

NASHUA

MOBILE

42 James Crescent, Halfway House Midrand
PO Box 3843 Halfway House 1685 South Africa
Sales: 0661 531 531
Client Services: 0661 412 412
Tel: +27 11 207 8000
Fax: +27 11 207 9000
www.nashuamobile.com

27th January 2010

ICASA

Attention: Mr Edmund Mhloti Baloyi

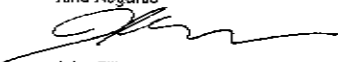
Telefax: 011 566 3006

RE: SUBMISSIONS BY NASHUA MOBILE (PROPRIETARY) LIMITED IN RESPECT OF THE DRAFT CODE OF CONDUCT ON THE SALE, LEASE, RENTAL OR SUBSIDISATION OF SUBSCRIBER EQUIPMENT PURSUANT TO CHAPTER 12 OF THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005 ("the Act") PUBLISHED IN GOVERNMENT GAZETTE 32803 DATED 11 DECEMBER 2009

I refer to the above and enclose herewith Nashua Mobile's submission in this regard.

Please acknowledge receipt hereof by e-mailing chamainew@nashuamobile.com.

Kind Regards



John Ellis
Financial Director
Nashua Mobile (Pty) Limited
johne@nashuamobile.com

1. SUBMISSIONS BY NASHUA MOBILE (PROPRIETARY) LIMITED IN RESPECT OF THE DRAFT CODE OF CONDUCT ON THE SALE, LEASE, RENTAL OR SUBSIDISATION OF SUBSCRIBER EQUIPMENT PURSUANT TO CHAPTER 12 OF THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005 ("the Act") PUBLISHED IN GOVERNMENT GAZETTE 32803 DATED 11 DECEMBER 2009 (hereinafter referred to as the "draft Code of Conduct" or the "draft Regulations")

2. INTRODUCTION

- 2.1. Nashua Mobile (Proprietary) Limited ("Nashua Mobile") is a service provider of all three mobile networks and operates a broadband business in respect of which Nashua Mobile is the holder of an I-ECNS licence and an I-ECS licence.
- 2.2. Nashua Mobile's submissions contained herein relate to the implications of the draft code of conduct from the perspective of a reseller of a licensee.
- 2.3. Nashua Mobile's submissions are contained under three main heads, namely:
 - 2.3.1. Overview;
 - 2.3.2. General Comments;
 - 2.3.3. Content Specific Comments;
 - 2.3.4. Typographical Comments and
 - 2.3.5. Conclusion

3. OVERVIEW

- 3.1 Nashua Mobile has perused both the draft Regulations as well as the explanatory note annexed thereto and notes that the explanatory notes are not binding but merely for information purposes.
- 3.2 Nashua Mobile respectfully submits that, in its opinion, the draft regulations do not reflect what the intention as contained in the explanatory note conveys. Nashua Mobile is of the opinion that a new month to month tariff will cater for

and achieve many of the goals of the explanatory note and indeed ICASA. Such a tariff would therefore not be subject to a 24 month contract but could be used for any consumer who does not want to be subject to the standard 24 contract period which forms the basis of the cellular industry.

- 3.3 Nashua Mobile views these regulations as being aimed at the protection of a consumer as envisaged in the Consumer Protection Act and supports such protection. Accordingly Nashua Mobile does not support that these regulations be made applicable where a consumer is an entity that is currently excluded from the protection of the CPA ie corporate customers above the threshold, government institutions etc. Further these regulations should not be applicable to Least Cost Routing consumers would not be subject to these regulations and only consumers (in possession of an identity document) should be subject hereto.
- 3.4 The draft Regulations are very onerous and implementing same will take time and system development at a huge cost to Nashua Mobile. The communications industry and specifically the cellular communications industry is the only industry that Nashua mobile is aware of where basic tariff increases have not been implemented in at least 5 years. This is an unsustainable situation from a commercial perspective as all expense structures increase with inflation e.g: salaries, rental and infrastructure. Ultimately, and unfortunately, the cost of implementing system changes required in regards to the implementation to a draft Regulation such as this, will have to, in some manner, be recovered and this could have a cost implication on the consumer whom the draft Regulations are attempting to protect and for whom the Regulation is attempting to lower costs for.
- 3.5 As a background as to how equipment is provided to subscribers by Nashua Mobile: for each new fixed term subscriber for post-paid mobile services or the renewal of a fixed terms subscriber agreement, Nashua Mobile receives a connection incentive bonus from the relevant mobile network. This connection incentive bonus (CIB) is in turn applied to the purchase of the supplied handset and/or the discounting of the tariff set in respect of the relevant package. In addition to the connection incentive bonus received from the mobile network, Nashua Mobile may in turn apply a portion of its own revenue from the subscriber to procure more expensive subscriber equipment for the subscriber or to provide a further discount. This is considered a free handset from all practical purposes and is advertised as such. Nashua Mobile takes a risk on each post-paid subscriber that the subscriber will pay the subscription charges and for airtime used, failing which Nashua Mobile takes the credit risk that it may have to reimburse the relevant network for outstanding subscription charges and airtime or for the

connection incentive bonus. Networks therefore clawback the CIB given to Service Providers in the event of early termination of the traditional 24 month contract eg: bad debts

4. GENERAL COMMENTS

- 4.1. Nashua Mobile submits that these draft Regulations are new proposed regulations and should not, strictly speaking, be seen as an extension of the erstwhile regulations on Handset Subsidies repealed by the Minister and, accordingly all procedures and process in regards to these regulations need to be carried out a fresh by ICASA before implementing same.
- 4.2. Handset subsidies have evolved in South Africa in order to meet the demand of South African consumers for high value handsets with the latest technology. In order to achieve this, mobile network operators and service providers are prepared to invest money upfront in a customer hoping to recover such investment from the proceeds of a mobile contract. The subsidy is independent from the subscription and airtime charges paid by subscribers which are never more than the tariffs approved by ICASA.
- 4.3. Each service provider has its own unique set of subsidy offerings in relation to any of the packages available from the network operators. Customers have the opportunity to compare these offerings and invariably opt for the combination of handset and service subsidies that suite their own needs best in respect of the package chosen.
- 4.4. Where customers do not require a handset or require a different handset from the service provider, they are invariably allowed to apply the Rand value of the subsidy to another handset or to subsidise their subscription and airtime fees.
- 4.5. Contracts and advertising have become far more regulated under the Consumer Protection Act in regard to disclosure and procedural fairness and in this regard, it is submitted that any regulations finally promulgated

in respect of the lease, rental or subsidisation of equipment should not duplicate or conflict with the provisions of the Consumer Protection Act, nor the National Credit Act.

4.6. Nashua Mobile notes that –

4.6.1. the draft Regulations have been described as a Code of Conduct. In this regard, Nashua Mobile requires clarification as to the applicability of the draft Regulations to non-licensees and resellers whose actions are also regulated in the draft Regulations. Such clarification will be pertinent to both the possible sanctions prescribed in paragraph 7 as well as the provisions of the Electronic Communications Act;

4.6.2. there are conflicts between the draft regulations and other relevant consumer legislation as more fully described below. In this regard, Nashua Mobile submits that while the principle established by the Constitutional Court that to the extent that one is able to comply with both the draft Regulations and such consumer legislation, one should do so – for good order and to avoid any confusion in the industry, Nashua Mobile wishes to alert the Regulator to such areas of confusion as appears in the relevant paragraphs below.

4.7. Nashua Mobile supports the provisions of the draft Regulations in so far as they extend consumer's rights, promote commercial disclosure and create certainty and standards in the mobile industry.

5. CONTENT SPECIFIC COMMENTS

5.1. Ad Definition of "contract"

5.1.1. The definition of "contract" refers to an agreement between a licensee, or its agent or a reseller, and a subscriber. The draft Regulations do not contain a definition of a "subscriber" and, accordingly, it is not clear whether both pre-paid and post-paid subscribers may enter into such contracts

- 5.1.2. Furthermore, the definition is silent as to the nature of the agreement, whether verbal or written. It is submitted that the definition should limit the definition to written agreements.
- 5.1.3. Nashua Mobile bills its post-paid subscribers for services on a monthly basis in accordance with the tariffs approved by ICASA. Pursuant to this relationship, Nashua Mobile may provide subscriber equipment to such post-paid subscribers upon the entering into or renewal of an airtime subscriber agreement with Nashua Mobile. It is unclear from the definition of "contract" as to whether the definition is referring to such airtime subscriber agreement and in this regard, the Regulator is requested to clarify the definition.
- 5.1.4. Nashua Mobile does not, as the norm, lease, rent or subsidise equipment on a monthly basis to subscribers. Nashua Mobile does from time to time in addition to subsidising equipment as a once off and providing same to a subscriber for free, provide higher end handsets and laptops to certain subscribers and allow them to pay the difference between the subsidy amount and the higher end phone on a monthly basis without any interest charged. This is done for subscribers based on credit risk and is done in order to offer more choice to subscribers. In addition Nashua Mobile may sell equipment to subscribers as a once-off outright purchase of the equipment and is not paid for by the subscriber on a monthly basis.

5.2. Ad Definition of "electronic communications provider"

This definition is not used in the draft Regulations and accordingly should be removed.

5.3. Ad Definition of "post-paid subscriber"

- 5.3.1. The use of the term "contract" in respect of this definition causes confusion (in this regard, please see paragraph 5.1.3 above). The definition of "contract" appears to refer only to agreements relating to subscriber equipment and not to services.
- 5.3.2. The provisions of Regulation 5 clearly emphasise the freedom of subscribers to elect to purchase, lease or rent subscriber equipment. Accordingly, if a subscriber elects not to purchase subscriber

equipment but only to enter into an agreement for services, then such subscriber does not fall within the definition of a post-paid subscriber.

5.3.3. It is submitted that either the definition of "contract" be reconsidered or, alternatively, the word "contract" contained in the definition of a "post-paid subscriber" be substituted with a "written subscriber agreement".

5.3.4. Further, the definition seems to suggest that these draft regulations apply to all subscribers including those that may fall outside the protection of the Consumer Protection Act 68 of 2008 ("CPA"). The draft Code of Conduct extends many of the existing protections afforded to consumers in terms of the CPA and it is Nashua Mobile's submission that, as the CPA intended, these proposed regulations should not extend to legal entities falling above the aforesaid threshold, as well as any other legal entities excluded therein for example government institutions. The definition of post-paid subscriber needs to be amended accordingly to exclude such legal entities. This should also no be applicable to Least Cost routing Customers.

5.4. Ad Definitions of "post-paid offerings or packages" and "pre-paid offerings or packages"

It is submitted that these definitions require reconsideration for the following reasons:

- 5.4.1. the terms "packages" and "deals" are not defined;
- 5.4.2. the definitions are silent as to what is in fact offered in such packages and deals. In this regard, the definition of "post-paid subscriber" may be useful, which definition refers to subscriber equipment, services, any element thereof and/or usage of the network over a specified period;

5.5. Ad Definition of "pre-paid subscriber"

- 5.5.1. The definition refers to "retail services".
- 5.5.2. The draft Regulations are silent as to what constitutes retail services. Please confirm that the definition of "retail" contained in the Act may

be read into these draft Regulations for the purposes of ascertaining the nature of such services.

5.6. Ad Definition of "subsidisation"

This definition is extremely broad when looked at in the context of agents and resellers. It would be extremely difficult to bring all manner of deals, discounts and offerings presented by agents and resellers across the mobile industry under the context of the draft Regulations.

5.7. Ad paragraph 4(1a)

Clarification is required in regards to the "capital cost of the subscriber equipment"

5.8. Ad paragraph 4(1)(b)

Please insert the words "if any" after the words "the interest charged".

5.9. Ad paragraph 4(1)(c)

The value of the services is provided is governed by the tariffs of the mobile operators duly approved by the Regulator.

5.10. Ad paragraph 4(1)(d)

Nashua Mobile supports this and its contracts currently provide for the disclosure contemplated in this paragraph.

5.11. Ad paragraph 4(2)

The provision of this information in the manner prescribed in this paragraph would require significant systems implementation given the range of available airtime agreements and the changing incentives offered by the mobile networks to Nashua Mobile from time to time. It is respectfully submitted that the proposed expedited implementation of the Draft Regulations would not afford Nashua Mobile sufficient time to re-programme its systems to generate such information.

5.12. Ad paragraph 4(3)

5.12.1. In addition to the comments in regard to system implementation set out above, please note that while there are a variety of contractual

terms and periods available, these are network dependant and, to the extent necessary, approved by ICASA

5.13. Ad paragraph 4(4)

- 5.13.1. Information regarding free minutes in regards to cellular airtime is already freely available to a subscriber by dialling the relevant short code of the network concerned.
- 5.13.2. Nashua Mobile receives Call Data Records (CDRs) from the Networks and bills subscribers accordingly. These CDRs are not "real time" as delays are experienced between usage and receipt of the CDRs and therefore a communication from Nashua Mobile in regard to free minutes available may not be accurate at the point it is sent and give a subscriber a false indication of his free minutes available.
- 5.13.3. In regard to data usage, a subscriber is made aware of his usage on data on a data calculator when he or she utilises his data services. To place an onus on either the networks or their respective service providers to send out a communication regarding unused data would, we respectfully submit, be unnecessary and extremely onerous. As data can be utilised very quickly by a subscriber, this may also result in a subscriber relying upon a communication that is not indicative of his "real time usage" of data which is more easily accessible and more accurate from the data calculator that he has available to him.
- 5.13.4. To the extent that ICASA persists with the inclusion of this paragraph, Nashua Mobile submits that the Draft Regulations should be amended so as to specifically include written correspondence or email as being forms of compliance with this paragraph given the historic (as opposed to real time) nature of the information required. This will also require system development. In addition, for Nashua Mobile to send this information to a subscriber, will have a huge monthly cost implication and accordingly have a cost implication for subscribers
- 5.13.5. Accordingly, Nashua Mobile respectfully questions the necessity for placing this onus on either the networks or service providers when, as stated above, this information is freely available to subscribers at any time. Accordingly Nashua Mobile does not support this.

5.14. Ad paragraph 4(5)

5.14.1. At the outset, compliance with these provisions would have to take place at a mobile network licensee level. Nashua Mobile relies on the network for the provision and carry over of minutes.

5.14.2. Essentially, each network has its own rules for the crediting of minutes and the number of minutes that may be carried over from month to month. Nashua Mobile in turn passes such credits on to its subscribers.

5.14.3. It is submitted that it would be manifestly unfair to credit minutes to any subscriber whose contract is terminated as a result of default.

5.14.4. Where a contract terminates in the ordinary course and the subscriber has elected not to continue to pay monthly subscriptions, it would be impractical to credit the subscriber for unused minutes as such subscriber would not be paying for network access and could not use these minutes. Equally, it would be manifestly unfair to give any financial credit for these minutes as the commercial basis upon which the subscriber received subscriber equipment, discounts, pricing and access to the network took place based upon the number of minutes or capacity or services that the subscriber undertook to contract for. In this regard, provided that the subscriber contracted with all available information, Nashua Mobile would submit that subscribers should be held to the terms of such contract.

5.14.5. Accordingly Nashua Mobile does not support this.

5.15. Ad paragraph 4(6)

Nashua Mobile supports this

5.16. Ad paragraph 4(7)(a)

"Reasonable efforts to interact with the subscriber in his or her preferred official language" requires clarification. Nashua Mobile supports subscribers understanding the implications of a contract and in this regard fully supports the provisions in this regard as contained in the CPA. It is

respectfully submitted that the provisions of this paragraph should be deleted and that the Regulator should look to the provisions of the CPA in this regard.

5.17. Ad paragraph 4(7)(b)

It is already an obligation in terms of the CPA to make a consumer fully aware of his or her obligations in terms of a contract and this would include consequences on breach. Nashua Mobile supports this obligation.

5.18. Ad paragraph 4(7)(c)

5.18.1. Nashua Mobile supports making terms and conditions of contracts available to any consumers in an understandable format before concluding a contract and using reasonable efforts to assist consumers in understanding the consequences and import of the contract for the relevant product offering which is in any event a requirement of the CPA.

5.18.2. Nashua Mobile is concerned that the requirement for a written statement will have an effect on certain aspects of Nashua Mobile's business and, in order for ourselves to properly consider this we require more clarity. Nashua Mobile supports making a subscriber aware of his obligations in terms of a contract (financial and otherwise) and bears the onus of ensuring a Subscriber understands his obligations in terms of CPA. Nashua Mobile will support giving documentation in writing where it is appropriate given the circumstances.

5.19. Ad paragraphs 4(8) an 4(9)

The provisions of these paragraphs contradict the Consumer Protection Act which stipulates that a supplier must inform a consumer not more than **80 but not less than 40 business days** of the expiry of the contract **in writing or any other recordable form**. Nashua Mobile support the CPA provision in this regard and not the draft Regulations.

5.20. Ad paragraph 4(10)

5.20.1. Nashua Mobile's contracts are not automatically renewed. However, upon the elapse of their fixed term, they continue on a month-to-month basis in order to not prejudice a subscriber by automatically terminating such subscriber's line.

5.20.2. In regard to a customer's right to "re-negotiate the terms", it is submitted that while the standard terms of subscriber agreements should not be subject to renegotiation and while the terms of the Regulator-approved airtime packages may not be negotiated, (including the duration of the package chosen), Nashua Mobile does support the choice of a subscriber to opt for a different package offering or combination of services upon renewing a contract and such subscriber should (subject to credit approval) be entitled to benefit from any available discount or subscriber equipment available.

5.21. Ad paragraph 4(11)

It is unclear what is meant by "the actual charges of the service" and required clarification in this regard. Nashua Mobile charges no more than the ICASA approved tariffs for airtime packages.

5.22. Ad paragraph 5(1)

5.22.1. Nashua Mobile has always provided its subscribers with the option of whether or not to purchase equipment together with its service offerings. The only condition Nashua Mobile places on a consumer in this regard is that he or she utilises ICASA approved equipment with the services, which equipment a consumer may purchase elsewhere if he or she so elects.

5.22.2. Nashua Mobile does this so as to promote ICASA approved equipment and to minimise a consumers use of "grey" products. It must be understood that Nashua Mobile does not build the purchase price of a handset into the consumer's subscription charge for a service. Nashua Mobile bundles packages with handsets in order to assist consumers to make use of the services with an ICASA approved handset as well as to provide the consumer with warranties and repair services in regards to the handsets to ensure that a consumer does not have unnecessary interruption of utilising his services due to not having a working handset.

5.23. Ad paragraph 5(2)

Nashua Mobile does not support giving all subscribers the option to rent or lease equipment. Nashua Mobile gives all customers the option to outright purchase equipment and, based on credit vetting criteria, may allow the consumer to pay the cost over the contract period at no interest and/or bundles equipment with service contracts for subscribers entering into a service agreement with Nashua Mobile. In the majority of cases equipment is purchased with the CIB incentive that Nashua Mobile receives from the networks and is given to the subscriber free of charge.

5.24. Ad paragraph 5(3)

5.24.1. Nashua Mobile's subscribers have always had the election to utilise Nashua Mobile's service without purchasing a handset from Nashua Mobile. However this choice has not often been utilised by subscribers

5.24.2. The proposed definition of "subscriber equipment" appears to include SIM cards which SIM cards will have to be provided by Nashua Mobile in order for the subscriber to access the relevant mobile network.

5.24.3. In the event that the subscriber does not receive an appropriate handset from the service provider, such subscriber may encounter two significant risks. The first risk is that the subscriber may however not be able to use certain services contracted for such as 3G where the handset that they have chosen does not support such services. The second risk is that in the event that the handset is acquired from a third party and is faulty or incompatible, the subscriber will still be obliged to pay his contract subscriptions notwithstanding his inability to use the service. Handsets supplied by the network operators have a two year warranty period whereas handsets from other supply channels often do not necessarily have such an extensive warranty. Further, the ability to service customers efficiently can be compromised in this event

5.24.4. Nashua Mobile therefore supports, however does not encourage, the customer's right to choose a service offering without having to conclude an agreement for a handset or to accept any particular handset from a service provider. In this regard we must point out the huge illegal industry of stolen and recycled handsets.

5.25. Ad paragraph 5(4)

Nashua Mobile's intention is never to penalise or prejudice a subscriber for not choosing Nashua Mobile equipment when utilising Nashua Mobile services in isolation, and does offer a reduced subscription and/or discount in this event. However, Nashua Mobile's systems do not currently automatically cater for a subscriber who elects not to take equipment from Nashua Mobile together with our service offering and require details on the equipment to be utilised with the services. Accordingly, in order to cater for the instance of a number of subscribers

taking this option, Nashua Mobile's systems would require further development.

5.26. Ad paragraph 5(5)

5.26.1. While Nashua Mobile supports the prevention of SIM locking as a means to prevent subscribers from reusing handsets upon the expiry of their contracts, there are circumstances in which SIM locking is an essential tool and the prohibition should not be absolute. These are -

5.26.1.1. handset locking and SIM locking when theft occurs – it is the only manner in which Nashua Mobile is able to prohibit spending on the account,;

5.26.1.2. Nashua Mobile has an obligation in terms of RICA to help prevent fraudulent activity and SIM and handset locking is a direct means of doing so once a SIM/handset has been stolen.

Ad paragraph 7

5.27.1 Nashua Mobile is of the opinion that the proposed fines in regard to contravention of the regulations is exorbitant and requires a detailed commercial explanation as to how these amounts were arrived at. We respectfully request ICASA to set out the rationale and thinking behind these amounts.

5.27. Ad paragraph 8

5.27.1. Nashua Mobile would (for reasons set out above) require more than one month to prepare for the implementation of the draft Regulations.

5.27.2. Nashua Mobile cannot begin the development on our systems alone to cater for these regulations until such time as -

5.27.2.1. the draft Regulations are in their final form (so that Nashua Mobile can properly assess the development required to its systems to avoid duplications and unnecessary development and unnecessary cost due to the draft Regulations changing);

5.27.2.2. Nashua Mobile receives the final rules and directives from the networks in regard to the implementation of the draft Regulations (for example, but not limited, to free minutes).

In regard to system developments Nashua Mobile estimates an 8 month period to comply with this once a final version is made available to it. This is merely an estimate at this stage.

6. **CONCLUSION**

6.1. Nashua Mobile is committed to co-operating with all other licensees and resellers and requests that ICASA keep Nashua Mobile informed of all meetings and plenary sessions which ICASA may facilitate between interested parties in order to give effect to the Code of Conduct.

6.2. Nashua Mobile thanks ICASA for this opportunity to comment on the draft Code of Conduct and wishes to be informed of any developments which take place in this regard. Furthermore, Nashua Mobile would also like to be involved in any other opportunities to provide further comments and to the extent that public hearings may be held in respect of the draft Code of Conduct, Nashua Mobile wishes to present at such hearings.