



MTN (Pty) Ltd

Submission to the Authority on Draft Regulations Pursuant to Section 67(4) of the Electronic Communications Act, No. 36 of 2005, published in Government Gazette No. 33121 of 16 April 2010

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1. Introduction

MTN (Pty) Limited ('MTN') would like to thank the Independent Communications Authority of South Africa ('ICASA') for the opportunity to respond to its Government Gazette No. 33121 ('draft regulations') to prescribe regulations in terms of section 67(4) of the Electronic Communications Act, No. 36 of 2005 ('the EC Act') as well as the accompanying Explanatory Note for the Draft Call Termination Regulations ("the explanatory note").

MTN's submission is structured in four parts. In the first part, MTN will indicate why the draft regulations are defective from a legal perspective. In the second part, MTN makes detailed comments about the content of the draft regulations. In a third part, MTN will discuss why the draft regulations are defective from a policy perspective. In the last part, MTN summarises its conclusions and makes suggested amendments to the draft regulations in hopes of recommending a balanced solution which holistically deals with both sector development and consumer welfare.

To avoid prolixity, MTN refers ICASA to the following MTN submissions:

- MTN's Response to Gazette No 29568 published 29 January 2007 (ICASA's intention to define wholesale call termination market) and subsequent public hearings held on 16 May 2007;
- MTN's Response to the draft regulations pursuant to sections 67(4)(a-f) of the EC Act as published in Gazette No 30846 to 30851 on 6 March 2008 and subsequent public hearings held on 5 June 2008;
- MTN's Presentation to the Parliamentary Portfolio Committee on Communications 13-14 October 2009.
- MTN's response to the Department of Communications regarding the draft Policy Direction on Mobile Termination Rates pursuant to Section 3(2)(c) of the Electronic Communications Act, No. 36 of 2005, published in Gazette No. 32640 on 13 October 2009.

These submissions are maintained and should be read in conjunction with this response, which focuses on new points and findings made by ICASA in its latest document. In submitting its written comments, MTN requests an opportunity to make oral submissions at the public hearing to be held on 28-30 June 2010.

2. Executive Summary

MTN welcomes ICASA's efforts to produce a rigorous and balanced solution to call termination regulation in South Africa.

The draft proposals suffer from serious legal and regulatory flaws. The body of this document highlights these issues and MTN's aim is to help resolve the problems with constructive proposals.

Putting aside these important technical problems, which we submit has to be considered by the Authority, by ignoring the 30% voluntary cut made less than four months ago, the proposals made by the Authority also raise a real policy issue. Although the cut took place outside this specific regulatory process (under a "moral suasion" banner), the voluntary cut and its effects are nonetheless very real. This particular decrease exists and should be taken into account and embraced by the Authority in this review.

When this cut is factored in, the drastic nature of the proposal is truly revealed. The so-called glide path is really a step function. In fact, it represents the most aggressive MTR price control MTN has ever seen:

- the peak rate would drop from R1.25 to R0.65 in just four months, and 70% of the total 85c cut proposed by the Authority would take place between March and July this year.
- since 40c is reached in July 2012, the glide path in fact only lasts two years (not the three years claimed by ICASA).

The impact of two steep and unbudgeted cuts in single financial year would force MTN to take dramatic cost cutting actions in the second half of 2010 affecting not just MTN's business, jobs and investment plans, but also its customers and the whole mobile ecosystem (LCR operators, independent Service Providers, distributors, etc.). These cost cutting actions would not be as a result of changes in the normal course of market development or as a result of a new product or service but as a direct result of regulatory intervention.

The 'business shock' is further heightened by the removal, overnight, of the peak/off-peak price structure that has characterised the market for the past 15 years, with great wholesale, retail, and network disruption.

MTN is also concerned that the proposed 40c target does not appear to take into account the substantial investment made since 2007 COA/CAM, past and future inflation and the 6c rate charged for CST interconnection.

MTN submits the public interest is not being served by such a radical proposal. A more balanced approach is required, that:

- acknowledges the 30% voluntary cut already made this financial year;
- adopts a best-practice CPI-X% price control to spread the cuts more evenly over the glide path and to account for future inflation (cf. Eskom); and
- specifically analyses its impact on the very important governmental policy objectives of Access for All, Broadband for All, jobs and economic growth.

3 Legal Submission

3.1 *The draft regulations are ultra vires the EC Act*

3.1.1 *The structure of section 67(4) of the EC Act*

Section 67(4) of the EC Act provides that ICASA “must prescribe regulations defining the relevant markets and market segments, as applicable, that pro-competitive conditions may be imposed upon licensees having significant market power where the Authority determines such market or market segments have ineffective competition”.

Section 67(4) envisages at least six stages that must occur in the course of regulation-making process:

- *First:* ICASA must prescribe regulations that define the relevant markets. This follows from section 67(4)(a), which provides that regulations must “define and identify the retail or wholesale markets or market segments in which [ICASA] intends to impose pro-competitive measures in cases where such markets are found to have ineffective competition”.
- *Second:* ICASA must prescribe regulations describing the methodology that it will use in order to determine which markets have ineffective competition. This follows from section 67(4)(b), which provides that regulations must “set out the methodology to be used to determine the effectiveness of competition in such markets or market segments, taking into account subsection (8)”. (The reference to subsection (8) should be to subsection (6).)
- *Third:* ICASA must determine which of the identified markets have ineffective competition, by applying the methodology referred to above.
- *Fourth:* ICASA must prescribe the range of pro-competitive measures that it may impose in order to remedy market failure. This follows from section 67(4)(c), which provides that regulations must “set out the pro-competitive measures the Authority may impose in order to remedy the perceived market failure”. Section 67(7) sets out a non-exhaustive list of pro-competitive terms and conditions that may be imposed in this regard.

- *Fifth*: ICASA must declare which licensees have significant market power. This follows from section 67(4)(d), which provides that regulations must “declare licensees in the relevant market or market segments, as applicable, that have significant market power, as determined in accordance with subsection (6)”. (The reference to subsection (6) should be to subsection (5).)
- *Sixth*: ICASA may impose pro-competitive conditions upon a licensee who has significant market power in a market that has ineffective competition. This follows from section 67(4)(d), which provides that regulations must set out “the pro-competitive conditions applicable to each ... licensee”.

The draft regulations seek to short-circuit the requirements of section 67(4) in at least two respects. The short-circuit is explicitly foreshadowed in the explanatory note, which states as follows (page 47):

“The Authority’s market review process comprises three main components as set out in section 67 of the ECA:

- Definition of the relevant markets;
- Assessment of competition in the relevant markets, in order to identify competitive constraints and to identify whether any licensees have SMP; and
- Where SMP identified, the imposition of pro-competitive remedies, or SMP Obligations, in relation to the identified markets.”

Crucially, this overview of the “market review process” omits to make any reference to the requirements of subsections 67(4) (b) and (c).

3.1.2 Failure to comply with 67(4)(b) of the EC Act

Section 67(4)(b) of the EC Act requires ICASA to prescribe “the methodology to be used to determine the effectiveness of competition in such markets or market segments, taking into account subsection (8)” (our emphasis). As the underlined words make clear, the methodology must be prescribed before the effectiveness of competition in a particular market is determined.

The draft regulation do not prescribe the methodology “to be used” by ICASA. On the contrary, regulation 4(1) describes the methodology that ICASA “has applied” in determining the effectiveness of competition in the call termination markets. This use of the past tense makes it plain that the methodology is backward-looking rather than forward-looking. This is *ultra vires* section 67(4)(b).

In addition, the draft regulations do not engage with the considerations listed in section 67(6) of the EC Act. Regulation 4(1) merely lists in a perfunctory fashion three factors that ICASA purportedly had regard to when determining its methodology. This falls well short of the injunction in section 67(6) that ICASA “must” have regard to the considerations listed in that section. Regulation 4 cannot possibly purport to “set out the methodology to be used to determine the effectiveness of competition in such markets or market segments, taking into account subsection (8)” (should read as subsection (6)). Subsection 6 (b) of the EC Act states:

“When conducting an analysis of the effectiveness of competition in the relevant markets or market segments the Authority must take the following factors, among others, into account:

- (i) An assessment of relative market share of the various licensees in the defined markets or market segments; and
- (ii) A forward looking assessment of the market power of each of the market participants over a reasonable period in terms of, amongst others:
 - (aa) actual and potential existence of competitors;
 - (bb) the level, trends of concentration, and history of collusion, in the market;
 - (cc) the overall size of each of the market participants;
 - (dd) control of essential facilities;
 - (ee) technological advantages or superiority of a given market participant;
 - (ff) the degree of countervailing power in the market;
 - (gg) easy or privileged access to capital markets and financial resources;

(hh) the dynamic characteristics of the market, including growth, innovation, and products and services diversification;

(ii) economies of scale and scope;

(jj) the nature and extent of vertical integration;

(kk) the ease of entry into the market, including market and regulatory barriers to entry.”

MTN believes that regulation 4 has not addressed these issues. In March 2008, the Authority published a draft set of regulations aimed at addressing the complex methodological issues raised by the assessment of effective competition. The regulations were pursuant to section 67(4)(b) read with Section 67(6) of the Electronic Communications Act No. 36 of 2005 setting out the methodology to be used to determine the effectiveness of competition in a relevant market or market segment.

It also published a set of Guidelines to Conduct Market Reviews on 8 March 2010 to “provide clarity to stakeholders and licensees as to how market reviews are to be conducted [...]”

Neither the 2008 draft regulations nor the 8 March 2010 Guidelines discharge ICASA from its obligation in terms of Section 67 (4) b, but these clearly highlight that these complex methodological issues deserve more than the simple reference to market shares in regulation 4 b.

3.1.3 Failure to comply with 67(4)(c) of the EC Act

Section 67(4)(c) of the EC Act requires ICASA to “set out the pro-competitive measures the Authority may impose”. What this means is that ICASA must set out by regulation a “menu” of pro-competitive measures that it may choose to impose in particular circumstances. In ICASA’s own terms, it must set out “the range of pro-competitive remedies that form part of its regulatory toolkit” (page 64 of the explanatory note).

Regulation 2(d) states that the draft regulations “set out the pro-competitive measures that the Authority may impose and the pro-competitive measures that it must impose to remedy market failure in the relevant markets”. But the draft regulations do nothing of the sort; on the contrary, they do no more than to impose particular pro-competitive measures on specific operators. The draft regulations make no attempt to set out a “menu” of pro-competitive measures that ICASA may impose. This is ultra vires.

This error is foreshadowed in the explanatory note, which states as follows (page 52):

“In terms of section 67(4)(c), the Authority is required to select from the pro-competitive remedies set out in section 67(7), amongst others.”

This is incorrect in law. What ICASA is required to do is to publish the “range of pro-competitive remedies that form part of its regulatory toolkit” (page 64 of the explanatory note). ICASA has not done so.

3.2 Irregularities in the draft regulations

The draft regulations are vitiated by material irregularities in several respects. These irregularities are set out below.

3.2.1 Markets other than voice termination

ICASA’s analysis is solely focused on voice call termination. However, because the market definition contained in Regulation 3 is not limited to voice call termination services, the pro-competitive measures imposed by Regulations 7 and 8 would not be limited to voice call termination; they could apply to other termination services that have not been analysed by the Authority (such as SMS or MMS). This would be irregular.

3.2.2 The distinction between “established SMP licensees” and “other SMP licensees”

The draft regulations distinguish between “established SMP licensees” and “other SMP licensees”.

MTN submits that this distinction is likely to yield irregular outcomes. In the future, “established SMP licensees” may well provide voice termination services in markets in which they should not be required to comply with the onerous remedies reserved for “established SMP licensees”. For example, it is difficult to understand why MTN should provide a RIO, produce a COA/CAM and be subjected to strict cost-based price controls if it chooses to provide termination at fixed locations, in circumstances where Neotel does not have such an obligation.

3.2.3 The glide path is unreasonable

Regulation 9 contains a “glide path” for call termination rates to be charged by established SMP licensees. For the reasons that follow, MTN submit that the glide path is unreasonable.

3.2.4 The glide path is in reality a rapid descent

The so-called “glide path” is in reality not a glide path at all; it is an extremely rapid descent. The fact of the matter is that approximately 70% of the total cuts will be achieved over the first four months (since the peak rate would drop by 60c between March and July 2010). ICASA has also confused the length of the control period with the length of the glide path itself: it will only take two years to get to 40c. Once the March cut is factored in, the proposed glide path is probably the most aggressive in the world.

MTN notes that the benchmarks referred to by ICASA point to a four-year glide path (three years to reach target). ICASA gives no reason why it has deviated from the results of its own research and has chosen to introduce a shorter glide path than international best practice.

Furthermore, the peak/off-peak price structure that has characterized the market for the past 15 years would be removed overnight. This is likely to lead to considerable wholesale, retail and network disruption, yet the rationale for this drastic decision is unclear.

3.2.5 ICASA has relied on outdated data in relation to MTN

The explanatory note states that, in order to arrive at the “efficient charge level”, ICASA had regard to MTN’s COA/CAM return *for the year to December 2007* (see page 69).

What this means is that ICASA has relied on data that is two years out of date. The substantial investment made by MTN after the 2007 COA/CAM has therefore not been recognised. Past and future inflation has also not been recognised. MTN submits that the use of 2007 COA/CAM data means that termination prices have been determined on the basis of data that is obsolete.

MTN set out its concerns to ICASA in a letter dated 3 May 2010. ICASA responded as follows in its letter of 7 May 2010:

“The Authority’s view is that it is for MTN to put forward its views on the rates proposed by the Authority ...”.

MTN submits, with respect, that this is no answer at all. It is ICASA which is required to justify its proposed glide path. ICASA has chosen to base its decision on data that is two years old. On this ground alone, the glide path is manifestly unjustifiable.

3.2.6 ICASA's reliance on "international benchmarks"

The explanatory notes state that "benchmarking data has been used to provide a 'sanity check' for the Authority to ensure that the Authority's chosen approach produces results that would reasonably be expected in other jurisdictions" (page 69). In other words, ICASA says that it has used "existing cost accounting data complemented by relevant international benchmarks of the cost of fixed and mobile call termination to determine the efficient charge levels" (page vii). Curiously, the explanatory note provides no details as to which "international benchmarks" have been used.

In its letter of 3 May 2010, MTN requested ICASA to explain what "benchmarking data" had been used. ICASA's response was contained in its letter of 7 May 2010:

"The Authority appreciates MTN's request for more detailed information on other jurisdictions. The information MTN seeks is publicly available off the websites of the Namibian Communications Commission ... and the New Zealand Commerce Commission"

MTN's submits, with respect, that this is no answer at all. ICASA has failed to explain what "benchmarking data" it relied on, or how this impacted on its computation of the glide path. In the absence of such information, MTN cannot meaningfully engage with ICASA's determination of "the efficient charge levels to be set in the price control regime to be implemented during this review period, i.e. 2010 – 2013" (page 70 of the explanatory note).

3.3 Conclusion

For the reasons set out above, MTN submits that the draft regulations are *ultra vires* section 67(4) of the EC Act. In addition, the draft regulations are vitiated by material irregularities and are substantively unreasonable. These issues are discussed in our detailed comments below.

4. Detailed Comments on the content of the Draft Regulations

4.1 Comments on Regulation 3 (Market Definition)

MTN submits the proposed market definition is defective for the following reasons:

4.1.1 The proposed markets include services that have not been analysed by ICASA

Regulation 3 identifies the relevant markets as being “wholesale call termination markets on each electronic communications network and electronic communications service licensee in South Africa”.

Many wholesale call termination services may be provided by a communications network or electronic communications service licensee in South Africa. For example the termination of voice calls, video calls, data calls, Short Messages (SMS) or Multimedia Messages (MMS).

However, it is apparent that the explanatory note only analyses voice call termination services. At no point does it attempt to define markets or analyse competition for the provision of SMS, MMS, or video call termination services.

MTN submits it is not possible for the Authority to assert there is a single wholesale call termination market for all these call termination services. Based on its analysis, it may only reasonably make a statement about the market boundaries and competitive situation for the provision of wholesale voice call termination services.

This is more than just semantics. The pro-competitive measures detailed in Regulations 7, 8, 9, 10 and 11 apply to the relevant market defined by the Authority. Given the proposed market definition, these remedies could be deemed to apply to services for which no analysis has been performed (such as SMS or MMS) in terms of Chapter 10 of the EC Act.

4.1.2 The proposed market definition is not consistent with the markets defined in the explanatory note

At page v. of the explanatory note, ICASA states that: “the market is defined as Wholesale call termination on an electronic communications network operating in South Africa” (our emphasis).

At Section 1.16 of the explanatory note, ICASA states that: “the market is defined as Wholesale call termination on any electronic communications network operating in South Africa” (our emphasis).

At Section 3.1 of the explanatory note, ICASA states it has explicitly identified the following markets:

- “Wholesale call termination on a fixed network in South Africa”
- “Wholesale call termination on a mobile network in South Africa”

The Authority is clearly inconsistent in its explanatory note but more damagingly, the market proposed in regulation 3 (“wholesale call termination markets on each electronic communications network and electronic communications service licensee in South Africa”) is itself not consistent with any of the markets defined in the explanatory note.

The definition(s) contained in the explanatory note focus on termination on a *network*. The definition contained in regulation 3 refers to termination on a *licensee*. A single licensee may operate various fixed and/or mobile networks so the proposed definition could easily lead to confusion at the time of applying network-specific remedies (e.g. MTRs vs. FTRs).

MTN submits best practice is to define call termination markets along the network dimension. The European Commission, for example, defines the following markets in its Recommendation on relevant product and service markets¹:

- Wholesale call termination on individual public telephone networks provided at a fixed location;
- Wholesale voice calls termination on individual mobile networks. (our emphasis)

¹ Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

4.1.3 The proposed market definition does not distinguish between fixed and mobile call termination

The market proposed in regulation 3 does not distinguish between call termination services provided at fixed and mobile locations, yet the remedies proposed in regulation 9 clearly distinguish between Mobile Call Termination rates and Fixed Call Termination rates.

MTN agrees these services should be regulated at different levels, because the underlying costs of providing fixed and mobile call termination service are different. This is due to underlying technological distinctions (mobile access network costs are traffic sensitive, fixed access network cost are largely not). The issue with the draft regulations is that there is no clear legal basis for doing so.

MTN's submission that the proposed market definition should explicitly reflect the distinction between fixed and mobile network is supported by international best practice (see European Commission above).

4.1.4 Summation

In summation, the market definition proposed by ICASA in this draft regulation is defective for these reasons:

- It includes call termination services that have not been analysed by the Authority;
- It is not consistent with the market highlighted in its explanatory note nor international best practice; and
- It fails to properly distinguish between call termination services provided at fixed locations and those provided on a mobile network.

4.2 Comments on Regulation 4 (Methodology)

MTN submits the proposed regulation fails to comply with 67(4) (b) of the Act. The reasons have already been exposed above in the legal submission.

4.3 Comments on Regulation 5 (Effectiveness of Competition)

MTN submitted that regulation 4 does not fulfil ICASA's obligations in terms of Section 67(4)(b). It follows that the effectiveness of competition in the market defined in regulation 5 cannot be established pursuant to regulation 4.

4.4 Comments on Regulation 6 (SMP Determination)

Regulation 6 (1) states that "each electronic communications network licensee and electronic communication service licensee that offers voice call termination services is dominant and has SMP in its own market".

MTN submits the reference to dominance is superfluous and should be removed.

MTN submits SMP should be determined by reference to the market(s) defined in regulation 3. The current wording of regulation 4 (1) is awkward. This is because of ICASA's choice to define the market as a licensee, rather than a licensee's (fixed or mobile) network (be it physical or virtual – the relevant factor is whether the licensee controls the call termination charge, not the network facility). MTN submits it would make a lot more sense to designate a licensee as having market power over termination on its own (fixed or mobile) network, rather than its 'own market'.

The Authority's confusion between the licensee and its network truly comes to a head when considering the Established Licensees concept in regulation 6 (2).

MTN notes that the underlying rationale for the established SMP concept and the selection of licensees is not explained.

In addition, by failing to associate the concept to a specific network or service, a so-called Established SMP player entering a new market may be required to fulfil obligations that other, more established players in this new market do not. This is discriminatory. Take the example of MTN entering the fixed market, as it is allowed to do in terms of its ECNS licence. It is difficult to understand why MTN should produce a RIO, a COA/CAM and be subjected to strict cost-based price controls when providing termination at fixed locations, in circumstances where Neotel, a much more established player in the fixed market, does not have such an obligation today.

4.5 Comments on Regulations 7 to 11(Pro-competitive Measures)

4.5.1 The proposed glide path is unreasonable

MTN notes ICASA appears to confuse the length of the control period (3 years until the next review) with the length of the glide path itself (2 years to reach 40c).

The glide path bringing the peak termination rate from 89c to 40c (a 55% cut) between July 2010 and July 2012 is very steep indeed. But this ignores the recent March voluntary 30% cut that brought the peak termination rate from R1.25 to R0.89. The draft proposals effectively mean the peak termination rate will drop from R1.25 to R0.40 (a 85c drop or 68% cut) over a period of just 28 months. To MTN’s knowledge, this is the most aggressive glide path ever implemented the world, especially considering that 70% of the total cut takes place in the first four months (60c of the total 85c cut will take place between March and July this year). See figure 1 below.

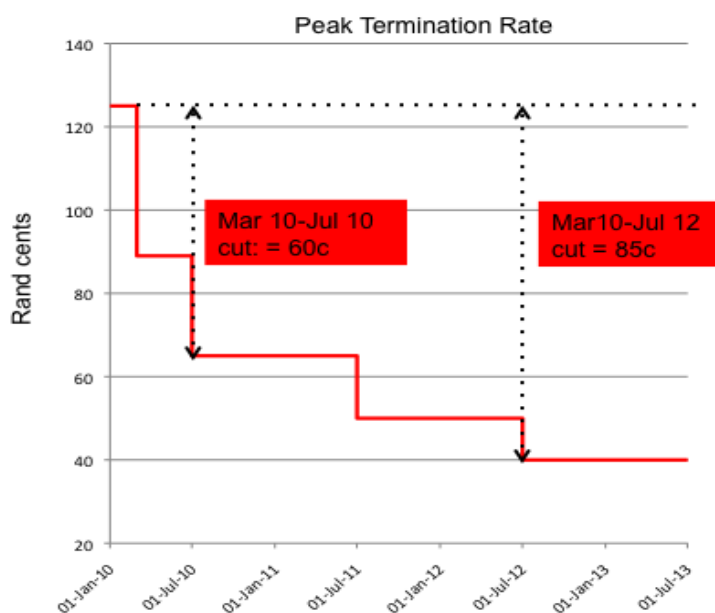


Figure 1

The substantial front-loading of the proposed glide path is highlighted by ICASA when it states, in Section 3.1. of Annexure 1 that:

“Three annual charges are recommended:

- From July 2010 – 0,65 ZAR per minute (~50 per cent reduction from pre-March rate).

- From July 2011 – 0,50 ZAR per minute (~23 per cent reduction), and
- From July 2010 – 0,40 ZAR per minute (~20 per cent reduction)” (our emphasis)

In such circumstances, it is not appropriate to talk about a glide path. The proposals represent a step function.

MTN notes the proposed 85c drop is the largest cut implemented over a single price control period in a sample of 24 international price controls proposals it has reviewed. In fact, to MTN’s knowledge, this is the single largest cut ever implemented over a single price control in the world. The substantial financial and policy implications of this drastic stance are discussed further in the policy implications below.

MTN notes that it is somewhat ironic that ICASA, who started the voluntary cuts process under a ‘moral suasion’ banner, appears to have ‘rewarded’ the operators, who already made a substantial, unplanned cut this financial year, with another, drastic and unplanned 30% cut just four months later. The signal ICASA is sending the industry for ‘doing the right thing’ last March is not encouraging.

Significantly, the glide path proposal is at odds with ICASA’s Authority’s own statement at Annexure 1 Section 2.1.1 that: “Reductions should allow sufficient time for licensees to adjust to new charging levels and structures and take these changes into account in their business plans and capital expenditures.” A 30% cut in interconnect just four month after another 30% does not allow for such planning or adjustment.

Inexplicably, the Authority also appears to have ignored its own research regarding international best practice for glide path durations. In Table 1, Section 2.3 of Appendix 1, the Authority provides five examples of glide paths implemented in other jurisdictions. Out of these five countries, three implemented a four year price control period (Nigeria, Uganda, United Kingdom), one even implemented a five year control period (Tanzania) but just one (Kenya) implemented the three year control period proposed by the Authority in these draft regulations. The Authority’s rationale for diverting from its own best practice benchmarks is not explained.

The short glide path also contradicts the Authority’s statement in Section 2.1.1 of Annexure 1: “The greater the differential between the efficient charge level and the existing termination rates, and the larger the reduction in the termination rates required, as is the case in South Africa, the

stronger the argument for a glide path”. MTN cannot reconcile why the single largest drop in interconnect rates in the world should be achieved over a glide path period that is shorter than best practice.

For the reasons above, MTN submits ICASA’s glide path proposals are unreasonable and unjustifiable.

4.5.2 The sudden removal of the peak/off-peak is unjustified

The “business model shock” highlighted above is compounded by ICASA’s proposal to align the peak / off-peak interconnection rates on 1st July 2010.

This proposal implies the price structure that characterised the interconnection and retail market for the last fifteen years will be removed overnight, leading to great wholesale, retail, and network disruption.

MTN submits the rationale provided for this proposal is weak and its implications are not understood.

In Section 2.1.3 of Annexure 1, the Authority summarises its reasons for the drastic move as follows: “The initial view of the Authority is that in a South African context, Option 2, a set regulated rate which reduces the regulatory burden, provides clarity and simplifies the charging control regime is the preferred approach”.

Facilitating ICASA’s regulatory duties is an acceptable objective, but this cannot be the overarching consideration for the Authority’s regulatory choices. Consumer welfare and efficiency should be the primary objectives. In its draft Wholesale Mobile Call Termination Market Review of 1 April 2010, Ofcom states at paragraph 9.114:

“ Why do we permit time of the day pricing flexibility?

Within the confines of the overall cap on charges we permit the flexibility described in paragraph 9.112 and 9.113 [freedom to set peak, off-peak and week-end interconnect rates]. Our general approach to setting charge controls is to intervene no more than is necessary to achieve our regulatory aims. And allowing MCPs [mobile providers] a degree of pricing freedom can allow them to vary the structure of charges, which can help promote efficiency.

For example, higher daytime rates can allow MCPs to send price signals, which if passed on to end-users might encourage more efficient use of networks (i.e. demand shifting to less busy periods where termination rates are relatively lower). If terminating operators can shift demand between different times of day, then it may be possible for them to meet the same demand with less overall capacity and hence at lower cost².

MTN submits the ‘blended rate’ benefits highlighted above by Ofcom are very significant and MTN does not believe these come at the cost of substantial regulatory complexity or lack of clarity. On the contrary the monitoring of blended rates is straightforward and well documented. In its April 2010 call termination document, Ofcom describes the mechanism in very simple terms at paragraph 9.113:

“The 2007 charge control formula allows the flexibility to make price changes during the year at any time and to charge different prices by time of day. Variation in prices is permitted as long as the overall prior year traffic weighted average charge (the Average Interconnection Charge or AIC) for the year does not exceed the Target Average Charge (TAC). The TACs for the 2007 charge control are set out in the 2007 statement and the subsequent amendment in the 2009 statement. The following shows the charge control formula and assumes the charge control year is 2011/12:

$$\text{AIC} = \Sigma(2010/11 \text{ volumes} \times 2011/12 \text{ prices}) / \Sigma 2010/11 \text{ volumes}”$$

The claw-back mechanisms for target over-shoot / under-shoot are well documented too, as are the mechanisms to deal with potential issues of price “flip-flopping”. None of these mechanisms are beyond ICASA’s capabilities.

Nor is ICASA a stranger to the approach. The Authority has long controlled Telkom SA’s retail price cap (CPI-X) obligations over the years. Indeed, ICASA acknowledges at 2.1.3, that:

“[...] the impact of selecting one approach over the other on the Authority is relatively minimal”.

² OfCom Wholesale mobile voice call termination market review, Volume 2 – Main consultation. 1 April 2010.

In any event, MTN submits ICASA has provided no reason why peak and off-peak prices should be aligned straight away. The same arguments put forward by ICASA to support a glide path to 40c apply to a change in the price structure. If ICASA believe that the alignment in interconnect price structure is necessary, “business shock” management would warrant a glide path within the glide path so peak and off-peak prices align over time rather than straight away.

4.5.3 ICASA has failed to consider 6c interconnection

ICASA recommends that termination prices be cost-oriented and determines the efficiently incurred costs for mobile termination to be 40c.

Currently, mobile operators terminate calls originated from Community Service Telephones (CSTs) at a below-cost rate of 6c per minute. These calls terminate on MTN mobile subscribers in exactly the same way as any other fixed or mobile call, making use of the same network facilities from the point of interconnect onwards. In other words, the termination of calls from CSTs cannot be distinguished from a cost or functionality perspective from any other call terminating on MTN’s network.

The 6c rate is currently subsidised by peak and off-peak termination prices. As these prices move towards cost, as determined by the Authority, the subsidy goes away. If the current situation is maintained, mobile operators would therefore be required to provide termination services below the effectively incurred cost.

This is best illustrated by an example. MTN currently terminates 10% of incoming calls at 6c. If peak and off-peak rates were 40c, its revenue per minute across peak, off-peak and CST would be 36.6c. This is below the efficient charge level determined by ICASA.

There is no international precedent, economic rationale or legal requirement in South Africa for mobile operators to explicitly sell termination services below cost. The current CST obligation only relates to the roll-out of community payphones in certain areas.

To remedy this issue, two options are available:

- An upward glide path in the CST rate could be implemented so the rate aligns with the underlying cost, as determined by the Authority, by the time the 40c rate is reached for peak and off-peak. MTN believes a profitable CST business can be run at this level of interconnection: given per minute billing unitisation, the 90c regulated retail price is

sufficient to allow a reasonable margin. In any case, MTN notes the roll-out of CSTs is a universal service obligation, not a commercial opportunity.

- Embracing a blended rate approach which includes the 6c interconnect rate in the weighted average, would require a peak and off-peak interconnection rate in order to allow each individual operator to effectively recover the efficiently incurred 40c cost which has been determined by ICASA.

4.5.4 MTN believes the use of COA/CAM for the purpose of price setting is inappropriate

The explanatory note states that, in order to arrive at the “efficient charge level”, ICASA had regard to MTN’s COA/CAM return for the year to December 2007 (page 69).

Yet, the 40c target bears no relationship with the interconnection cost per minute reported in MTN’s 2007 COA/CAM submission, which was independently audited and approved by ICASA.

ICASA therefore appears to have modified MTN’s COA/CAM in a way that is not described in any regulation, or been open to consultation with MTN. This, in MTN’s view, is inappropriate. MTN is also concerned that ICASA appears to have used a cost-reporting framework for the purpose of price setting, and has therefore used the COA/CAM instrument for an ulterior motive.

4.5.4.1 ICASA relied on outdated data in relation to MTN’s costs

The use of MTN’s 2007 COA/CAM means ICASA has relied on data that is two years out of date. This has two important implications:

- The substantial investment made by MTN since 2007 has not been recognised when setting the cost-oriented termination charge; and
- 2008 and 2009 inflation has been ignored when setting the cost-oriented termination charge.

In 2007, MTN invested only R2,893 bl in its network (similar levels were invested in 2006: R2,391bl). The quality issues that ensued are well documented. To address these issues, MTN engaged in an intensive network investment programme bringing capex to R4, 868 bl in 2008 and R6,034 bl in 2009. The 40c cost-based target set by the Authority is therefore based on unusually low investment years, and ignores the 112% increase in annual capex since 2007.

Since 2007 subscribers only grew by 9%, and network minutes by just 2%. So, the network depreciation associated with a 112% increase in capex has only been offset by a 2% increase in minutes. It is self-evident that, everything else being equal, MTN's network costs have risen since 2007. It is not clear that ICASA made any adjustment for this in its draft call termination regulations.

In a similar fashion, 2008 CPI stood at a staggering 10.1%. 2009 CPI was 7.1%. MTN's network costs are inflation-sensitive (cf. rents and rates for our BTS and switch sites, network staff, the fuel used for power back-up, etc.). With inflation rising much faster than traffic, our per minute network cost have risen since 2007 due to this factor alone.

The table below graphically illustrates the substantial increase in opex and capex inputs relative to output volumes (subscribers, traffic): Please refer to part 1 of confidential section (Annexure A)

Table 1: Relative growth in capex, inflation and minutes since 2007

	CAPEX (M Rand)	CPI (2007 = 100)	SUBSCRI- BERS (000's)	MoUs/ Month	Traffic p.a. (M mins)
2007					
2008					
2009					
VAR (2007-2009)					

Source: MTN Group Limited Final Audited Results for the year ended 31 December 2009. NB: Traffic per annum estimated is obtained by multiplying monthly MoU/sub by subscribers times 12.

MTN is not required to produce a COA/CAM anymore so it is not possible to say how these effects would have impacted our 2009 COA/CAM on a like-for-like, auditable basis. Any estimate is likely to be controversial, but MTN calculates the combined effect of higher capex and inflation could be significant.

4.5.5 The proposals need to explicitly address future inflation

Regulation 9 does not specify whether the target rates contained in Table 1 are expressed in real or nominal terms.

MTN's understanding is that international best practice would set cost-based targets in real terms. This is to account for future exposure to price inflation (South Africa's CPI target is 3 to 6% p.a.).

If the controls were expressed in nominal terms and assuming inflation of 4% between Jul 2010 and July 2012, the real interconnection rate charged in 2012 would be 37c, a full 3c below the efficiently incurred cost determined by the Authority.

This effect, combined with the use of obsolete COA/CAM data and the lack of recognition for the 6c interconnect rate, could lead to substantial cost-under recovery by the mobile operators.

The best-practice approach for inflation-adjusted price controls is to use a CPI-X formula. This is also the approach adopted by ICASA in past price controls. For example, Telkom SA has long been subjected to CPI-X price cap regulations on a basket of Telkom's specified services. MTN does not understand why ICASA chose to adopt a different approach in these regulations. MTN notes that a CPI-X formula would also address the issue of the substantial front-loading of the glide path highlighted above.

4.5.6 ICASA's reliance on international benchmarks

The explanatory notes states that "benchmarking data has been used to provide a 'sanity check' for the Authority to ensure that the Authority's chosen approach produces results that would reasonably be expected in other jurisdictions" (page 69). Curiously, the explanatory note provides no details as to which "international benchmarks" have been used.

In its letter of 3 May 2010, MTN requested ICASA to explain what "benchmarking data" had been used. ICASA's response was contained in its letter of 7 May 2010:

"The Authority appreciates MTN's request for more detailed information on other jurisdictions. The information MTN seeks is publicly available off the websites of the Namibian Communications Commission ... and the New Zealand Commerce Commission"

MTN submits the use of benchmarks for the purpose of call termination price setting is inadequate without substantial adjustments. In a 2008 report by Ingenious Consulting Network written in reference to the use of benchmarking in a draft interconnection decision by the Australian Competition & Consumer Commission (ACCC), the authors state (page 4):

“Our conclusion is that there are a significant number of adjustments that would be necessary for a valid comparison; that several of these adjustments are individually material; and that in aggregate these adjustments are even more so”.³

The authors isolate the following factors as requiring special attention:

- the choice of the comparator set;
- differences in the Weighted Average Cost of Capital (WACC)
- the point in time of comparison;
- exchange rates volatility;
- mobile traffic density;
- the cost of mobile equipment;
- the cost of spectrum;
- the operating cost of mobile masts / BTSs; and
- the cost of leased lines.

To MTN’s knowledge, ICASA has not addressed any of the above factors. For example, MTN notes the apparent random selection of benchmarks that characterises the Namibian study.

The New Zealand Commerce Commission sampling is more principled: it focuses exclusively on countries that implemented LRIC costing methodologies. Nonetheless, MTN notes the sample produces results in the range of 0.049 NZD to 0.125 NZD, a spread of 255%. The proposed 40c does indeed fit in this range, but how this serves “to establish that the Authority’s chosen approach produces results that would reasonably be expected in other jurisdictions” is not immediately clear.

At Section 1.9.2.1., of the explanatory note, the Authority quotes a recent benchmarking study on fixed to mobile pass-through prepared for the ACCC. The study finds that fixed pass-through of

³ Commentary on the use of international benchmarking in setting interconnection rates. A report from the Ingenious Consulting Network, December 2008.

MTR cuts is normally very limited. This observation is consistent with MTN's international experience.

But the Authority then goes on to say:

“For the provision of mobile services, South Africa shares this experience. Licensees who provide mobile services serve a larger customer base and are therefore insulated from competitive pressures to respond to any reduction in input costs. This is evidenced by the recent less than 100% pass-through of the reduction of peak-hour mobile call termination rates from R1.25 to R0.89”.

MTN submits it is inadequate to apply findings that were solely focused on *fixed* retail pass through to the retail *mobile* market. It is well known that the fixed and mobile retail markets have very different competitive dynamics. Throughout the world, fixed retail markets are typically characterised by market power, whereas mobile markets are typically considered effectively competitive from 3 players onwards. It is also extraordinary that the Authority suggests that mobile operators are “insulated from competitive pressures” using (unsubstantiated) observations about a cut that took place just 6 weeks before the publication of this draft document. In any case, such an observation would be consistent with the waterbed effect observed in other jurisdictions. In fact, economic theory suggests that the more competitive the mobile retail market, the more likely retail prices are to increase (conversely, the less likely retail pass-through)⁴.

4.5.7 ICASA does not explain why it has set a single fixed termination rate

Mobile interconnection is characterised by “near-end handover”. This is due to the fact that the calling party's network cannot know in advance where the called party is located and so cannot choose to handover nearest to the subscriber (far-end handover). A single, national average termination rate is justified.

Fixed geographic numbering allows an originating network to choose whether to handover traffic near-end or far-end. If the price for “far end” call termination is below the price of “near end” call termination, the originating network may choose to invest in a long distance network to carry the call closest to the called party and pay the lower rate. Alternatively, a third party network may play

⁴ See for example: Testing the "Waterbed" Effect in Mobile Telephony, Christos Genakos and Tommaso Valletti, October 2007

that arbitrage role by collecting the call near the calling party, and handing it over near the called party for a small margin. The potential for a competitive so-called ‘transit market’ is clear.

This potential is usually expressed in terms of three fixed termination rates: local level, single transit and double-transit. In the EU, for example, the average local FTR is R0.05, a single transit FTR is R0.07 and the average double transit is R0.10 (long distance termination)⁵.

If, on the other hand, the termination price is the same for near-end or far-end handover, the originating network has no incentive to invest in a transit network, and will always chose to deliver the call as soon as physically possible.

The proposed, single fixed termination rate therefore destroys the transit price signals, and with it, the emergence of a competitive transit market. The Authority gives no rationale for this decision.

4.5.8 An interpretation of the “Fair and Reasonable” obligation should be included in the final regulations

MTN fully supports ICASA’s symmetrical regulatory treatment of the mobile operators. Internationally, the price and market distortions created by asymmetrical termination rates have now been recognised and the global trend is to remove, rather than introduce asymmetrical mobile rates.

MTN submits it would also be inappropriate to treat Telkom SA as a ‘new entrant’ in the mobile market. Telkom already enjoys substantial fixed infrastructure that will be shared with its mobile network (including base station sites) large economies of scale inherited from its fixed volumes and economies of scope from cross-selling fixed and mobile services to its existing customer base. Any claim that Telkom should get a ‘new entrant’ interconnection regulatory subsidy must be treated with extreme caution.

MTN also supports ICASA’s proposed obligation to interconnect on a ‘Fair and Reasonable’ basis. It is both proportionate and best practice. In its own experience, small operators can and do use market power to set high and discriminatory termination prices. For example, MTN has long paid mobile termination rates to fixed termination providers and it is systematically being denied the lower rates these operators offer to other providers.

⁵ Source: Commission Staff Working Document accompanying the Progress report on the Single European Electronic Communications Market (15th Report) Figure 39a (page 43).

Given the above issues, and the potential for legal disputes, MTN believes the Authority should provide clear guidance on the “fair and reasonable” obligation by including the reciprocity expectation in the regulations.

The Authority states in 1.2. of Annexure 1:

“...the Authority expects the following outcome of the fair and reasonable obligation for non-established licensees:

- Non-established licensees to charge a reciprocal rate with the rate set for Telkom if these licensees offer a fixed service’ and
- Non-established licensees to charge a reciprocal rate for Cell C, MTN and Vodacom if these licenses offer a mobile service”

MTN support this interpretation. It is consistent with Oftel’s, position in its 2003 Explanatory Statement and Notification⁶:

“... Oftel believes that other fixed PECNs should only be allowed to charge BT a fair and reasonable sum for call termination on their networks. It is Oftel’s view that a “fair and reasonable” amount in most cases would be an amount that would be based on the charges that BT charges other PECNs for termination on its network.”

4.5.9 Summation on the price control

MTN submits the glide path proposed by the Authority is unreasonable. This is because:

- The proposed glide path is really a step function; it represents the most aggressive MTR price control MTN has ever seen;
- The glide path only really lasts two-years: 40c is reached in July 2012;
- Taking account last March’s cut, the peak rate would drop by 60c between March and July 2010, and 70% of the total proposed cut (85c) would be achieved in just 4 months;

⁶ Oftel – Review of Fixed Geographic Call Termination Markets – Explanatory Statement and Notification (August 2003).

- In addition, the peak / off-peak price structure that characterized the market for the past 15 years would be removed overnight, leading to great wholesale, retail, and network disruption; and
- The substantial investment made since 2007 COA/CAM, past and future inflation and the 6c rate charged are not recognized, leading to a substantial risk of cost under-recovery by the operators.

4.6 Comments on the accounting separation and cost accounting obligation

MTN notes ICASA's intention to re-introduce the COA/CAM obligations.

MTN agrees with the Authority when it states that the COA/CAM obligations are intrusive and onerous (Section 3.4.3.2.6.3 of the explanatory note). MTN is therefore confused when ICASA also suggests (Section 1.3.1 of Appendix 1) that: "A cost model, using a methodology such as LRIC, could subsequently be created and its findings applicable for the next review". If it is the Authority's intention to develop a standalone LRIC model for the purpose of the next review, then MTN cannot understand why it also wants the operators to produce an "intrusive and onerous" COA/CAM. Both would effectively serve the same purpose. MTN submits the Authority may require a COA/CAM or produce a cost model for the purpose of call termination pricing but doing both at the same time would be disproportionate and unreasonable.

MTN is concerned that the requirement for a COA/CAM is in fact driven by an ulterior motive which has little to do with the wholesale call termination market. In section 3.4.3.2.6.3, the Authority states that: "it is intended that the Regulatory Financial Reports and information collected by the Authority under these obligations will inform decisions on price regulation and the imposition of wholesale price controls in the future." (our emphasis). Retail price regulation is clearly outside the scope of the current market review.

MTN is also extremely concerned that its current and generic labelling as Established SMP player would mean that it would also be required to produce a COA/CAM should it decide to enter the fixed voice market. MTN submits such an obligation would be unreasonable and discriminatory.

4.7 Comments on keeping of accounts, records and other documents (reporting)

MTN notes the requirement to produce the information described in Appendix B on a bi-annual basis. MTN believes the Authority would be able to perform its duties adequately if the information was produced on an annual basis only. This would lighten the burden on the operators and facilitate reconciliation with audited annual figures.

MTN submits the information requirement relating to retail markets (2.1.) goes far beyond the scope necessary for the analysis of the wholesale call termination market (e.g. “description of each retail service offering’s subscribers, traffic volumes and revenues generated” - our emphasis). MTN cannot see how systematic data collection of, say its Retail Value Added Services or Broadband retail services would help the Authority monitor the wholesale voice call communication market.

By the same token, MTN submits it should not be “required to provide information regarding “each wholesale service offering” (2.2.1). MTN does not see how information about its volumes of site sharing business or its fibre offerings to third party operators are relevant to the wholesale call termination market.

MTN submits the reporting requirement contained in these regulations is too broad, unnecessarily burdensome and therefore unreasonable.

5. The Draft regulations are defective from a policy perspective

The real measure of success of regulating interconnect rates down is to do so in a manner that benefits all, rather than producing winners (those already connected and who call a lot) at the expense of the unconnected, or those whose lines are only profitable because they get called a lot. Therefore, we believe ICASA's real challenge is to facilitate the reduction of termination rates in a way that balances the policy objectives of, mobile penetration, access, rural coverage, network investment, jobs, retail cuts, broadband developments and competition.

MTN notes that ICASA has not included in the draft regulations the regulatory impact assessment or proportionality assessment of its proposed regulations. We believe that a full regulatory impact assessment (RIA) is necessary prior to imposing the draft call termination regulations. The aim should be to assess whether the benefits of imposing the proposed regulatory measures outweigh the costs. The RIA should be the first critical step to ensuring a balanced approach of policy objectives. In fact, global benchmarks show there is no universal "right price" for interconnect, only a set of compromises between investment, innovation, penetration, coverage, and competition.

*Oftel concluded: "Our current view is that there is no single regulatory option for termination regulation that is unambiguously better than the alternatives. Different approaches would affect different types of consumers to different degrees, particularly if there were to be a sudden shift in approach, and considerable uncertainty remains about how the future services might develop."*⁷

5.1 The draft proposals' financial impact is substantial (confidential)

MTN earlier highlighted the business shock associated with ICASA's proposal to cut mobile termination rates just four months after the voluntary cut, the exceptional steepness of the implied glide path and the decision to align peak and off-peak rates on 1st of July. The scale of the business shock and associated policy implications are discussed in annexure A which are strictly confidential as per section 4(D) (4) (b), (c) and (e) of the ICASA Act, No 13 of 2000.

⁷ Ibid.

However, MTN would like to submit that the radical business shock associated with the model restructuring (provided in annexure A) will come at significant cost from a policy perspective. This is discussed below.

5.2 The linkage between MTR levels and mobile penetration

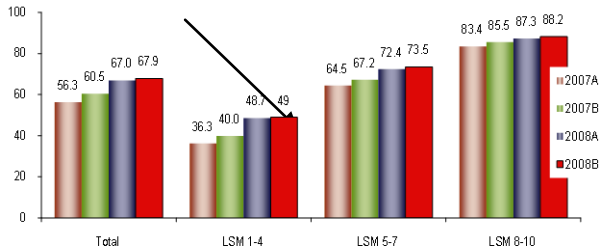
The South African mobile penetration success stems from intense competition between network operators to attract new customers via substantial connection and access funding and subsidies provided by the operators. In 2009, MTN's investment in new customers via handset, connection and access subsidies was R2, 3 bn. As a result, today, it costs as little as 49 cents (the purchase price of a SIM) to get a mobile line from MTN and one call once every 90 days to keep it. Compare this with the equivalent costs for a fixed telephone line.

Therefore, from a policy perspective interconnection rates in South Africa have funded penetration into the low usage segment. In fact, 50% of LSM 1-4 adults own a mobile phone today. The bar chart below illustrates that the greatest area of growth in terms of SIM penetration is in the LSM 1-4 category. But the 50% LSM 1-4 penetration also shows that South Africa still needs to enable a framework that facilitates the connection of poor and rural citizens of this country.

From a policy perspective it is paramount to recognise the significant role wireless technology plays in developing economies. Principally, wireless technologies have faster deployment times and greater cost effectiveness than fixed line alternatives. Consequently unlike fixed telephone penetration, which generally peaks at 1 phone per two inhabitants, mobiles penetration has not yet reached an upper limit. With this in mind it is important to focus on the suggested remedy in the draft Call Termination Regulations.

The proposal correctly adopts the principle of a "glide path", however, its application is not reflective of a 'glide path' but rather a radical step down. Application in its current form would adversely affect the current mobile penetration model and the wireless objective of growing the market and connecting the remaining 50% of the LSM 1-4 population that still don't own a mobile.

Figure 2: LSM 1-4: 50% penetration level, now fastest area of subscriber growth



Source: SAARF AMPS

MTN notes that ICASA rejects the impact of the proposed remedy on marginal subscribers. ICASA uses arguments that were deployed in developed markets to suggest that MTR-based access subsidies tend to focus on the high end, post-pay market. These European arguments are not applicable to South Africa:

- First, South Africa is one of the rare countries where pre-pay handsets are in fact subsidized. Last year; MTN spent R851 ml bringing subsidized handsets to those prepay subscribers that can't afford their full cost;
- Second, these developed market arguments significantly underestimate the amount of “trickling down” taking place in a market like South Africa, Many subsidized post-pay handsets are being passed on to pre-paid customers. MTN estimates that more than 25% of its post-pay handset base is currently being used with a prepay SIM. This means that for every four post-pay handsets that is subsidised, one is being passed on (presumably for free) to a pre-pay subscriber, bringing lower connection costs to the bottom of the market (MTN analysis based on a 4 month period from Feb to May2010)
- Third, these arguments solely focus on handset subsidies. Last year, MTN spend R2, 3bn in customer acquisition and retention, with handsets only representing 64% of that expense.

In any case, it is wrong to believe that reducing a source of revenue (interconnection) from a group of customer that have low and often capped disposable income to spend on outbound services will not affect the economics of that group, Again, developed markets concepts (in this case elasticity) need to be revisited for South Africa.

At the low end of the market, MTN observes that what constrains spend is disposable income. If retail prices go down, usage may go up (and with it, MTN's network costs), but spend remains the same, simply because there is only a finite amount of money available to call in a given month. So the R20 outbound spend remains R20, regardless of call prices. What ICASA is about to change however, is the amount of revenue generated by these users that is not capped by disposable income. How ICASA asserts that the marginal subscriber will not be affected is difficult to understand. The issue is very real: more than 25% of MTN's prepay base only generates revenues because of inbound calls, and more than half the base spends less than R40 per month.

Equally important is the realisation that SIM penetration has had large economic multiplier effects. According to the World Bank; each incremental 10% of mobile penetration delivers an incremental 0.8% of GDP growth. The world-class penetration enjoyed in South Africa has therefore been a major boost to the South African economy. In addition, 10% of broadband internet penetration delivers a 1.4% boost in GDP growth, so MTN's existing and future investment in access networks and fibre backbone capacity is a critical to the future of the country.

5.3 Investment in mobile services in South Africa

South Africa is at a cross-road. It is being overtaken by many countries in the very high speed communications services that can bring the profound benefits of information technology to its citizens. The South African Government would best advance the interests of South African citizens by establishing regulations that deliver assurances to those who wish to partake in risky investments needed to advance broadband network development. South African companies compete in the global capital market for such investment funds, and investors must find the prospects for earning a return sufficient to be willing to accept the risks.

What is evident from the international arena is that investment in information and communications technology (ICT) is the principal driver of labour productivity growth and, therefore, overall economic growth in developed nations. A major component of ICT capital is the broadband infrastructure required to transmit information in the modern economy. The benefits of broadband infrastructure are not abstract - in addition to driving economic growth, they manifest themselves in providing to South African citizens and businesses increased availability, quality, and efficiency of a myriad of services that are central to citizens' well-being, including healthcare, education, government services, commerce, media, and entertainment. In fact, the UK communications regulator, Ofcom, has recognised the link between the level of termination rates and the levels of

investment in new infrastructure and services which mobile operators are required to sustain on an ongoing basis. In particular:

“Ofcom has taken into account the potential impacts on investment and innovation if MNOs are prevented from recovering their efficiently incurred costs...”[Paragraph 9.33 Mobile call termination statement March 2007]

*“... option 1 reflects a conservative assumption about the level of MNOs’ costs in a competitive market and would therefore ensure that Orange and T-Mobile recover their efficiently incurred costs (which to the extent that **this impacts on investment decisions, is likely to serve the longer term interests of consumers.**”* [Paragraph 9.138]

“Ofcom has noted that charge controls should not be so tight as to impact adversely prospects for investment.” [Paragraph 9.167]

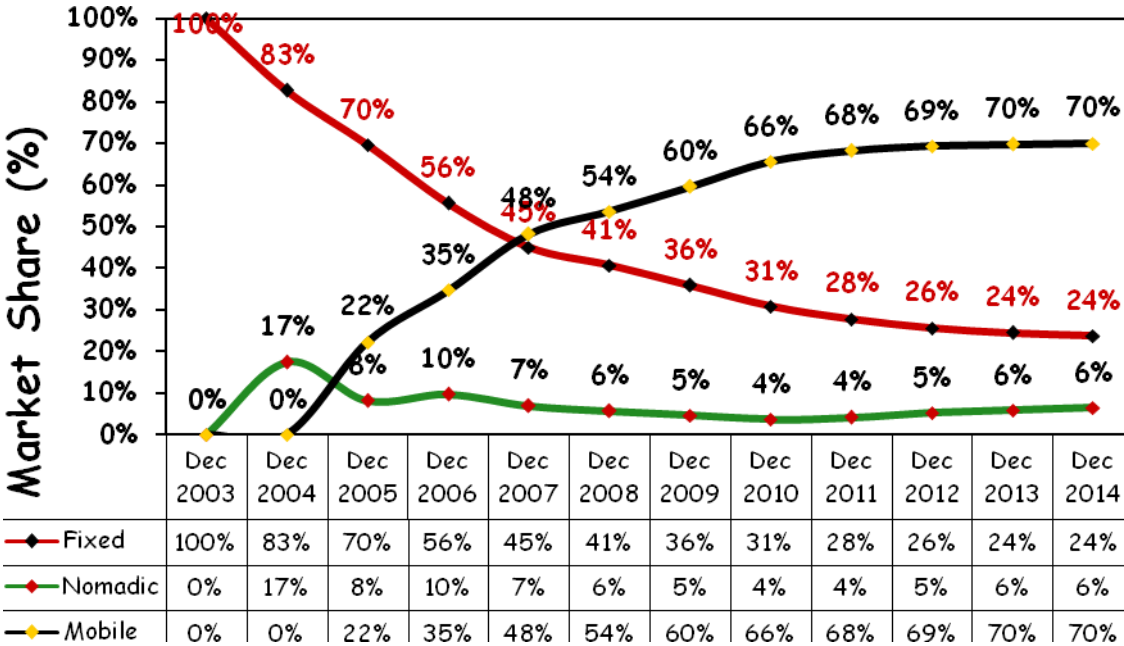
*“Ofcom recognises that a balance must be achieved between serving the short term welfare of consumers (through lower prices and hence immediate reductions of prices to a level consistent with the underlying costs), and conversely **the need for efficient investment incentives for existing and prospective network operators and service providers allowing a sufficient period of time for operators and customers to adjust to new levels and structures of mobile charges (which benefit consumers in the longer term).**”* [Paragraph 9.175]

*“Ofcom is concerned that a sharp and immediate reduction to cost (Option 3) may not be in the longer term interests of consumers (if such a reduction presents a **material risk to further investment in mobile services).**”* [Paragraph 9.185].

The Deputy Minister of Communications, Ms Dina Pule, highlighted broadband telecommunications development as one of the South African Governments key priorities in her speech to Parliament on June 2009. This suggests that the South African Government is no different to the rest of the world in recognizing that the deployment of the broadband networks as the evolution tool which will provide new possibilities and advantages for the business and public sector. It is now accepted that the technology and the network will be fundamental to information technology, for innovation, rationalisation and value creation, in summation a primary economic growth economic engine for the South African economy. The diagram below, clearly illustrates

that mobile technology, and not fixed lines, will take broadband Internet access to South African citizens.

Figure 3: Broadband Technology Market Share



Source: © Africa Analysis, 2009

Mobile networks can bring Broadband to parts of the country where they will never be deployed via fixed networks, and will put Internet in the hands of citizens in the LSM 1-4 category in the same way that it brought telephony to the poorest.

Connecting the remaining 50% of LSM 1-4 and to turn “Mobile South Africa” into “Broadband South Africa” can only be done through more investment in fibre and broadband access as well as subsidising broadband take-up (handsets, mobile modems, data SIM cards, etc) for a new wave of growth and inclusiveness obviously subject to the competitive and regulatory environment making such investment feasible. The impact of two, unbudgeted reductions in a single financial year on this essential investment is discussed below.

5.4 The policy impact of the “business shock”

The scale of the business shock and associated policy implications are discussed in annexure A which are strictly confidential as per section 4(D) (4) (b), (c) and (e) of the ICASA Act, No 13 of 2000.

6. Conclusions and Recommendations

The regulations should be substantially modified to comply with section 67(4) of the EC Act, else they risk being challenged.

The proposed market definition must also be revisited: it should reflect the Authority's analysis of voice call termination services only, and focus on specific networks, not licensees. Fixed and mobile call termination should also be distinguished.

The concept of "Established SMP" player must be refined. MTN cannot be considered to be an established player in the fixed call termination market.

The Authority must also consider whether COA/CAM is a reasonable obligation. Its reporting requirements (Annex B) are already too burdensome.

MTN supports ICASA's symmetrical treatment of the mobile operators. This is because the global trend is to remove, rather than introduce asymmetrical mobile rates and Cell C who launched in 2001, cannot possibly claim a "new entrant" interconnection subsidy. Given the scale of its existing infrastructure and customer base, any claim that Telkom should get a 'new entrant' subsidy must also be treated with extreme caution.

MTN also supports ICASA's proposed obligation to interconnect on a 'Fair and Reasonable' basis. It recognises that small operators can and do use market power to set high and discriminatory termination prices. But MTN believes the Authority should include clear guidance on its expectation of 'reciprocity' in the final regulations.

MTN submits the proposed glide path is unjustified and unreasonable. This is because:

- It is really a step function and represents the most aggressive MTR price control MTN has ever seen;
- It only lasts two-years: 40c is reached in July 2012;
- Recognising the recent March industry voluntary reduction, the peak rate would drop by 60c in just four month, and 70% of the total proposed cut (85c) would therefore be achieved between March and July 2010.

- The peak / off-peak price structure that characterized the market for the past 15 years would be removed overnight, leading to great wholesale, retail, and network disruption;
- The substantial investment made since 2007 COA/CAM, past and future inflation and the 6c rate charged for CST interconnection are not recognized, leading to a substantial risk of cost under-recovery by the operators.

For the price control, MTN would recommend the adoption of a best practice CPI-X formula, with targets set in real terms and 6c CST interconnection taken into account. Peak and off-peak prices should be allowed to float, or only align by the end of the glide path.

Finally from a policy perspective, MTN cannot reiterate enough the effective need for a balanced solution and submits that the current approach does not provide the opportunity to rebalance its business model. This will have adverse effects not only on our business, the mobile ecosystem and the marginal subscriber but also on mobile investment which in turn affects the aggressive policy objectives set by Government, such as policies which relate to broadband penetration.

MTN trusts that its submission will assist ICASA in its endeavour of achieving a well-structured and reasoned approach to regulating call termination in South Africa. In addition, MTN is available to meet with the Authority to further elaborate and discuss the confidential information which we have submitted in Annexure A.