

UNIVERSAL INTERNET ACCESS IN SOUTH AFRICAN DISADVANTAGED COMMUNITIES: IS THERE ADEQUATE REGULATION?

by

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DECLARATION

I, 2628815, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

As a result of the advent of the fourth industrial revolution, artificial intelligence, the technology of things and other similar technologies, information communications technologies (ICT) form the basis of our routine lives and sit at the core of both economic and social development. Therefore, the advancement of universal access and service is indispensable for the equal and full enjoyment of all freedoms and rights by all and provides for the improvement of the quality of life for all citizens, and further presents a gateway to freeing each person's potential, as envisaged in the Constitution. This is particularly true for the digitally marginalised situated in informal settlements, townships and remote rural areas (Disadvantaged Communities).

Notwithstanding the above, statistics show that to date the digital community in South Africa is still very much skewed towards the affluent urban communities, with only 1% of rural households able to access the internet in their homes. Achieving universal access and service in Disadvantaged Communities is a key policy goal in a democratic society such as ours. It is in light of this that this research report presents a multi-method research approach to holistically conclude on the adequacy of the South African regulatory framework to drive the advancement of universal access and service in Disadvantaged Communities, and recommend law reform. This entails a review of the regulatory framework governing universal access and service (in the South African historical background context under the apartheid regime) compared against international best practices on the regulation of universal access and service in Disadvantaged Communities (using the prevailing socio-economic realities in Disadvantaged Communities as guiding principles).

The research report findings, taking into consideration the South African historical background and the prevailing socio-economic realities in Disadvantaged Communities, indicate that the South African regulatory framework is to a great extent on par with international best practices on regulation aimed at the advancement of universal access and service in Disadvantaged Communities, barring its unsuccessful implementation. The research report identifies that the unsuccessful implementation of the regulatory framework is largely owing to its fragmentation (i.e., the regulatory framework relies on vast legislation, policies and regulations and different stakeholders for its implementation). Therefore, the proposed law reform constitute regulatory framework structural measures aimed at redressing the identified fragmentation so as to achieve a regulatory framework that adequately facilitates the implementation of the universal access and service objective in Disadvantaged Communities..

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I INTRODUCTION

While the respective objectives are different, universal access and service essentially entail access by all to the economic and social benefits attributable to ICTs.¹ Universal access was previously defined as access to a public telephone over a walking distance, whereas universal service was previously defined as access to a telephone at home.² With technological advancements extending telecommunications beyond telephony to broadband services, universal access is now understood to mean access on a shared basis by communities to ICT services,³ and universal service as direct access to ICT services at home or individual access.⁴ On the back of this, universal access and service regulation seeks to facilitate access to basic ICT services by all citizens including those situated in Disadvantaged Communities, who would otherwise not be granted access absent such regulation.⁵

(a) *Research Limitations*

The research report employs a multi-method research approach (comprising a review of the South African regulatory framework governing universal access and service in the context of the South African historical background under the apartheid regime compared against regulatory international best practices (using the prevailing socio-economic issues in Disadvantage Communities as guiding principles)) to holistically to determine the adequacy of the South African regulatory framework to drive the advancement of universal access and service in Disadvantaged Communities and to recommend law reform that is aimed at facilitating the advancement of universal access and service in these communities. This research report seeks in no way to constitute a comprehensive review of the South African ICT laws or a comprehensive review of the regulatory framework generally governing universal access and service, nor does its scope extend to prevailing political realities derailing the advancement of universal access and service in Disadvantaged Communities. The scope of this research report is limited to determining the adequacy of the regulatory framework that is aimed at redressing the digital divide in Disadvantaged Communities (i.e., it focuses on digital disparities pertaining to geographical locations in South Africa) and doesn't encompass gender,

¹ ITU Publications 'Qestion 7-3/1: Implementation of Universal Access to Broadband Services' available at <https://www.itu.int/pub/D-STG-SG01.07.3-2014Implementation>, accessed on 15 September 2023.

² Lisa Thornton, Yasmin Carrim, Patric Mtshaulana and Pippa Reburn *Telecommunications Law in South Africa* (2006) 217.

³ Section 1 of the Electronic Communications and Transactions Act 25 of 2002.

⁴ The National Integrated ICT Policy White Paper (GN 1212 in GG 40325 of 03 October 2023) 34.

⁵ Lisa Thornton op cit note 2.

age and/or disparities based on disabilities or disparities based on other grounds that exist in relation to ICTs in South Africa.

(b) Research Objectives

Based on the identified digital divide afflicting Disadvantaged Communities in South Africa, the research report has the following objectives: (i) to determine the scope of the South African regulatory framework governing universal access and service; (ii) to analyse international best practice recommendations and guidelines for regulation aimed at facilitating universal access and service in Disadvantaged Communities; and (iii) to evaluate the adequacy of the South African regulatory framework governing universal access and service to facilitate this objective in Disadvantaged Communities.

In light of the above, this research report will first look at the current South African regulatory framework governing universal access and service in the historical background context under the apartheid regime. Thereafter, the research report will look at the international best practice recommendations and guidelines by the International Telecommunications Union (ITU) for regulation aimed at the advancement of universal access and service in Disadvantaged Communities. Last and to conclude on the adequacy of the South African regulatory framework in the mentioned regard and to recommend the appropriate law reform, the research report will consider the South African regulatory framework against the said international best practice guidelines and recommendations, taking into account the historical background and using the prevailing socio-economic realities in Disadvantaged Communities as guiding principles.

II THE SOUTH AFRICAN REGULATORY FRAMEWORK GOVERNING UNIVERSAL ACCESS AND SERVICE

It is commonplace that the South African legal framework is reformatory in that it comprises of the legacy legal framework under the apartheid regime and the reformed legal framework under the Constitutional order. This theory also holds true in relation to the South African regulatory framework governing universal access and service, as will be shown below. This section looks at the current South African regulatory framework governing universal access and service in the context of its historical background under the apartheid regime to put into perspective the digital divide in South Africa and to gain understanding of the legacy issues

this regulatory framework seeks to address, particularly, in relation to Disadvantaged Communities.

(a) Historical Background

The unique nature of the South African legal framework is in view of the country's colonial history under the apartheid regime. Underlying the apartheid system, was the parliament's prerogative to enact laws that may encroach upon an individual's life, property, and/or liberty, with the court's role only limited to enforcing such laws.⁶ These laws, which were aimed at segregation and "separate development" created and perpetuated the digital divide as it exists today.⁷ This was achieved through situating the black population in townships with inadequate telecommunications infrastructure and in isolated rural areas where access to telecommunications services and networks was in effect non-existent.⁸ To exacerbate issues, the legitimised income disparities amongst races meant that the affordability of telecommunication services became a challenge for the black population in these Disadvantaged Communities.⁹ To illustrate this inequity, data shows that between 1978 to 1987, 84% of the white population had access to a telephone at home, whereas less than 14% of the black population situated in rural areas had access to a telephone at home.¹⁰

In terms of regulation, the South African Posts and Telecommunications (SAPT), was the state-owned monopoly responsible for the postal and telecommunications sector in South Africa under the apartheid regime.¹¹ The Posts and Telecommunication-Related Matters Act 44 of 1958 was the authority governing SAPT, which contained no similar universal access and service objectives.¹² At the time, the existence of state-owned monopolies was not unique to the communications sector but also existed in other economic sectors, such as transportation and energy.¹³ This was in line with the apartheid regime's objective to maintain full power and control over the state, including its economy.¹⁴ Different from telecommunication monopolies

⁶ Pierre De Vos, Warren Freedman, Danie Brand, Christopher Gevers, Karthigasen Givender, Patricia Lenaghan, Douglas Mailula, Nomthandazo Ntlama, Sanele Sibanda, Lee Stone *Constitutional Law in Context* (2014) 20.

⁷ Robert B. Horwitz 'The Uneasy Relationship Between Political and Economic Reform in South Africa: The Case of Telecommunications' (1994) 93 *African Affairs* at 363.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Charley Lewis 'Universal Access and Service in South Africa's Telecommunications Policy' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4027325, accessed on 30 July 2023.

¹² The Posts and Telecommunication-Related Matters Act 44 of 1958.

¹³ Horwitz op cit note 7 at 361.

¹⁴ *Ibid.*

in developed countries, which were aimed at universal access and service, SAPT exercised its monopoly mainly to extend telecommunications infrastructure and services largely to the white population and businesses at highly subsidised rates.¹⁵

Global reform in telecommunications, characterised by a move away from state-owned monopolies to privatisation, had commenced as early as the early 1980s in South Africa.¹⁶ In the late 1980s, there began efforts aimed at legal reform in South Africa, including legal reform in the ICT sector in line with, amongst other things, the need to achieve universal access and service to telecommunications infrastructure and services in Disadvantaged Communities.¹⁷ This legal reform was aimed at undoing the damage caused by the laws of the apartheid regime in denying the black population in Disadvantaged Communities access to telecommunications networks and services.¹⁸ The nature of the reform was, to a large extent, informed by global best practices on regulation, as recommended by the ITU,¹⁹ as will be discussed in detail further below.

This reform is codified in the Constitution and the regulatory framework governing universal access and service today. The Constitution establishes a democratic society founded on the values of advancement of equality, human dignity, non-discrimination, and the supremacy of the Constitution.²⁰ For regulatory purposes, the Constitution establishes, through the separation of powers doctrine, three different arms of government, namely: the judiciary, the executive and the legislature.²¹ In this way, the Constitution ensures that no arm of government has unfettered power and builds a system of checks and balances amongst the three arms of government. Each arm of government plays a unique role in regulation, as will be

¹⁵ Horwitz op cite note 7 at 363.

¹⁶ ITU Publication ‘The African Green Paper: Telecommunication Policies for Africa’ available at https://www.itu.int/itudoc/itu-d/baap/ap/progl/afr_gp_e_ww6.doc, accessed on 30 July 2023.

¹⁷ Charley Lewis ‘Universal Access and Service in South Africa’s Telecommunications Policy’ op cit note 11 at 1.

¹⁸ Ibid.

¹⁹ Lewis, C ‘Universal Access and Service Interventions in South Africa: Best Practice, Poor impact’ (2013) 13 *The African Journal of Information and Communication* at 95.

²⁰ Section 1 of the Constitution of the Republic of South Africa, 1996.

²¹ Pierre De Vos op cit note 6 at 32.

shown in the discussion of the reformed telecommunications regulatory framework that follows.²²

(b) Reformed Telecommunications Regulatory Framework

The make-up of the reformed telecommunications regulatory framework under the Constitutional order comprises legislation pertaining to the promotion and advancement of universal access and service. The relevant legislation is augmented in policy documents by the relevant minister and in regulations by the relevant regulatory body established by the legislation, as discussed below. The relevant legislation further establishes institutions and bodies responsible for facilitating implementation and oversight of this objective, as will be shown below. Integral to this regulatory reform is the regulation of telecommunications in the public interest²³ and the concomitant advancement of universal access and service, particularly, in Disadvantaged Communities. The research report considers the aforementioned components comprising the reformed regulatory framework governing universal access and service in South Africa below.

(i) Legislation

Since the call for universal affordable access in the Reconstruction and Development Plan (which served as the ANC election manifesto adopted prior to South Africa's first elections under democracy in 1994)²⁴ and the White Paper on Telecommunications Policy,²⁵ the universal access and service objective made its way to the now repealed Telecommunications Act No.103 of 1996 (the Telecommunications Act),²⁶ the Electronic Communications Act No.36 of 2005 (the Electronic Communications Act)²⁷ and in the Electronic Communications and Transactions Act No.25 of 2002 (the Electronic Communications and Transactions Act).²⁸ In addition, the Independent Communications Authority of South Africa Act No. 13 of 2000 (the ICASA Act) establishes the Independent Communications Authority of South Africa (the Authority),²⁹ as the regulator responsible for regulating telecommunications in the public

²² Ibid.

²³ Lisa Thornton op cit note 2 at 218.

²⁴ Charley Lewis 'Universal Access and Service in South Africa's Telecommunications Policy' op cit note 11 at 46.

²⁵ The White Paper on Telecommunications Policy (GN 291 in GG 16995 of 13 March 1996) .

²⁶ Section 2 of the Telecommunications Act No.103 of 1996.

²⁷ Section 2 of the Electronic Communications Act No.36 of 2005.

²⁸ Section 2 of the Electronic Communications and Transactions Act No.25 of 2002.

²⁹ Section 3 of the Independent Communications Authority of South Africa Act No. 13 of 2000.

interest,³⁰ which includes facilitating universal access and service. The aforementioned legislation constitute legislation principally governing universal access and service in South Africa.

Universal access and service was introduced in South African statute as a legislative objective in the Telecommunications Act. Notwithstanding the repeal³¹ of the Telecommunications Act, the objective is maintained in the Electronic Communications Act (the repealing Act).³² It is an express objective of the Electronic Communications Act to promote universal access and connectivity for all.³³ The Electronic Communications Act further empowers the Minister responsible for communications (the Minister) to make universal access and service policy.³⁴ The ICASA Act empowers the Authority to recommendations on policy to the Minister pertaining to universal access and service and to make regulations connected therewith.³⁵ Lastly, the Electronic Communications and Transactions Act recognises universal access as access by all citizens to the internet and electronic transactions.³⁶ As already mentioned, the aforementioned legislation establish institutions and/or bodies responsible for facilitating implementation and oversight of this objective, as will be shown in the discussion of responsible institutions and bodies that follows.

(ii) *Responsible Institutions and Bodies*

The Universal Service Agency (Agency) is established in the Telecommunications Act as the body responsible for facilitating the advancement of universal access and service in South Africa.³⁷ The Agency was controlled by the head of the Agency, the head was appointed by the Minister for Posts, Telecommunications and Broadcasting,³⁸ and reported to the Minister.³⁹ The role of the Agency under the Telecommunications Act included: (i) promoting the advancement of universal access and service; (ii) managing schemes for providing

³⁰ Sections 2 of Act No. 13 of 2000. The independent regulatory body under the repealed Telecommunications Act comprised the South African Telecommunications Regulatory Body and the Independent Broadcasting Authority before the two bodies were merged into the Authority (Z Lesame 'The new Independent Communications Authority South Africa: its challenges and implications for telecommunications liberalisation in the country' *South African Journal for Communication Theory and Research* (2000) 26 at 29).

³¹ DP van der Merwe, A Roos, GTS Eiselen, SS Nel, W Erlank and NQ Mabeka *Information and Communications Technology Law* 3 ed (2021) 34.

³² Section 2 of Act 36 of 2005.

³³ *Ibid.*

³⁴ Section 3 of Act 36 of 2005.

³⁵ Section 4 of Act 13 of 2000.

³⁶ Section 1 of Act 25 of 2002.

³⁷ Section 58 of Act 103 of 1996.

³⁸ Section 60(1) of Act 103 of 1996.

³⁹ Section 63(1) of Act 103 of 1996.

universal access and service; (iii) facilitating the use and the adoption of new methods to achieve universal access and service; (iv) making recommendations to the Minister on policy issues pertaining to universal access and service and the advancement thereof;⁴⁰ and (v) management of the Universal Service Fund (Fund).

The Electronic Communications Act provides for the continued existence of the Agency and the Fund (as the Universal Service and Access Agency of South Africa and the Universal Service and Access Fund, respectively).⁴¹ In terms of the Electronic Communications Act, a board responsible for oversight and guidance of the Agency is appointed by the Minister.⁴² A CEO accountable to the Board is appointed by the Board (with the Minister's approval) to oversee the advancement of the objectives of the Agency.⁴³ In addition, the CEO is required to employ staff to assist the CEO in the performance of the functions of the Agency.⁴⁴

Closely resembling the provisions of the repealed Telecommunications Act (set out above), the functions of the Agency in terms of the Electronic Communications Act, broadly include: (i) promoting the advancement of universal access and service; (ii) managing schemes for providing universal access and service; (iii) facilitating the use and adoption of innovative methods to achieve universal access and service⁴⁵ and (iv) management of the Fund (subject to the control and instruction of the Minister).⁴⁶ The Agency is further tasked (as and when requested) to advise the Authority with regard to universal access and service and to put forward recommendations to the Minister on policy issues pertaining to universal access and service,⁴⁷ including recommendations from time to time to the Minister so as to enable the Minister to make a determination on the universal access and service definition.⁴⁸ Insofar as reporting is concerned, the Agency reports (subject to prior approval by the Board⁴⁹) to the

⁴⁰ Section 59(3)(e) of Act 103 of 1996.

⁴¹ Section 80(1) of Act 36 of 2005.

⁴² Section 80(2) of Act 36 of 2005.

⁴³ Section 82A(1) of Act 36 of 2005.

⁴⁴ Section 83(5) of Act 36 of 2005.

⁴⁵ Section 82 of Act 36 of 2005.

⁴⁶ Section 87(4) of Act 36 of 2005.

⁴⁷ Section 82(4) of Act 36 of 2005.

⁴⁸ Section 82 (3) Act 36 of 2005.

⁴⁹ Section 81(2)(d) of Act 36 of 2005.

Minister annually on, inter alia, the progress on the advancement of universal access and service, the report is then tabled before Parliament.⁵⁰

In terms of financing, the Agency is financed by money allocated by parliament to the Fund⁵¹ and the electronic communications network and services licensees' contributions to the Fund (as collected by the Agency from the Authority).⁵² Money in the Fund is to be used solely towards: (i) the costs of providing electronic communications network and services to needy persons (as determined by the Authority by way of regulation⁵³); (ii) the cost of extending electronic communications networks or services to underserved areas (as determined by the Authority by way of regulation⁵⁴); (iii) schools and colleges for the procurement of electronic communications networks and services; and (iv) community centres for access to electronic communications network and services.⁵⁵

(iii) Policy and Regulations

As mentioned above, various ministerial policies and regulations have been published by the Minister and the Authority, respectively, giving effect to the provisions of the aforementioned governing legislation in relation to the advancement of universal access and service. Pertinent and for discussion in relation to the topic at hand is the South Africa Connect: Creating Opportunities, Ensuring Inclusion - South Africa's Broadband Policy (SA Connect) and The National Integrated ICT Policy White Paper (ICT Policy White Paper). These policies outline South Africa's objectives and targets pertaining to universal access and service. In addition to the mentioned ministerial policies, the research report will also look at the relevant regulations by the Authority, as contemplated above.

SA Connect is, in broad terms, the policy giving effect to the country's development plan to achieve universal access and service (prioritising Disadvantaged Communities) by 2030, in line with South Africa's economic and social development plans.⁵⁶ One of the principles underlying SA Connect is embracing innovation and advancement of technology-neutral regulation (i.e., regulation not favouring any technology over the other) to achieve

⁵⁰ Section 86(3) of Act 36 of 2005.

⁵¹ Section 84(1) of Act 36 of 2005.

⁵² Section 89(4) of Act 36 of 2005.

⁵³ Section 88(3) of Act 36 of 2005.

⁵⁴ Section 88(4) of Act 36 of 2005.

⁵⁵ Section 88(1) of Act 36 of 2005.

⁵⁶ South Africa Connect: Creating Opportunities, Ensuring Inclusion- South Africa's Broadband Policy (GN 953 in GG 37119 of 6 December 2013) 5.

universal access and service in Disadvantaged Communities.⁵⁷ To this end, SA Connect recognises satellite networks and community networks as a viable alternative to rural and remote access.⁵⁸ It should be noted that the application procedure to the Authority for the required licenses to operate ICT networks, such as satellite network, is provided for in the regulatory framework.⁵⁹ Community networks in underserved areas are further envisaged in the Electronic Communications Amendment Bill.⁶⁰

Recognising the affordability challenges in extending ICTs in Disadvantaged Communities, SA Connect identifies, amongst others, public-private partnerships as an effective resolution to achieve the availability of quality and affordable ICT services in Disadvantaged Communities.⁶¹ Furthermore, cross-sector cooperation amongst state-owned entities is recommended to effectively leverage state resources to enhance affordable digital service delivery in Disadvantaged Communities.⁶² The importance of competition to achieve affordability in ICTs is highlighted in the policy.⁶³ Facilitating competition in the regulatory framework includes powers granted on the Authority to perform competition market inquiries and competition assessments when exercising its licensing functions, as envisaged in the Electronic Communications Amendment Bill.⁶⁴ SA Connect further notes the necessity for the state to incentivise the advancement of universal access and service in these low-income Disadvantaged Communities, by way of (amongst others) device subsidies, tax exemptions and direct contributions to universal access and service initiatives.⁶⁵ Other initiatives, as set out in the policy, aimed at achieving affordability, include free public WIFI network enabling individuals to connect to e-government and other public services.⁶⁶ This entails the use of ICTs to connect citizens to public services.⁶⁷

⁵⁷ Ibid at 16.

⁵⁸ Ibid at 25.

⁵⁹ Staff Writer, IT Web 'Gungubele Slams Claims Govt is Blocking Starlink' *IT Web* 21 April 2023 at 1

⁶⁰ Invitation to Provide Written Comments on the Proposed Electronic Communications Amendment Bill (GN 3567 in GG 48841 of 23 June 2023) 18.

⁶¹ South Africa Connect: Creating Opportunities, Ensuring Inclusion- South Africa's Broadband Policy (GN 953 in GG 37119 of 6 December 2013) 5.

⁶² Ibid at 10.

⁶³ Ibid at 29.

⁶⁴ Invitation to Provide Written Comments on the Proposed Electronic Communications Amendment Bill (GN 3567 in GG 48841 of 23 June 2023) 55.

⁶⁵ South Africa Connect: Creating Opportunities, Ensuring Inclusion- South Africa's Broadband Policy (GN 953 in GG 37119 Of 6 December 2013) 20.

⁶⁶ Ibid at 8.

⁶⁷ National e-Government Strategy and Roadmap (GN 886 in GG 41421 of 7 November 2011) 7.

SA Connect further makes recommendations aimed at facilitating availability and access to ICTs in Disadvantaged Communities. In relation to stimulating access and demand, SA Connect envisages e-readiness and e-literacy programmes in schools and initiatives to promote relevant and local content and applications to individuals.⁶⁸The advancement of such digital skills and local content and application are incorporated in the National e-Skills Plan by the Minister of Higher Education and Training,⁶⁹Electronic Communications Act⁷⁰ and regulations,⁷¹ respectively. Insofar as facilitating availability, SA Connect recognises the importance of removing regulatory barriers in broadband rollout.⁷²This, particularly the removal of cumbersome land-use approval, is elucidated in the National Policy on Rapid Deployment of Electronic Communications Networks and Facilities⁷³ and Electronic Communications Amendment Bill.⁷⁴ In addition, SA Connect envisages creating a regulatory framework that enables competitive infrastructure and spectrum sharing.⁷⁵ Details on infrastructure sharing are contained in the Interconnection and⁷⁶ Facilities Leasing regulations⁷⁷. Spectrum sharing is provided for in the Radio Frequency Spectrum Regulations⁷⁸ and in the Electronic Communications Amendment Bill (insofar as it pertains to underserved areas).⁷⁹On the whole, SA Connect outlines objectives and targets to achieve universal access and service (prioritising Disadvantaged Communities)⁸⁰ and envisages monitoring, evaluation and reporting of the progress and outcomes of the objectives.⁸¹

⁶⁸ South Africa Connect: Creating Opportunities, Ensuring Inclusion- South Africa's Broadband Policy (GN 953 in GG 37119 of 6 December 2013) 9.

⁶⁹ National e-Strategy Digital Society South Africa (GN 887 GG 41242 of 7 November 2017) 16.

⁷⁰ Section 61(1) of Act 36 of 2005.

⁷¹ ICASA Regulations on Local Television Content (GN 346 in GG 39844 of 23 March 2016).

⁷² South Africa Connect: Creating Opportunities, Ensuring Inclusion- South Africa's Broadband Policy (GN 953 in GG 37119 of 6 December 2013) 15.

⁷³ National Policy on Rapid Deployment of Electronic Communications Networks and Facilities (GN 3236 in GG 48346 of 31 March 2023) 5.

⁷⁴ Invitation to Provide Written Comments on the Proposed Electronic Communications Amendment Bill (GN 3567 in GG 48841 of 23 June 2023) 47.

⁷⁵ South Africa Connect: Creating Opportunities, Ensuring Inclusion- South Africa's Broadband Policy (GN 953 in GG 37119 of 6 December 2013) 20.

⁷⁶ Interconnection Regulations (GN 282 in GG 33101 of 9 April 2010).

⁷⁷ Facilities Leasing Regulations (GN 468 in GG 33252 of 31 May 2010).

⁷⁸ Radio Frequency Spectrum Regulations (GN 279 in GG 38641 of 30 March 2015) 23.

⁷⁹ Invitation to Provide Written Comments on the Proposed Electronic Communications Amendment Bill (GN 3567 in GG 48841 of 23 June 2023) 48.

⁸⁰ South Africa Connect: Creating Opportunities, Ensuring Inclusion- South Africa's Broadband Policy (GN 953 in GG 37119 of 6 December 2013) 18.

⁸¹ The National Integrated ICT Policy White Paper (GN 1212 in GG 40325 of 03 October 2023).

The ICT Policy White Paper is an extension of the universal access and service strategies contained in SA Connect.⁸² The regulatory framework has subsequently been updated by way of amendment legislation and regulations and further policies (as touched on in the discussion of SA Connect above) consistent with the universal access and service strategies contained in the ICT Policy White Paper⁸³(which include the strategies contained in the SA Connect above). The policy prioritises increasing coverage to Disadvantaged Communities and highlights the prevailing socio-economic realities in these communities.⁸⁴ These socio-economic realities are used as guiding principles in preparing a regulatory framework, which adequately facilitates the universal access and service objective in these communities, and are classified as follows: (i) availability of quality infrastructure and services; (ii) affordability of ICT services and devices; and (iii) accessibility of ICTs irrespective of one's geography, background and literacy levels.⁸⁵ The research report deals with these socio-economic realities/guiding principles in detail further below when considering the ITU regulatory recommendations and guidelines for a regulatory framework aimed at the advancement of universal access and service in Disadvantaged Communities.

In addition to the goals and targets outlined in the SA Connect above with regard to the advancement of universal access and service in Disadvantaged Communities, the ICT Policy White Paper envisages a refined regulatory framework that sets out measurable targets and definitions for the advancement of the universal access and service objective.⁸⁶ Noteworthy in this context, the ICT Policy White Paper puts forward that universal access and service implementation plan must include definitions of the key terms, including outlining the eligibility criteria as to what will be supported and how underserved areas should be identified and. The policy adds that these definitions should be regularly reviewed and updated in line with changing circumstances in technologies in the communities it is serving.⁸⁷

Similar to the SA Connect, The ICT Policy White Paper envisages a built-in ongoing monitoring, evaluation and review of its objective to achieve successful implementation.⁸⁸ Noteworthy in relation to implementation, the policy highlights overlap concerns between the roles and functions of the stakeholders (the Minister, Authority and Agency) as an impediment

⁸² Ibid at 11.

⁸³ Ibid at 14.

⁸⁴ Ibid at 32.

⁸⁵ Ibid at 29.

⁸⁶ Ibid.

⁸⁷ Ibid at 32.

⁸⁸ Ibid.

to the successful implementation of this objective, particularly in Disadvantaged Communities.⁸⁹ As a measure to redress this overlap, it is recommended in the ICT Policy White Paper that policymaking be limited to the Minister (including the Minister taking over all current policy-related responsibilities currently vesting with the Authority and the Agency), that regulatory functions be limited to the authority and that the Agency be dissolved and the Fund is transferred to a new Digital Development Fund, which will be responsible for managing the Fund,⁹⁰ as will be considered further below.

Insofar as the regulations by the Authority are concerned, the scope of regulations to be published by the Authority in line with the universal access and service objective include the regulations providing the definitions of "needy persons" and "underserved areas". On 10 September 2012, the Authority published, in terms of section 88 of the Electronic Communications Act, the Underserved Areas Definition Regulations providing the definition of underserved areas. The regulation defines underserved areas according to an area within a local or district municipality which meets the eligibility criteria set out therein and purports to provide a list of underserved areas.⁹¹ There is no evidence of recent updates to this definition, notwithstanding the requirement for the Authority to review and update this definition and the list every two years⁹² in order to ascertain areas eligible for Fund subsidies. Insofar as the definition of needy persons is concerned, despite earlier efforts at inviting written representations on the proposed definitions,⁹³ there is no regulation defining needy persons nor evidence of recent efforts by the Authority in defining this term. This is the reality in relation to the universal access and service definition itself, for which a recommendation must be made by the Agency to the Minister to enable the Minister to make a determination as to the universal access and service definition.⁹⁴

The above is the scope of the South African regulatory framework aimed at facilitating universal access and service in Disadvantaged Communities. The research report now moves to analysing the international regulatory best practice recommendations and guidelines by the

⁸⁹ Ibid.

⁹⁰ Ibid at 30.

⁹¹ Underserved Areas Definition Regulations (GN 734 in GG 35675 of 10 September 2012).

⁹² Section 41 of the Electronic Communications Amendment Act 1 of 2014.

⁹³ Notice of Intention to Extend the Time Period for the Submission of Written Comments regarding the Proposed Definitions for Universal Access And Service, Proposed Determination for Underserved Areas and the Proposed Determination for Needy Persons Pursuant to Section 82(3) read with Sections 88(2), (3) and (4) of the Electronic Communications Act (No.36 of 2005) as Amended (GN 1208 in GG 31456 of 15 August 2008).

⁹⁴ Section 37 of the Electronic Communications Amendment Act 1 of 2014.

ITU pertaining to the regulation of universal access and service in Disadvantaged Communities.

III INTERNATIONAL REGULATORY BEST PRACTICE IN TERMS OF THE ITU

To understand the relevance of the ITU best practice guidelines and recommendations in relation to the scope of this research report (i.e. ascertaining the adequacy of the South African regulatory framework governing universal access and service to facilitate the advancement of this objective in Disadvantaged Communities), these guidelines and recommendations should, first, be viewed in light of the role of the ITU in informing and shaping the South African reformed telecommunications regulatory framework, as set out above and as we know it today. Secondly, given the ubiquitous nature of the ICT sector and nascency of South Africa's regulatory framework governing universal access and service, these guidelines and recommendations serve as an apt benchmark and provide guidance for necessary law reform for driving the advancement of universal access and service in Disadvantaged Communities.

To that end, first, this section looks at the role of the ITU in informing and shaping the reformed regulatory framework (set out above) so as to illustrate the ITU's relevance for the purpose of this research report, as opposed to other similar international bodies governing ICTs. Secondly, this section looks at the regulatory best practice guidelines and recommendations proposed by the ITU for a regulatory framework aimed at facilitating the advancement of universal access and service in Disadvantaged Communities, which serves as a benchmark for the South African regulatory framework and provides guidance for the necessary law reform.

(a) *Background*

The ITU is the United Nations agency aimed at enabling international connectivity, including promoting the advancement of universal access and service in Disadvantaged Communities globally.⁹⁵ Owing to the oppressive and discriminatory apartheid laws, South Africa was excluded from the ITU in 1965.⁹⁶ In 1994, following the transition to democracy, South Africa re-joined the ITU.⁹⁷ South Africa is now a member of the ITU and a signatory to the ITU

⁹⁵ ITU 'Committed to connecting the world' available at <https://www.itu.int/en/about/Pages/default.aspx>, accessed on 30 July 2023.

⁹⁶ Charley Lewis 'Universal Access and Service in South Africa's Telecommunications Policy' op cit note 11 at 1.

⁹⁷ Ibid.

Constitution and Convention.⁹⁸ The final Constitution declaring South Africa a democratic state was promulgated in 1996.⁹⁹ In terms of the Constitution, binding international agreements executed at the time when the Constitution took effect are binding on South Africa.¹⁰⁰ Furthermore, the Constitution provides that in the interpretation of any legislation, courts must favour any reasonable interpretation of that legislation that aligns with international law above any other interpretation that is not in alignment with international law.¹⁰¹

The ITU makes binding regulations and non-binding recommendations and opinions on ICT-related matters.¹⁰² The ITU comprises of three sectors, namely: Telecommunications Standardisation, Radiocommunication and Telecommunications Development.¹⁰³ The Telecommunications Development sector is the sector responsible for activities (including regulatory initiatives) aimed at curbing the digital divide and advancing universal access and service in developing countries.¹⁰⁴ The Telecommunications Development Sector does not produce binding treaties in the same way as the other mentioned ITU sectors, but is responsible for producing non-binding guidelines and recommendations, including guidelines and recommendations aimed at the advancement of universal access and service in Disadvantaged Communities. Although non-binding, these guidelines and recommendations have significant value for member states as they are developed by experts in the field and adopted by regulatory bodies globally. It is for this reason and the reasons mentioned above that the research report considers below these best practice regulation recommendations and guidelines of the ITU Telecommunications Development sector pertaining to regulation of the advancement of universal access and service in Disadvantaged Communities.

(b) *The African Green Paper*

The Missing Link (also known as the Report of the Independent Commission for World Wide Telecommunications Development) is an important report published by the ITU on 22 January 1985. This report highlighted disparities that exist in telecommunications coverage and quality

⁹⁸ Sylvia Papadopoulos & Sizwe Snail ka Mtuze *Cyberlaw@SA The Law of the Internet in South Africa* 4ed (2022) 2.

⁹⁹ The Constitution of the Republic of South Africa, 1996,

¹⁰⁰ Section 231 of the Constitution of the Republic of South Africa, 1996.

¹⁰¹ Section 233 of the Constitution of the Republic of South Africa, 1996,

¹⁰² Section 18 of the Constitution of the Republic of South Africa, 1996.

¹⁰³ ITU website homepage available at <https://www.itu.int/en/Pages/default.aspx>, accessed on 15 September 2023.

¹⁰⁴ ITU-page on ITU website available at <https://www.itu.int/en/ITU-D/Pages/default.aspx>, accessed on 15 September 2023.

between developing and developed countries, and urban and rural areas in the developing countries.¹⁰⁵ In the early 90s Africa was lagging behind in global developments in the telecommunications sector due to (amongst other things) the public telecommunication operators' underperformance, the lack of infrastructure,¹⁰⁶ and the inequitable distribution thereof.¹⁰⁷ The African Telecommunication Development Conference created a study group within the ITU's Telecommunication Development sector aimed at preparing a first draft regional telecommunications policy document, which became known as the African Green Paper: Telecommunication Policies for Africa (the Green Paper).¹⁰⁸ The Green Paper provides guidelines and recommendations for a reformed telecommunications regulatory framework for African countries following their respective democratic transitions.¹⁰⁹ Key to this reformed regulatory framework was the advancement of universal access and service.

In providing guidelines and recommendations for regulation aimed at the advancement of universal access and service objective, the Green Paper importantly recognised that Africa comprises of mainly Disadvantaged Communities.¹¹⁰ It further recognised the high cost and low return in rolling out telecommunications infrastructure and services in Disadvantaged Communities, which presents challenges in extending telecommunications services to these communities.¹¹¹ The Green Paper further noted an imbalance in the level of development between rural and urban areas, as attributing to the digital community being skewed towards urban areas.¹¹²

The aforementioned are all socio-economic realities, which constitute challenges peculiar to the advancement of universal access in Disadvantaged Communities, which had to be taken into account in the reformed regulatory framework aimed at universal access and service. In response to these challenges peculiar to Disadvantaged Communities, the Green Paper recommended the following policy consideration for the advancement of universal access and service in Disadvantaged Communities: (i) that state-owned telecommunications monopolies are maintained in relation to basic services and infrastructure in

¹⁰⁵ ITU Publications 'The Missing Link: Report of the Independent Commission for World Wide Telecommunications Development' available at <https://www.itu.int/en/history/Pages/MaitlandReport.aspx>, accessed on 16 October 2023.

¹⁰⁶ ITU Publication 'The African Green Paper: Telecommunication Policies for Africa' op cite note 16.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

telecommunications;¹¹³ (ii) the establishment of universal service and rural development obligations for state-owned telecommunications providers;¹¹⁴ (iii) for the government to incentivise telecommunication projects by way of tax exemptions or direct contribution to rural telephony¹¹⁵ and (iv) the adoption of new technologies, such as satellite systems, cellular telephony and radio systems.¹¹⁶ These regulatory recommendations aimed at extending access to Disadvantaged Communities, informed the early regulatory reform in South Africa in the process of its democratic transition, as alluded to above.¹¹⁷

The Green Paper is a clear illustration of the ITU's initial role and relevance in shaping South African regulatory framework aimed at driving the advancement of universal access and service in Disadvantaged Communities. Without a doubt, the ICT sector has developed significantly since the days of telephony, state-owned monopolies in telecommunications and South Africa's democratic transition (as envisaged in the Green Paper). The ITU Telecommunications Development sector international best practice recommendations and guidelines for a regulatory framework aimed at the advancement of universal access and service in Disadvantaged Communities has correspondingly developed in line with changes in technology and the prevailing socio-economic issues in these communities. These developments in international best practice recommendations and guidelines for a regulatory framework aimed at the advancement of universal access and service in Disadvantaged Communities follow below.

(c) Best Practice Guidelines and Recommendations for Regulation of Universal Access and Service in Disadvantaged Communities

As mentioned above, regulation is indispensable in facilitating universal access and service in Disadvantaged Communities. Best practice guidelines and recommendations, in general, propose that regulatory frameworks governing universal access and service should provide for the creation of the universal service agency, the universal service obligations and the universal service fund (as set out above).¹¹⁸ The universal service agency is a specialised agency created by legislation focusing on all issues pertaining to the advancement of universal access and

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Charley Lewis 'Universal Access and Service in South Africa's Telecommunications Policy' op cit note 11 at 81.

service, including advising on universal access and service policy and strategy and managing the universal access and service fund.¹¹⁹ The universal access and service fund is a designated fund established by legislation, which focuses on the financing of universal access and service initiatives.¹²⁰ Universal service obligations include license conditions or other regulatory measures imposed on operators to provide non-profitable ICT services to designated areas,¹²¹ including contributions to the Fund and infrastructure and/or spectrum sharing obligations, as discussed above.

The aforementioned are considered overarching regulatory best practices for facilitating universal access and service. However, there is not one blueprint for regulatory best practice for universal access and service, but an array of tools that converge, which, amongst others, entails taking into consideration historical background and prevailing socio-economic realities in the communities the regulatory framework is serving.¹²² Viewed in this context, the advancement of universal access and service in Disadvantaged Communities requires regulation tailored and targeted to the very challenges/socio-economic realities that inhibit the advancement of universal access and service in these communities.¹²³ The prevailing challenges pertaining to universal access and service in Disadvantaged Communities are broadly classified by the ITU as: (i) availability; (ii) affordability; and (iii) accessibility in relation to ICTs.¹²⁴

The research report unpacks the aforementioned challenges below and set out the ITU regulatory best practice recommendations and guidelines aimed at addressing these challenges afflicting Disadvantaged Communities. Based on the nature of the challenges, it should be

¹¹⁹ Ibid at 97.

¹²⁰ Ibid at 43.

¹²¹ Ibid at 96.

¹²² ITU Publications ‘Global Digital Regulatory Outlook 2023 - Policy and Regulation to Spur Digital Transformation’ available at

<https://www.itu.int/search/#?q=global%20digital%20regulatory%20outlook%202023&fl=0&ex=false&target=All>, accessed on 15 September 2019.

¹²³ ITU Publications ‘Digital Regulation Handbook’ available at <https://www.itu.int/pub/D-PREF-TRH.1-2020>, accessed on 30 July 2023.

¹²⁴ Ibid.

noted that there will be an inherent overlap between the recommendations and guidelines applicable to each challenge.

(i) *Availability*

The availability issue refers to the lack of ICT infrastructure and service in Disadvantaged Communities.¹²⁵ Lack of investment in broadband infrastructure rollout, digital services, and new wireless technology in Disadvantaged Communities (owing to the realities of low population, low incomes and lack of necessary infrastructure, such as public roads and electricity) is a key impediment in the advancement of universal access and service in these communities.¹²⁶ Accordingly, regulation must be adapted to facilitate the availability of sustainable infrastructure and services in Disadvantaged Communities. In the past, universal access and services regulation focused on telephony, however, with the shift towards digitisation, broadband infrastructure and services and wireless technology should be at the centre of regulation aimed at achieving universal access and service in Disadvantaged Communities.¹²⁷ What follows are practical best practice recommendations and guidelines by the ITU Telecommunications Development sector for a regulatory framework that is aimed at addressing the issue of availability

To address the issue of availability it is recommended that the regulatory framework, enables the leveraging of new technologies.¹²⁸ Satellite networks are an example of new technology that is most suitable for Disadvantaged Communities. Based on their global and regional coverage capabilities, satellite networks are able to provide immediate internet connectivity directly to the home, including to remote areas, utilising the existing satellite resources.¹²⁹ This does away with the challenges of extending infrastructure resources, such as fibre optic cables for example, to the underserved Disadvantaged Communities. To facilitate the deployment of satellite networks in these communities, regulators need to keep an open mind, this includes (to a certain extent) removing regulatory red tapes to investments in new technologies. Regulatory barriers to investment, which include cumbersome land-use approval

¹²⁵ITU Publications ‘Towards building inclusive digital communities: ITU toolkit and self-assessment for ICT accessibility implementation’ available at <https://www.itu.int/en/publications/ITU-D/pages/publications.aspx?parent=D-PHCB-TOOLKIT.01-2023&media=electronic>, accessed on 30 July 2023.

¹²⁶ITU Publications ‘Digital Regulation Handbook’ op cit note 123.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ ITU Publications ‘Telecommunications/ICTs for Rural and Remote Areas’ available at <https://www.itu.int/search/#?q=Telecommunications%20for%20Rural%20and%20Remote%20Areas&fl=0&ex=false&target=All>, accessed on 15 September 2023.

regimes, high licence fees, taxes and levies, serve as an impediment to the deployment of telecommunications to remote and rural areas,¹³⁰ and these should be eradicated. Furthermore, the laws should be technology-neutral (as described above).¹³¹ Other recommendations include regulatory objectives aimed at the establishment of public internet access hubs, such as public Wi-Fi, and community telecentres, in schools and libraries to facilitate availability.¹³²

(ii) *Affordability*

Needless to say, Disadvantaged Communities comprise low-income population with a low purchasing power (compared to their affluent counterparts).¹³³ This coupled with the high prices of digital services and devices¹³⁴ presents another impediment to the advancement of universal access and services in these communities. Owing to the exorbitant prices associated with ICT services, ICT services are out of reach for the ordinary members of these communities and are almost considered a token of opulence, as opposed to the catalyst to the exercise of Constitutional freedoms and rights that they are. Accordingly, the regulatory framework should facilitate the implementation of affordable alternatives to traditional national privately owned broadband that will serve the needs of these communities. Below we look at the best practice recommendations and guidelines for achieving a regulatory framework that promotes affordable access to ICTs in Disadvantaged Communities.

Community broadband networks, for the reasons that follow, are a viable alternative for universal access in Disadvantaged Communities in remote low-population rural areas and in high-density low-income urban areas where it would be uneconomical to deploy ICT infrastructure and services.¹³⁵ Community networks are less expensive owing to their nature and scale. In addition, community broadband networks are more sustainable in Disadvantaged Communities, as they often make use of alternative energy such as solar to operate.¹³⁶ To effectively facilitate this model, it is recommended the regulatory framework should encourage public and private partnerships between municipalities and private network operators on the planning, funding and building of broadband networks within communities,¹³⁷ by way of tax

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

concessions, limitation of liability and partial ownership rights over public services.¹³⁸ It is further recommended, the regulatory framework must further promote cross-sectoral broadband infrastructure deployment amongst state-owned entities.¹³⁹ It is, in addition recommended that the regulatory framework must be aimed at the promotion of a competitive ICT market in order to achieve affordability.¹⁴⁰

(iii) *Accessibility*

Accessibility pertains to one's experience with ICT.¹⁴¹ It is aimed at not merely available and affordable access (as described above), but one that is meaningful and empowers the users.¹⁴² Owing to the realities of low literacy levels, traditional ICT services are easily dismissed as irrelevant for these communities, as they do not cater for their capabilities or lifestyles. Accordingly, it is recommended that the regulatory framework incorporates plans to create awareness and demand for ICTs in Disadvantaged Communities.¹⁴³ In addition, the regulatory framework should include objectives of implementing ICT skills training programs in schools and communities.¹⁴⁴ ICTs must form an essential part of all education curricula, and capacity building should be an important component of ICT policy.¹⁴⁵ It is further recommended that the regulatory framework promotes local content that is relevant to the users in Disadvantaged Communities and in the relevant vernacular language(s) in order to achieve meaningful access.¹⁴⁶

Above all, the aforementioned regulatory recommendations and guidelines must be clearly outlined in regulatory documents, not as mere objectives, but as clearly measurable targets.¹⁴⁷ This is so that it is possible to successfully implement the objectives and targets and to subsequently assess whether the regulation (and the initiatives and programmes in line with the regulation) met its objective.¹⁴⁸ The aforementioned constitutes an analysis of the ITU recommendations and guidelines for purposes of this research report, we now move to the final

¹³⁸ Investopedia Team 'Public-Private Partnerships (PPPs): Definition, How They Work, and Examples' available at <https://www.investopedia.com/terms/p/public-private-partnerships.asp>, accessed on 15 September 2023.

¹³⁹ ITU Publications 'Telecommunications/ICTs for Rural and Remote Areas' op cit note 129.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

objective, which is evaluating the adequacy of the regulatory framework in order to reach a conclusion and recommend law reform.

IV CONCLUSION

It is now commonplace that in the generation of the fourth industrial revolution, the technology of things, artificial intelligence and other similar technologies, ICTs are interwoven into our routine lives. This is the global reality and South Africa is no exception. Despite noticeable growth in the digital community in South Africa, data shows that these numbers are skewed towards the affluent urban communities, with the Disadvantaged Communities left to suffer the brunt of the digital divide.

It is worthwhile to now reiterate the identified digital divide afflicting Disadvantaged Communities and the final research report objective, which is to evaluate the adequacy of the regulatory framework to achieve universal access and service in these communities, so as to understand the findings that follow on the back of this. What follows is the findings (classified as strengths and weaknesses of the regulatory framework) and the recommended law reform aimed at facilitating the objective in Disadvantaged Communities and, finally, the concluding remarks.

(a) Findings

(i) Strengths of the Regulatory Framework

As mentioned, this regulatory structure is founded in legislation, which authorises the Minister and the Authority to publish policies and regulations, respectively, for the advancement of this objective. The relevant policies by the Minister, which are discussed above (consistent with the ITU regulatory best practice recommendations and guidelines), recognise that to achieve universal access and service in Disadvantaged Communities, the regulatory framework must be tailored and targeted to the mentioned prevailing socio-economic issues in Disadvantaged Communities. It is further recognised that these prevailing socio-economic issues should be used as guiding principles for regulation. To reiterate, these socio-economic issues pertaining to ICTs are classified as: (i) availability; (ii) affordability; and (iii) accessibility, as will be considered below.

The South African policies pertaining to universal access and service discussed under the reformed telecommunications regulatory framework above, identify the issue of lack of

availability of ICT infrastructure and services in Disadvantaged Communities and recognise that targeted regulation (which in this case entails tech-neutral regulation to facilitate investment and the adoption of new technologies through the removal of regulatory barriers) is necessary to redress the issue of availability. In relation to the affordability challenge in Disadvantaged Communities, the policy sets out targeted regulatory initiatives aimed at public and private partnerships for planning, funding, and building broadband networks in Disadvantaged Communities. The policies further highlights regulation aimed at promoting cross-sectoral cooperation amongst state-owned entities to effectively leverage the state-owned resources, and encourage competitive cooperation by private network operators by way of infrastructure and spectrum sharing to achieve affordability. In addition, the policies highlight regulation aimed at promoting competition in the ICT market in order to achieve affordability.

In addition to available and affordable access (as described above), is the issue of accessibility, which relates to meaningful access that empowers the user. With regard to the issue of accessibility afflicting Disadvantaged Communities, the policies recognise that in addition to the aforementioned challenges of availability and affordability, there is no demand for ICTs in these communities, as they do not cater to their manner of living or literacy levels. To address this issue the policies provide for regulation that is aimed at creating awareness and demand for ICTs in Disadvantaged Communities through e-education initiatives and promoting local and relevant content that caters for Disadvantaged Communities.

Furthermore and as already discussed above, the legislation establishes institutions and bodies to fulfil an oversight and/or implementation role in relation to the objective. To this end the legislation establishes the Agency and the Fund. In addition, the legislation establishes universal access and service obligation, including license conditions (such as, licensee's contribution to the Fund) or other regulatory measures imposed on operators to provide non-profitable services to designated underserved areas.

The aforementioned reveals that the regulatory framework is, to a great extent, on par with the ITU international best practices recommendations on regulations aimed at the advancement of universal access and service in Disadvantaged Communities (as set out above).

(ii) Weaknesses of the Regulatory Framework

Although to a great extent comparable to the ITU best practice recommendations and guidelines, it is noted above that the critical terms to the advancement of universal access and service in Disadvantaged Communities are left undefined or undetermined or the definitions

are not reviewed or updated to reflect the current realities of the communities the regulatory framework seeks to serve and the changing circumstances in technology. The terms referred to are identified above as "needy persons", "underserviced areas" and "universal access and service" itself.

Another noteworthy weakness in the regulatory framework is the overlap between the functions of the stakeholders involved (the Agency, Authority and the Minister). Starting with the Agency, the functions of the Agency include making recommendations to the Minister periodically to enable the Minister to make a determination on the definition of universal access and service, and to advise the Authority (as and when requested) with regard to universal access and service. It would seem then that the Minister is tasked with the final definition of universal access and service by way of a determination in policy. On the other hand, the Authority is tasked with defining "needy persons" and "underserviced areas" by way of regulation. In addition, the Authority is responsible for receiving the licensee's contribution to the Fund, which are thereafter collected by the Agency from the Authority. The Minister is further responsible for policy-making, including policy pertaining to the determination of universal access and service (as already mentioned). The Minister further plays an oversight role over the activities of the Agency with regard to the advancement of universal access and service. This has the result that the Agency is awkwardly placed in the regulatory framework accountable to both the Minister and the Authority.¹⁴⁹

The aforementioned overlap is not a novel finding in this research report, in fact, the overlap was noted in the ICT Policy White Paper above. In light of this, the ICT Policy White Paper recommends that policymaking be limited to the Minister (including taking over all current policy-related responsibilities vesting with the Authority and the Agency), that regulatory functions are limited to the authority and that the Agency is dissolved and the Fund is transferred to a new Digital Development Fund, which will be responsible for managing the Fund.

The identified weaknesses in the regulatory framework largely lie in its fragmentation. The regulatory framework relies on vast legislation, policies and regulations and different stakeholders for its implementation, as illustrated above. There is no single piece of legislation governing universal access and service in South Africa so as to make it easily understandable

¹⁴⁹ Lewis, C 'Universal Access and Service Interventions in South Africa: Best Practice, Poor impact' op cit note 19 at 101.

to those tasked with its implementation. This results in the identified overlap and non-performance of functions by the stakeholders. In light of this, what follows are recommendations for law reform to remedy this.

(b) *Recommended Law Reform*

The research report sets out below the recommendations for law reform aimed at facilitating the advancement of universal access and service in Disadvantaged Communities. It is recommended that:

- (i) The independence of the Agency as the body administering universal access and service (answerable only to the Minister) should be established by way of single piece of legislation governing universal access and service. This will have the result that the Agency will be solely responsible for administering the advancement of universal access and service in line with this legislation and other laws affecting universal access and service. This entails, amongst other things, granting the Agency statutory powers to make final determinations on critical definitions and roadmaps outlining implementation of the objectives, subject to regular (i.e., annual or bi-annual) review and updates of same, taking into account, amongst other things, the prevailing socio-economic factors in the communities the regulatory framework is serving and changes in technology. These new powers vested on the Agency in terms of this envisaged new legislation, will involve the Agency taking over any such powers, which currently vest with the Minister and the Regulatory.
- (ii) As envisaged in the ICT White Paper, the Minister's role should be limited to (on consultation with the Agency and relevant ministers) policymaking with regard to universal access and service.
- (iii) As envisaged in the ICT White Paper, the Authority's functions should be limited to regulatory matters. In relation to universal access and service, this entails, amongst others, consulting with the Agency on electronic communications regulations that it is authorised to publish, which affect the advancement of universal access and service. In addition to this and in line with its functions (and on consultation with the Agency) it creates, monitors and enforces compliance with licence conditions pertaining to universal access and service (including licensees' contributions to the Fund), and should report to the Agency in this regard.

The proposed law reform seeks to redress the fragmentation in the regulatory framework giving rise to the identified overlap and the issue of non-performance by stakeholders of their regulatory functions, (i.e., the weaknesses identified in the regulatory framework) that serve as an impediment to the facilitation by the regulatory framework of successful implementation of the objective in Disadvantaged Communities. These recommendations are in line with ITU regulatory best practice recommendations and guidance aimed at facilitating implementation of this objective by clearly defining the roles of the stakeholders (i.e., avoiding overlap) and defining the critical terms (which are necessary for defining measurable deliverables and milestones for the successful implementation and subsequent assessment of the objective in Disadvantaged Communities). Furthermore, consistent with the ITU best practice guidelines on implementation, the proposed law reform provides for built-in monitoring, reporting and subsequent review and evaluation mechanisms built into the regulatory framework.

(c) *Concluding Remarks*

To come to a holistic conclusion as to the adequacy of the South African regulatory framework governing universal access and service to achieve this objective in Disadvantaged Communities, by way of a multi-method research approach, the report considered the regulatory framework in the context of its historical background so as to determine the scope of the regulatory framework governing universal access and service in South Africa. The research report further analysed and evaluated the regulatory framework against the ITU regulatory best practice recommendations and guidelines, which aptly benchmarks the regulatory framework against regulatory international best practices for the advancement of universal access and service (using the prevailing socio-economic issues in Disadvantaged Communities as guiding principles) and as such, providing appropriate guidance for law reform.

The findings indicate that the South African regulatory framework is, to a great extent, on par with international best practice regulatory initiatives aimed at achieving universal access and services in Disadvantaged Communities, barring its unsuccessful implementation, which is largely owing to the fragmentation in the regulatory framework (i.e., the reliance by the regulatory framework on vast legislation, policies and regulations and different stakeholders for its implementation). Therefore, the proposed law reform constitute regulatory framework structural measures aimed at redressing the identified fragmentation so as to achieve a

regulatory framework that adequately facilitates the implementation of the universal access and service objective in Disadvantaged Communities.

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