

**ANNEXURE B -  
LEGAL  
SUBMISSIONS**

1. Cell C's legal representatives make the following submissions on the adequacy of the process ICASA has so far followed in implementing call termination regulations ("**the proposed regulations**") pursuant to s67(4) of the Electronic Communications Act 36 of 2005 ("**the ECA**"), and on the lawfulness of the proposed regulations themselves.

**2. THE PROCEDURE ADOPTED BY ICASA DOES NOT MEET THE REQUIREMENTS FOR A FAIR PROCEDURE AS CONTAINED IN PAJA**

2.1. Section 3(1) of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**") requires that administrative action which materially and adversely affects the rights of any person must be procedurally fair. Section 6(2)(c) of PAJA confirms that the fact that administrative action is procedurally unfair is a ground of review and may lead to the relevant decision being set aside.

2.2. While what constitutes a fair procedure depends on the circumstances of each case (s3(2)(a)), in order to give effect to the right to a fair procedure, an administrator (save where it is reasonable and justifiable to do otherwise) must give a person whose rights are affected (in terms of s3(2)(b)) *inter alia*:

2.2.1. adequate notice of the nature and purpose of the proposed administrative action;

2.2.2. a reasonable opportunity to make representations; and

2.2.3. a clear statement of the administrative action.

2.3. Moreover, in terms of s4 of PAJA, where administrative action affects the rights of the public, an administrator must hold a public enquiry or follow a “*notice and comment procedure*”, or both.

2.4. Where the administrator decides to follow a “*notice and comment*” procedure, the administrator must (in terms of s4(3)) *inter alia*:

2.4.1. take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them; and

2.4.2. consider any comments received.

2.5. In this matter, ICASA has not:

2.5.1. So far given sufficient time to Cell C to make adequate representations on the proposed regulations in that although ICASA has met the minimum time frame for the making of regulations set out in s4 of the ECA, the nature and importance of the proposed regulations are such that this time period is inadequate;

2.5.2. given a clear statement of the proposed regulations, in that it has not:

2.5.2.1. explained properly the reasoning behind the proposed regulations (as set out in Cell C's submission and further below);

2.5.2.2. issued proposed regulations that are clear on their own terms (as is discussed below);

2.5.2.3. responded to Cell C's request for information that underlies the analysis in the explanatory note that accompanies the proposed regulations; or

2.5.3. set aside sufficient time to consider the comments it receives, and in particular those it may receive at the public hearings on 28 – 20 June 2010, before implementing the proposed regulations.

2.6. In the circumstances, should ICASA proceed with the implementation of the proposed regulations on 1 July 2010 it will have acted procedurally unfairly and the regulations it promulgates will be liable to be set aside on review not only by reason of procedural irregularity and unfairness but because ICASA may be regarded as having predetermined its decision, which would, of course, be unfair.

2.7. The present process adopted by ICASA stands in stark contrast to that adopted in relation to the making of the Regulations promulgated by ICASA on 9 April 2010 as GN R282 in GG 33101 ("**the Interconnection Regulations**"). ICASA developed those regulations over a period of three years, which is at least an indicator of the reasonable time required for such

an exercise, and revised the draft regulations three times after receiving comments.

### **3. THE PROPOSED REGULATIONS ARE IMPERMISSIBLY VAGUE IN THAT THEY CONTAIN CONTRADICTORY PROVISIONS AS TO HOW THE CHARGE SPECIFIED IN TABLE 1 IS TO BE APPLIED**

3.1. In regulation 9(1) ICASA stipulates that established SMP licensees “*must charge the call termination rates in accordance with Table 1*”. Table 1 sets out single fixed mobile and fixed call termination charges, which are stated to be applicable for the period July 2010 – July 2013.

3.2. However, clause 1.4 of Annexure A to the proposed regulations, which prescribes the minimum content of a Reference Interconnect Offer (RIO), indicates that the RIO must include a schedule of charges for interconnection services and specifically states that:

*“Where relevant charges should:*

- *Be broken down into or built up from the charges for the network components*
- *Reflect the different charges for the same service depending on time of day or day of week (e.g. peak/ off peak);*
- *Include an indication of any surcharges;*
- *Include an indication of charging units (e.g. per second)” (our underlining)*

3.3. In terms of regulation 8 of the proposed regulations, only an established SMP licensee is required to submit a RIO. Annexure A of the proposed regulations therefore envisages that an established SMP licensee is entitled to charge:

3.3.1. different charges at peak and off peak times;

3.3.2. surcharges; and

3.3.3. charges for network components.

3.4. The reference to a single fixed call termination charge in Table 1 is inconsistent with the reference to different charges at peak and off peak times in Annexure A to the proposed regulations.

3.5. ICASA's attention is also drawn to the fact that regulation 11(3) of the Interconnection Regulations also specifies that charges for interconnection "*must be sufficiently unbundled so that an interconnection seeker does not have to pay for anything it does not require for the requested interconnection*". This regulation therefore also envisages that interconnection services are made up of a bundle of charges. The proposed regulations do not make clear how these charges relate to the single fixed call termination charges in Table 1 either.

3.6. The proposed regulations are therefore internally contradictory and apparently inconsistent with the provisions of the Interconnection Regulations. On this basis the proposed regulations, if implemented, will fall to be set aside, in terms of s6 of PAJA.

#### 4. REGULATION 9(1) IS *ULTRA VIRES* THE ECA IN THAT ICASA HAS SET A CALL TERMINATION CHARGE WITHOUT PROPER REGARD TO THE FINANCIAL FEASIBILITY OF SUCH CHARGE

4.1. In regulation 9(1) ICASA stipulates that established SMP licensees “*must charge the call termination rates in accordance with Table 1*”. Table 1 sets out mobile and fixed call termination charges, which are stated to be applicable for the period July 2010 – July 2013.

4.2. In terms of ss37(1) and (3) of the ECA, however, an interconnection provider may refuse to interconnect to any other person if that person’s request for interconnection is unreasonable. A request is reasonable only if it is technically feasible **and** financially feasible **and** if it will promote the efficient use of electronic communications networks and services.

4.3. If the charges set out in Table 1 of regulation 9(1)(b) are not financially feasible for Cell C, or if it is not possible to determine in advance of any particular request for interconnection whether those charges are or are not financially feasible, then in purporting to regulate the charge as it has done, ICASA has acted *ultra vires* s37(3) of the ECA.

4.4. Cell C is statutorily entitled to refuse a request to interconnect if it is not financially feasible. The regulation removes this right by obliging Cell C to offer call termination (i.e. interconnection) at the price determined in table 1, whether this price is financially feasible or not. ICASA is not authorised under the ECA to do this.

4.5. Secondly, as set out in the main submission to which this note is attached, the contents of the explanatory note confirm that ICASA has not had access to the same information on costs from Cell C that it has had from MTN and Vodacom and that the information that ICASA has stated that it has relied on in assessing Cell C's costs (its annual financial reports and its response to an ICASA questionnaire) are simply insufficient to perform the assessment. The call termination charge imposed on Cell C is therefore also arbitrary.

4.6. For both these reasons, the call termination charge that ICASA proposes to impose on Cell C is liable to be set aside on review, in terms of s6 of PAJA.

**5. REGULATION 9(2) IS ALSO *ULTRA VIRES* THE ECA IN THAT IT IS IN CONFLICT WITH S37(3) OF THE ECA AND THE INTERCONNECTION REGULATIONS**

5.1. In terms of ss37(1) and (3) of the ECA an interconnection provider may only refuse to interconnect to any other person if that person's request for interconnection is unreasonable. A request is reasonable if it is technically feasible **and** financially feasible **and** if it will promote the efficient use of electronic communications networks and services.

5.2. An interconnection provider, therefore, is only entitled to refuse to interconnect if the charge the seeker offers to pay is not financially feasible.

- 5.3. Regulation 9(2) of the proposed regulations, however, permits SMP licensees to offer interconnection at “*commercially negotiated fair and reasonable prices*”.
- 5.4. This must imply that SMP licensees are entitled to negotiate prices that are higher than those that are financially feasible, since negotiation cannot lead to prices lower than are financially feasible (since an interconnection provider is entitled in terms of s37 of the ECA to refuse interconnection at such prices). However, if negotiation would only result in the setting of prices that are financially feasible, then the regulation is redundant.
- 5.5. The ECA does not permit an interconnection provider to offer interconnection only if the seeker pays a price higher than is necessary for provision of the service to be financially feasible.
- 5.6. Moreover, the use of the phrases “*commercially negotiated*” and “*fair and reasonable*” suggest that an interconnection provider may take into account the need of the seeker to interconnect, which is also impermissible under the ECA. Under the ECA, the only relevant consideration (as to price) is whether the request is financially feasible. This must of necessity require an analysis only of the interconnection provider’s costs.
- 5.7. Finally, “*financially feasible*” is defined in the Interconnection Regulations to mean that “*there are no material adverse financial consequences*”. To the extent that the proposed regulations purport to permit providers of interconnection to charge a different rate, the proposed regulations are therefore also in conflict with the existing Interconnection Regulations.

**6. REGULATION 9(3) IS ARBITRARY IN THAT IT DOES NOT MAKE PROVISION FOR AN ESTABLISHED SMP LICENSEE TO REFER A DISPUTE ABOUT PRICE WITH AN SMP LICENSEE TO ICASA**

6.1. Regulation 9(3) provides that “[w]here *Other SMP licensees* fail to agree on price, the dispute resolution procedure in the *Interconnection Regulations* applies”.

6.2. The term “*other SMP licensees*” is not defined in the proposed regulations. Regulations 9(1) and 9(2) make plain, however, that established SMP licensees are not “*Other SMP licensees*”, whatever the scope of that term. Regulation 9(3), therefore, on its own terms does not apply to established SMP licensees.

6.3. There is no other provision in the proposed regulations that sets out a procedure for the resolution of a dispute between an Established SMP licensee and an “*Other SMP licensee*” about the price at which the Other SMP licensee will provide interconnection to the Established SMP licensee.

6.4. There is no reason for this provided in the explanatory note, and no reason suggests itself for the failure. The failure to provide for a remedy for an established SMP licensee is therefore arbitrary. This is a ground on which the proposed regulation may be set aside, in terms of s6(2)(e)(vi) of PAJA.

6.5. There does not appear to be any reason for this omission, which seems to be no more than a drafting lapse. If this is the case, it is remediable by a drafting amendment.

**7. THE IDENTIFICATION OF “ESTABLISHED SMP LICENSEES” IN THE PROPOSED REGULATIONS AND THE APPLICATION OF UNIFORM REMEDIES IN RESPECT OF ALL ENTITIES SO IDENTIFIED IS ARBITRARY AND *ULTRA VIRES* THE ECA**

7.1. “*Established SMP licensee*” is defined in regulation 1 as “*a licensee with SMP that is subject to additional pro-competitive measures*”. This definition of “*established SMP licensee*” is circuitous and therefore arbitrary.

7.2. in the “*list of abbreviations*” in the explanatory note to the proposed regulations “*established SMP licensee*” is stated to mean “*a licensee that held a PSTN and MCTS licence and has a market share of greater than ten (10) percent in the downstream markets as of June 2009*”. There is no further explanation or discussion of this in the explanatory note. In particular, the method of determining the 10% share is not explained at all.

7.3. As set out in the main submission to which this note is attached, the 10% figure is arbitrary in that there is no basis in fact or principle to suggest that a 10% market share confers any significant market power on a firm – which is the purpose of the categorisation of firms as “*established SMP licensees*”. In categorising Cell C as an established SMP licensee, and imposing conditions on Cell C based on that categorisation, ICASA has, therefore, acted arbitrarily.

7.4. Importantly, the categorisation of the licensees as having held a “PSTN” and “MCTS” licence is irrelevant as these categorisations no longer apply and have not applied since 19 July 2006.

7.5. Even more importantly, the imposition of a joint remedy on various entities in different markets is impermissible under the ECA. In terms of s67(4) of the ECA, may only impose pro-competitive conditions on a licensee that has significant market power where ICASA determines that the market in which that licensee operates has ineffective competition. Since ICASA has (correctly) found that each market for call termination is a separate market, s67(4) of the ECA requires that ICASA determine and impose appropriate remedies for the ineffectiveness of competition in each market for call termination on an individual basis.

7.6. ICASA has not done this. As is demonstrated in the main submission, although each operator has SMP in its own market for call termination as a matter of statutory definition, as a matter of fact the degree of market power that Cell C is able to exert is significantly less than either MTN or Vodacom is able to. As such, the imposition of the same remedy on it cannot be appropriate, since the effectiveness of competition in its market is not the same as for MTN and Vodacom.

7.7. For the same reason, the adoption of a charge for call termination that is based on the costs of MTN and Vodacom in their markets for call termination is also impermissible as a pro-competitive condition as regards Cell C, under the ECA.

## **8. REGULATION 9(4) IS *ULTRA VIRES* THE ECA**

8.1. Regulation 9(4) purports to reserve to ICASA the “right to make an industry determination”. The regulation does not explain what this power consists of; nor is it dealt with in the explanatory note.

8.2. The regulation is impermissibly vague, on which basis alone it is liable to be set aside on review in terms of s6 of PAJA.

8.3. There is also no provision in the ECA or ICASA Act that permits ICASA to make industry determinations.

8.4. In the circumstances, the attempt by ICASA to accord itself this power in the proposed regulations is also *ultra vires* the ECA and ICASA Act. On this basis too, the proposed regulation falls to be set aside, in terms of s6 of PAJA and in particular s6(2)(e)(i).

## **9. THE REGULATIONS DO NOT PROVIDE AN ADEQUATE OPPORTUNITY FOR CELL C TO ADJUST ITS BUSINESS PRACTICES AND THE PROPOSED DATE FOR IMPLEMENTATION IS THEREFORE UNFAIR**

9.1. Even if ICASA is entitled to impose call termination charges on Cell C, it must do so fairly.

9.2. Where ICASA does not provide sufficient opportunity to Cell C to restructure its business (such as, for example, its debt financing) to deal with the dramatic changes likely to result in its revenues it acts unfairly.

9.3. The present date for the implementation of the proposed regulations does not give Cell C sufficient opportunity to re-organise its business. As set out in the main submission to which this note is attached, Cell C has already reduced its call termination charges this year, and has committed to incurring significant additional costs to expand its network during 2010. Should Cell C's call termination revenues decrease any further in 2010 then this will cause it significant prejudice.

9.4. In order to act fairly, ICASA must therefore, provide Cell C with adequate notice of intention of its intention to implement the proposed regulations so that Cell C can minimise its prejudice.

9.5. In the Interconnection Regulations, for example, ICASA afforded licensees up to one year in which to adjust their businesses and become compliant with the requirements of the regulations. As a national regulatory authority, ICASA must act consistently and predictably.

**10. REGULATIONS 9(1)(a) AND 12 OF THE PROPOSED REGULATIONS ARE IMPERMISSIBLY VAGUE IN THAT THE TERMS “*PERIOD UNDER REVIEW*” AND ‘*AFTER A PERIOD OF THREE YEARS*’ ARE NOT DEFINED**

10.1. In regulation 9(1)(a) ICASA stipulates that established SMP licensees must comply with the prices in table 1 for “the *period under review*”. This period is not defined in the proposed regulations.

10.2. In addition, regulation 12 provides that ICASA will review “*the call termination markets*” “*after a period of three years*”. Again, there is no indication in the proposed regulations as to when this three year period commences or ends.

10.3. Cell C assumes that the three year periods mentioned in regulations 9(1)(a) and 12 are the same period as set out in Table 1, namely July 2010 – July 2013 (although this period is in fact three years and one month). Unless this is made clear in the proposed regulations, however, this is open to debate and renders the proposed regulations impermissibly vague and therefore liable to be set aside on review.