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Cell C (Pty) Ltd
Waterfall Campus
Cnr Maxwell Drive and Pretoria Main Road
Buccleuch, Ext 10, 2090
Private Bag X36, Benmore 2010
Johannesburg, South Africa
General Tel: +27 (0)84 174 4000
Fax: +27 (0)84 167 6598
Website: www.cellc.co.za
Reg. no: 1999/007722/07

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Mr. Jake Mongalo

Project Leader

ICASA

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

Dear Sir

DISCUSSION DOCUMENT: REGULATORY FRAMEWORK ON INFRASTRUCTURE-SHARING

The above discussion document has reference. Attached are Cell C's written comments for consideration by the Authority. Cell C confirms its readiness to participate in any subsequent consultations that might be convened by the Authority.

We trust that you find the above in order.

Yours faithfully

Zolile Ntukwana

Executive Head: Regulatory Affairs

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INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

Government Gazette, General Notice 916 of 2015

DISCUSSION DOCUMENT: REGULATORY FRAMEWORK ON INFRASTRUCTURE-SHARING

Responses to ICASA's Discussion Document on the Regulatory Framework for Infrastructure-Sharing

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Cell C is pleased to participate in this important consultation. However we believe that the ambit of the consultation is very narrow, and in order to ensure more competition, easier access to the market, and cost-savings, other matters could be investigated by ICASA.

A regulatory impact assessment is a common and indeed a necessary prerequisite for any regulatory process and Cell C hopes that ICASA will conduct the necessary investigations before taking this process forward.

At the same time, Cell C believes the market for infrastructure is currently controlled by the incumbents, Telkom in the fixed market, and MTN and Vodacom in the mobile market. The existing Facilities Leasing Regulations (of 2010) already provide significant rights for operators seeking to share infrastructure, but in our view, they have not been adequately enforced. Cell C urges ICASA to take steps to implement and enforce these Regulations without further delay, whilst at the same time, investigating spectrum-sharing, active and passive sharing, and other more complex but related issues.

Cell C also notes that the imminent release of the Rapid Deployment Policy by the Minister of Telecommunications and Postal Services should assist ICASA in determining its priorities for the short and medium term in this regard.

General Comments

1.1.1 GDP growth, which in South Africa was enhanced by R94,7 billion from ICT services, comprising R64,8 billion or 2,0% of total GDP from telecommunications, followed by computer services (R7,3 billion or 0,2% of total GDP) and ICT manufacturing telecommunications services (R6,6 billion or 0,2% of total GDP).7%)[1] and economic openness correlate with FDI, but political stability, illiteracy and **infrastructure** are also significant factors in avoiding market failure, particularly in South Africa.

1.1.2 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..."

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

1.1.4 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

[1] http://www.statssa.gov.za/?p=4414

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Orange (France), decided not to invest in South Africa even as an MVNO because of the uncertainty in the regulatory environment.[2]

1.1.5 If regulatory intervention takes place so as to designate 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, because the ECA provides that requests for access to essential facilities will be deemed to be "reasonable".

1.1.6 Cell C continues to be of the view (expressed to ICASA on numerous occasions) that 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.

1.1.7 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.

2. Our response to this discussion paper is premised on the following two comments, as well as the introduction set out in paragraph 1 above:

2.1 "*SA Connect calls on the Authority to encourage the sharing of infrastructure by regulating where necessary in support of coordinated civil works. The regulations that the policy appears to anticipate are to enable the commercial sharing of infrastructure and pooling of resources, including spectrum, in order to reduce wholesale costs and encourage services-based competition in the market.*

2.2 *The sharing of infrastructure is key in achieving South Africa's broadband goals. According to the World Bank, "broadband has social benefits, connecting consumers, businesses, and governments and facilitating social interaction." Further, every 10 percentage point increase in broadband penetration in low and middle income bands, accelerates economic growth by 1.38 percentage points.*"

Our response follows the order of the questions in the document as summarised in section 9. We have used the numbering in section 9 for convenience.

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

DIRECT RESPONSES

9.1 Do you agree that infrastructure sharing will encourage the deployment of networks to rural and sparsely populated areas? If not, please provide the reason(s) for your answer.

Cell C agrees that the deployment of telecommunications infrastructure is capital-intensive and has associated risks with regard to return on investment. In fact, Cell C has argued this exact point to ICASA most recently in its response to the cost modelling exercise carried out by ICASA in setting MTRs. The costs of building and maintaining infrastructure for smaller operators with fewer subscribers and less than 11% market share by revenue are significant because they lack economies of scale and scope. This is not the case for MTN and Vodacom, or even Telkom, whose capital costs are largely sunk, and whose larger share of revenue in the market plus entrenched dominance, should enable them to extend infrastructure to under-served areas without the same negative financial consequences.

Cell C's view is that infrastructure sharing will certainly encourage the deployment of networks to rural and sparsely populated areas. This would greatly lessen the cost of deployment in the underserved and unserved areas of South Africa which are otherwise largely uneconomic in that they would otherwise tend to cost more to serve than would be the return that is likely from providing services. The cost of such deployment will be amortised over time and shared by a number of operators if infrastructure must be shared.

We are aware of the policy process in which the Minister of Telecommunications and Postal Services (DTPS) is engaged, in terms of which the Minister is to publish a draft policy to encourage and support rapid deployment of infrastructure. Having participated in the initial consultation, Cell C also notes that the Minister is encouraging infrastructure-sharing to ensure national coverage in an efficient and cost-effective manner.

9.2 In your opinion, how do you think infrastructure-sharing will encourage service-based competition?

The telecommunications market becomes more attractive to new players because of the decreased barriers to entry, of which the cost of new infrastructure is part. New entrants can enrich the competition at a retail level while investing effectively. By alleviating pressure (cost and unnecessary duplication) of network deployment, Cell C believes that sharing will allow operators to turn their attention to increased innovation, better customer service and eventually better commercial offerings and healthier competition. Ideally in a regulated environment where infrastructure-sharing is mandatory and this is enforced, network services will be provided to all industry players fairly, equitably and transparently.

9.3: The objective of infrastructure sharing is to:

a) Promote effective competition,

b) Avoid duplication of investment in infrastructure,

c) Reduce cost of service, and

d) Realise universal access objectives.

To what extent do you believe that the objectives of infrastructure sharing are reached?

The listed objectives can be achieved through infrastructure sharing to a large extent.

The list above could have included the following ancillary objectives:

- Promoting aesthetics which encompass protection of the environment by reducing the proliferation of infrastructure and facilities installations or deployment.
- Encouraging the operators to take public health and safety and the environment into account when constructing and or deploying infrastructure.
- Creating positive incentives for rollout into underserved and unserved areas such as [reduced licence fees/subsidies].

- Consequential downstream reduction in the cost to communicate (as a result of costs in the upstream market being more manageable, or cost-savings being achieved by virtue of not having to invest in an entire network or facilities nationwide when these can be shared).

9.4 The purpose of this discussion document is to solicit input on a regulatory framework that will provide certainty on infrastructure sharing holistically to include facilities leasing, interconnection and other matters relevant to access to broadband services within the Republic.

Do you believe that the Authority should deal with infrastructure sharing matters in one regulation?

Cell C believes that there is already an infrastructure-sharing regulation in the form of the facilities-leasing regulation, but that it would be beneficial to revisit this and improve where necessary, on the sharing aspects of it. Chapter 8 is very specific about the designation of essential facilities and it is here where another regulation may be beneficial.

ICASA will need to align itself with existing and future policy processes underway in DTPS in due course when the rapid deployment policy is published in final form including the finalisation of the ICT Policy Review and the draft policy direction on effective competition in broadband markets and the reduction of data costs. ICASA should consider infrastructure sharing within the framework of the ECA, SA Connect, Facilities Leasing and Interconnect Regulations among others. All these require effective and careful coordination in order to be useful to ICT development in South Africa. It may be useful to consider where best to amend the facilities-leasing regulations in the meantime, and to proceed to designate essential facilities, to save time.

9.5 Operators in the emerging or developing markets are looking for economic options for coverage and capacity growth, while operators in more penetrated and mature markets, who are faced with high competition and lower margins, are seeking cost optimisation. It therefore follows that in order for operators to consider infrastructure sharing the financial benefits of sharing need to outweigh any loss of competitive advantage from network coverage at premium sites.

a. **Benefits to Network Operators:** Benefits listed which focus mainly on improvement in the use of investment fund, improved revenue resulting from less infrastructure duplication, and faster network deployment including in rural areas;
b. **Benefits to Consumers:** Benefits listed which include improvements in quality of service, geographic/population coverage, and cost to communicate;
c. **Benefits to the Environment:** The reduction in duplication of investment in infrastructure, such as masts, through the implementation of infrastructure sharing will result in a decrease in the impact to the environment.

Please list other benefits realised as a result of infrastructure sharing.

Cell C is unclear on the reason for including the following statement at section 4.1, and its source. The statement reads, *"It therefore follows..... the financial benefits of sharing need to outweigh any loss of competitive advantage from network coverage at premium sites".* It is precisely the need for sharing at premium sites that is the reason Cell C supports regulation of infrastructure-sharing. Smaller operators with less bargaining power are typically excluded from premium sites because larger operators wish to maximise revenue from the advantages they reap from being on a premium site – lower cost of network planning (the site is usually situated in an optimal location), and maximum traffic (the site is usually able to cover a significant number of premises and therefore potential subscribers).

Cell C has approached ICASA on several occasions to intervene in the (i) unsubstantiated and significantly increased cost of accessing facilities ostensibly at premium sites, e.g. Telkom, and (ii) refusal to share at all without any reason being given (i.e. the refusal is not because the request is "not reasonable") e.g. MTN. In addition, these operators sometimes require Cell C to pay for facilities plus other bundled services which Cell C does not require, such as backhaul or rack space, or

DAS services. This increases the costs of access at these and other sites and effectively eliminates competition or reduces Cell C's ability to compete on relatively equal terms.

9.6 The SA Connect policy states that the Authority will regulate where necessary in support of coordinated 'one-build' civil works and mast erection; and the encouragement of infrastructure sharing more generally. The sharing of infrastructure would include licensees interconnecting their networks and making available their facilities at cost-based rates. Furthermore, the policy states that the Authority is to identify existing essential facilities and ensure the access of competitors to them by enforcing regulations requiring network operators' obligations to meet all reasonable requests for access to infrastructure on a non-discriminatory basis to their physical infrastructure.

Do you think that it is necessary for the Authority regulate for 'one-build' civil works and mast erections at this time? Please state your reasons?

ICASA has no mandate or jurisdiction to regulate building of civil works, unless the intention of this question is to seek answers narrowly confined to the building of electronic communications networks. Even so it is a stretch to require operators to build once only. We are unclear on what is being asked here. It is possible to share infrastructure up to a point – then the weight of the infrastructure may become an engineering hazard. It would not be appropriate for ICASA to stray into this area.

We understand that the DTPS has considered this issue in the context of municipal and provincial building regulations and that this will be addressed by the rapid deployment policy. Accordingly Cell C suggests that ICASA should take its lead from the policy in due course.

9.7 **In your view, what incentives will encourage infrastructure sharing in general?**

Cell C's view is that regulation is critical. Our market structure is skewed, and as the history of termination prices has shown, without regulation, operators with market power do not reduce prices on their own initiative or indeed take any pro-competitive steps. Disruptive operators such as Cell C are helping to bring down prices, but in the case of infrastructure-sharing, Cell C has been unable to make much headway without ICASA's assistance.

Cell C considers that incentives (other than penalties for failure to comply with regulation) could include simplified planning processes for shared sites (a matter presently being addressed by the DTPS).

9.8 In your view, how can the Authority improve on its intervention in terms of non-discriminatory access to infrastructure?

Cell C believes that the Authority needs to upskill the resources that deal with intervention in matters to do with non-discriminatory access to infrastructure. There is a noticeable lack of capacity within the Authority which leads to a number of regulatory matters being deemed approved simply because there has been neither the time nor the personnel to deal with the issues before the Authority within the stipulated times. The CCC ought to have a special unit within it to deal with facilities-leasing and sharing disputes (assuming ICASA intends to amend the existing regulations and to publish essential facilities regulation). This unit should be staffed with experts in engineering, law, and network build and deployment. Financial/economic expertise would also be vital. This is how these sorts of disputes are dealt with in other countries. There is an industry ombudsman in the UK for example, who sits separately from but linked to OFCOM, to deal with just this sort of dispute.

9.9 In the spirit of the Act, the facilities leasing regulations refer to electronic communications facilities' instead of 'infrastructure', except in Regulation 13(c) where infrastructure sharing and co-location are stipulated as items that are to be addressed by electronic communications facilities leasing agreements. The regulations stipulate the procedures for infrastructure sharing, including guidelines for timeframes and dispute resolution.

Would you say that the facilities leasing regulations adequately cater for infrastructure sharing needs in South Africa? If not, please state the areas that have not been covered.

The facilities leasing regulations (which were published in terms of Chapter 8 of the ECA) on their own address both facilities leasing and sharing.

However, it is possible to have joint ownership of a facility which is then shared among different licensees. Such potential relationships are not necessarily covered in Chapter 8. This sort of arrangement would take the form of the *"wholesale open access network"* concept outlined in SA Connect. Unfortunately ICASA has not consulted on this yet and neither has DTPS subsequent to publishing SA Connect. This form of ownership would allow for sharing, possibly in proportion to investment, but it is a highly complex issue and it does not fall within the scope of ICASA's discussion document.

There has been, in the past, contention regarding whether, for instance, the Local Loop is a facility or just a service or even a product. The same applies to spectrum. Does the Authority consider spectrum to be a resource that can be leased or shared? Cell C believes it would be useful for ICASA to issue some draft guidelines on these matters. However, for our purposes, the ECA is very clear that electronic communications networks are comprised of electronic communications facilities. Therefore it is a simple matter – a request to share facilities includes any facility within a network that is capable of sharing e.g. air conditioning, floor space, ducting, poles, masts, and even electricity.

As to whether a facility is a facility or a product, Cell C considers this distinction to be a tactic to avoid making facilities available. Products are definable because they have certain characteristics, not least of which is that they are specifically designed for sale whereas facilities are incorporated into networks. So in the case of the local loop, traditionally and around the world, whilst the local loop may be capable of becoming a product, it is first and foremost part of a network. There are other characteristics that distinguish products from facilities, including economic elements. A separate consultation might be useful in this regard.

9.10 Passive infrastructure sharing refers to the sharing of space, electrical and civil engineering elements of an electronic communications network. Several examples of passive infrastructure that can be shared are provided.

Do you agree with the Authority on the definition of passive infrastructure? If not, please provide an alternative definition.

Cell C believes that the definition does not go far enough. It is necessary to cover all possible elements in order to remove ambiguity. Cell C proposes the definition below:

"Passive infrastructure sharing involves multiple operators sharing the same infrastructure as a means to reduce the costs associated with real estate, access rights and preparing sites for the requirements of active infrastructure."

As a general rule in the cellular industry, passive infrastructure sharing encompasses all the non-electronic or non-active elements required of a cell site. These can include: the tower itself, buildings or shelter, air conditioning plant, security, electricity generation capability for back-up, an electrical supply, technical premises and pylons.

9.11 Please state other passive infrastructure that you consider essential for sharing.

All passive infrastructure or facilities should be shared unless the request is "not reasonable".

9.12 Please state the advantages and disadvantages of passive infrastructure sharing.

Please see our answers above.

Possible negative considerations could include the following:

It is given that tower sharing enables new entrants to scale-up faster but it must be borne in mind that it exposes established players to the risk of market share loss. Furthermore, the challenges of monitoring network performance and quality will increase as control over network roll out and equipment maintenance decreases.
However, these challenges are controllable through appropriate contract governance structures and well-defined service level agreements. The Authority should consider

the competitive advantage that sharing of towers could provide in South Africa. However, it is important to remember that new and smaller operators will be incurring lease payments as an operating expense with relative lower risk, whilst the large and incumbent operators are still recovering the capital expense incurred in erecting the towers.

9.13 Active infrastructure sharing refers to the sharing of active or intelligent elements of an electronic communication network. Examples provided include all network elements, RANs and Transmission.

Do you agree with the Authority on the definition of active infrastructure? If not, please provide an alternative definition.

The definition should be expanded to include antennae, feeder cable, Node B, Radio Access Network (RAN) and transmission systems.

9.14 Please state other active infrastructure that you consider essential for sharing.

Cell C has no comment on this.

9.15 Please state the advantages and disadvantages of active infrastructure sharing.

Until such time as ICASA has properly consulted on this matter and the definitions, Cell C believes that more work should be done on this area. More research into international examples of active and passive sharing is required and more understanding of the benefits and disadvantages (from third party sources) is recommended. Cell C does not consider this an appropriate way to consult on these important matters i.e. simply by asking a question. The industry does not know what is envisaged by ICASA or what the policy in this regard might be

ICASA has not undertaken any work in this regard to our knowledge and accordingly we believe it should not form part of this consultation. Cell C urges ICASA to consult further on this important matter and to extend the ambit of the consultation to include active and passive sharing and spectrum-sharing, with the support of ICASA's own regulatory impact assessment.

9.16 At present infrastructure sharing in South Africa is done through commercial agreements such as electronic communications facilities leasing agreements. The main facilities that are being shared are masts/towers and equipment rooms.

Please provide examples of how active and passive infrastructure is being shared in South Africa.

This is currently being done on a commercial basis. The terms are mutually agreed upon by licensees. The Authority does not have oversight of such commercial arrangements although it should in terms of the Facilities Leasing Regulations, 2010.

Cell C is not aware of any active sharing arrangements as these are currently not permitted in terms of any regulations.

Cell C trusts the Authority will give due consideration to these matters in taking this further.

End