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Attention: Mr Christian Mhlanga

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ICASA

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Dear Sirs

DRAFT BITSTREAM AND SHARED/FULL LOOP ACCESS REGULATIONS

Cell C would like to thank the Authority for the opportunity to provide written comments on the draft Bitstream and Shared/Full Loop Access regulations ("**the Regulations**") as published in *Government Gazette* 36840 on 11 September 2013.

Cell C supports the intention of the Authority to follow through with its Findings Note on the ICASA framework for Introducing Local Loop Unbundling ("**Findings Note**") and Media Briefing as presented by the ICASA Chairperson, Dr Stephen Mncube on 30 November 2011. Cell C further supports a logical conclusion of the Local Loop Unbundling ("**LLU**") regulatory process that is aligned to legislation.

Cell C wishes to make an oral submission in the event that an oral hearing is convened by the Authority.

Our further written comments on the process and the draft Regulations are set out below.

1. LLU Process

- 1.1 Cell C notes with concern that the process followed by the Authority may be considered to be inconsistent with the process anticipated in its Findings Note, as it could be said to result in uncertainty and may lead to unintended consequences. This is because the publication of these further draft Regulations appears to have taken place without any reference to the Authority's Media Briefing on Local Loop Unbundling process and its Findings Note of 2011. An explanatory note would be helpful in the circumstances.
- 1.2 Cell C also believes that some of the required actions by the Authority as contained in the Findings Note and Media Brief are yet to be completed. Section 1 of the Findings Note states the following:

"The Authority determines the following:

- *The obligation to lease facilities under Chapter 8 of the Electronic Communications Act applies to all licensees providing Electronic Communications Network Services.*
- *Due to limited scope of this inquiry, the Authority will confine its findings to the application of Local Loop Unbundling to fixed line networks*
- *Local Loop Unbundling is to be introduced in a phased approach to minimise disruptions in the ICT sector, particularly regarding employment and network investments, whereby :*
 - *The Authority will engage industry, as part of a separate regulatory process, to ensure that IP Connect prices are reduced starting from 31 March 2012.*
 - *The Authority will engage industry to ensure ways of introducing Bitstream by 1 November 2012,*
 - *An industry working group will be established to address the ordering system specification mechanisms to support the introduction of Bitstream, with the working group to be convened by the Authority in February 2012,*





- *The Authority will engage industry on establishing an Access Line Deficit recovery scheme, through a public consultation process, as a precursor to the introduction of Bitstream,*
- *A Regulatory Impact Assessment on the costs and benefits of the fixed line full loop, sub loop and shared line forms of LLU will be conducted, commencing in mid -2012,*
- *The Authority will introduce supplementary LLU Regulations and conduct Market Reviews after completion of the Regulatory Impact Assessment,*
- *The Authority will undertake an inquiry into the unbundling of wireless access networks."*

The 2nd last paragraph of the Media Brief states the following:

"We have issued a short Findings Note that outlines the Findings of the Inquiry. This lays out the framework and schedule for LLU in the future. Copies are available to you here, and will be published in the Government Gazette shortly. A more comprehensive Reasons Document will be published in due course, which explains the rationale behind the decisions taken."

The Reasons Document has yet to be published, and we are not aware of the outcome of any regulatory impact assessment or consideration of any access deficit fund. The implication is that the Authority's process is flawed and could be regarded possibly administratively unfair. It is Cell C's view that an access deficit fund is not required, but we say this in the absence of any evidence to the contrary.

2. Authority's Determination in terms of Question 2 of Section 4.2 of the Findings Note

- 2.1 In response to the Authority's question on what form of local loop unbundling stakeholders realistically favour in the South African Market, the Authority concluded:

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"The Authority determines that for the scope of this inquiry, access to the "local loop" refers to the traditional fixed network, and not access to the mobile or fixed wireless network. The Authority will address access to wireless networks in an inquiry and a determination will then be made as to whether to conduct a Market Review into wireless access networks. The Authority accepts that Bitstream is a service and not an electronic communications facility and will not be regulated in terms of Chapter 8 of the ECA"

Cell C strongly supports the view that the local loop refers to the traditional fixed network only. Indeed we are not aware of this term applying to anything else in any other country. For consistency and certainty purposes it is Cell C's view therefore that the scope of the Regulations must encompass only the unbundling of the fixed line local loop. The local loop unbundling process has already been significantly and unnecessarily delayed and has arguably already hampered the introduction of real competition in the fixed line market, and improved prices in the broadband market.

- 2.2 Cell C is also concerned that the Authority determined in its Findings Note that "bitstream" is a service and not an electronic communications facility and therefore will not be regulated but has now included in the draft Regulations the term "Bitstream Access". Cell C agrees that unbundling should indeed include bitstream access simply because this is a critical service offered over facilities that only one or a limited number of fixed line licensees construct, operate and make available to third parties. Again, an explanatory note will assist in understanding the change here, although Cell C supports this position.

3. Definition of Local Loop and Aggregation Point

- 3.1 Cell C notes that the Authority has defined the "Aggregation Point" so as to include *"the radio network interface that connects the local loop with facilities of an ECNS licensee so as to provide voice and data services"*.
- 3.2 Cell C notes that the Authority has defined the local loop as follows:

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“means all physical media, including electrical, optical and radio frequency, used as the electronic communications facilities for the connection of an end-user or end-site to an access network aggregation point on the electronic communications network”

3.3 The Authority has not included provisions in the Radio Frequency Spectrum Regulations that allow for sharing or trading, leasing or other forms of access to a licensee’s spectrum by third parties. If this is the Authority’s intention, we submit that this is not the appropriate consultation for the consideration of these important matters. The absence of an explanation for these definitions is similarly concerning and potentially administratively unfair. The Authority should take care in drafting the regulations to avoid unintended consequences, ambiguity and lack of clarity; and to ensure that decisions are well-reasoned.

3.4 Cell C believes that the purpose of the Authority’s inquiry was to provide for the implementation of the unbundling of fixed networks’ local loop which may include spectrum in the loop. For example, in giving bitstream access, the copper pair spectrum is shared by the incumbent and the new entrant or competitor. The difference is that it is the incumbent that provides the ADSL technology and modems; entrants do not have control over the physical line nor are they allowed to add other equipment. New entrants and competitors are limited to the supply of **services designated by the incumbent (usually broadband internet access)**¹. However, this should be clarified both in relation to the Aggregation Point and the Local Loop definitions.

3.5 Cell C therefore recommends that the definition of “Aggregation Point” should be amended to refer specifically to the **fixed** local loop.

3.6 In addition, “local loop” be improved as follows (changes that are proposed are in bold and underlined):

*“means all physical media, including electrical, optical and radio frequency, used **in** the electronic communications facilities **that are required or available** for the connection of an*

¹ de Bijl, Paul W.J. and Peitz, Martin (2005): *Local Loop Unbundling in Europe: Experience, Prospects and Policy Challenges*. Published in: International Journal of Digital Economics No. 57 (March 2005): pp. 33-57.



end-user or end-site to an access network aggregation point on the electronic communications network so as to enable the use of that part of the electronic communications network as may be necessary for any or all of Full Loop Access, Shared Loop Access or Bitstream Access."

- 3.7 In order to supplement any explanatory notes, we recommend that the Authority have regard to the definition and explanation offered by OFCOM in the United Kingdom which is simple, relevant and appropriate in our view, in relation to each of line-sharing (Shared Loop Access), full loop unbundling (Full Loop Access), and bitstream access. This can be found at:

http://www.ofcom.org.uk/static/archive/oftel/publications/broadband/dsl_facts/LLUbackground.htm

4. Part II, Interconnection between and leasing of facilities for access to the local loop

In subregulation 3(a)(i) the Authority proposes that the facility to be leased is the "Point of interconnection at a point agreed upon in the core network". Cell C believes that the inclusion of this requirement amounts to the unbundling of the access and core network. The unbundling of the core network does not fall within the scope of this regulatory process and therefore should be removed.

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5. Conclusion

To ensure regulatory certainty and avoid unintended consequences or legal and administrative challenges, the Authority must be consistent with its own processes and with the requirements of administrative justice. Cell C therefore recommends that the actions required to be taken by the Authority as contained in the Findings Note and Media Brief must be completed prior to the finalisation of these Regulations. The publication of an explanatory note or Reasons Document would assist in this regard.

Yours faithfully



Mothibi Glenview Ramusi
Executive Head: Regulatory Affairs