THE POWER IS IN YOUR HANDS

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ICASA
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By email: cnkosi@icasa.org.za
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23 June 2014

Dear Sirs

CELL C'S RESPONSE TO THE ICT COMPETITION INQUIRY IN TERMS OF SECTION 4B OF THE ICASA ACT

Cell C is pleased to contribute to this high level inquiry. Cell C looks forward to contributing to the more formal inquiries under Chapter 10 of the ECA, which will go a long way towards enabling more effective competition in the sector, particularly if these take account of the submissions made in this document. We say this because Cell C has been at the forefront of competition in the market since its launch in 2001 – offering a viable alternative to the services of MTN and Vodacom.

Cell C has also contributed to the submission made by the South African Communications Forum (SACF) and therefore addresses certain issues in this document that are either not addressed by SACF or not addressed in any detail.

Cell C urges ICASA to accelerate the formal inquiries under Chapter 10, with a view to determining relevant markets or market segments, identifying whether there are any operators in those markets with significant market power (SMP), considering whether or not as a result there is a market failure, and identifying and imposing appropriate and proportionate remedies.

1. Role of ICASA

1.1 ICASA is the regulatory authority for the electronic communications sector. It is tasked with regulating in order to promote competition. It is also required, as a matter of good practice, to review its own regulations to ensure that they are appropriate, proportionate and reasonable, from time to time. A responsible regulatory authority would need to ask if the regulations published by it are achieving their stated purpose, on a reasonably regular basis. In addition, such a regulatory authority would need to monitor the sector on an ongoing basis, to ensure that areas that are not currently regulated are not in need of regulation.

1.2 ICASA has taken such steps at our urging, in relation to mobile termination rates and asymmetry, and has reviewed the 2010 Call Termination Regulations. However, it is Cell C's view that other areas also require attention in order to ensure that ICASA is fulfilling its mandate and is also creating an environment within which

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competition can flourish – provided that the regulation of wholesale prices by way of setting of an MTR with asymmetry, is already in place.

1.3 Cell C has included its views on the importance of an appropriate regulatory framework in which competition can flourish, to the interests of investors. Investors are naturally concerned with risk and mitigation. The way in which new entrants and incumbents can operate within a regulatory framework constitutes an important part of any due diligence process when considering an investment.

1.4 On 20 June 2013, Cell C addressed a detailed letter to ICASA regarding the Number Portability Regulations of 2005, to which Cell C has had no substantial response. We have attached a copy of that letter to this submission. In the paragraphs that follow, we will supplement the reasons that we set out in that submission, and again request that ICASA review these regulations as a matter of urgency.

1.5 We will also address the issue of essential facilities below, as the draft Essential Facilities Regulation was published in 2007 but never revisited. Cell C believes that this is an area that requires regulatory scrutiny before the implementation of the broadband policy that is promised by the former Department of Communications, can take place.

1.6 Furthermore, Cell C believes that the Reference Interconnection Offers of each of Telkom, Vodacom and MTN that have been filed with ICASA, do not consist in nor are they adequate as reference interconnection offers, as this term is commonly understood in other jurisdictions and international jurisprudence. We will also address this issue below.

1.7 Finally, Cell C has already noted to ICASA its concerns regarding national roaming. We addressed ICASA on this point on 18 July 2013.

2. The importance of competition and the associated regulatory framework to investors

2.1 Market failure is usually described as a situation where normal market forces do not work sufficiently to ensure allocative and productive efficiency. According to Case & Fair (Industrial Organisation (1999)): "Markets 'fail' when the market outcome is inefficient. Markets, left to themselves, do not exhaust all of the gains from trade and total surplus is not maximized". These markets then require some form of government intervention (or regulation) to ensure a better outcome in terms of optimal social welfare. The market characteristics that would usually indicate a market failure would be a natural monopoly or an industry with large sunk costs or specific investments (such as electronic communications).

2.2 This section examines 3 of the factors that are invariably intertwined and that that may be employed to avoid or mitigate against market failure:

1. Clear policy goals and delivery mechanisms
2. Predictable and stable regulatory environment
3. Incentives to attract investment locally and from abroad

2.3 National and sector policy

2.3.1 This must be aligned and the implementation of policy goals must be co-ordinated and effective. Investors will not invest where there is regulatory uncertainty, conflict within government agencies, and no credible monitoring, which means that there is unlikely to be proper accountability.

2.3.2 In summary, joined up working between government departments is necessary to ensure that existing assets are used efficiently, taxpayer funds are deployed to areas of greatest need in accordance with a sensible timetable and in line with identified priorities, and expertise is shared.

2.3.3 In broad terms, policy is the over-arching set of goals and objectives for a sector. Once the goals are identified, the way in which they will be achieved must be outlined in sufficient detail to ensure that anyone reviewing the policy can be left in no doubt about where the sector is headed and how it will get there. Policy must also be reviewed to ensure that it is keeping pace with technological forces, consumer demand, and international trends.

2.3.4 The South African policy history has, since the White and Green Paper processes at the end of the 90s, lacked clear objectives and perhaps more importantly, not offered credible delivery mechanisms. Even though policy is not meant to have the effect or to take the role of legislation or regulation, without it, the framework for the sector lacks structure. For example, the ECA has introduced the concept of convergence in the absence of a policy – policy in this case was framed by a series of cases, notably the Altech decision on conversion of VANS licences to individual ECNS and ECS licences. That should have been the role of policy, and that policy should have preceded the ECA.

2.3.5 Policy interventions by various Ministers in the past 4 years have strayed into the jurisdiction of the regulatory authority, instead of giving guidance on what is expected. Although it is not the Minister's role to determine what spectrum is available and to whom it should be awarded, for instance, a policy direction in this regard could require information from the regulatory authority to support proper decision-making, having regard to national and sector goals. These could include investigating award options appropriate to the South African market, a review of the spectrum plan, and identifying social or economic imperatives that might be served by the award of that spectrum in a particular way or to qualifying entities.

2.3.6 This sort of policy-making lends credence to the sector. It indicates that the Minister wants to be sure that the sector is well-served by its regulatory authority, is aligned to national goals and priorities, and has considered all the options. Without proper policy guidance, investors are not sure what the future of the sector holds for them or the entities they may wish to fund or participate in. Predictability is key to investors. We deal with this in more detail below.

2.4 The regulatory authority

2.4.1 The importance of the regulatory authority cannot be overstated. Investor and stakeholder confidence depends to a significant degree on the level of certainty, quality of output and type of intervention by a regulatory authority in any sector.

2.4.2 ICASA has been beset by challenges including high turnover of staff, political divisions, power-struggles, and generally poor oversight. Some blame for this must be laid at the door of the Minister of the day, whose role it is to monitor the work product and resourcing of the regulator. In the absence of proper regulation and Ministerial oversight, it is arguable that there has been a degree of market failure in this sector.

2.4.3 In the pursuit of regulatory excellence, what is needed is a focussed and expert staff, dedicated to the goal of public service, with a strong grounding in the sector needs and regulatory imperatives.

2.4.4 Regulatory uncertainty has also characterised this sector. Regulations have been published and withdrawn several times (interconnection and digital migration are just two examples). Regulations have been challenged and withdrawn (handset subsidies). The roles of each of the NCC, CompCom and ICASA are not clear (although the proposed changes to the ECA and ICASA Act should help here) and forum-shopping has delayed decision-making. A number of applications have been brought against ICASA in terms of the Promotion of Administrative Justice Act, to compel ICASA to produce reasons for certain decisions, or to take action in circumstances when there is a clear duty on them to act, but they do not.

2.4.5 The lack of sustainable and real competition in the sector is a key reason why the sector has not delivered benefits to consumers in the form of lower prices – arguably the best example of market failure in this context. ICASA's failure to address this sooner and to keep it under review has had a direct effect on the current market structure (2 operators holding about 89% of revenue share in the market) and resulting high cost to communicate.

2.5 Foreign Investment

2.5.1 It is widely accepted that investment is central to achieving long-term sustainable economic growth in developing countries. Several academic papers record that average Foreign Direct Investment (FDI) inflows in developing countries are greater in countries that have better telecommunications networks.

2.5.2 In many developing countries, capital may be limited because there is little domestic saving and access to international financial markets is either limited or non-existent. FDI can therefore be a vital source of capital. Attracting FDI is therefore a key policy objective in many developing countries, many of which receive considerable inflows of FDI through multinational investors in mobile and fixed markets.

2.5.3 GDP growth (which in South Africa was enhanced by 7% from telecommunications) and economic openness correlate with FDI, but political stability, illiteracy and infrastructure are also significant factors in avoiding market failure, particularly in South Africa.

2.5.4 Developments in India are indicative of the way in which FDI flows can also reduce significantly without a credible policy framework. FDI in India dropped by 96% in 2012, with a detrimental effect on the telecoms sector. In 2011 a study on FDI in developing nations funded by the Council for European Investment Security found that "advances in telecommunications are a hallmark of the most successful advanced economies, because they help create, knit together and integrate large national economies and provide critical infrastructure for the global networks of multinational companies…." The study focuses on Poland and notes that "Our analysis finds that Poland's current difficulties in attracting FDI in telecom infrastructure largely reflect issues of governance, not economics….the World Bank ranks Poland next to last among the nine Central and Eastern European countries for the quality of its political institutions and ease of doing

business…The inefficiency of the Polish state bureaucracy also is often cited by international organisations, as is the accountability of its political institutions…"

2.5.5 The same study observes that the OECD cites communications infrastructure as one of the key determinants of investment location decisions, especially for foreign investors.

2.5.6 A further study carried out by WITS University (South Africa) in 2011 concluded that "market size, regulatory environment and government policy" are the three most important factors influencing the decision to undertake FDI. It also established that South Africa would be an attractive market for investors whose own markets are saturated, and who wish to diversify their risk. It warns, however, that telecommunications firms wishing to enter sub-Saharan Africa must be prepared "for an unstable and uncertain policy environment and understand that the cost of starting a new venture...is high".

2.5.7 Other factors likely to influence investors' decisions to invest (and consequently the reduction in the likelihood of market failure) include macro-economic stability, infrastructure and logistics, the existence of protectionism or the openness of the economy, attitude to and interventions to achieve competition, country governance, labour considerations and cultural considerations. We note, in this regard, that Orange (France), decided not to invest in South Africa even as an MVNO because of the uncertainty in the regulatory environment.[1]

3. Number Portability Regulations, 2005

3.1 As indicated above, Cell C's submission of 20 June 2013 contains several important points of substance which should be read as if incorporated into this submission. In particular, we have a high level of penetration in South Africa, which means that a material number of customers will have to be ported away from other operators, particularly where they have higher ARPUs (and are likely to be contract customers). This means that porting is of the very essence of competition.

3.2 That submission also contains argument on the appropriateness of in particular, regulation 7(3), which restricts the advertising of or marketing of porting if it consists in an incentive to port that is not also made available to other new customers.

3.3 We have considered the position under the Consumer Protection Act, 2008, and under the Advertising Standards Authority (ASA) code of conduct, being the two primary sources of legislation and practice in relation to what is acceptable conduct regarding consumers and marketing.

3.4 The ASA is a reactive body, it only investigates complaints lodged by competitors or consumers that contravenes the code which relates to misleading, unsubstantiated or disparaging advertising (which are the main provisions). There is nothing in the code that prohibits advertisers from making an offer to one group of people and not making the same offer available to another – the advertising must just be clear and not misleading.

3.5 Section 8 of the CPA contains provisions that create protection against discriminatory marketing. Offering different prices for any goods or services to any persons or category of persons is prohibited if the basis for the

[1] http://www.techcentral.co.za/orange-store-to-open-sa-warehouse/47470/

different treatment is on one of the unfair discrimination grounds in section 9 of the Constitution. This implies that if the basis of the differential treatment is not unfair or discriminatory, this would be allowed / permitted.

3.6 As we say in our previous submission, in no other industry including regulated industries, is there a provision that prevents advertising or marketing to new customers wherever they are coming from, whether they originate from another competitor, or not.

3.7 Again, Cell C urges ICASA to review the Number Portability Regulations as a priority. The restriction on offering incentives to port customers is hampering the ability of challenger players to entice customers to their networks, although once they join, the likelihood of churn is low, and we are as a result, able to build our base more easily.

3.8 The rationale behind regulation 7(3) is not known, but it can only have been to protect the established customer bases of Vodacom and MTN who stood and still stand to lose the most by the introduction of number portability.

3.9 In addition to the proposed changes to MTRs and asymmetry as set out in the Draft Regulations, Cell C believes this will give it and other challenger networks a fighting chance of growing market share quickly and competing in a sustainable manner with MTN and Vodacom and really being able to offer innovative pricing and packages to consumers.

4. Facilities-Leasing Regulations, 2010

4.1 The Facilities-Leasing Regulations of 2010 (Facilities-Leasing Regulations) provide, as foreseen in the ECA, that a request for facilities shall be "reasonable" unless it is (i) technically not feasible, (ii) financially not feasible, and (iii) does not promote the efficient use of networks and services. Unfortunately it has been Cell C's experience that requests for facilities from each of our competitors (MTN, Vodacom, Telkom and Telkom Mobile) are frequently met with resistance or outright refusal.

4.2 Cell C can furnish specific examples of this supported by correspondence if ICASA is minded to take the matter further in the form of an inquiry. In the meantime, Cell C can offer the following examples:

4.2.1 In requesting access to facilities primarily leased or owned by either of Vodacom or MTN, Cell C has been advised that it should follow the historical practise of a "one for one" lease arrangement. In other words, sites can only be made available to Cell C if Cell C in return makes the same number of sites available to Vodacom or MTN, as the case may be. Since Cell C is the smallest operator in the market which is already clearly dependant on Vodacom for service where it does not have sites by virtue of its national roaming agreement with Vodacom, it makes no sense nor is it fair to require Cell C to provide sites in order to get access to third party sites. Cell C naturally has a smaller number of sites – effectively denying access to existing sites owned or leased by the dominant operators could be categorised as any one of a number of anti-competitive practises including a refusal to deal or an exclusionary practise.

4.2.2 Furthermore, these operators do not have any cost-oriented basis for charging for site rental or facilities-leasing when agreements are concluded, despite Cell C's request. There is no reason why site-sharing should be a profitable business for either MTN or Vodacom – the ECA enjoins licensees to share facilities for various reasons, and these can also be described as being to save costs, avoid unnecessary duplication of facilities, and protect the environment from continuous site build. Accordingly Cell C believes that the price of

facilities-leasing should be cost-oriented and licensees should declare what the costs to the licensee in fact are. If a landlord (eg Liberty or Growthpoint, who own many of the properties in the central business district of Sandton) charges MTN a rental of R40,000 per month, and MTN is able to share the site with up to 2 other operators, then MTN's actual costs (leaving aside electricity, insurance and other associated costs) are R40,000 divided by 3. MTN should not therefore charge each operator R40,000 per month. This would amount to excessive pricing – again an anti-competitive action.

4.2.3 Telkom owns all exchange facilities. Despite the fact that the Facilities-Leasing Regulations require sharing on request unless a request is "not reasonable", Telkom refuses to allow Cell C's agents to enter exchanges to install necessary redundant links. Specifically we have experienced this refusal when we asked that Neotel be permitted to install their backhaul in the same space as Cell C leases from Telkom – in other words the access for Neotel would not be greater than the dimension of the space allocated to Cell C and for which Cell C pays Telkom. Telkom requires redundant links to be provided by it alone which could be contextualised as a form of anti-competitive bundling – access must be bundled with redundancy or backhaul.

4.2.4 Cell C is concerned that its redundant link providers including Broadband Infraco, will in future not be able to access Telkom sites despite the fact that they are subcontracted to Cell C, necessary for the provision of redundancy (to ensure quality network services) and result in no extra cost to Telkom. This already has a detrimental effect on our network rollout and network cost.

4.2.5 In the data exchanges operated by licensees such as Teraco, no such limitation or restriction exists. It is unclear why Telkom would, in the voice environment, impose limitations and restrictions of this sort.

5. Draft Essential Facilities Regulations, 2007

5.1 In 2007 and after a thorough regulatory process, ICASA introduced the draft Essential Facilities Regulations. These sought to give effect to section 43(8) of the ECA, read with section 67.

5.2 Despite the publication of an explanatory note, ICASA did not take the draft regulations forward, and some 6 years later, no facilities have been declared to be "essential".

5.3 The definition of "essential facilities" is contained in section 1 of the ECA and reads as follows, "an electronic communications facility or combination of electronic communication or other facilities that is exclusively or predominantly provided by a single or limited number of licensees and cannot feasibly (whether economically, environmentally, or technically) be substituted or duplicated in order to provide a service in terms of this Act".

5.4 It is Cell C's view that there are a number of "essential facilities" that ought to be declared as such, in order to ensure equal and non-discriminatory access on reasonable prices. Currently as ICASA is aware, access to facilities of Cell C's competitors including Broadband Infraco, is challenging and often takes a long time or is refused outright as we explain above in the context of the Facilities-Leasing Regulations. The rentals for sites are escalating at rates that are wildly out of line with market trends and given that many sites are shared, are significantly inflated in our view.

5.5 If relief can be offered for essential facilities, this will also assist smaller players in rolling out infrastructure more efficiently and this will no doubt have a beneficial effect on the cost of operations.

5.6 Cell C made similar submissions in our response to the Broadband Value Chain Review, earlier in the year, as part of the ICASA Cost to Communicate process. Cell C believes defining essential facilities will be particularly important in the context of broadband – avoiding the costly duplication of infrastructure associated with broadband services will be critical in enabling nationally available services at affordable prices.

5.7 Cell C has highlighted the high cost of among others, access to high sites, municipal and provincial land (including road reserves), backhaul; and other difficulties experienced in negotiations with other operators. We understand that commercial landlords such as Liberty and Growthpoint, ACSA and Gauteng Transport Authority (as Gautrain) will if they are not already doing so, restrict access by more than one licensee to their properties. This will make it absolutely critical to ensure access is granted by the first-mover licensee – the licensee that is the exclusive lessee in buildings owned by these landlords.

5.8 Cell C recommends that ICASA re-issue the draft regulations for further consultation.

6. Reference Interconnection Offers (RIOs)

6.1 On 29 April 2013 Cell C requested that ICASA provide it with the RIOs of each of Telkom, MTN and Vodacom – the dominant incumbents. In terms of the 2010 Call Termination Regulations, these operators were required to file RIOs with ICASA for approval and to publish these on their websites in 2011.

6.2 Despite requesting that each of these licensees renegotiate its interconnection agreements with Cell C on the basis of the RIO, each of them has refused, and instead, requested that Cell C should provide them with a RIO.

6.3 Cell C is not obliged to file a RIO and it is not obliged to accept the terms of interconnection imposed by each of MTN, Vodacom and Telkom because it is not dominant. A request for interconnection by Cell C must be accepted by the incumbent SMP licensees unless it is not reasonable, meaning that it is "not technically and not financially feasible, and does not promote the efficient use of networks and services". This is a test that each of the other operators has failed to apply when Cell C's request has been made to it.

6.4 Because of the competitive pressure to roll out a network so as to be able to compete for customers nationally on both 2G and 3G, Cell C has often accepted the terms of interconnection without raising a dispute.

6.5 Cell C now requests that ICASA assist it by requiring Telkom, MTN and Vodacom to negotiate interconnection based on their RIOs only.

7. National Roaming

7.1 As set out in our submission of 29 July 2013 to ICASA in response to the Broadband Value Chain Review, Cell C depends on Vodacom for national roaming in certain areas of South Africa where it does not have its own network infrastructure.

7.2 In order to provide a seamless communications service to customers, thereby avoiding the perception of poor quality service, Cell C requires Vodacom to provide "seamless handover" of calls between its network and Cell C's network. Despite various requests by Cell C, Vodacom has failed or refused to make seamless handover available as a matter of course. Cell C alerted ICASA to this on 18 July 2013.

7.3 National roaming is a critical form of access for new entrants. Until they can establish themselves and are able to expend the vast sums of capital that are needed to build out a national network of a high quality, coverage can only be achieved by using a third party network. In the absence of regulation in this regard, challenger operators and new entrants such as Telkom Mobile and Cell C have had to negotiate terms of access on a commercial basis. It is obvious that the relative bargaining power of the parties is not equal. It follows that the terms on which access is made available are unlikely to be favourable.

7.4 ICASA has not indicated that it considers national roaming to be a priority, or to form part of interconnection, which in Cell C's view, it does.

7.5 Cell C submits that it would be appropriate and proportionate to require that the price for national roaming provided by any licensee should be set at or no higher than the regulated MTR.

7.6 Cell C would welcome the opportunity to present to ICASA on this matter and urges ICASA to consider the regulation of this important form of access, as part of its suite of pro-competitive tools.

8. Price competition and the cost to communicate

8.1 The cost to communicate remains high in South Africa due to a lack of competition in the electronic communications market. The relationship between operators is regarded as a "wholesale" relationship, whereas charges to consumers are termed "retail" prices. The wholesale rate has dropped following the regulation of the mobile call termination rate ("wholesale rate") in 2010 from R1,25 to R0,40 in 2013, but retail prices have only dropped in the last 9 months due to aggressive pricing by Cell C.

8.2 The South African market is still dominated by two operators namely Vodacom and MTN (dominant operators), meaning that there is insufficient competition. As a result, consumers are not benefiting and the national interest in reasonably-priced communications and investment in the sector is negatively affected. Cell C has passed on the benefit of lower wholesale rates to its customers but the dominant operators continue to make substantial profits without materially changing their rates.

8.3 There has not been adequate regulatory intervention by ICASA in the last 12 years. The call termination regulations of 2010 did not do enough to address the challenges facing new entrants and those with less than 25% market share i.e. Cell C, 8ta and others. Vodacom and MTN had the advantage of substantial asymmetry in wholesale rates vis-à-vis Telkom which assisted them to grow their businesses massively (in the late 90s, Telkom was the dominant operator in South Africa).

8.4 Cell C's business plan is not sustainable without urgent intervention. It is obvious that Telkom Mobile has suffered in the same way, which means that Telkom is also experiencing severe financial pressure by having to support it. Any other new entrant will not be able a launch a sustainable business under the current regime as it does not permit smaller operators and new entrants to truly grow market share.

8.5 As mentioned above, as a result of the reduction in wholesale rates from R1.25 to R0.40, Cell C introduced radical retail rate reductions (i.e. any network at any time for R0.99). By reducing the wholesale rates of dominant operators to say R0.10, Cell C will be able to bring the cost to communicate down further. This will also mean that

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the dominant operators will not be able to use their larger on-net communities to retain their market share and so continue to marginalise Cell C and other competitors as found in other countries.

8.6 In other countries, regulatory authorities are taking price competition very seriously. The regulatory authorities in France (December 2012) and in Papua New Guinea (January 2013) found that the dominant operators in those countries had acted anti-competitively by pricing their on-net calls at a lower rate than their off-net calls. As recently as 1 May 2013 the Nigerian Communications Commission ordered MTN, the dominant operator in Nigeria, to charge the same rate for on-net (calling MTN users) and off-net (calling other operators) calls. This was done to curb MTN's dominance which was inhibiting competition in the Nigerian market.

8.7 Cell C's view, which is supported by international experience, is that where the following 4 interventions are implemented, sustainable competition can follow:

a. Asymmetry should be set at not less than 30c - in other words licensees with *less* than a 25% market share can charge at least a 30c higher wholesale rate than dominant operators
b. The asymmetry should be in place until such time as the smaller licensees and new entrants have at least a 25% market share;
c. The wholesale rate to be charged by dominant licensees should be set as low as 10c; and
d. In addition to having lower wholesale rates, dominant licensees should charge a flat retail rate for on-net and off-net retail calls.

8.8 The consequences of not implementing these specific interventions will be:

8.8.1 Cell C will not be able to continue to drive retail prices down and, indeed, Cell C may not have a viable business at all and so only 2 operators will remain – Vodacom and MTN;

8.8.2 With only 2 dominant operators in the market, the cost to communicate will remain high to the detriment of all South Africans; and

8.8.3 Investor confidence in the electronic communications market will be further eroded and as a result, new direct investments will be highly unlikely.

Cell C believes that the other interventions mentioned above are equally important in the interests of providing policy and regulatory certainty.

Yours faithfully

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20 June 2013

Office of the Chairperson
Chairperson Dr Stephen Mncube
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Per email: chairperson@icasa.org.za

Dear Dr Mncube

REVISION OF THE MOBILE NUMBER PORTABILITY REGULATIONS

1. ICASA is obliged to promote competition under section 2 of the Electronic Communications Act. Cell C and other operators with less than 25%, require regulatory intervention in order to compete sustainably in the current market. Cell C has addressed ICASA in this regard on many occasions.

2. ICASA has chosen to regulate mobile number portability (MNP) in order to foster competition. In various publications including the consultation document on the proposed MNP regulations, ICASA stated that "*the newest entrant was expected to be a net gainer of porting customers*".

3. In the ICT Regulation Toolkit under the heading "Enhancing Competition", it is recognized that "*a regulatory instrument that has been used extensively to promote competition in mobiles is mobile number portability. European law treats number portability as a human right under the EU Universal Service Directive*[1] *that has applied since June 2003.*" It is noteworthy that Article 30 of this Directive and of its successor[2] does not impose any restrictions on incentivizing customers to port or advertising to customers who have already ported.

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[1] 2002/22/EC.
[2] 2009/136/EC.

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4. ICASA published the final Mobile Number Portability Regulations (the MNP Regulations) on 30 September 2005 in GG28091. It has not, to our knowledge, reviewed the impact of these Regulations, nor has it reviewed the Regulations themselves, since that time.

5. In 2007, ICASA published a MNP Consumer Guide. The Guide consists of questions and answers.

   a. One of the questions and answers is the following:

      My contract with my current service provider has not yet expired. Can I still port my number?
      Yes you can, but your contract with your current network operator/service provider is not automatically cancelled. You can arrange with your network operator/service provider to settle any outstanding debt in terms of the contract.

   b. Another question and answer in the Guide is set out below:

      If your current network operator rejects the request, it may be for one of the following reasons:

      - If you are a contract customer or corporate customer, your network operator/service provider may refuse to port your cellphone number if:.....
        - You have ported your cellphone number/s within the last two months;.....
        - You have already requested to port your cellphone number/s.....

6. The Guide makes it clear that ICASA anticipates and expects that customers from one network might wish to port to another network. Indeed this is the purpose of the MNP Regulations.

7. However, in terms of the MNP Regulations:

   a. "winback" is defined as *"[when] a donor network operator or a donor service provider who contacts subscribers to offer discounts, free services or other inducements in order to convince those subscribers not to change operators or to revert back to their original operator in the first two months after requesting number portability; but does not include offers made to*

subscribers in general that do not refer to portability or the individual's current or past services."

b. Regulation 7(2) provides that a donor operator may not engage in "winback" and shall ensure that a donor service provider does not engage in "winback".

c. Regulation 7(3) provides that "*Operators shall not make offers to subscribers with ported numbers that are not also made to subscribers without ported numbers and shall ensure that the service providers do not make offers to subscribers with ported numbers that are not also made to subscribers without ported numbers.*"

8. It is clear that the effect of subsections (2) and (3) of regulation 7 is to prohibit operators from making any offer at all to customers who have ported at some stage, whether in the last two months, or even thereafter. Whether or not this was intended by ICASA at the time of publishing the Regulations is not clear, but what is clear is that it has had a perhaps unintended consequence of restricting competition in the market.

9. It is also important to note that in practice, when publishing an advertisement regarding porting in the media, Cell C cannot possibly know whether or not the viewers or readers or listeners are part of the small community of potential new customers that are not yet subscribed to any operator or are prepaid customers (which in theory Cell C may then advertise to under the MNP Regulations), or are customers of existing operators other than Cell C (which under regulation 7(3) Cell C may not advertise to).

10. If the restrictions in the MNP Regulations were lifted, not only would each operator be able to compete for more customers, but an increase in the number of subscribers of the smaller operators, namely Cell C and 8ta, would enable them to compete more effectively with the dominant operators in general.

11. Growth at the current porting rate will make it impossible for Cell C to truly compete with the dominant operators. It is clear that the expected outcome of the MNP

Regulations (namely that smaller or new entrant operators would be net gainers) has not been realized in the past 8 years.

12. It is obvious that without making offers specifically to customers that are already subscribed to other networks, the total number of ports is unlikely to change.

13. Cell C has already drawn ICASA's attention to the fact that without regulatory intervention, its already precarious position in the market will worsen.

    a. Cell C has specifically requested ICASA to conduct a market review in order to increase the level of asymmetry that it currently has in mobile termination rates as against MTN and Vodacom, and to extend the period for which this applies.

    b. As part of the investigation required by Cell C, ICASA has also been asked to investigate the on-net and off-net price disparity in the charging practices of these operators. By creating a community or "club" made up of its own subscribers who remain loyal to their network because of the beneficial on-net rates, MTN and Vodacom have effectively choked the smaller operators' ability to attract customers to their networks unless they reduce their prices below the on-net prices of these operators – which is economically impossible for all the reasons already outlined to ICASA.

14. It is appropriate and indeed, overdue, that ICASA conduct a review of the MNP Regulations and specifically regulations 7(2) and (3). Were subsection (3) to be removed from the MNP Regulations, operators would be able to truly compete for customers from other networks, and so increase their market share and so compete on a more level playing field.

15. It bears noting that in no other industry do the same restrictions apply on advertising or incentivizing switching.

16. There are also other areas within the Regulations that require review because of the changes in the industry over time. ICASA is requested to take these matters into account in conducting a review of the Regulations because these matters also constitute a barrier to efficient and successful porting experiences for customers and hamper the porting process unnecessarily for challenger networks:

a. The Network Synchronisation Time (NST) which is 22h30 to 23h30 resulted from an accommodation given to Telkom because in 2005, it was hampered in the updating of the routing tables by its so-called "legacy equipment". De-activation by the donor operator and activation by the receiving operator takes place during this time, as does daily routing updates of the tables.

b. The Regulations provide for only a signed written confirmation for postpaid port requests, whereas an electronic confirmation should suffice.

c. Porting hours supported by service providers are generally 09h00 to 17h00 on weekdays and 09h00 to 13h00 on Saturdays and Sundays and public holidays are excluded. Most businesses have extended working hours and many retail outlets are open on Sundays and public holidays. We recommend that the porting hours be extended.

d. The donor operator should respond to a request by an individual subscriber within one hour whereas a request by a corporate subscriber may take 16 hours. To prevent the donor operator from responding at the last minute of the 16-hour period, we recommend that the period be substantially reduced.

e. Cell C notes that there is currently only one form of validation for port requests by prepaid customers, which is the CLI check. Other forms of validation such as SMS validation should be permitted.

f. The donor operator network costs in the case of fixed line portability must be reasonable and not hinder fixed line port requests. Telkom currently charges a rate that is higher than that of mobile operators which is only R15 per port. This is unfair, unjustified and prejudicial to potential porting.

g. There are currently no specific penalties in the Regulations for failure to comply. Consequently it is impossible on the one hand to know what penalty one might face for breach, but also impossible to know what steps could be taken by Cell C, for example, against its competitors for any breach of the Regulations.

Cell C looks forward to engaging with ICASA on this matter further and awaits your response at your earliest convenience.

Yours sincerely

Mothibi Ramusi
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