister is able to do using policy directions to the Authority.

REGULATORY FORBEARANCE

28. The South African story has demonstrated that market segments with light touch regulation or where regulatory forbearance has been exercised has resulted in the explosion of networks and services that are competitive and extensive. The fibre environment is such an example, where there are lower barriers to entry including less regulatory obligations has enabled market entry and resulted in a thriving market.

29. However, the flipside of the absence of a regulatory framework meant that rollout was impeded due to high costs and delays in obtaining the necessary permits to rollout. We therefore welcome the Bill's attempt to create a regulatory framework that will enable the rollout of infrastructure and services.

[1] Telecommunications Regulation Handbook, Overview of Telecommunications Regulation, Module 1, Page 6

30. Our members have already noted the benefits of some of the rapid deployment provisions. Despite, our optimism at this section, we are concerned with the level of detail that borders on regulations, veering away from the level of detail intended for legislation. Rapid deployment is a critical issue that grows in importance as 5G increasingly becomes a reality – perhaps this process could be expedited through the issuance of a policy direction to ICASA to develop Rapid Deployment regulations using the draft provisions of the Bill as the basis, including the sharing of commentary emanating from this process.

Examples in the Amendment Bill includes:

1) The Bill proposes the relocation of much of ICASA's role in respect of spectrum to the Minister, this deviates from international best practice and the rationale for the departure from the current provisions is unclear.

ROLE OF POLICY

31. The role of policy is to establish the broad framework which is aligned to national priorities. The regulator is required to independently and freely consider the policy and develop regulations within the policy and legislative framework. Several of the amendments in our view is likely to erode the independence of the regulator.

32. It is important that the regulator has the discretion to consider policy directions and have the ability to amend or not act on the policy, however it cannot arbitrarily dismiss policy and policy directions without just cause.

33. Perhaps, if the concern is that policy may be dismissed out of hand, a process should then be set out in the Bill, rather than eroding the independence of the Regulator.

ASSESSMENT OF THE REGULATORY FRAMEWORK

34. The ITU has developed a tool to help assess the effectiveness of the regulatory framework and measures four clusters, viz. – regulatory authority, regulatory

mandates, regulatory regimes and competition framework. The assessment is based on the above indicators, and highlights gaps in the regulatory framework and also serves as a benchmark.

35. Indicators in the Regulatory Authority cluster includes the following which contributes to the national score for the cluster. Separate telecom / ICT regulator and autonomy are two of the indicators which contributes to the assessment regulatory reform. South Africa achieved these regulatory reforms. The Amendment Bill seeks to regress the regulatory reforms.

36. The Minister currently has the powers to provide the Authority with a guideline. While, the Authority has the discretion to consider and to even deviate from the guideline provided, it must have a sound rationale for the deviation from the guideline.

37. We are therefore of the view that the Minister's powers ought to be limited to issuing guidelines to the Authority rather than making determinations thus removing regulatory autonomy, e.g. the Bill proposes that the Minister develop a Frequency Band Plan instead of issuing guidelines to ICASA.

COST TO COMMUNICATE, licence obligations

38. Affordable access to ICTs is essential for effective and meaningful participation in the modern economy. The cost of services to the end user is a direct function of the input costs. While, we recognize the role of addressing socio-economic objectives through licence terms and conditions, it is important to strike a balance.

39. In South Africa, electronic communications operators, mainly the national operators have universal service obligations to maintain and as well as contribute to the Universal Access and Service Fund (USAF). While, most other jurisdictions adopt either pay or play, where licensees either contribute to a USAF or rollout obligations, usually not both.

40. Despite, electronic communications operators having contributed more than R3 billion to the USAF, these funds have on a very limited basis been used to promote universal access and service to electronic communications services.

41. Accordingly, we are of the view that the amendment to compel ICASA to universal access and service obligations should not be adopted, it would add to the input costs of services. Instead, we humbly suggest that the current provisions of the ECA be retained where ICASA may use its discretion on developing regulations on universal access and service. We further propose that the funds in the USAF be used to promote universal access and service; or that licensees may rollout services in accordance with guidance from ICASA and USAASA which may be offset against the licensee's USAF contributions.

INFRASTRUCTURE DUPLICATION

42. The Bill seeks to avoid the duplication of electronic communications infrastructure. While, we support the thrust of the ECA which seeks to promote infrastructure sharing as it promotes efficiency through the reduction of input costs, and ultimately the lower prices as has been evidenced in various jurisdictions.

43. Notwithstanding, the efficiencies that infrastructure sharing promotes, the duplication of infrastructure equally promotes choice and competition on which service competition is based. Notably of the recent past we have noted the changes in the wholesale arrangements of some players, which would not have been possible in the absence of the infrastructure duplication.

44. For example, Cell C has since its launch had a national roaming agreement with Vodacom and has subsequently switched to MTN. Telkom Mobile, since its launch has roamed nationally on MTN, but has switched to Vodacom. In each instance more, competitive agreements have reportedly prompted the changes. Infrastructure duplication and infrastructure competition promotes

differentiation. Therefore, in our view service-based competition on a limited number of networks does not alone promote competition.

SERVICE-BASED COMPETITION

45. It is important to note that over 300 entities hold I-ECNS licences, some of whom have made new applications for spectrum, but are yet to be licensed. The absence of spectrum since their licensing has stopped them from becoming operational.

46. Licensees in the communications sector are under growing pressure to provide increased capacity and quality of services at lower rates. This requires significant ongoing investment. In order to offer services at lower rates as has been demonstrated in various research, including the ITU – data prices have steadily been declining. As a result, there is growing pressure for operators to become more efficient to reduce costs. As a result, we have noted consolidations through mergers and acquisitions locally and globally in a bid to increase to efficiently increase the scope and scale of licences.

47. In addition to this, we have noted several operators who provide services through capacity leasing agreements with various network service licensees.

WHOLESALE OPEN ACCESS NETWORK

48. The Amendment Bill seems to assume that there is a need to establish a new framework for a wholesale open access network. We are of the view that the Electronic Communications Act (36 of2005) ("the ECA") already provides for a wholesale network through the Electronic Communications Network Service (ECNS) licence category, as an ECNS sells capacity to Electronic Communication Service (ECS) licensees.

49. As we understand it, the ECNS licence category already provides for a wholesale network. The Minister is required by 5. (6) the ECA to direct the

Authority to invite applications for I-ECNS licences, which the Policy Direction does. There is no such requirement for I-ECS licences. Accordingly, we are of the view that these licences are not linked. A licensee may hold both licences but is not required to do so. Therefore, the Minister may issue a policy direction to ICASA to invite applications for I-ECNS licences. This is our view would satisfy the Ministry's intention to licence a new infrastructure provider.

50. We would like clarity on the whether it is envisaged that there would be more than one WOAN. The inclusion of the provision for the WOAN suggests that there could be multiple WOANs. Is this the intention?

51. We are of the view that the inclusion of the description is superfluous in that it is already provided for in the ECNS licence category. The specific objectives may be better addressed from time to time through the Policy Direction required to prompt applications for I-ECNS licences.

52. On average markets in various jurisdictions globally have three (3) mobile operators with some outliers having four (4) mobile operators. Typically, the fourth operator has marginal market share, although Italy, Germany and Ireland demonstrate the fourth operator having less market share than the other three operators who hold similar market share.

53. Ghana had four (4) mobile operators, with others acquiring 2.5% market share. Tigo and Airtel merged during 2017 resulting in Ghana having three (3) operators. Post the merger, Tigo and Airtel became the second largest operator with a 26.8% share of the market.

54. Over the past few years, locally and globally most markets have noted the consolidation of players to achieve scope and scale. It is unlikely that the South African ICT market will display different patterns. Notably investment and efficiencies have been key drivers of the market consolidation.

55. In the South African market there was a slew of market consolidation which resulted in the consolidation of licensees to achieve scope and scale,

examples of these include, acquisition of Business Connexion by Telkom, Neotel by Liquid Telecoms and Smart Village by MTN.

SPECTRUM

56. The ECA currently empowers of the Minister to make guidelines for the Authority on licence and spectrum fees associated with the award of licences where the applicant makes binding commitments to construct electronic communications networks and provide electronic communications services in rural and under-serviced areas.

57. The Amendment seeks to remove the Authority's independence and discretion in determining licence and spectrum fees. The Amendment proposes that Minister will now determine spectrum and licence fees. It would first be important to understand the mischief to be cured here, as this is unclear.

58. South Africa like most other jurisdictions over the past two decades embarked on regulatory reform which saw the separation of powers to enhance transparency and effectiveness. The ITU developed a regulatory tool, the ITU Regulatory Tracker which assists in benchmarking regulatory frameworks and "helps identify gaps in existing regulatory frameworks, making the case for further regulatory reforms towards achieving a vibrant and inclusive ICT sector[2]."

59. Other examples in the Bill on the redistribution of the roles in spectrum management includes:

- Spectrum planning
  The function has been split between the Minister and the Regulator, now all will reside with the Minister.
- Determination of what constitutes high demand spectrum

[2] https://www.itu.int/net4/iti-d/irt#/about tracker

The Bill proposes that the Minister will determine what constitutes high demand spectrum, however, it is ICASA that receives and assigns spectrum. Again, the rationale for the change is unclear. The consequence of the proposed changes in the Bill is that it reduces the separation of functions that telecoms reform sought to introduce.

Spectrum Refarming

60. The Bill appears to be veering away from the policy of technology neutrality when it comes to spectrum licensing. Spectrum is refarmed to enable innovation and maximize the use of spectrum already allocated through the implementation of new technologies, this practice of spectrum refarming has benefited the industry for at least the past 10 years. It is unclear how spectrum refarming would impede or is impeding competition, so that a regulatory intervention is required at this point. What is the mischief that is being addressed with subjecting spectrum refarming to regulatory approval?

61. Further, while we support the general principle of universal service obligations, we do not believe that it can be imposed arbitrarily and repeatedly on the same spectrum assignment. Consequently, we are the view that regulatory approval and universal service obligations attached to refarming must be removed and the definition of refarming clarified.

Spectrum Trading

62. We welcome the progression from the previous version of the Bill in terms of spectrum trading, where spectrum trading is now permitted.

Spectrum Sharing

59. The provisions in respect of spectrum sharing are quite unclear, as the Bill proposes that all parties to the sharing arrangement must hold a licence for the spectrum to be able to use. We would like clarity on this, particularly as spectrum sharing is premised on one licensee sharing spare capacity with another licensee on a temporary basis without relinquishing any of its rights or obligations.

60. We are therefore, of the view that the spectrum cannot be licensed to two licensees simultaneously. As spectrum sharing is already provided for in the current Spectrum regulations, it is unclear as to why this has been included in the Bill.

Licensing of High Demand Spectrum

Non-exclusive Licensing

61. It is important to note that the pricing of spectrum or other property rights is determined by its value. Spectrum is currently assigned on an exclusive basis which determines its valuation and consequent pricing. The Bill changes this paradigm, where high demand spectrum ought to be assigned on a non-exclusive use basis.

62. This raises several questions:
    1) How would spectrum be priced?
    2) Who would have access and when?
    3) How would it be shared or traded?

63. When the spectrum is licensed on an exclusive use basis, its value can be priced and can form part of an investment, that it is to be recovered over a licence term. However, when spectrum is allocated on a shared basis, it is more difficult to include it in a company's valuation and fund it.

64. Unlicensed spectrum may typically be used on a non-exclusive basis, but we are of the view that this is unworkable in an environment where licensees are required to pay significant amounts with no guarantee of access and the significant risks of quality of service, co-ordination and cost.

Digital Migration

65. Broadcasting service licensees do not currently pay for spectrum, while, electronic communications service licensees do. The continued delays in digital migration prolongs the inefficient use of spectrum for analogue broadcasting. Digital Migration would be more spectrum efficient however there is little incentive for broadcasters to migrate. The introduction of spectrum

pricing for all licensees and AIP pricing in particular is likely in our view to enhance the efficiency of use of spectrum. This is our view may also contribute to speeding up digital migration.

66. The introduction of spectrum fees for all holders of spectrum, particularly broadcasters we believe will contribute to expediting digital migration, freeing up critical spectrum necessary for effective participation in the modern economy of the fourth industrial revolution.

Universal Service Obligations

67. We note that the Bill imposes universal service obligations that are attached to the licensing of the high demand spectrum. While, we support the principle of ensuring access in rural and under-served areas, as is evidenced from the current rollout of our members.

68. The Bill imposes a requirement that universal service and access obligations are to be imposed on radio frequency spectrum licensees to ensure that the spectrum and by implication the networks are rolled in rural and under-serviced areas before rollout in other areas may commence.

69. This provision does not recognize the propagation properties of the different bands. For example, sub 1GHz bands such as the 700 and 800 bands are better bands for the propagation over distances which is more suitable for rural areas, whereas 2.6GHZ and 3.5GHz are better suited to the densification of the networks and therefore provides capacity.

70. Lower bands offer wider coverage and require fewer base stations. High bands provide coverage over shorter distances and therefore require more base stations. These bands therefore, play complimentary roles to achieve an efficient national rollout.

71. Therefore, it becomes a challenge when determining that 2.6GHz for example, cannot be used in urban areas until the rollout has been completed in rural areas first. This would result in an inefficient and more expensive rollout of

spectrum. The unintended consequence of this approach would be inefficient network planning would have to ensure that all spectrum would be rolled out in rural areas first regardless of the demand. Therefore, this approach would result in the inefficient use of spectrum.

72. This is exacerbated by the delays in digital migration, which may result in some bands being available sooner than others. Therefore, we are of the view that rollout obligations must be aligned to the properties of the relevant spectrum bands and its availability.

Developing the Radio Frequency Plan

73. The ECA currently creates a separation of functions in terms of radio frequency

a) The Minister represents South Africa at the ITU in all matters relating to amongst others spectrum planning,
b) ICASA develops the national radio frequency plan; and
c) The Minister approves the plan.

74. The Bill proposes that these functions are consolidated under the Minister. The rationale for this is unclear. It would be useful to understand the mischief being cured with this proposed amendment as the ECA is clear and the functions are separated.

75. The current provisions of the ECA explicitly sets out a robust consultative process, the Bill appears to replace this with a less consultative process.

76. Should there be concerns about the about potential delays, timeframes could be included in the Bill rather than an overhaul of the current system.

National Radio Frequency Spectrum Planning Committee

77. The Bill proposes the establishment of a National Radio Frequency Spectrum Planning Committee, thus stripping away ICASA's role and functions in terms of spectrum planning and assignment. The function is currently fulfilled by ICASA and the rationale for the change is unclear.

78. Further, the creation of another structure, would require additional resources, in the absence of a clear rationale, is this an efficient proposal?

WHOLESALE OPEN ACCESS

79. The Bill seeks to create "deemed entities" and imposes additional obligations. The objective and rationale behind the "deemed entity" is unclear. A licensee is considered a deemed entity based on the criteria below:
    1) An ECNS licensee who has SMP (25%) in an infrastructure market;
    2) An ECS licensee who has SMP (25%) in the total electronic communications market
    3) Controls an essential facility
    4) Controls a scarce resource including IMT spectrum.

80. The Bill proposes that a licensee would simply need to possess any of the above to attract additional obligations. Typically, a licensee would typically need SMP and demonstrate an abuse of dominance to invoke remedial measures.

81. In addition, it is unclear what obligations would be imposed on the "deemed entity".

82. Currently, the ECA provides for market reviews which looks at the status of the market and when there is market failure the regulator may impose remedies to address the market failure.

83. The rationale and objective for the inclusion of the "deemed entity" should be clarified.

RAPID DEPLOYMENT

84. We welcome the revised provisions on rapid deployment based on previous comments. However, the concept of adequately served remains a grave

concern. Fibre rollouts are funded by private sector funding based on the business case of each licensee.

85. Competition is important as it promotes consumer choice and as discussed above service competition is limited in the absence of infrastructure competition. Therefore, we are of the view that this proposal unduly interferes in the commercial operations of licensees and therefore should be removed. This is further exacerbated by the absence of a clear rationale and framework thereto.

86. While, we understand that the intention may be to drive rollouts to areas perceived to be of lower economic value, the prohibition of rollouts deemed to be adequately served areas does not equate to the rollout in the desired areas.

87. Instead, incentives may drive rollouts to the desired areas. Electronic Communications licensees in the main contribute significantly to the Universal Service and Access Fund (USAF).

INTERNATIONAL ROAMING

88. We are concerned about the level of detail contained in the Bill dealing with SADC roaming. As we understand that role of primary legislation is to establish a principle at a high level and/or prescribe the powers conferred to the Minister or the Regulator or other agency.

89. It is essential to recognize the jurisdiction of the Bill, that it can only regulate services within the Republic. The provisions on International Roaming appear to exceed such powers as it appears to delve into the commercial operations of operators and imposes cost pricing principles on local operators. It is important to note that the success of the SADC roaming model is dependent on reciprocity. However, SADC roaming partners fall outside of South Africa's jurisdiction, the regulator must therefore enter into bilateral agreements with all SADC National Regulatory Authorities (NRAs) so that the principles of

reciprocity may be enforced. Simply including the obligation in draft legislation with the level of detail that should be contained in regulations is not ideal.

90. We further note that SADC Roaming was not included in the White Paper and there has been no prior consultation in this regard. We understand this to be a crucial step of engagement that is still required. We are optimistic that the comments in this regard from the operators concerned will contribute to remedying this.