



MTN'S RESPONSE TO ICASA'S NOTICE OF INTENTION TO AMEND THE REGULATIONS IN RELATION TO THE END-USER AND SUBSCRIBER SERVICE CHARTER, AS PUBLISHED IN GOVERNMENT GAZETTE NO 41263 DATED 17 NOVEMBER 2017 (NOTICE 901 OF 2017)

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1. Introduction

- 1.1 On 7 August 2017, the Independent Communications Authority of South Africa (“**the Authority**”) published draft regulations (“**the Draft Regulations**”), which are intended to amend the End-User and Subscriber Service Charter Regulations 2016 (published in Government Gazette No 39898 on 1 April 2016) (“**the Charter**”), together with a notice inviting interested persons to submit written comments on the Draft Regulations.
- 1.2 MTN provided the Authority with its written comments on the Draft Regulations on 18 September 2017 (“**the September Submissions**”).
- 1.3 On 17 November 2017, the Authority published the second draft of the Draft Regulations (“**the Amended Draft Regulations**”) (published under Government Gazette No 41263), together with an explanatory note (“**the Explanatory Note**”) and a notice inviting interested persons to submit written comments on the Amended Draft Regulations.
- 1.4 Mobile Telephone Networks Proprietary Limited (“**MTN**”) welcomes the opportunity to make submissions to the Authority on the Amended Draft Regulations. The purpose of these submissions is to set out MTN's concerns in respect of the Amended Draft Regulations, which, in the main, relate to the appropriateness of certain of the amendments included in the Amended Draft Regulations.
- 1.5 MTN's submission is structured as follows:
- 1.5.1 Part A: Background to the Charter and MTN's concerns;
- 1.5.2 Part B: MTN's specific submissions on the concerns set out in Part A; and
- 1.5.3 Part C: MTN's specific comments on the Amended Draft Regulations.

2. Part A: Background to the Charter and MTN's concerns

- 2.1 The Charter, which was enacted pursuant to the provisions of section 69 of the Electronic Communications Act, 2005 (“**ECA**”), came into effect on 1 April 2016. The stated purpose of the Charter in regulation 2 is:
- 2.1.1 to prescribe “*minimum standards*” for electronic communications services to an end-user by an individual or class electronic communications network service licensee, and an individual or class electronic communications service licensee (collectively, “**Licensees**”);

- 2.1.2 to ensure that the quality of service offered to an end-user is in accordance with prescribed service parameters; and
- 2.1.3 to protect the rights of end-users in the electronic communications sector by (i) providing an end-user with sufficient information to enable informed decisions, (ii) ensuring the efficient and effective resolution of complaints, and (iii) facilitating redress to an end-user where appropriate.
- 2.2 The Charter requires a Licensee (including MTN) to, *inter alia*:
- 2.2.1 provide certain specified information to end-users at the point of sale or prior to contracting with the end-user, and to provide certain billing information to end-users upon request from the end-users;
- 2.2.2 lodge certain documentation with the Authority in relation to any promotional tariffs or promotions which may be launched by the Licensee;
- 2.2.3 provide certain specified information to end-users roaming internationally; and
- 2.2.4 ensure that end-users are aware of the Charter and its terms.
- 2.3 The Charter also prescribes certain minimum standards which relate to service and network availability, network fault clearances, network monitoring and service interruptions. As MTN understands it, these are aimed at ensuring service quality to end-users.
- 2.4 The Draft Regulations sought to amend the Charter by imposing a number of additional obligations on Licensees. It is MTN's understanding from the explanatory note that the Authority received a number of written submissions from interested parties in response to the provisions in the Draft Regulations and that the Amended Draft Regulations have been published by the Authority to address some of the concerns raised by these interested parties.
- 2.5 While MTN does not take issue with all of the proposed amendments included in the Amended Draft Regulations and is in fact in agreement with certain of the proposals therein, MTN submits, for the reasons set out below, that certain of the proposed amendments in the Amended Draft Regulations are (notwithstanding the amendments made by the Authority) still challenging in a number of respects. In particular, MTN notes that the Amended Draft Regulations require Licensees to, amongst other things:

- 2.5.1 provide end-users who are on post-paid / hybrid tariff plans (collectively, "**Post-paid End-Users**") with the option to purchase additional voice and/or SMS services ("**Additional Services**") upon the depletion of such services and to provide Post-paid Plan End-Users who do not buy Additional Services with an option to be disconnected from accessing the depleted services (subsection 8A (2) and 8A (3));
- 2.5.2 ensure that end-users are not defaulted to out-of-bundle data charges when their data bundle is depleted and to provide a mechanism for end-users to, per session, opt-in or opt-out of out-of-data bundle charges upon the depletion of their data bundles (subsections 8B(1)(c) and 8B(1)(d));
- 2.5.3 disconnect end-users that have opted out of out-of-bundle data usage when their data bundle is depleted until such time that the end-user gives express consent or authorisation to be charged out-of-bundle rates (subsection 8B (2));
- 2.5.4 provide prepaid data bundles with a minimum expiry period of three years, save where such prepaid data bundles have been exhausted prior to the expiry of the three-year period (subsection 8B (3)); and
- 2.5.5 provide an option to post-paid end-users to roll over any unused data from the end-user's monthly data allocation to the next billing period or to transfer the monthly data allocation or a portion thereof to other end-users on the same network (subsection 8B (4)).
- 2.6 MTN is particularly concerned about the obligations that the Authority seeks to place on Licensees in terms of these provisions and is, for the reasons set out in more detail below, of the view that these provisions fall outside the ambit of what may be regulated by the Authority in terms of section 69 of the ECA. This is an issue that was previously addressed in great detail in the September Submissions. However, it appears that the Authority has not taken any of MTN's concerns on board in framing the Amended Draft Regulations.
- 2.7 MTN's submissions with respect to subsections 8A (2) and 8A (3), subsections 8B(1)(c) and 8B(1)(d), subsection 8B (2), subsection 8B (3) and subsection 8B (4) (collectively, "**the Contested Provisions**") of the Amended Draft Regulations may be summarised as follows:
- 2.7.1 MTN persists in its argument that the inclusion of the Contested Provisions in the Amended Draft Regulations amounts to an attempt by

the Authority to regulate the price of the services provided to end-users by Licensees and that this falls outside the ambit of the Authority's powers in terms of section 69 of the ECA;

- 2.7.2 by requiring Licensees to provide Post-paid End-Users who do not purchase Additional Services upon the depletion of such services with an option to be disconnected from accessing the relevant services, the Authority is, in effect, requiring Licensees to do away with the very essence of what makes up the post-paid voice and SMS service (i.e. the ability to continue accessing the services after the depletion of the inclusive services and to pay for such usage after the fact) and is, to this end, impermissibly interfering with the design of the products which may be offered to Post-paid End-Users by Licensees;
- 2.7.3 the obligation requiring Licensees to ensure that end-users are not defaulted to out-of-bundle data charges when their data bundle is depleted and to provide a mechanism for such end-users to, per session, opt-in or opt-out of out-of-data bundle charges upon the depletion of their data bundles amounts to an attempt by the Authority to interfere with consumer choice insofar as product selection is concerned. In addition (and as stated in the September Submissions), this amounts to an attempt by the Authority to interfere in the contractual relationship between Licensees and end-users in a manner that is not authorised by section 69 of the ECA, as well as an indirect attempt to regulate the price of the services provided to end-users by Licensees;
- 2.7.4 it is unnecessary for the Authority to require the Licensees to disconnect end-users and provide a mechanism for end-users to opt-out of out of bundle data usage as there are already mechanisms available to end-users to prevent and decrease out of bundle billing, which we will explain in more detail below;
- 2.7.5 requiring Licensees to adhere to a prescribed minimum validity period in respect of data expiry amounts to the Authority fixing the terms applicable to the provision of data services and preventing licensees from being able to compete with one another insofar as this aspect is concerned. In particular, Licensees will be prevented from offering different validity periods to end-users and consequently will not be able to differentiate themselves through data validity periods. In addition, the Authority, in its attempt to justify the three-year validity period, has incorrectly equated the

purchase of a prepaid data bundle with the vouchers contemplated in section 63 of the Consumer Protection Act, 2008 ("**CPA**");

2.7.6 requiring Licensees to provide end-users with the option to roll over any unused data is overly prescriptive; and

2.7.7 the Authority, in requiring Licensees to allow end-users to transfer any unused data to other end-users on the same network, is overly prescriptive.

2.8 We deal with each of these submissions in more detail below.

3. **Part C: MTN's specific submissions**

3.1 ***Ultra Vires***

3.1.1 MTN repeats the arguments made in the September Submissions regarding the ambit of the Authority's powers in terms of section 69 of the ECA. In particular, MTN notes that section 69 empowers the Authority to prescribe minimum standards for end-user and subscriber service charters. These minimum standards may extend to, amongst other things, the provision of information to end-users, complaint procedures, end-user and subscriber charging, billing, collection and credit practices, and any other matter of concern to end-users.

3.1.2 It is important to note that section 69(5) does not provide that the Authority is empowered to prescribe the price that may be charged to end-users by Licensees. Rather, section 69(5) gives the Authority the power to prescribe the *practices* which must be adopted by Licensees when charging or billing consumers¹. In MTN's view, this involves *the manner* in which Licensees must conduct themselves when charging end-users and does not involve *the amounts* that may be charged to end-users by Licensees. In the circumstances, it is MTN's submission that section 69(5) does not empower the Authority to attempt to control the amounts that are billed to end users. In the explanatory note, the Authority states, on more than one occasion, that certain measures in the Amended Draft Regulations have been included in an attempt to control or minimise "bill shock" that may be as a result of out-of-bundle voice, data and SMS

¹ Section 69(5)(d) of the ECA

charges. This is a conduct that does not fall within the purview of the Authority's powers in section 69 of the ECA.

- 3.1.3 The proposed subsections 8A(2) and 8A(3) as well as subsections 8B(1)(c) and 8B(1)(d) of the Amended Draft Regulations indirectly seek to regulate the amounts charged by Licensees to end-users by attempting to ensure that end-users, in the case of voice and SMS, are always given the option to be disconnected from access to voice and SMS services once their services have been depleted and, in the case of data, are only charged for out of data bundle usage where the end-user has expressly opted-in for out of bundle data. It is MTN's submission that these subsections go beyond what is contemplated in section 69 (and in particular, section 69(5)) of the ECA. What is contained in these subsections is not a practice that needs to be observed by Licensees so as to ensure fairness to end-users; rather, these subsections amount, in essence, to an attempt to by the Authority to regulate the price billed to end-users by Licensees. That falls outside the remit of the Authority's powers in section 69(5) of the ECA and is *ultra vires*. In the circumstances, MTN submits that these subsections in the Draft Amended Regulations ought to be deleted.

3.2 ***Disconnecting Post-paid Users***

- 3.2.1 Subsection 8A (3) requires Licensees to provide post-paid and hybrid End-Users who do not purchase Additional Services upon the depletion of their voice and SMS services with an option to be disconnected from accessing such services. However, the very essence of a post-paid product is that it allows for additional usage after inclusive allocations have been depleted by the end-user.
- 3.2.2 MTN urges the Authority not to be too prescriptive in terms of how licensees protect end-users from out of bundle spend. In any event, MTN is cognisant of the fact that end-users want control over their spend and may want to limit their out of bundle spend once inclusive value is depleted. Current measures put in place by MTN to assist end-users to manage spend on voice and SMS is the usage limit. The usage limit selected by an end-user will determine how much an end-user is able to spend once inclusive value is depleted. The usage limit can be set to zero thus allowing no further usage once inclusive value is depleted. As part of the customer journey, end-users are notified by SMS when they start

incurring cost from their usage limit (if it is not set to zero). This message includes a reminder to end-users to check their balance and on how to manage their usage limit. End-users then have the additional freedom to load airtime, voice and SMS bundles once the usage limit is reached to access services on a prepaid basis.

3.2.3 It is MTN's submission that by requiring Licensees to give post-paid End-Users the option to be disconnected from accessing voice and SMS services upon the depletion of their inclusive allocations (and upon their failure to select any Additional Services), is too prescriptive and does not consider the current interventions put in place by licensees. MTN submits that the usage limit provides the end-user with sufficient flexibility and produces the same outcome as is desired by the Authority.

3.2.4 In addition, it is MTN's submission that limiting Licensees in the manner prescribed in subsection 8A (2) and subsection 8A (3) amounts to impermissible interference with the design of the products that are currently offered to post-paid Plan End-Users by Licensees. Such interference is not authorised in terms of section 69 of the ECA and is thus *ultra vires*.

3.3 ***Opting-in to out of bundle***

3.3.1 Subsections 8B(1)(c) and 8B(1)(d) of the Draft Amended Regulations require Licensees to ensure that end-users are not defaulted to out-of-bundle data charges when their data bundle is depleted and to provide a mechanism for such end-users to, "per session", opt-in for, or opt-out of, out-of-data bundle charges upon the depletion of their data bundles.

3.3.2 It is MTN's submission that the amendments proposed in subsections 8B(1)(c) and 8B(1)(d) infringe upon the right of end-users to choose their products and services. MTN believes that end-users should be allowed to choose products and services which suit their needs as only they have insight into what products and services would best suit them. End-users should not be dictated to by the Authority insofar as choice of products and services is concerned.

3.3.3 MTN understands that these subsections have been included in the Amended Draft Regulations in an attempt to protect end-users against "bill shock" owing to differences between in-bundle and out of bundle charges. However, these subsections fail to take cognisance of the fact

that MTN (and other Licensees) has already put in place measures aimed at ensuring that end-users have mechanisms at their disposal to control and limit their spend. End-users who choose post-paid products currently have the ability to set a usage limit which allows them to control their out-of-bundle spend on data. For example, an end-user can choose a limit of zero which will mean that an end-user will not be able to spend more than the inclusive allocated value (at out of bundle rates) but still has the freedom to load additional data bundles on a prepaid basis.

- 3.3.4 In addition to the usage limit MTN has included proactive notifications as part of the customer journey to assist end-users to manage their spend. We encourage end-users to continue monitoring their data by notifying end-users when they have reached 50% and then 90% of their data bundles. We also send regular messages to end-users, encouraging them to purchase data bundles to avoid being charged out of bundle rates. In response to the concerns raised by the Authority and our customers, MTN launched our significantly reduced 60c / MB out of bundle data rate. This offering requires end-users to “opt-in” for the reduced rate. Please refer to **Annexure A** for a detailed description of MTN’s reduced out of bundle rates.
- 3.3.5 It is our view that MTN has made significant progress towards addressing the challenges raised by the Authority in the absence of prescriptive regulation and will continue to do so as we have to be sensitive to the needs of our customers. MTN reiterates that end-users should be free to choose options that best suit their needs. The Amended Draft Regulations limit this choice by prescribing the default position for end-users. Accordingly, it is MTN's submission that subsections 8B(1)(c) and 8B(1)(d) should be deleted
- 3.3.6 In relation to 8B (1) (d), it is unclear what is meant by "per session". MTN interprets this to mean that on each occasion that an end-user who is incurring out of bundle charges initiates a session, that end-user must be given the option to opt-out of out of bundle data charges. If this is the Authority's intention, it is MTN's submission that this will be overly prescriptive and will result in poor customer experience. We are also of the view that it is not possible to implement an opt-out on a per session basis. As an alternative, we propose to send notifications to end-users while they are browsing, at the point of depletion of a bundle so that end-users know their bundle is just about to deplete. End-users will then be

able to close the session and stop browsing, purchase another data bundle to continue browsing, or ignore the notice (should they choose to do so) and continue with the session.

3.4 ***Disconnecting end-users that have opted out of out of bundle***

As stated above, it is MTN's submission that there is no need to require it to disconnect end-users that have opted-out of out of bundle data usage as MTN has made efforts to transparently communicate with end-users and to empower them to choose how to control their spend. In any event, once a customer has opted out of "out of bundle" it makes no logical sense to disconnect that customer that has already indicated his preference. There are various options currently available to end-users, including the newly introduced reduced out of bundle rate. Accordingly, subsection 8B (2) of the Amended Draft Regulations is unnecessary, logically flawed and should be deleted.

3.5 **Prescribed minimum validity period**

3.5.1 Subsection 8B (3) of the Amended Draft Regulations requires Licensees to provide prepaid data bundles with a minimum expiry period of three years, save where such prepaid data bundles have been exhausted prior to the expiry of the three-year period. MTN submits that imposing this obligation is problematic in several respects.

3.5.2 First, as stated above and in the September Submissions, requiring Licensees to adhere to a prescribed validity period of three years in respect of data expiry amounts to the Authority fixing terms applicable to the provision of data services and prevents Licensees from being able to compete with one another insofar as this aspect is concerned. Licensees will be prevented from offering different validity periods to end-users and consequently, will not be able to differentiate themselves through their market offerings in relation to data validity periods. In other words, if MTN is required to offer the same minimum data validity period to end-users as those offered by its competitors, MTN will be prevented from differentiating its offering from that of its competitors insofar as this aspect is concerned. In effect MTN (and other Licensees) will by the stroke of a pen not be able to offer hourly, daily, weekly or monthly bundles at all as all bundles will need to carry a 3-year validity period. Consequently, by regulation, the Authority will make all Licensees look the same in terms of data bundle offerings. This will have the effect of stifling competition, and may ultimately be to the detriment of the end-user, since it may discourage

any form of innovation insofar as data validity periods are concerned. Accordingly, the Authority's proposal of a prescribed period of three years would mean that end-users would no longer have the ability to choose from a large variety of products and services as everything is now 3 years; this will inevitably disadvantage the end-user both from a choice and affordability point of view. MTN would like to emphasise that competition is not based on price alone but is also based on the ability of the end-user to choose products and services that are suitable to their needs.

3.5.3 Second, it is particularly important to bear in mind the commercial implications that may arise as a result of the Authority imposing a three-year minimum expiry period. In this regard, MTN's current data pricing structure includes a wide variety of products with a variety of expiry options. These structures have been designed to, amongst other things, take account of the commercial impact that data expiry periods can have on the operation of network infrastructure. In particular:

3.5.3.1 The pre-paid data bundles are cheaper when the validity period is shortest. Smaller purchases allow end-users more control over their spend and increase data affordability by lowering the cost barrier. As an example, small data purchases with short validity periods will be cheaper than significant data purchases with longer validity periods. This is because the smaller data purchases with short validity periods allow the electronic communications networks of Licensees to be used consistently over a period so that the investment in infrastructure does not lie idle. MTN is, in making use of its network infrastructure, required to take into consideration the data service requirements of end-users over a specific period of time and for specified data volumes. This information is vital for planning purposes. MTN's planning occurs well in advance, at least 18 months in advance, due to the long lead times for network deployment. Capacity is planned to cater for this requirement and to allow for a margin of headroom on the network for unexpected traffic growth volumes. If traffic exceeds these volumes, the quality of service experienced by end-users on the network will be impacted negatively. If, however capacity is over provided for and not utilised, this in turn will impact MTN's ability to manage the cost of providing data to end-users. Put differently, if MTN is not able to determine the data requirements of end-users and the period over which it will

be used (indicated by expiry periods), the quality or cost of data will be affected.

- 3.5.3.2 A minimum expiry period of three years will therefore result in substantial increased liability on MTN's balance sheet. This is because MTN will, in order to ensure that the quality of its network is not impacted by the longer expiry period, be required to ensure that there is sufficient capacity on its network (despite the fact that such capacity may not be utilised in the immediate or short-term future). In other words, because MTN will not be able to properly predict data usage over its network and the period over which it will be used (which is what different expiry periods enable it to do), MTN will inevitably be required to overprovide capacity on its network to take account of the fact that data (no matter how small) will now expire after a minimum of three years. As explained above, if capacity is over-provided for and is not utilised, this will impact MTN's ability to manage the cost of providing data to end-users.
- 3.5.3.3 MTN's balance sheet will also be affected by the fact that MTN will not be able to recognise revenue for data bundle purchases until the data is utilised. The increased financial unearned revenue liability on the balance sheet will have a negative impact on the MTN's overall cost of capital. As a result, the price of data will need to increase because the cheaper bundles with shorter validity will effectively become redundant. MTN will need to rebalance data tariffs to cater for the longer expiry period.
- 3.5.3.4 The lower revenue recognised would also initially result in a lower yearly license fee and Universal Service and Access Fund contribution ("USAF") paid to the Authority.
- 3.5.3.5 As a result, the lower revenue recognised would also initially result in a lower income tax payable to the Treasury.
- 3.5.4 Third, subsection 8B (3) incorrectly equates the purchase of a prepaid data bundle with the purchase of a voucher as contemplated in section 63(2) and (3) of the CPA.
- 3.5.5 Section 63 of the CPA provides as follows (underlined words are our emphasis):

"(1) This section applies only to a transaction in which a supplier-

- (a) accepts consideration from a person in exchange for a prepaid certificate, card, credit, voucher or similar device; and
- (b) expressly or implicitly agrees to provide goods or services to any person who subsequently presents that certificate, card, credit, voucher or similar device, up to the value represented by it,

but does not apply with respect to such a device, or the value represented by it, after all of the value of the device has been exchanged for goods, services or future access to services.

(2) A prepaid certificate, card, credit, voucher or similar device contemplated in subsection (1) does not expire until the earlier of -

- (a) the date on which its full value has been redeemed in exchange for goods or 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.

(3) Any consideration paid by a consumer to a supplier in exchange for a prepaid certificate, card, credit, voucher or similar device contemplated in subsection (1) is the property of the bearer of that certificate, card, credit, voucher or similar device to the extent that the supplier has not redeemed it in exchange for goods or services, or future access to services."

3.5.6 From the above, it is clear that:

3.5.6.1 section 63 only applies where there is a prepaid certificate, card, credit, voucher or similar device which can be exchanged for goods and services when it is presented;

3.5.6.2 section 63 does not apply to a prepaid certificate, card, credit, voucher or similar device, or the value represented by it, after all of the value of the device has been exchanged for goods, services or future access to services; and

3.5.6.3 a prepaid certificate, card, credit, voucher or similar device will expire on the date on which its full value has been redeemed in exchange for goods or services or future access to service.

3.5.7 Prior to addressing the issue of whether the Authority is correct in equating the purchase of a prepaid data bundle to the purchase of a voucher as contemplated in section 63 of the CPA, we believe it is necessary to set out some background information as to how prepaid data is purchased, redeemed and used by consumers. This is essential for making any

determination of the scope and extent of the application (if any) of section 63 of the CPA.

3.5.8 There are, broadly speaking, three ways in which a person can purchase prepaid data from MTN:

3.5.8.1 The end-user can purchase a physical MTN-branded PayAsYouGo card (commonly referred to as a 'scratch card') which entitles the end-user to a specific data bundle which appears on the face of the PayAsYouGo card (for example, 10 MB, 75 MB etc). In addition to a description of the size of the data bundle value/denomination, a PIN is also printed on the scratch card. Until the end-user transmits the PIN to MTN, the end-user is unable to use the data and the data bundle is not yet made available to the end-user. To access the data bundle, the end-user transmits the PIN number found on the scratch card to MTN. Transmitting the PIN to MTN results in the full value of the data bundle which was purchased being redeemed and made available for use by the end-user immediately or in the future. We will refer to this method of purchasing data as the "**Scratch Card Method**".

3.5.8.2 The end-user can enter a retail store (for example, Checkers, Edgars or Foschini) and purchase a certain bundle of data. The end-user is able to purchase the data bundle in particular denominations. The end-user will not, however, receive a scratch card in the form of a PayAsYouGo card. Instead, the end-user will receive a till slip. The till slip will display the size or denomination of the data bundle h/she purchased and a PIN. Until the end-user transmits the PIN to MTN, the end-user is unable to use the data and the data is not yet made available to the end-user. To access the data bundle, the end-user transmits the PIN number printed on the till slip to MTN. Transmitting the PIN to MTN results in the full value of the data bundle purchased being redeemed and made available for use by the end-user immediately or in the future. We will refer to this method of purchasing data as the "**Till Slip Method**".

3.5.8.3 An end-user can purchase a data bundle electronically through channels, such as the banks or directly from MTN. An example is by way of Internet Banking or an Automatic Teller Machine ("ATM"). In this case, the end-user selects the value/denomination of the data

bundle, the end-user's bank account is debited and the entire value of the data bundle is simultaneously made available by MTN for use by the end-user. With this method of electronically purchasing a data bundle, the end-user does not use or receive any PIN, voucher or scratch card. The data bundle is automatically and seamlessly made available to the end-user and can be used by the end-user immediately or in the future. We will refer to this method of purchasing data as the "**Electronic Method**").

- 3.5.9 As stated above, in all three scenarios the consumer purchases a data bundle (for example, in increments of 10MB, 75MB, 500MB, etc). When the end-user transmits the PIN to MTN (in the case of the Scratch Card Method and the Till Slip Method) or when data is purchased using the Electronic Method, the entire data bundle is immediately made available to the consumer for the consumer's use. The practical consequence (by way of example) is that a consumer who has purchased a 500MB data bundle can utilise the entire 500MB immediately by sending or receiving an electronic file of this size through the Internet. Alternatively, the consumer could use the data in the future in increments until all of the 500MB have been utilised.
- 3.5.10 In all of these scenarios, the full value of the data bundle has been made available by MTN to the consumer and is waiting to be used by the consumer at the consumer's convenience. In other words, the full value of the device has been "*redeemed in exchange for ... future access to services*", within the meaning of sections 63(1) and 63(2)(a) of the CPA.
- 3.5.11 We point out that when the full value of the data bundle is made available to the end-user in this manner, the end-user obtains the right to access and use MTN's infrastructure for the purposes of transmitting or receiving data up to the total value of the data bundle purchased. In these submissions, when we speak of MTN making the full data bundle available to the consumer, what we mean is that MTN has made its telecommunications infrastructure available for use by the end-user immediately or in the future for the transmission and receipt of data. Similarly, when we speak of data being available for use by the end-user, what we mean is that the end-user is able to transmit or receive data using MTN's telecommunication infrastructure.

3.5.12 Subsection 8B (3) of the Amended Draft Regulations appears to suggest that the value of the data bundles is redeemed only when the data bundles are used up or depleted and that is why section 63 of the CPA is applicable. In other words, the Authority seems to be of the view that redeeming the full value of the data bundles is synonymous with using up or depleting the full value of the data bundles paid for by the consumers. MTN submits that this interpretation is incorrect. What is relevant to section 63 of the CPA is the issue of *redemption* not *exhaustion*. Put differently, section 63 requires that a consumer be given a period of three years within which to *redeem* a voucher and not a period of three years to *exhaust* the services that are made available pursuant to the purchase of a voucher. Section 63(1) of the CPA provides in express terms that the three-year period does not apply once the value of the device “*has been exchanged for goods, services or future access to services*” (our underlining). As explained above, when the end-user transmits the PIN to MTN (in the case of the Scratch Card Method and the Till Slip Method) or when data is purchased using the Electronic Method, the entire data bundle (i.e. the full value of the data bundle) is made available to the end-user for the end-user's use immediately or in the future. Once this occurs, MTN has made its telecommunications infrastructure available to the end-user in order for the end-user to send or receive data up to the value of the data bundle. The end-user has then redeemed the full value of the device for *future access to goods or services*, within the meaning of section 63(1). At this point, section 63 ceases to apply. Accordingly, MTN submits that the Authority's attempt to justify the 3-year period referred to subsection 8B (3) through applying the provisions of section 63 of the CPA is incorrect and therefore, that subsection 8B (3) ought to be deleted.

3.5.13 Furthermore, MTN points that out that the National Consumer Commission (“**the NCC**”), as established in terms of section 85 of the CPA, is charged with the responsibility to carry out functions such as, among others, establishing national norms and standards relating to consumer protection, providing for improved standards of consumer information and prohibiting certain unfair marketing and business practices. In making a pronouncement that a data bundle constitutes a voucher in terms of the CPA, the Authority is, in effect, making pronouncements as to the proper interpretation of the provisions of the CPA, without any consideration as to the views of the NCC - which is empowered in terms of the CPA to make such pronouncements. In this

regard, it is worthwhile noting that the NCC has not taken issue with MTN's application and interpretation of section 63.

- 3.5.14 Lastly the Electronic Communications Act, 2006² sets out in section 68 “Numbering plans and number portability” that the Authority must make regulations prescribing a numbering plan including regulations for the efficient use and allocation of numbers. The Numbering Plan Regulations, 2016³ clearly set out that the purpose of the regulations is to provide for the efficient use and allocation of numbers⁴. Furthermore, section 6(3)(g) of the regulations place an obligation on Licensees to ensure that all numbers allocated to them are used effectively and efficiently. To give effect to this obligation, MTN has put rules in place whereby a prepaid Sim Card is deactivated and recycled if it is inactive for a period of 90 days. MTN will therefore have to deactivate and recycle prepaid numbers regardless of whether there may be unexpired data on them. If this rule is not enforced, many number resources may be wasted as a result. Numbering resources will be wasted because the subscriber would need to remain longer on the MTN network. This would mean that the MSISDN's would not be able to be recycled and would require a significantly larger number range that the Authority would then have to issue more numbers to all the Licensees. The 3-year validity period will therefore work directly against another regulation issued by the Authority.
- 3.5.15 The higher number of subscribers on the MTN Network that need to be enabled for usage which may not be transacting at all except for keeping the unexpired data, would also result in an increase in the software license fee payable to the OEM's who provide MTN with Network services. That would increase the cost of providing the service which again would need to be covered by a possible increase in the rates payable for data by the end-users.

² Electronic Communications Act no 36 of 2005, as amended.

³ Numbering Plan Regulations in terms of section 68 of the Electronic Communications Act of 2005 (act no 36 of 2005), as amended.

⁴ Section 2(a)

3.6 ***Roll over of unused data***

- 3.6.1 Subsection 8B (4) of the Amended Draft Regulations requires Licensees to provide an option to post-paid end-users to roll over unused data. MTN currently rolls over unused data for post-paid end-users as contemplated in 8B (4). We would caution the Authority not to be overly prescriptive in terms of how such roll over is achieved.

3.7 ***The transfer of unused data***

- 3.7.1 MTN is already providing this service to its customers, however it is MTN's submission that the provision in subsection 8B (4) of the Amended Draft Regulations is overly prescriptive and again amounts to an attempt by the Authority to prescribe products and services which must be made available to end-users. In other words, by imposing this obligation on Licensees, the Authority is attempting to prescribe contractual terms governing the provision of data to end-users and the products and services which must be made available to end-users - this despite the fact that the Authority has not conducted any inquiries or analyses as to appropriateness of the products and the contractual terms which it seeks to impose on Licensees. This is a conduct that goes beyond what is contemplated in section 69(5) of the ECA. In particular, the Authority is not empowered in terms of section 69(5) of the ECA to design or prescribe the products and services which must be made available to end-users. This is something that always ought to be at the discretion of Licensees.
- 3.7.2 For the reasons set out above, MTN therefore submits that subsection 8B (4) in the Amended Draft Regulations ought to be deleted.

4. **Part D: Specific comments on the Amended Draft Regulations**

4.1 ***Ad Regulation 3 of the Amended Draft Regulations – Amendment of Regulation 4 of the Charter***

MTN does not object to the amendments to regulation 4.

4.2 ***Ad Regulation 4 of the Amended Draft Regulations – Amendment of Regulation 5 of the Charter***

MTN does not object to the amendments to regulation 5.

4.3 ***Ad Regulation 5 of the Amended Draft Regulations – Amendment of Regulation 8 of the Charter***

MTN welcomes the deletion of sub regulation 7.

4.4 ***Ad Regulation 6 of the Amended Draft Regulations – Insertion of Regulations 8A, 8B and 8C respectively in the Charter***

4.4.1 **8A (1)** - The Authority has not stipulated whether the proposed amendment refers to prepaid and/or post-paid end-users. As stated in the September Submissions, MTN currently sends various usage notifications to its end-users, but would caution against the prescription of intervals. Firstly, for a low denomination bundle (or inclusive value), notifications at 50%, 75%, 90% and 100% may be excessive and may only serve to aggravate end-users. In particular, end-users may become exasperated at the frequency of notifications. MTN again proposes that it be left up to a Licensee to determine reasonable intervals at which to send usage notifications taking the size of the bundle or inclusive value into account. It would logically follow that the last notification be sent at 100% depletion.

4.4.2 **8A (2)** - MTN is of the firm view that it is not necessary to provide for the option to buy additional voice services or SMS services. End-users who have chosen a prepaid, hybrid or post-paid package are currently able to purchase and load additional airtime or voice and SMS bundles.

4.4.3 **8A (3)** - Without derogating from the arguments made above, MTN is of the view that the proposed amendment is also unnecessary and will infringe upon the end-users' right to choose products and services.

4.4.4 **Regulation 8B(1)(a)** - As stated above, MTN currently sends usage notifications to its end-users, but would caution against the prescription of intervals. The number of notifications prescribed in the Amended Draft Regulations is excessive and may result in a poor customer experience.

4.4.5 **Regulation 8B(1)(b)** - MTN submits that it is not necessary to require Licensees to provide end-users with the option to buy additional data bundles. The end-user is currently able to choose between a wide variety of additional data bundles.

4.4.6 **Regulation 8B(1)(c) and (d)** - for the reasons set out above, MTN submits that these proposed amendments ought to be deleted.

- 4.4.7 **Regulation 8B (2)** - For the reasons set out above, MTN submits that sub-regulation 2 should be deleted.
- 4.4.8 **Regulation 8B (3)** – please refer to paragraph **Error! Reference source not found.** and 3 above.
- 4.4.9 **Regulation 8B (4)** – please refer to paragraphs **Error! Reference source not found.** and 3 above. Sub-regulation (4) requires a Licensee to provide post-paid end-users with an option to roll over unused data of the monthly allocation or to transfer the unused data to another end-user on the same network. MTN again submits that the Authority is not empowered in terms of section 69 of the ECA to prescribe to Licensees the mechanics of how a product should operate. Such product rules ought to be at the discretion of a Licensee in order to enable the Licensee to manage the risks and costs associated with such a product and to distinguish itself from its competitors.
- 4.4.10 **Regulation 8C** – MTN does not object to conducting education awareness campaigns.

4.5 ***Ad Regulation 7 of the Amended Draft Regulations - Amendment of regulation 13 of the Charter***

MTN does not object to the substitution of sub-regulation 1.

4.6 ***Ad Regulation 8 of the Amended Draft Regulations - Short Title and Commencement***

MTN submits that should the Authority elect to publish the Amended Draft Regulations in their current form and without further amendments, it would not be reasonably practicable to expect Licensees to comply with the Amended Draft Regulations immediately upon the date of publication. In many instances, system development (that comes at a significant cost which will need to be recouped) will be required to implement the changes required. MTN urges the Authority to consult widely with all relevant stakeholders and to ensure that Licensees are afforded a reasonable time to implement the requisite compliance programs.

5. Conclusion

- 5.1 MTN is cognisant of the public outcry referred to in the explanatory note and the Authority's concern regarding the cost to communication and data prices in particular. However, any interventions proposed by the Authority in this regard must be conceived within the current legislative prescript and must not impermissibly limit end user choice or the ability of Licensees to properly compete with one another. Any solution to the current concerns requires a holistic approach which takes into account all factors relevant to data cost. Any overly prescriptive approach, which seems to be the theme of Authority's intervention, without taking into account all factors relevant to data cost will lead to unintended consequences.
- 5.2 MTN urges the Authority not to be too prescriptive. In many instances, the same objective can be achieved through many innovative ways, which may differ from one Licensee to the next. Licensees should be free to choose how to comply within the boundaries of broad prescripts in line with section 69 (4) and (5) of the ECA. MTN have highlighted a number of ways in which MTN transparently communicates with its customers, sends notifications and provides various options to end-users to manage their spend. We believe in empowering our customers through a wide variety of products and services. Furthermore, we have introduced significant reductions on out of bundle spend in response to the public outcry, concerns raised by our customers and the Authority.
- 5.3 In order to continue to provide end-users with a balance between quality and price, it is imperative for MTN to continue to charge and incorporate an appropriate pricing philosophy. The consequence of regulating these practices in the manner proposed by the Authority, would result in unintended consequences and stifle competition between licensees in that product offerings and consequently limiting the customer's choice.

Annexure A

On 1 December 2017 MTN introduced new out of bundle rates for its Prepaid, Post-paid Hybrid and Post Converge customers. The new MTN Out of Bundles rates will be segmented to ensure that each customer receives a rate that is suited for their data needs. MTN has identified 4 segments to target different customer types and customer usage. The segments are as follows:

- **Steppa 1:** Only applicable to Prepaid, Post-paid Hybrid and Post-paid Converged customers who do not use data bundles with less than 5MB out of bundle spend for the last 3 conservative months. This segment will be charged an out of bundle rate of 29c per MB;
- **Steppa 2:** Only applicable to Prepaid, Post-paid Hybrid and Post-paid Converged customers who use data bundles with less than 5MB out of bundle spend for the last 3 conservative months. This segment will be charged an out of bundle rate of 60c per MB.
- **Freedom:** Any Prepaid, Post-paid Hybrid and Post-paid Converge subscriber not on Steppa 1 or Steppa 2 can opt into this segment. This segment will have the choice to opt into an out of bundle rate of 60c per MB.
- **Standard:** All new and existing subscribers not subscribed to Steppa 1, Steppa 2 or Freedom segments. These customers will incur the current out of bundle rate.