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Chairperson: Priority Markets and Data Services Committee  
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Dear Sirs

**Re: Cell C submissions in response to the proposed amendments to the End-user and Subscriber Service Charter Regulations, 2016**

- 1 Thank you for the opportunity to comment on the latest proposed amendments to the End-user and Subscriber Service Charter Regulations 2016, published on 17 November 2017 (*draft regulations*).
- 2 Cell C notes that the draft regulations have been published together with ICASA's explanatory note. This note sets out summaries of the various submissions made to ICASA on each provision of the 7 August 2017 proposed amendments. The note also contains ICASA's position on these submissions.
- 3 Cell C's submissions on the draft regulations are in 6 parts:
  - 3.1 Section 69 of the Electronic Communications Act 36 of 2005 (*ECA*);
  - 3.2 Expiry of data bundles - prepaid;
  - 3.3 Disconnection of service upon expiry of bundles - postpaid;
  - 3.4 Rolling over of unused data - postpaid;
  - 3.5 The adequacy of the explanatory note; and
  - 3.6 Miscellaneous submissions.

## Section 69 of the ECA

- 4 Section 69(3) of the ECA provides that ICASA must prescribe regulations setting out the minimum standards for and end-user and subscriber service charters (*service charters*). Section 69(5) sets out the matters which service charters may address. These broadly include issues pertaining to end-user information (its provision and protection), the quality of licensee services, complaint procedures and remedies.
  
- 5 On 1 April 2016, ICASA published its service charter regulations. Regulation 2 sets out the purpose of these regulations, in line with section 69(5), as follows:
  - 5.1 to prescribe minimum standards for licensees' services to end-users;
  - 5.2 to ensure the quality of the services offered to end users; and
  - 5.3 to protect the rights of end-users by providing them with sufficient information to enable them to make informed decisions, ensuring the efficient and effective resolution of complaints, and facilitating redress to end-users where appropriate.
  
- 6 The regulations that follow regulation 2, in turn, deal with the provision of information to end-users, the quality of electronic communications services, complaints procedures, and reporting to ICASA.
  
- 7 A service charter has a clear and circumscribed function. It is concerned primarily with ensuring that consumers receive quality services. It seeks to equip them with enough information to make the best choice for their usage needs, with full knowledge of what they will pay and what product they will be getting in return. It also creates complaint mechanisms for consumers' issues to be addressed to the licensee.
  
- 8 The service charter's purpose is not, however, to dictate the commercial terms upon which a licensee and an end-user may contract. Indeed, one of the ECA's express purposes, set out in section 2(y), is to refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public. The ECA achieves this balance by ensuring that consumers are guaranteed a minimum quality of services and that there is

transparency about the terms and conditions of the contracts they conclude with service providers. Consumers must be clearly informed of their rights so that they are not vulnerable to misleading or predatory practices. But once consumers are provided with full information, they must ultimately be given a choice about the product packages they buy and licensees must be free to develop products and pricing that enable them effectively to compete for consumers.

- 9 The content of the commercial terms offered to consumers is a function of the electronic communication services market. Service providers compete with one another by providing favourable commercial terms for consumers. Product offerings and terms of service are also tailored to meet the needs of different consumers. This is to the ultimate benefit of the consumer because they get to choose from a variety of products and services at a reasonable price – which is an object of the ECA (sections 2(m) and (n)). The ECA contemplates achieving these efficiency gains from a competitive market, as another of its key objects is to promote competition in the ICT sector (section 2(f)).
- 10 If the market is for some reason failing to produce this result, then ICASA is empowered to intervene to correct this market failure. Chapter 10 of the ECA deals with competition matters. It provides that ICASA must prescribe regulations and impose pro-competitive licence conditions where there is ineffective competition, including rate regulation for the provision of specified services. However, ICASA may only do so after it has held an inquiry into the relevant markets and assessed where there is significant market power.
- 11 ICASA is not purporting to publish the draft regulations pursuant to chapter 10, and it could not do so as it has not performed a market inquiry. Instead, ICASA published the draft regulations as part of a service charter, which must ensure that consumers are empowered to make informed choices about the commercial terms they agree to – but may not dictate what those commercial terms will be.
- 12 It is in this context that section 69(5)(d) must be understood. It provides that a service charter may deal with “end-user and subscriber charging, billing, collection and credit practices”. Read in context, and together with the other matters listed in section

69(5), it is clear that this pertains to the manner in which charging and billing are conducted – in other words, in a transparent and clear manner that gives consumers sufficient information to make an informed choice and enforce their rights. In essence, it regulates how service providers engage with consumers with regard to recovering the costs of their products and services. This has already been given effect to in, for example, existing regulation 8. This regulation provides for all the information that must be contained in an itemised bill and a prepaid usage report.

- 13 The draft regulations go beyond ICASA's powers and breach the distinction between, on the one hand, ensuring quality services to consumers and, on the other, dictating the commercial terms of a consumer's contract with a licensee.

### **Expiry of data bundles – draft regulation 8B(3)**

#### *ICASA lacks authority*

- 14 In draft regulation 8B(3), ICASA wishes to dictate the commercial terms on which data bundles are offered by stipulating a minimum expiry period of three years. This is beyond the power afforded to ICASA under sections 69(3) and (5) of the ECA.
- 15 An expiry period for the data product is not the manner in which the data is *charged or billed*. It does not speak to a minimum standard for the quality of the product or the transparent provision of information to consumers. Instead, it is a part of the product offering itself and is necessary given the nature of the limited resource provided – capacity on the network.
- 16 ICASA may not regulate these retail terms through a service charter, as this manner of intervention is not envisioned in section 69 of the ECA, as informed by section 2(y) of the ECA. If ICASA promulgates draft regulation 8(b)(3) in its current form, it will be susceptible to review under section 6(2)(a)(i) of the Promotion of Administrative Justice Act 3 of 2000 (*PAJA*), as ICASA was not authorised to do so under the ECA.

## *Irrational*

17 In its media statement pertaining to the draft regulations, ICASA states:

*"The Independent Communications Authority of South Africa (ICASA) is committed to ensuring that the cost of communication, particularly the cost of data, is reduced to acceptable levels to the ultimate of benefit consumers. In this regard, ICASA has developed a comprehensive plan that outlines its short, medium and long term interventions to ensure greater transparency of communication services and also to bring down the cost of communication in South Africa" (emphasis added.)*

18 The ECA itself highlights the importance of reducing costs of data for consumers. Its objects include the provision of quality services at reasonable prices; and the promotion of the interests of consumers with regard to the price, quality and variety of services (sections 2(m) and (n)) (emphasis added). It also ultimately seeks to promote the universal provision of electronic communications networks, services and connectivity for all (section 2(c)).

19 Contrary to these objectives, the three-year expiry proposal will significantly increase costs for consumers. This is something that all the service providers have been at pains to convey to ICASA.

20 There is a limited amount of spectrum available to provide mobile broadband services of a reasonable speed and quality, particularly in congested areas. This limited resource must be provisioned in advance to ensure there is enough capacity to support all the activity on the network at one time.

21 Cell C provides mobile data services to its customers by leasing capacity on infrastructure that is owned by other service providers. It must be able to assess how much capacity it needs to make available for network usage in a given month in order to know how much capacity to lease from its service providers. This is known as "provisioning" its network. The only accurate way to make this assessment is through its customers' data bundle purchase. If subscribers use more than the estimated



capacity in any given month, Cell C must pay penalties to its service providers. This is a very significant cost.

- 22 If data is allowed to carry over beyond a defined period, then that capacity will have to be made available – and leased – again in the next period, with no guarantee of when it will be used.
- 23 If consumers may now carry over data bundles for three-year periods, this makes provisioning close to impossible. Service providers will have to ensure that this usage capacity is available for this entire period at vastly increased and unpredictable costs.
- 24 This also presents large compliance costs for service providers. The proposed regime will require a complete overhaul of the current GAAP and IFRS approved methods of recording data vouchers sold. Under the current system, data vouchers are reflected as current liabilities in the form of unearned revenue. They only become revenue when they are depleted and fully exhausted. Data expiry allows service providers to put a limit on the time allowed to use the data so that the revenue can be recognised in the income statement within a reasonable period. This is important, because inflated current liabilities lead to unfavourable debt-to-equity ratios which increase borrowing cost and leads to difficulty in obtaining finance. If Cell C is required to extend data expiry periods to three years, this will have a serious impact on its balance sheet and may well impact its ability to obtain financing at reasonable costs.
- 25 There are numerous other costly complications associated with this proposed regulation that ICASA has neither acknowledged nor addressed. For example, Cell C will incur costs in relation to IT licences required to maintain a subscriber on the HLR, and to maintain their “allocated” data over 3 years. Cell C’s roaming costs will also escalate disproportionately due to high volume subscriber demand.
- 26 In the case of Cell C, all of these additional costs will have to be passed onto the consumer as they are too significant for Cell C to bear itself. This makes the consumer subject to unnecessarily inflated costs and in a far worse position than is currently the case. The proposed three-year expiry period will ultimately make data



more expensive and less accessible, in direct conflict with the objects of the ECA and the express purpose of the draft regulations.

- 27 What is more, large fluctuations in use from month to month puts pressure on Cell C's existing infrastructure – which only has capacity for a limited volume of data traffic – and this diverts resources away from much needed future network infrastructure roll out. This frustrates one of the ECA's objects to promote investment, including strategic infrastructure investment in the communications sector (section 2(d)).
- 28 Further, in order to give effect to the requirements of SA Connect, Cell C has made mobile devices available (as have other licensees) on a subsidised basis which places a financial burden on Cell C. This has enabled the connection of millions of consumers to the internet as well as basic communications. Were it not for the subsidy, many consumers would be unable to afford and therefore have access to a handset or other device. By requiring the preservation of unused data over a 3-year period, ICASA will increase the cost to do business for licensees. One of the ways in which to try to absorb these additional costs would be to reduce or eliminate the current subsidies on devices. This will have the effect of reducing affordability and accessibility to data services, and this will not be supportive of the objects of national policy. This is also diametrically opposed to the ECA's object to achieve universal access to electronic communication services and connectivity for all (section 2(c)).
- 29 In addition to network capacity, numbers are also a scarce resource. The reserve numbering capacity for mobile services in terms of ICASA's numbering plan is near exhaustion. In order to manage its number assignment efficiently, as required by the ICASA Numbering Plan Regulations, Cell C generally recycles numbers that are not in use after three months. The effect of making unused data valid for three years is that this recycling of numbers will only be possible every three years, causing the number resource to run out.
- 30 These dramatic consequences, that are detrimental to the electronic communication industry as a whole and on the consumer in particular, render draft regulation 8B(3) irrational. If the draft regulations were promulgated in their current form, they would

be susceptible to review under section 6(2)(f)(ii) of PAJA on the grounds that they were not rationally connected to the express purpose for which they were taken; the purpose of the ECA as set out in its objects; and the information before ICASA in the form of the detailed submissions on the harm that would be caused by this proposed amendment.

- 31 The draft regulation is also irrational because it is unnecessary. Cell C offers various packages, large and small, to ensure that consumers can tailor their data purchases to their usage needs. Cell C offers the Data Extenda Plan which allows consumers to recharge before the first bundle expires so that unused data can roll over to the next month. It has also offered to voluntarily increase its validity period for data by extending the validity of the 10, 20 and 30GB bundles for 90 calendar days. It has also introduced 10GB / 20GB / 30GB and 50GB prepaid bundles that are valid for 365 days. This a reasonable and proportionate balance between the interests of the public in not losing data, and the interests of Cell C and ultimately the consumer, in having lower overall data costs.

### *Unreasonable*

- 32 Even assuming that ICASA has the authority under section 69(3) and (5) of the ECA to regulate this subject matter, which it does not, it is required to comply with section 2(y). This object of the ECA requires ICASA to refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public. This requires a balancing between leaving the electronic communication services market to operate competitively on its own and ensuring the public's best interests are promoted.
- 33 Draft regulation 8B(3) does not allow the electronic communication services market to operate competitively on its own; it substantially interferes with the commercial retail terms on which the parties contract. It also fails to ensure that the public's best interest is promoted as it will have the inevitable result of increasing the costs of data for consumers. The draft regulation therefore fails to strike any sort of rational or reasonable balance. No reasonable administrator would make such a regulation because it fails to strike the balance required by section 2(y) of the ECA. If regulation



8B(3) is promulgated in its current form, it will be susceptible to review in terms of section 6(2)(h) of PAJA.

## *Failure to take into account relevant considerations*

- 34 Cell C and various other service providers have made these or similar submissions before in previous engagements with ICASA. However, ICASA's explanatory note only briefly mentions these critical concerns and then concludes – contrary to the bulk of the submissions – that instead of the prescribed periods of expiry in the 7 August proposed amendment, it would impose an even more infeasible, inflexible and disproportionate expiry provision of three years. In doing so, the ICASA has at the very least failed to adequately consider or appreciate highly relevant considerations: that the draft regulation is commercially unviable and would raise data costs significantly, to the detriment of the consumer. Accordingly, if draft regulation 8B(3) were promulgated in this form, it would be susceptible to review under section 6(2)(e)(iii) of PAJA.

## *Error in law*

- 35 ICASA's previous proposed amendments of 7 August 2017, contained a table of different data bundles and proposed different and longer expiry periods for each category of bundle. The majority of the submissions objected to this approach because it too made provisioning very difficult and was outside ICASA's authority under section 69(3) and (5) of the ECA.
- 36 SANCU, however, submitted that the provision was in conflict with the requirements of section 63 of the Consumer Protection Act 68 of 2008 (CPA). ICASA appears to have been persuaded by SANCU and therefore proposes to impose draft regulation 8B(3) which sets a three year minimum expiry date, "in line with section 63 of the CPA".
- 37 However, a minimum three year expiry period for data is not "in line with section 63 of the CPA". Section 63(2) of the CPA provides that a prepaid voucher does not expire until the earlier of (a) the date on which its full value has been redeemed in exchange

for goods and services or future access to services; or (b) three years after the date on which it was issued, or at the end of a longer or extended period agreed by the supplier at any time.

- 38 ICASA assumed, incorrectly, in proposing this regulation, that a data bundle voucher was only “redeemed” under section 63(2) when the actual data was used. This is incorrect. When a data bundle voucher is *purchased* with a unique pin code on it, it is indeed valid for three years, as the CPA requires. But once it is *loaded onto* a device and activated, it is no longer a prepaid voucher. It has been “redeemed in exchange for ... future access to services” under section 63(2) of the CPA. This is the earlier event referred to in section 63(2)(a) of the CPA and therefor renders section 63(2)(b) inapplicable. ICASA has therefore misconstrued section 63 of the CPA. If draft regulation 8B(3) remains in its current form, it will be reviewable under section 6(2)(d) of PAJA on the ground that ICASA was materially influence by a material error of law.

## *Competition*

- 39 Setting a three-year period for the expiry of data bundles would also undermine competition in the ICT market.
- 40 Currently, different service providers offer different data bundles at different prices and with different expiry periods. Data bundle expiry periods are one of the key ways that service provider firms differentiate themselves and compete in the market. This promotes competition, as required by the objects of the ECA (section 2(f)). In draft regulation 8B(3), ICASA wishes to standardise expiry periods across the Board. This would eliminate product differentiation on data bundles which would lessen competition, to the detriment of the consumer.
- 41 In addition, as explained above, this measure would considerably increase the costs of providing data. This would impact smaller electronic communications firms disproportionately as they would not be able to bear these additional costs without passing them on in greater proportions to the consumer. Larger firms may be able to cross-subsidise these costs or better absorb them – at least in the short term. Cell C is the smallest, non-dominant licensee (Telkom Mobile being a business unit of



Telkom SA SOC Ltd) with a revenue market share of less than 15% of the total market. Accordingly, the financial and operational impact of the draft regulation on Cell C is substantial and more significant relative to its larger competitors.

- 42 Rather than promoting competition in the ICT sector, the draft regulation will have a significant anti-competitive effect. If the draft regulation is promulgated in its current form, it will be reviewable under section 6(2)(f)(i) of PAJA as it conflicts with section 2(f) of the ECA.

### **Disconnection of service upon expiry of bundles – postpaid – draft regulations 8B(1) and 8B(2)**

#### *Impermissibly vague*

- 43 Draft regulation 8B(1)(c) provides that an end-user may not be defaulted to out-of-bundle data charges when their data bundle is depleted. Regulation 8B(1)(d) requires the end-user to be provided with an option through sms or other means to “opt-in or opt-out of data bundle usage per session” (emphasis added). Draft regulation 8B(2) provides that where an end-user opt-outs of out of bundle data usage when their data bundle is depleted, the licensee must disconnect the end-user until they give their express consent to be charged out-of-bundle rates.

- 44 This is vague and nonsensical in that—

44.1 (1)(d) and (2) do not speak to each other. The first calls for opting in or out of “data bundle” usage; and the second only contemplates out-of-bundle usage. The draft regulations make no provision for opting in or out of “in-bundle” or “out-of-bundle” data usage.

44.2 It is not clear what “usage per session” means.

- 45 This vagueness will make it impossible for licensees to comply with the regulation because they will not know what is required of them. If the regulation is promulgated



in its current form, it will be reviewable under section 6(2)(i) of PAJA as being impermissibly vague.

#### *Unreasonable*

- 46 Even if draft regulation 8B(1) is redrafted to remove this ambiguity and it provides that whenever a data bundle becomes depleted, the consumer will be provided with an option to buy additional data bundles and if they fail to do so, then they will not be defaulted to out-of-bundle charges, but instead disconnected from service until they expressly agree to out-of-bundle charges, the draft regulation will be in conflict with section 2(y) of the ECA.
- 47 This is because the draft regulation would then deprive consumers of the option they selected in choosing a postpaid contract instead of a prepaid contract. The main point of a postpaid contract is to have continued access to data and services and not be cut off mid-way through a download because you are required to opt-in to out-of-bundle rates in order to continue with your data download. A consumer will not be exploited or face any danger of bill shock if they are adequately notified that their bundle is coming to an end. There is no reason why their chosen service should be interrupted in order to introduce an opt-in system. This is a disproportionate measure and again constitutes an unreasonable exercise of ICASA's discretion under section 2(y) of the ECA.

#### **Rolling over of unused data – postpaid – draft regulation 8B(4)**

- 48 Draft condition 8B(4) requires licensees to provide an option to postpaid users to roll over unused data of the monthly allocation to the next billing period or transfer the data allocation to end-users of the same network.
- 49 This once again raises the network provisioning problems that draft regulation 8B(3) did, together with the other ancillary costs listed under that section. Service providers will not be able to estimate when data capacity will be required and they will have to constantly “over-provision” for that usage. This is costly and unnecessary. Cell C already rolls over data for one calendar month on contract data plans.

50 The draft regulation is also vague; it is not clear what licensees' obligations are under this provision. Must the option to roll over be free of charge or free of any other consideration, like, for example, the purchase of a further bundle before expiry? It is also unclear for how long the data must be rolled over. Can rolled over data extend beyond the three year period prescribed in draft regulation 8B(3)? This uncertainty as to the meaning of the draft regulation makes it liable to review under section 6(2)(i) of PAJA.

## **Voice and sms provisions – regulation 8A**

51 It is unclear on what basis the voice and sms provisions in regulation 8A have been included in the draft regulations. The primary reason for the amendments to the service charter regulations is to deal with data services, not voice or sms. When Cell C engaged with ICASA on 22 June 2017, it was not even told that the regulations would cover voice and sms.

52 In any event, these provisions are unnecessary as Cell C already provides end-users, who are on post-paid plans, the option to buy additional services upon depletion of such services (draft regulation 8B(2)). The option to be disconnected is also extremely unlikely to be taken up by any consumer (draft regulation 8B(3)).

53 It is also important to note in the context of voice and data services that many of the complaints that Cell C receives concern international roaming services, and not national services. This is an entirely different issue and as ICASA will know, the charges levied by international operators are not within Cell C's control. ICASA has not mentioned this in the explanatory note but this is an important distinction and it is therefore a material consideration in imposing obligations on licensees in relation to national services. If the source of the complaint relates to international roaming services and ICASA responds to that complaint by regulating national services, the draft regulation will be irrational because it will not address the source of the problem.

54 If the draft regulation is promulgated in its current form, it will be liable to be reviewed on the ground that it is irrational under section 6(2)(f)(ii)(aa) and (cc) of PAJA.

## The explanatory note

- 55 ICASA's explanatory note is very difficult to follow as an explanation for the proposed regulations. This is because they are set out as responses to the 7 August 2017 proposed amendments and do not always speak directly to the 17 November 2017 draft amendments.
- 56 The explanatory note also purports to be ICASA's response to the submissions received from interested parties. However, ICASA's responses to the submissions are generally nothing more than an assertion that ICASA does not agree with the submission. That is not adequate. If ICASA is to regulate in a lawful and procedurally fair manner, it must meaningfully engage with the submissions its receives and explain why it rejects the submissions made to it. It is not enough for it simply to state that it rejects those submissions. In the absence of a proper engagement with the submissions received, the inference may be drawn that ICASA has failed properly to consider the representations made to it. This would render the draft regulations liable to review under section 6(2)(c) and 6(2)(f)(ii)(cc) of PAJA.

## Miscellaneous

- 57 Cell C does not agree with the definition of "data bundle" in regulation 1. We suggest that the definition refer to "bytes" and "connectivity for purposes of using the internet".
- 58 Draft regulation 8B(1) provides that a licensee must ensure that an end user is sent data depletion notifications on a regular basis showing 50%, 75%, 90% and 100% depletion of the bundle. Cell C already provides alerts that bundles are becoming and have become depleted. But these proposed four increments are excessive and will only serve to irritate consumers, especially if the bundle is small. The end-user would receive incessant and unwanted messages. It is irrational for ICASA to implement requirements that would only serve to annoy consumers and not inure to their benefit. It would also be counter-productive to have such frequent messaging as customers would become desensitised to the messages and would be more likely to ignore them, robbing the provision of any utility whatsoever.

59 Cell C submits that the following provisions are unnecessary and would therefore only increase compliance and administration costs without any concomitant benefit to the public:

59.1 The obligation on licensees to allow a subscriber *"the option to be disconnected from access to the relevant depleted services"* in draft regulation 8A(3) does not make sense in the context of commercial transactions. If a subscriber chooses the right package for their level of usage and their budget, then the subscriber is unlikely ever to need to use this mechanism. In our experience, it is also not likely that a subscriber will choose this option when purchasing services, because the effect will be to limit the subscriber's access, rather than simply allowing continued service at a higher price if the subscriber no longer has access to the bundle.

59.2 The obligation contained in regulation 8B(2) to allow a subscriber the option to have that subscriber's access to data services terminated once their data bundle is exhausted is similarly not necessary provided subscribers choose the right package for their level of spend. Cell C agrees that more education in this area is required. However customers wishing to subscribe to a postpaid package are given information about the cost of the contract on a monthly basis and what the cost covers. It is not fair to punish a licensee for a subscriber's failure to monitor his or her own spend.

## Conclusion

60 The draft regulations should not be promulgated in their current form.

61 The draft regulation on expiry of data (regulation 8B(3)) is beyond ICASA's powers and irrational. If implemented, it would raise the costs of data unnecessarily and would undermine the objects of the Act. It should, accordingly, be removed from the draft regulations.

62 Many of the remaining draft regulations are based on errors of law, and are either vague, unnecessary or undermine the consumers' right to choose what kind of service they want. They should be substantially overhauled to address these issues.



Cell C requests an opportunity to make representations if ICASA decides to hold oral hearings in this matter.

Yours sincerely

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**Themba Phiri (Mr)**  
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