CELL C

THE POWER IS IN YOUR HANDS

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Mr Peter Mailula

Project Leader

ICASA

Per e-mail: pmailula@icasa.org.za

Dear Sir

PROPOSED AMENDMENTS TO THE TERMS AND CONDITIONS REGULATIONS FOR INDIVIDUAL LICENCES. GOVERNMENT GAZETTE NO 38918 OF 26 JUNE 2015

The above draft regulations have reference. Attached are Cell C's written comments for consideration by the Authority. Cell C confirms its readiness to participate in the public hearing process and any other consultations that might be called by the Authority.

We trust that you find the above in order.

Yours faithfully

Zolile Ntukwana
Executive Head: Regulatory Affairs

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SUBMISSION TO ICASA

CELL C'S RESPONSE TO THE CONSULTATION ON PROPOSED AMENDMENTS TO THE TERMS AND CONDITIONS REGULATIONS

GAZETTE 38918 OF 26 JUNE 2015

Cell C has a material interest in the continued improvement and growth of the regulatory environment in South Africa for electronic communications. Cell C welcomes actions by ICASA that will have this effect and that promote and give effect to the objectives of section 2 of the Electronic Communications Act, 2005 as amended ("**ECA**"). Cell C therefore submits its comments on the amendments proposed by ICASA to the important Terms and Conditions Regulations ("**the Regulations**"), first published in June 2010 ("**the proposed amendments**"). Cell C would like to participate in any oral hearings on these proposed amendments.

1. Cell C notes that it is appropriate and necessary that a regulatory authority continually monitor the impact and effect of its regulations and take steps to modify them as required, over time.

2. Cell C is unable to deduce from the proposed amendments which of the objects of the ECA ICASA is attempting to promote. A reactive approach to regulation is not an appropriate approach. As Cell C has reiterated to ICASA, a regulatory impact assessment is a necessary part of every regulatory intervention. There is no indication from ICASA as to the intended outcome of the proposed amendments.

3. The proposed amendments are not explained. The reason for making some of the changes is impossible to deduce. For example, regulation 4(4) requires information on the syndication of programming, which presumably only applies to broadcast licensees, but does not give a reason why a regulatory authority would need this.

4. Our specific comments are as set out below:

4.1 Schedule 1

a. Regulation 5(1) and (3): we suggest that continued extensions be limited in number and time because the award of a licence has been made to a particular entity which has the value of scarce resources and a licence. These should be re-allocated if they are not being used.

b. Regulation 5(4): we suggest that the underlined words in the sentence be included, namely "Where a licensee has applied for an extension or not commenced operations...."

c. Regulation 5: we propose a new subsection (6) which clarifies that subsections (4) and (5) also apply where a licensee fails to commence operations altogether.

d. Regulation 9(5): we suggest that some additional work is required to improve and clarify the phrase "reasonable attempts" so that it is clear what this means in terms of time and reasonableness. Should the attempts be by written notice for example? Cell C does not consider it appropriate to refer this matter to a committee of ICASA when ICASA itself will have to make a final decision in the matter. This seems to not only introduce delay but unnecessary complexity and resource allocation.

e. Regulation 14: whilst Cell C understands the rationale for a penalty regime and it can act as an incentive to "do the right thing", Cell C is concerned that there is no explanation for the increase or reference to any benchmark or rationale (percentage of revenue etc). In fact the reference to "*R5 000 000,00 (Five million Rand) or 10% of the Licensees annual turnover for every day or part thereof during which the offence is committed*" (our underlining) and is so disproportionate to the potential offence that it induces a sense of shock and on reflection appears to have been inserted by mistake by ICASA. The cumulative and ongoing nature of the penalties suggested will, if applied, be extortionate in our view when there may be an explanation or force majeure reason for non-compliance. This is perhaps our most immediate concern in this regard, and that is that non-compliance should always be noted in writing along with a request to remedy that non-compliance before any penalty is even considered. We suggest that this be specifically referenced in the proposed amendments.

4.2 Schedules 2 and 3

a. Regulation 2(1): Cell C recommends that any such notice should be supported with the relevant CIPC documents.

b. Regulation 5: the amendments to this regulation in (1) should include a drop-dead date, in other words a date or time period beyond which further extensions will not be considered.

c. Regulation 5(5): Cell C believes that the same provision ought to apply to broadcasting licensees, in the absence of an explanation from ICASA as to why it ought not to apply.

d. Regulation 8: Cell C does not understand the reason for the use of the word "ordinarily", and this introduces unnecessary vagueness and subjectivity into the regulation. ICASA has very weighty rights to request information from licensees under various sections of the ICASA Act. There is no need to dilute its authority in this regard or suggest that it does not have these rights by describing requests as other than ordinary.

e. Regulation 8(1): we suggest that some additional work is required to improve and clarify the phrase "reasonable attempts" so that it is clear what this means in terms of time and reasonableness. Should the attempts be by written notice for example? Cell C does not consider it appropriate to refer this matter to a committee of ICASA when ICASA itself will have to make a final decision in the matter. This seems to not only introduce delay but unnecessary complexity and resource allocation.

f. Regulation 10(5) (this comment applies to Schedule 2 only):
    a. We understand that this requirement is intended to ensure that there is symmetry between the requirements of the National Consumer Commission and ICASA. However, we consider it appropriate and necessary for these entities to liaise between themselves as to an appropriate regulatory regime, but for licensees to individually ensure compliance with the requirements of the Consumer Protection Act, 2008. Therefore Cell C does not support the inclusion of these mandatory billing requirements.
    b. In addition, Cell C is not aware of any regulatory impact or cost assessment in relation to the imposition of these additional billing requirements. In the case of a data session or downloads of music or videos, it may not be possible from a technical point of view, to provide details as required in subsection (5). Cell C recommends that ICASA undertake the required assessment before imposing potentially costly or technically impossible obligations on licensees.
    c. Finally, having regard to the imminent application of various provisions of the Protection of Personal Information Act, 2014, Cell C would also like to ensure that ICASA considers this step a necessary step and that it is in response to a substantial number of consumer requests, so as to ensure that the obligation to be imposed by ICASA on operators is in fact proportionate.

g. We note that the provisions of this regulation (considered immediately above) only apply to ECNS licensees. It is our view that a billing obligation ought to apply to ECS licensees.

Our comments under paragraph 4.1(e) in relation to the penalty regime proposed in Schedule 1 apply equally to Schedules 2 and 3.